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Journal des Regrets & Citations

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A DIGEST
OF THE
REPORTED DECISIONS

OF THE
COURTS OF COMMON LAW, BANKRUPTCY, PROBATE,
ADMIRALTY, AND DIVORCE,

TOGETHER WITH
A SELECTION FROM THOSE OF THE COURT OF CHANCERY
AND IRISH COURTS.

From 1756 to 1883 inclusive.

FOUNDED ON FISHER'S DIGEST.

BY
JOHN MEWS,
ASSISTED BY
C. M. CHAPMAN,
HARRY H. W. SPARHAM,
AND
A. H. TODD,
BARRISTERS-AT-LAW.

IN SEVEN VOLUMES.

VOL. VI. PRINCIPAL AND AGENT—SURRENDER.

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A LIST OF THE ABBREVIATIONS AND REFERENCES

ADOPTED IN
THE DIGEST,
WITH EXPLANATIONS.

A.

ABBREVIATIONS.	NAMES OF REPORTERS AND REPORTS.	NAMES OF COURTS OR JUDGES.
A. & E.	Adolphus & Ellis	Queen's Bench
Adm.		Admiralty
Adm. D.	Law Reports	Admiralty Division
Amb.	Ambler	Chancery
Anst.	Anstruther	Exchequer
App. Cas.	Law Reports	House of Lords and Privy Council
Arn.	Arnold	Common Pleas
Arn. & H.	Arnold & Hodges	Queen's Bench
Asp. M. C.	Aspinal Maritime Cases	Admiralty and other Courts

B.

B. & A.	Barnewall & Alderson	King's Bench
B. & Ad.	Barnewall & Adolphus	King's Bench
B. C. C.	Lowndes & Maxwell's Bail Court Cases	Bail Court
B. C. Rep.	Saunders & Cole's Bail Court Reports	Bail Court
Bayl. Bills	Bayley on Bills.	
Beav.	Beavan	Rolls
B. & S.	Best & Smith	Queen's Bench
Bell, C. C.	Bell's Criminal Cases	Criminal Appal
Bing.	Bingham	Common Pleas
Bing. N. C.	Bingham's New Cases or Series	Common Pleas
Bk.	Bankruptcy.	
Bligh	Bligh	House of Lords
Bligh, N. S.	Bligh's New Series	House of Lords
B. & P.	Bosanquet & Fuller	Common Pleas
Bott's P. L.	Bott's Poor Law.	
B. & B.	Broderip & Bingham	Common Pleas
Bro. C. C.	Brown's Chancery Cases	Chancery
Bro. P. C.	Brown's Cases in Parliament	House of Lords
B. & L.	Browning & Lushington	Admiralty
Buck	Buck	Bankruptcy
Bull, N. P.	Buller's Law of Nisi Prius.	
Burr.	Burrow	King's Bench
Burr. S. C.	Burrow's Settlement Cases	King's Bench

C.

C.		Lord Chancellor
Cald.	Caldecott's Settlement Cases	King's Bench

ABBREVIATIONS AND REFERENCES.

ABBREVIATIONS.	NAMES OF REPORTERS AND REPORTS.	NAMES OF COURTS OR JUDGES.
Camp.	Campbell	Nisi Prius
Car. C. L.	Carrington's Criminal Law.	
Car. & M.	Carrington & Marshman	Nisi Prius
Car. & K.	Carrington & Kirwan	Nisi Prius
C. & P.	Carrington & Payne	Nisi Prius
Chit.	Chitty	King's Bench
C. & F.	Clark & Finnelly	House of Lords
Collyer, C. C.	Collyer's Chancery Cases	Chancery
C. B.	Common Bench Reports, Old Series	Common Pleas
C. B., N. S.	Common Bench Reports, New Series	Common Pleas
C. L. R.	Common Law Reports of 1855-56	Queen's Bench, Common Pleas and Exchequer
C. P. D.	Law Reports	Common Pleas Division
Colt.	Coltman's Registration Cases.	
Cooper, C. C.	Cooper's Chancery Cases	Chancery
Cowp.	Cowper	King's Bench
Cox	Cox	Chancery
Cox, C. C.	Cox's Criminal Cases	Crown & Criminal Appeal
Cr. & Ph.	Craig & Philip	Chancery
C. & J.	Crompton & Jervis	Exchequer
C. & M.	Crompton & Meeson	Exchequer
C., M. & R.	Crompton, Meeson & Roscoe	Exchequer
Curt.	Curteis	Ecclesiastical
D.		
Daniell	Daniell	Exchequer
D. & M.	Davison & Merivale	Queen's Bench
Deacon	Deacon	Bankruptcy
Deac. & Chit.	Deacon & Chitty	Bankruptcy
Deane, Ecc. Rep.	Deane's Ecclesiastical Reports	Ecclesiastical
Dears. C. C.	Dearsly's Crown Cases	Criminal Appeal
Dears. & B. C. C.	Dearsly & Bell's Crown Cases	Criminal Appeal
De G.	De Gex	Bankruptcy
De G., F. & J.	De Gex, Fisher & Jones	Lord Chancellor and Appeals in Chancery
De G., J. & S.	De Gex, Jones & Smith	Do.
De G., M. & G.	De Gex, Macnaghten & Gordon	Do.
De G. & Sm.	De Gex & Smale	Knight Bruce, V.-C.
Den. C. C.	Denison	Criminal Appeal
Dick.	Dickens	Chancery
Dougl.	Douglas	King's Bench
D. P. C.	Dowling's Practice Cases, Old Series	Queen's Bench, Common Pleas, Exchequer and Bail Court
D. N. S.	Dowling's New Series	Do.
D. & L.	Dowling & Lowndes	Do.
D. & R.	Dowling & Ryland	King's Bench
D. & R. N. P. C.	Dowling & Ryland's Nisi Prius Cases	Nisi Prius
Dom. Proc.	Domus Procerum	House of Lords
Drink.	Drinkwater	Common Pleas
Drew.	Drewry	Kindersley, V.-C.
Drew. & Sm.	Drewry & Smale	Chancery
E.		
East	East	King's Bench
East, P. C.	East's Pleas of the Crown.	
Eden	Eden	Chancery
El. & Bl.	Ellis & Blackburn	Queen's Bench
El., Bl. & El.	Ellis, Blackburn & Ellis	Queen's Bench
El. & El.	Ellis & Ellis	Queen's Bench
Eq. R.	Equity Reports of 1855-56	Chancery
Esp.	Espinasse	Nisi Prius
Ex.	Exchequer Reports by Welsby, Hurlstone & Gordon	Exchequer
Ex. Ch.	Exchequer Chamber	Exchequer Chamber
Ex. D.	Law Reports	Exchequer Division
F.		
Forrest	Forrest	Exchoquer

ABBREVIATIONS AND REFERENCES.

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ABBREVIATIONS.	NAMES OF REPORTERS AND REPORTS.	NAMES OF COURTS OR JUDGES.
Fonb. N. R. . . .	Fonblanque's New Reports	Bankruptcy
F. & F.	Foster & Finlason	Nisi Prius

G.

Gale	Gale	Exchequer
G. & D.	Gale & Davison	Exchequer
Giff.	Giffard	Vice-Chancellor Stewart
Giff. & H.	Giffard & Hemming	Vice-Chancellor Stewart
Glyn & J.	Glyn & Jameson	Bankruptcy
Gow	Gow	Nisi Prius

H.

H. & T.	Hall & Twells	Lord Chancellor and Appeals in Chancery
Hare	Hare	Wigram, V.-C., Turner, V.-C., and Wood, V.-C.
H. & R.	Harrison & Rutherford	Common Pleas
H. & W.	Harrison & Wollaston	King's Bench
H. or Hem. & M. or Mil.	Hemming & Miller	Chancery
Hodges	Hodges	Common Pleas
Holt	Holt	Nisi Prius
H. & H.	Horn & Hurlstone	Exchequer
H. L.	House of Lords Cases, by Clark	House of Lords
H. L. Cas.	Hurlstone & Coltman	House of Lords
H. & C.	Hurlstone & Norman	Exchequer
H. & N.	Hurlstone & Walmsley	Exchequer
H. & W.	Hopwood & Philbrick's Election Cases	Common Pleas
H. & P.	Hopwood & Coltman's Election Cases	Common Pleas

I.

Ir. C. L. R. . . .	Irish Common Law Reports (1850-1866)	Common Law
Ir. Ch. Rep. . . .	Irish Chancery Reports (1850-1866)	Chancery
Ir. R., C. L. . . .	Irish Common Law Series (1866-1878)	Common Law
Ir. R., Eq.	Irish Equity (1866-1878)	Chancery
Ir. L. R.	Irish Law Reports (1879-1883)	All the Courts

J.

J. P.	Justice of the Peace	All the Courts
J. & W.	Jacob & Walker	Chancery
Johns.	Johnson	Chancery
Johns. & H. . . .	Johnson & Hemming	Chancery
Jur.	Jurist	All the Courts
Jur., N. S. . . .	Jurist, New Series	All the Courts

K.

Kay	Kay	Wood, V.-C.
Kay & J.	Kay & Johnson	Wood, V.-C.
K. & G.	Keane & Grant	Common Pleas
Keen	Keen	Chancery
Ld. Kenyon	Lord Kenyon's Notes of Cases	King's Bench

L.

L. C.		Lord Chancellor
L. J. or L. JJ.		Lord Justice or Lords Jus- tices
L. J., Adm.	Law Journal, New Series	Admiralty
L. J., Bk.	" "	Bankruptcy
L. J., Ch.	" "	Chancery
L. J., C. P.	" "	Common Pleas
L. J., Ex.	" "	Exchequer

ABBREVIATIONS AND REFERENCES.

ABBREVIATIONS.	NAMES OF REPORTERS AND REPORTS.	NAMES OF COURTS OR JUDGES.
L. J., M. C.	Law Journal, New Series	Magistrates' Cases
L. J., Q. B.	"	Queen's Bench
L. J., Mat.	"	Divorce and Matrimonial
L. J., P. C.	"	Privy Council
L. L., P.	"	Probate Court
L. R., Q. B.	Law Reports	Queen's Bench
L. R., C. P.	"	Common Pleas
L. R., Ex.	"	Exchequer
L. R., Adm.	"	Admiralty
L. R., P.	"	Probate
L. R., C. C.	"	Crown Cases Reserved
L. R., Eq.	"	Master of the Rolls and Vice-Chancellors
L. R., Ch.	"	Lord Chancellor's and Appeal
L. R., P. C.	"	Privy Council
L. R., H. L.	"	House of Lords
L. T., O. S.	Law Times Reports, Old Series	All the Courts
L. T.	Law Times Reports, New Series	All the Courts
Leach, C. C.	Leach's Crown Cases	
Lofft	Lofft	King's Bench
Lewin, C. C.	Lewin's Crown Cases	Crown Cases
L. & C. or L. & C. C. C.	Leigh & Cave's Crown Cases	Crown Cases
L., M. & P.	Lowndes, Maxwell & Pollock	Bail Court
Lush.	Lushington	Admiralty
Lutw. Reg. Cas.	Lutwyche's Registration Election Cases	Common Pleas

M.

Mac. & G.	Macnaghten & Gordon	Lord Chancellor
Macq. H. L. Cas.	Macqueen's Scotch Appeals	House of Lords
Madd.	Maddock	Chancery
M. & G.	Manning & Granger	Common Pleas
M. R.	"	Master of the Rolls
M. C.	Magistrate Cases	
Mat.	Matrimonial	Matrimonial and Divorce
M. & W.	Meeson & Welsby	Exchequer
M. C. C.	Moody's Crown Cases	Exchequer Chamber
M. & M.	Moody & Malkin	Nisi Prius
M. & P.	Moore & Payne	Common Pleas
M. & Rob.	Moody & Robinson	Nisi Prius
M. & R.	Manning & Ryland	King's Bench
M. & S.	Maulc & Selwyn	King's Bench
M. & Scott	Moore & Scott	Common Pleas
M'Clel.	M'Clelland	Exchequer
M'Clel. & Y.	M'Clelland & Younge	Exchequer
Marsh.	Marshall	Common Pleas
Mer.	Merivale	Chancery
Mont.	Montagu	Bankruptcy
Mont. & Ayr.	Montagu & Ayrton	Bankruptcy
Mont. & Bligh	Montagu & Bligh	Bankruptcy
Mont. & Chit.	Montagu & Chitty	Bankruptcy
Mont., D. & D.	Montagu, Deacon & De Gex	Bankruptcy
Mont. & Mac.	Montagu & Macarthur	Bankruptcy
Moore	J. B. Moore	Common Pleas
Moore, P. C. C.	Moore's Privy Council Cases	Privy Council
Moore, P. C. C., N. S.	Moore's Privy Council Cases, New Series	Privy Council
Moore, Ind. App.	Moore's Indian Appeals	Privy Council
Mur. & H.	Murphy & Hurlstone	Exchequer
Myline & C.	Myline & Craig	Chancery
Myline & K.	Myline & Keen	Chancery

N.

N. R.	Bosnanquet & Puller's New Reports	Common Pleas
N. & M.	Neville & Manning	King's Bench
N. & P.	Neville & Perry	Queen's Bench
Nev. & Mac.	Neville & Macnamara	Railway Cases
New Scss. Cas.	Carrow, Hamerton and Allen	All the Courts
Nolan	Nolan	King's Bench

ABBREVIATIONS AND REFERENCES.

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P.

ABBREVIATIONS.	NAMES OF REPORTERS AND REPORTS.	NAMES OF COURTS OR JUDGES.
Ph.	Phillips	Chancery
Park, Ins.	Park on Insurance.	
Peake	Peake	Nisi Prius
Peake's Add. Cas.	Peake's Additional Cases	Nisi Prius
P. Wms.	Peere Williams	Chancery
P. & D.	Perry & Davison	Queen's Bench
Price	Price	Exchequer
Price P. C.	Price's Notes of Points in Practice	Exchequer
P. D.	Law Reports	Probate Division
P. C.	Privy Council.	

Q.

Q. B. D.	Law Reports	Queen's Bench Division
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R.

Railw. Cas.	Railway Cases by Nicholl, Hare, Oliver, Bea- van & Lefroy	All the Courts
Rob.	Robinson	House of Lords
Rob. Adm. Rep.	Dr. W. Robinson's Admiralty Reports	Admiralty
Rob. Ecc. Rep.	Dr. Robertson's Ecclesiastical Reports	Ecclesiastical
Romilly's Notes of Cases.		
Rose	Rose	Bankruptcy
Russ.	Russell	Chancery
Russ. & Mylne	Russell & Mylne	Chancery
Russ. C. & M.	Russell on Crimes and Misdemeanors, by Greaves.	
R. & R. C. C.	Russell & Ryan's Crown Cases.	
R. & M.	Ryan & Moody	Nisi Prius

S.

Scott	Scott	Common Pleas
Scott, N. R.	Scott's New Reports	Common Pleas
Selw. N. P.	Selwyn's Law of Nisi Prius, by Keane & Smith.	
Sim.	Simon	Shadwell, V.-C. E.
Sim. N. S.	Simon's New Series	Chancery
Sim. & Stu.	Simon & Stuart	Lord Cranworth, V.-C.
Smith	Smith	King's Bench
Stark.	Starkie	Nisi Prius
Swans.	Swanston	Chancery
S. C.	Same case.	
S. P.	Same point or principle.	
Sm. & G.	Smale & Giffard	Stuart, V.-C.
S. & T.	Swabey & Tristram	Divorce and Probate

T.

Tamlyn	Tamlyn	Rolls
Taunt.	Taunton	Common Pleas
T. R.	Term Reports (Durnford & East)	King's Bench
Tidd's Prac.	Tidd's Practice.	
Turn. & Russ.	Turner & Russell	Chancery
Tyr.	Tyrwhitt	Exchequer
Tyr. & G.	Tyrwhitt & Granger	Exchequer
T. & M.	Temple & Mew	Criminal Appeal

U.

U. C. L. J.	Upper Canada Law Journal.	
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V.

Ves. jun.	Vesey, junior	Chancery
Ves. & B.	Vesey & Beames	Chancery

W.

ABBREVIATIONS.	NAMES OF REPORTERS AND REPORTS.	NAMES OF COURTS OR JUDGES.
West	West	House of Lords
Wightw.	Wightwick	Exchequer
W., W. & D.	Wilmore, Wollaston & Davison	Queen's Bench
W., W. & H.	Wilmore, Wollaston & Hodges	Queen's Bench
Wils.	Wilson	King's Bench and Common Pleas
Wils. C. C.	Wilson's Chancery Cases	Chancery
Wils. Exch.	Wilson's Exchequer Reports	Exchequer, Equity
W. P. C.	Wollaston's Practice Cases	Queen's Bench, Common Pleas and Exchequer
Woodf. L. & T.	Woodfall's Law of Landlord and Tenant, by Cole.	
W. Bl.	Sir William Blackstone	King's Bench and Common Pleas
W. R.	Weekly Reporter	All the Courts

Y.

Younge	Younge	Exchequer, Equity
Y. & C.	Younge & Collyer	Exchequer, Equity
Y. & C. N. C. C.	Younge & Collyer's New Chancery Cases	Knight Bruce, V.-C.
Y. & J.	Younge & Jervis	Exchequer

A CHRONOLOGICAL LIST OF THE REPORTS COMPRISED IN THE DIGEST.

HOUSE OF LORDS.

Brown's Reports—1702 to 1800.	Law Journal, New Series—1832 to 1883.
Dow—1812 to 1818.	Law Reports—1865 to 1883.
Bligh—1819 to 1821.	Jurist—1837 to 1854.
Bligh, New Series—1827 to 1837.	Jurist, New Series—1855 to 1866.
Dow & Clark—1827 to 1832.	Law Times, New Series—1859 to 1883.
West—1839 to 1841.	Weekly Reporter—1852 to 1883.
Clark & Finnelly—1831 to 1846.	Macqueen—1851 to 1866.
House of Lords Cases (Clark)—1847 to 1866.	

PRIVY COUNCIL.

Knapp's Reports—1829 to 1836.	Law Journal, New Series—1865 to 1883.
Moore—1836 to 1852.	Law Reports—1865 to 1883.
Moore's Indian Appeals—1836 to 1873.	Law Times, New Series—1859 to 1883.
Moore's New Series—1852 to 1873.	Swabey—1858 to 1859.
Jurist—1837 to 1854.	Lushington—1860 to 1863.
Jurist, New Series—1855 to 1866.	Browning & Lushington—1863 to 1865.

QUEEN'S BENCH AND BAIL COURT.

Wilson's Reports—1742 to 1774.	Law Reports—1866 to 1883.
Kenyon's Notes—1753 to 1760.	Dowling & Ryland—1821 to 1827.
Sir William Blackstone—1746 to 1780.	Manning & Ryland—1827 to 1830.
Burrow—1757 to 1771.	Neville & Manning—1831 to 1836.
Burrow's Settlement Cases—1732 to 1776.	Neville & Perry—1836 to 1838.
Caldecott's Settlement Cases—1775 to 1786.	Perry & Davison—1838 to 1841.
Nolan—1791 to 1792.	Gale & Davison—1841 to 1843.
Lofft—1772 to 1774.	Davison & Merivale—1843 to 1844.
Cowper—1774 to 1778.	Chitty—1819 to 1820.
Douglas—1778 to 1784.	Dowling's Practice Cases, Old Series—1830 to 1840.
Term Reports—1785 to 1800.	Dowling's Practice Cases, New Series—1841 to 1842.
Smith—1803 to 1806.	Harrison & Wollaston—1835 to 1837.
East—1801 to 1812.	Willmore, Wollaston & Davison—1837.
Maule & Selwyn—1813 to 1817.	Willmore, Wollaston & Hodges—1838 to 1839.
Barnewall & Alderson—1817 to 1822.	Jurist—1837 to 1854.
Barnewall & Cresswell—1822 to 1830.	Jurist, New Series—1855 to 1866.
Barnewall & Adolphus—1830 to 1834.	Law Times, New Series—1859 to 1883.
Adolphus & Ellis—1834 to 1840.	Weekly Reporter—1852 to 1883.
Queen's Bench Reports (Adolphus & Ellis, New Series)—1841 to 1852.	Lowndes, Maxwell & Pollock—1850 to 1851.
Ellis, Blackburn & Ellis—1858.	Lowndes & Maxwell—1852.
Ellis & Ellis—1858 to 1861.	Saunders & Cole—1842 to 1848.
Best & Smith—1861 to 1869.	
Law Journal, New Series—1832 to 1883.	

CHRONOLOGICAL LIST OF THE REPORTS.

COMMON PLEAS.

H. Blackstone—1788 to 1796.
 Bosanquet & Puller—1796 to 1807.
 Taunton—1808 to 1819.
 Broderip & Bingham—1819 to 1822.
 Bingham—1822 to 1834.
 Bingham's New Cases—1834 to 1840.
 Manning & Granger—1840 to 1844.
 Hodges—1835 to 1837.
 Arnold—1838 to 1839.
 Marshall—1814 to 1816.
 Moore—1817 to 1827.
 Moore & Payne—1828 to 1831.
 Moore & Scott—1831 to 1834.
 Scott—1834 to 1840.
 Scott's New Reports—1840 to 1845.

Common Bench Reports—1845 to 1856.
 Common Bench Reports, New Series—1856 to 1865.
 Harrison & Rutherford—1866 to 1868.
 Law Journal, New Series—1832 to 1883.
 Law Reports—1865 to 1883.
 Dowling's Practice Cases, Old Series—1830 to 1840.
 Dowling's Practice Cases, New Series—1841 to 1842.
 Jurist—1837 to 1854.
 Jurist, New Series—1855 to 1866.
 Law Times, New Series—1859 to 1883.
 Weekly Reporter—1852 to 1883.

EXCHEQUER.

Anstruther's Reports—1792 to 1797.
 Forrest—1801.
 Wightwick—1810 to 1811.
 Price—1814 to 1824.
 McClelland—1824.
 McClelland & Younge—1825.
 Younge & Jervis—1826 to 1830.
 Crompton & Jervis—1830 to 1832.
 Crompton & Meeson—1832 to 1834.
 Crompton, Meeson & Roscoe—1834 to 1836.
 Meeson & Welsby—1836 to 1847.
 Exchequer Reports—1847 to 1856.
 Hurlstone & Norman—1856 to 1861.
 Hurlstone & Colman—1862 to 1865.
 Law Journal, New Series—1832 to 1883.

Law Reports—1865 to 1883.
 Tyrwhitt—1830 to 1835.
 Tyrwhitt & Granger—1836.
 Dowling's Practice Cases, Old Series—1830 to 1840.
 Dowling's Practice Cases, New Series—1841 to 1842.
 Gale—1835 to 1836.
 Murphy & Hurlstone—1836 to 1837.
 Horn & Hurlstone—1838 to 1839.
 Jurist—1837 to 1854.
 Jurist, New Series—1854 to 1866.
 Law Times, New Series—1859 to 1883.
 Weekly Reporter—1852 to 1883.

ADMIRALTY.

Robinson (W.)—1838 to 1852.
 Swabey—1858 to 1859.
 Spinks—1854 to 1855.
 Lushington—1860 to 1863.
 Browning & Lushington—1863 to 1865.
 Jurist—1837 to 1854.

Jurist, New Series—1855 to 1866.
 Law Journal, New Series—1832 to 1883.
 Law Reports—1865 to 1883.
 Weekly Reporter—1852 to 1883.
 Law Times, New Series—1859 to 1883.

DIVORCE AND PROBATE.

Swabey & Tristram—1858 to 1865.
 Jurist, New Series—1858 to 1866.
 Law Journal, New Series—1832 to 1883.

Law Reports—1865 to 1883.
 Law Times, New Series—1859 to 1883.
 Weekly Reporter—1852 to 1883.

BANKRUPTCY.

Rose—1810 to 1816.
 Buck—1816 to 1820.
 Glyn & Jameson—1821 to 1828.
 Montagu & Macarthur—1828 to 1830.
 Montagu—1830 to 1832.
 Montagu & Bligh—1832 to 1833.
 Montagu & Ayrton—1833 to 1838.
 Montagu & Chitty—1838 to 1840.
 Deacon & Chitty—1832 to 1835.
 Deacon—1836 to 1839.

Montagu, Deacon & De Gex—1840 to 1844.
 De Gex—1845 to 1848.
 De Gex, Macnaghten & Gordon—1851 to 1857.
 De Gex & Jones—1857 to 1860.
 De Gex, Fisher & Jones—1860 to 1862.
 De Gex, Jones & Smith—1862 to 1865.
 Jurist—1837 to 1854.
 Jurist, New Series—1855 to 1866.
 Law Times, New Series—1859 to 1883.
 Weekly Reporter—1852 to 1883.

NISI PRIUS.

Peake's Reports—1790 to 1812.
 Peake's Additional Cases—1795 to 1812.

Espinasse—1793 to 1807.
 Campbell—1808 to 1816.

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NISI PRIUS—*Continued.*

Starkie—1815 to 1822.
Holt—1815 to 1817.
Gow—1818 to 1820.
Ryan & Moody—1823 to 1826.
Moody & Malkin—1827 to 1830.
Moody & Robinson—1831 to 1844.

Dowling & Ryland—1822 to 1823.
Carrington & Payne—1823 to 1841.
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A Digest

OF THE

CASES REPORTED

FROM 1756 TO 1883.

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I. AGENCY GENERALLY.

1. CREATION OF RELATIONSHIP.

Consensus of Parties.—The relation of principal and agent requires the consensus of both parties. There must be an express or implied assent to, or a subsequent ratification of, that

relation. *Markwick v. Hardingham*, 15 Ch. D. 349; 43 L. T. 647; 29 W. R. 361—C. A.

No one can become the agent of another except by the will of the principal, manifested in writing, or orally, or by his being placed in a situation in which, according to the ordinary usages of mankind, he would be understood to represent and act for the principal. *Pole v. Leask*, 33 L. J., Ch. 155; 9 Jur., N. S. 829; 8 L. T. 605—H. L.

Agent or Purchaser.—When a person has goods consigned to him to sell, and he is bound, if he sells, to pay a fixed price to his employer at a fixed time after sale, but he may sell to his customers at any price and upon any credit he pleases, though he may be called an agent, yet the legal relation of principal and agent does not exist between him and his employer; on the contrary, the relation between him and his employer is that of purchaser and vendor, and a separate relation of vendor and purchaser exists between him and the persons to whom he sells, and the moneys which come to his hands by means of the sales which he effects are his own moneys, and are not impressed with any trust for his employer. *White, Ex parte, Nevill, In re*, 6 L. R., Ch. 397; 40 L. J., Bk. 73; 24 L. T. 45; 19 W. R. 488.

A., a foreign merchant, employed B. to purchase goods on commission; the vendors (with the knowledge that the purchases were made on account of A.) made out the invoices to B., and took in payment his acceptances payable at six months:—Held, that there was no contract of sale as between A. and B. *Seymour v. Pycklau*, 1 B. & A. 14.

Between Wrongdoers.—There is no agency as between wrongdoers; each of them is personally liable. *Heugh v. Abergavenny (Earl)*, 23 W. R. 40.

By Ratification.—The maxim of omnis ratihabito retrotrahitur et mandato æquiparatur means, first, as applied to cases of contract, that if A., unauthorized by B., makes a contract on his behalf with C., which B. afterwards recognizes and adopts, the contract is to be dealt with as having been originally made by his authority. Secondly, as applied to cases of tort, that where A., professing to act by the authority of B., does that which *prima facie* amounts to a trespass, and B. afterwards assents to and adopts his act, A. is treated as having from the beginning acted by his authority, and B. becomes a trespasser unless he can justify the act. *Bird v. Brown*, 4 Ex. 786; 19 L. J., Ex. 154; 14 Jur. 132.

A subsequent ratification by a principal of a contract by an agent is equivalent to a previous authority. *Maclean v. Dunn*, 1 M. & P. 761; 4 Bing. 722; *S. P.*, *Forster v. Bates*, 12 M. & W. 226.

An act done by an agent of the government, though in excess of his authority, being ratified and adopted by the government, is equivalent to a previous authority. *Secretary of State for India v. Kamahee Boye Sahaba*, 7 Moore, Ind. App. 476; 13 Moore, P. C. C. 22.

When A. enters into a contract with B. before a company is in existence, that contract cannot be made binding on the company by mere ratification. *Empress Engineering Company, In re*,

16 Ch. D. 125; 43 L. T. 742; 29 W. R. 342—C. A. And see cases, sub tit. COMPANY.

— **Who may Ratify.**—A person may ratify an action brought in his name, but without his knowledge or authority, by another professing to act as his agent and on his behalf. *Ancona v. Marks*, 7 H. & N. 686; 31 L. J., Ex. 163; 8 Jur. N. S. 516; 5 L. T. 753; 10 W. R. 251.

Therefore, where a holder of a bill of exchange without the knowledge or authority of the plaintiff, indorsed and delivered it to an attorney for the plaintiff, and in order that an action might be brought upon it in his name, and the plaintiff after action ratified the act:—Held, that the subsequent ratification was equivalent to a prior authority, and that the plaintiff had a valid title to sue on the bill. *Id.*

To entitle a person to sue upon a contract, it must be shewn that he himself made it, or that it was made on his behalf by an agent authorized to act for him at the time, or whose act has been subsequently ratified and adopted by him, and the person for whom the agent professes to act must be capable of being ascertained at the time. *Watson v. Swann*, 11 C. B., N. S. 756; 31 L. J., C. P. 210.

A party may ratify the acts of an agent whose name is unknown to him. *Foster v. Bates*, 1 D. & L. 400; 12 M. & W. 226; 13 L. J., Ex. 88; 7 Jur. 1093.

An act done for another, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him; in such case, the principal is bound by the act, whether it is to his detriment or for his advantage, and whether it is founded on a tort or a contract, to the same extent and with all the consequences, which follow from the same act, if done by his previous authority; but it is otherwise where the party did not at the time assume to act as agent. *Wilson v. Tummam*, 6 M. & G. 236; 6 Scott N. R. 894; 1 D. & L. 573.

Where A. does an act as agent for B., without any communication with C., C. cannot, by afterwards adopting that act, make A. his agent, and thereby incur any liability, or take any benefit under the act of A. *Id.*

In some cases, where an act, which if unauthorized would amount to a trespass, has been done in the name and on behalf of another, and without previous authority, a subsequent ratification may enable the party on whose behalf the act was done to take advantage of it, and treat it as having been done by his direction; but this doctrine must be taken with the qualification that the act of ratification must take place at the time and under circumstances when the ratifying party might have himself lawfully done the act which he ratifies. *Bird v. Brown, supra.*

— **Liability of Agent for Acts ratified by Principal.**—A., a naval commander, stationed on the coast of Africa, with instructions to suppress the slave trade, was requested by the governor of Sierra Leone to obtain the liberation of two British subjects, detained as slaves at the Gallinas by the son of the king of that country, and in effecting that object to use force, if necessary. He accordingly proceeded to the Gallinas with an armed force, and, having landed at Dombocorro, took military possession

of a barracoon belonging to B., who was a Spaniard, carrying on the slave trade at the Gallinas. He then communicated with the king of the country, and the two British subjects having been released, A. concluded a treaty for the abolition of the slave trade in that country. In execution of this treaty he fired the barracoons of B., and carried away his slaves to Sierra Leone, where they were liberated. Some of B.'s goods used in the slave trade were claimed by the king as forfeited, and delivered up to him; other goods were destroyed. These proceedings having been communicated to the Lords of the Admiralty, and the secretaries of state for the foreign and colonial departments, they respectively, by letter, adopted and ratified the act of A. :—Held, that the ratification of his act by the ministers of state was equivalent to a prior command, and rendered it an act of state, for which the crown was alone responsible. *Buron v. Denman*, 2 Ex. 167.

— **Liability of Principal for Wrongful Distress—Notice of Facts.**—A landlord authorized bailiffs to distrain for rent due to him from his tenant of a farm, directing them not to take anything except on the demised premises. The bailiffs distrained cattle of another person (supposing them to be the tenant's) beyond the boundary of the farm; the cattle were sold, and the landlord received the proceeds :—Held, that the landlord was not liable for the value of the cattle, unless he ratified the act of the bailiffs with knowledge of the irregularity, or that he chose, without inquiry, to take the risk upon himself, and to adopt the whole of their acts. *Lewis v. Read*, 13 M. & W. 834; 14 L. J., Ex. 295.

A landlord is not liable for the tortious act of a broker in seizing what his warrant does not authorize him to seize, unless he ratifies the broker's act, with knowledge of what he has done, but he is responsible for any irregularity by the broker in dealing with the distress he was authorized to make, as for selling the goods without notice of the distress, and without appraisal. *Haseler v. Lemoyne*, 5 C. B., N. S. 530; 28 L. J., C. P. 103; 4 Jur., N. S. 1279.

— **Conversion.**—If a principal ratifies the purchase by his agent of a chattel which the vendor had no right to sell, he is guilty of a conversion, although at the time of the ratification he had no knowledge that the sale was unlawful. *Hilbery v. Hatton*, 2 H. & C. 822; 33 L. J., Ex. 190; 10 L. T. 39.

— **Evidence of.**—A., being the owner of a house, No. 17, employed B. to sell it. The plaintiff viewed No. 7 with a card obtained from B., and paid B. money, and received from him a receipt for it as and for a deposit on the purchase of No. 7, but, under a misapprehension, signed an agreement drawn up by B. for the purchase of No. 17; and then finding that under it he would acquire, not No. 7, but No. 17, applied to B. for repayment of his deposit, which A. authorized B. to make :—Held, that there was evidence of a ratification by A. of B.'s authority. *Benham v. Butty*, 12 L. T. 266; 13 W. R. 636.

An agent employed to buy goods, to be paid for at a future day, paid for them out of his own

money, for the purpose of obtaining the discount allowed by the seller. The principal, with knowledge of these facts, directed the agent to clear the goods at the Custom-house, which, in the ordinary course of business, would be done after payment of the price by the agent for his principal :—Held, a ratification or an adoption of the previous payment of the price, and that the agent might sue the principal for the price as money paid to his use at his request. *Hawley v. Sentance*, 7 L. T. 745; 11 W. R. 311.

The defendant employed R., as his agent, to agree with the plaintiff for the purchase of the plaintiff's interest in a leasehold house; the plaintiff also held a stable under a demise distinct from that under which he held the house. The defendant did not authorize R. to purchase the stable, and R. represented to the defendant that he had purchased the lease of the house only; but, in fact, R. had taken from the plaintiff an agreement in writing for the purchase of both. Afterwards, on the plaintiff stating to the defendant that such was the agreement, and requiring the defendant to take the stable, the defendant wrote and signed a letter to the plaintiff, stating that the defendant did not know what R. had agreed to, but must support him in all he had done for the defendant :—Held, that this was a ratification of R.'s agreement, whatever it might be, sufficient to constitute with it a signed memorandum, under s. 4 of the Statute of Frauds (29 Car. 2, c. 3), to charge the defendant with a contract to take the stable. Per Lord Campbell, C. J., Wightman and Erle, JJ., Crompton, J., not concurring. *Fitzmaurice v. Bayley*, 6 El. & Bl. 868; 26 L. J., Q. B. 114; 3 Jur., N. S. 264.

A., who received the rents, and generally managed the property of B., in B.'s name, but without authority from her signed a warrant to distrain the goods of C., a tenant, for rent in arrear, and after the goods had been distrained, informed B. thereof, who thereupon said that she should leave the matter in his hands :—Held, sufficient evidence that the distress was authorized or ratified and adopted by B. *Haseler v. Lemoyne*, 5 C. B., N. S. 530; 28 L. J., C. P. 103; 4 Jur., N. S. 1279.

The plaintiffs, through D. & Co., who were brokers, sold 682 bags of linseed, at a certain price per quarter, to H., and H. afterwards, through the same brokers, sold the linseed, at an increased price, to the defendant. The time for the defendant's payment of the purchase-money was to arrive before the time fixed for H.'s payment. The defendant being in want of the linseed, to complete a contract he had made, sent one of his clerks to D. & Co., for the delivery order, with instructions to follow up the matter and get the order. The clerk was taken by D. & Co. to the plaintiffs, from whom he obtained the order only on his promising that the defendant would pay the plaintiffs for the seed, as the plaintiffs required to be paid before they parted with the order. On the following day the defendant sent a cheque to D. & Co. for 900*l.* on account of the linseed, which had not been measured at that time, so that the precise quantity of it was not then known. Upon its being measured, it was found that the plaintiffs were entitled, under their contract with H., to receive 971*l.* 15*s.* 6*d.* In an action by them against the defendant, to recover the difference between this amount and 900*l.*, the amount of the cheque :—Held, that

there was no evidence to warrant a jury in finding a ratification by the defendant of the contract which the clerk had so made, it not being proved that the clerk had communicated to the defendant what had passed between him and the plaintiffs when he obtained the order. *Fitzgerald v. Dressler*, 7 C. B., N. S. 374; 29 L. J., C. P. 113; 5 Jur., N. S. 598.

2. AGENTS OF DIFFERENT KINDS.

General Agent — Authority of.]—When a general authority is given to an agent, this implies a right to do all subordinate acts incident to and necessary for the execution of that authority, and if notice is not given that the authority is specially limited, the principal is bound. *Collen v. Gardner*, 21 Beav. 540.

An agent employed generally to do an act is only authorized to do it in the usual way of business; therefore, as stock is usually sold for money only, a principal is not bound by the acts of a broker employed by him, who sells it upon credit without a special authority, though acting bona fide and with a view to the benefit of the principal. *Wiltshire v. Sims*, 1 Camp. 258.

The appointment of a general agent for the sale of goods implies an authority to sell according to the ordinary course of trade. *Howell, Ex parte*, 12 L. T. 875.

A principal is bound by all the acts of his general agent; but, where he appoints an agent for a particular purpose, he is only bound to the extent of the authority given. *East India Company v. Hensley*, 1 Esp. 112. And see *Attwood v. Munnings*, 7 B. & C. 278; 1 M. & R. 66.

When a person permits another to act as his general agent, he is bound by a contract made by the agent, although the latter declares himself as acting by procuration, and has received special instructions which he exceeds. *Smith v. McGuire*, 3 H. & N. 554; 27 L. J., Ex. 465.

— Evidence.]—If a merchant constitutes any one his general agent for buying and selling in the market, either through a particular broker or otherwise, then, until revoked, the agency will continue, and the principal will be bound by his acts; and the fact that such general agency once existed would be admissible as *prima facie* evidence of its continuance, and the burthen would be thrown on the principal to shew that it had been determined; but unless the agency was a general continuing agency to endure until revoked, the fact that there had been a separate agency in any number of previous cases would afford no evidence of agency in any subsequent transaction, however closely it might resemble all which might have gone before. *Pole v. Leask*, 33 L. J., Ch. 155; 9 Jur., N. S. 829; 8 L. T. 645—H. L.

Special Agent — Authority of.]—A special agent, under a limited authority, cannot bind his principal by any act beyond the scope of such limited authority. *Fenn v. Harrison*, 3 T. R. 757; 4 T. R. 177.

Where the holder of a bill of exchange desired A. to get it discounted, but positively refused to indorse it, and A. delivered it to B. for the same purpose, informing him to whom it belonged; and B., finding that he could not dispose of it without indorsing it, was prevailed upon to do so by A.'s telling him that he would indemnify him;

but the indorsee took it upon the credit of the names on the bill, without any knowledge of the real owner; although such original owner afterwards promised to pay the bill, yet such promise cannot support an action against him by the indorsee, it being *nudum pactum*; for, as A. was a special agent under a limited authority, he could not bind his principal by any act beyond the scope of such limited authority. *Id.*

Where a party dealing with others through an agent intrusts the agent with a written consent on his part to do a particular act, and privately instructs him not to give the consent except upon certain conditions not specified in it, and the agent gives the consent unconditionally, the principal cannot, subsequently, undo the effect of the consent so given, on the ground that the agent exceeded his authority, and it is the same if the principal signed the consent at the suggestion of his agent, without examining its contents and supposing that the conditions were virtually if not actually, comprehended within it. *Neeld v. Beaufort (Duke)*, 5 Jur. 1123. Affirmed in H. L. sub nom. *Beaufort (Duke) v. Neeld*, 11 C. & F. 248; 9 Jur. 813.

Brokers and Factors.]—A person who, for brokerage and hire, negotiates and conclude bargains for stock, is a broker in point of law *Jansen v. Green*, 4 Burr. 2103.

The character of broker differs materially from that of factor; the former is not trusted with the possession of the goods, nor ought he to sell in his own name; but the latter, from its being usual for him to make advances upon the goods, has a special property in, as well as a general lien upon them; and may sell in his own name and his principal will be bound by all the consequences of such sale, of which the right of setting off a debt due from the factor is one. *Baring v. Corrie*, 2 B. & A. 137.

— In City of London.]—See BROKER.

Bill Brokers.]—A bill broker is not a person known to the law with certain duties, but his employment is one which depends entirely upon the course of dealing; his duties may vary in different parts of the country, and their extent is a question of fact to be determined by the usage and course of dealing in the particular place. *Foster v. Pearson*, 1 C., M. & R. 849; 5 Tyr. 255.

A bill broker, who receives a bill from a customer merely for the purpose of procuring it to be discounted, has no right to mix it with bills of other customers, and to pledge the whole mass as a security for an advance of moneys to himself; still less has he a right to deposit bills which are received merely for the purpose of discount as a security or part security for money previously due from him. *Haynes v. Foster*, 2 C. & M. 237; 4 Tyr. 65.

A bill broker who takes a forged bill to a money dealer to be discounted, although he does not indorse the bill, and is not cognizant of the forgery, is liable to repay the money received for the bill. *Gurney v. Womersley*, 4 El. & Bl. 133; 24 L. J., Q. B. 46; 1 Jur., N. S. 328. See also *Bishop, Ex parte. Fox, In re*, 15 Ch. D. 400; 50 L. J., Ch. 18; 43 L. T. 165; 29 W. R. 144—C. A.

Del credere Agents.]—A commission del credere is an absolute engagement to the principal

from a broker, and makes him liable in the first instance, though the principal may resort to the person trusted as a collateral security. *Groce v. Dubois*, 1 T. R. 112. See *Bize v. Dickason*, 1 T. R. 283.

An agreement by a factor to sell upon a del credere commission need not be in writing, not being a promise to answer for the debt, default, or miscarriage of another person, within the 4th section of the Statute of Frauds. *Couturier v. Hastie*, 8 Ex. 40; 22 L. J., Ex. 97; *S. P.*, *Wickham v. Wickham*, 2 Kay & J. 478.

— **Evidence of.]**—An agent who received annuities for his principal, sent him several accounts, in which he gave credit for instalments of annuities, but which he stated he had not yet received. He charged commission on them, as well as on the others which were received, and told his principal he might draw for the balance, which he did. In subsequent accounts no notice was taken of the instalments, which, in a previous account, were stated to be unpaid:—Held, sufficient evidence for a jury to infer a del credere commission, creating an agreement for the agent to be responsible to his principal for the annuities. *Shaw v. Woodcock*, 7 B. & C. 73; 9 D. & R. 889.

Shipbrokers.]—See SHIPPING.

Stockbrokers.—See STOCK AND STOCK EXCHANGE.

II. RIGHTS AND LIABILITIES OF PRINCIPAL AND AGENT.

1. GENERALLY.

Duty to his Employer.]—Amongst the most important duties of an agent are those which require him to give to his principal the free and unbiassed use of his own discretion and judgment, to keep and render just and true accounts, and to keep the property of his principal unmixed with his own or the property of others. *Clarke v. Tipping*, 9 Beav. 284.

An agent cannot employ himself for a third person when he has agreed to give up the whole of his personal services to his principal. *Thompson v. Harelock*, 1 Camp. 527.

A traveller, about to set up in business on his own account, may solicit orders from his master's customers, provided the orders he takes at the time are for his master. *Nichol v. Martyn*, 2 Esp. 732.

Where an agent is authorized, from a previous course of dealing between himself and his principal, to do so, he may, on an approval of a purchase by the latter, make out a contract note in his own name, without inserting that of his principal, provided he makes an entry in his book in the name of his principal. *Kemble v. Atkins*, 1 Moore, 6; 7 Taunt. 260; Holt, 427.

The mere relation of principal and factor confers ordinarily an authority to sell at such times and for such prices as the factor may, in the exercise of his discretion, think best for his employer: but if he receives the goods subject to any special instructions, he is bound to obey them. *Smart v. Sanders*, 3 C. B. 380; 16 L. J., C. P. 39; 10 Jur. 841.

Delegation of Authority.]—A broker cannot,

without the assent of his principal, delegate his authority. *Henderson v. Barnwell*, 1 Y. & J. 387.

A., employed by the defendant to transport goods to a foreign market, delegated the entire employment to the plaintiff, who performed it without the privity of the defendant:—Held, that there was no privity between them, and therefore, that the plaintiff was not entitled to recover his charges, or those of his agents, from the defendant, although the latter had not paid the amount to A. *Schmaling v. Tomlinson*, 1 Marsh. 500; 6 Taunt. 147.

Though an agent cannot delegate his authority, yet there are many acts which he must necessarily do through the agency of other persons, and which are valid when so done. *Rositer v. Tralfalgar Life Assurance Association*, 27 Beav. 377.

A factor has no right to send away goods to another person, when they have been consigned to him for sale at a particular place, though he is unable to sell them there. *Catlin v. Bell*, 4 Camp. 183.

A factor, who was a partner in a house abroad, to whom goods were consigned, made advances to the consignor, to be repaid out of the proceeds:—Held, that the consignees were not authorized to purchase bills for the account and risk of the consignor. *Lucas v. Groning*, 7 Taunt. 164; 2 Marsh. 460; 1 Stark. 391.

2. DURATION OF AGENCY.

Retainer for Fixed Period—No implied Condition that Business shall continue.]—When two parties mutually agree, for a fixed period, the one to employ the other as his sole agent in a certain business, at a certain place, the other that he will act in that business for no other principal at that place, there is no implied condition that the business itself shall continue to be carried on during the period named. *Rhodes v. Forwood*, 1 App. Cas. 256; 47 L. J., Ex. 396; 34 L. T. 890; 24 W. R. 1078.

A. and B. agreed "in consideration of the services and payments to be mutually rendered," that for seven years, or as long as A. should continue to carry on business at the town of Liverpool, A. should be the sole agent there for the sale of B.'s coals, and that B. would not employ any other agent there for that purpose. There were stipulations in the agreement that B. should have the entire control over the prices for which, and the credits at which, the coals were to be sold; and that if A. could not sell a certain amount per year, or B. could not supply a certain amount per year, either party might, on notice, put an end to the agreement. At the end of four years, B. sold the colliery itself. In an action by A. for damages for breach of the agreement thereby occasioned:—Held, that the action was not maintainable; for that the agreement did not bind the colliery owner to keep his colliery, or to do more than employ the agent in the sale of such coals as he sent to Liverpool. *Id.*

A declaration stated that, by agreement in writing between B., since deceased, and the defendant of the one part, and the plaintiff of the other part, B. and the defendant, who at the date of the agreement were carrying on business as stone merchants in co-partnership, appointed the plaintiff their sole London agent, for a period of four years and a half, and the plaintiff, in consideration of the premises, agreed to accept the appointment upon the terms that B. and the

defendant should pay the plaintiff 2l. 10s. per cent. on all accounts received by them for stone sold by the plaintiff, or supplied by B. and the defendant to any person originally introduced to them by the plaintiff. Breach, that the defendant did not nor would employ the plaintiff as his sole agent for the whole period of four years and a half, and did not nor would execute certain orders for stone procured by the plaintiff in his capacity of agent:—Held, that the parties contracted with reference to the existing partnership business, and that the contract was to employ the plaintiff for a period of four years and a half, subject to the implied condition that all parties so long lived. *Tasker v. Shepherd*, 6 H. & N. 575; 30 L. J., Ex. 207; 4 L. T. 19; 9 W. R. 476.

Death of Principal.—A retainer under a contract to endeavour to sell goods on behalf of the owner, on the terms of receiving a stipulated sum in the event of the sale, but nothing, in the case of failure, is revocable by the employer before sale, even after endeavours have been made, and is revoked in law by his death after such endeavours; so that even if his personal representative confirms the sale under such contract, he will not (unless he knows of, and confirms the terms of the contract) be liable to pay the stipulated sum. *Campanari v. Woodburn*, 15 C. B. 400; 3 C. L. R. 140; 24 L. J., C. P. 13; 1 Jur., N. S. 17.

Bankruptcy of Principal.—In 1828 the plaintiff mortgaged freehold property to B., and in 1832, being about to reside abroad, he gave a full power of attorney to the defendant, who was a solicitor, to receive the rents and profits of all his property, and to apply them in payment of the incumbrances. In 1841 the plaintiff settled accounts with the defendant, shewing a large balance due to the defendant, which the plaintiff agreed to secure by a mortgage of his real estates when required. In 1845 the plaintiff became bankrupt, but his assignee did not interfere with the mortgaged property, and the defendant continued to receive the rents and profits. In 1849 the defendant took a transfer himself of B.'s mortgage, to which the plaintiff was not a party. In 1865 the defendant wrote a letter to the plaintiff expressing his readiness to settle all accounts. In 1877 the plaintiff's bankruptcy was annulled, and the plaintiff brought an action against the defendant claiming to redeem the mortgage, and claiming an account against him as mortgagee in possession, and, by amendment, as agent and trustee for him. The defendant pleaded the Statute of Limitations:—Held, that on the plaintiff's bankruptcy the defendant ceased to be the agent and attorney of the plaintiff, and did not become the agent of the assignee. *Markwick v. Hardingham*, 15 Ch. D. 339; 43 L. T. 647; 29 W. R. 361—C. A.

Proof in Winding up of Company.—An agent who has been engaged by a company for a fixed term, and who is to receive a commission on all orders obtained through him, as remuneration for his services, is entitled upon the determination of the agreement by the winding up of the company, to claim compensation in respect of the commission which he might otherwise have earned during the unexpired portion of the term. *Patent Floor Cloth Company, In re*,

Dean and Gilbert's claim, 41 L. J., Ch. 476; 20 L. T. 467.

By articles of association of a company it was provided that, in case of the dismissal of the manager, he should be paid the full amount of money paid upon his shares. A resolution was passed to wind up the company, and he was appointed liquidator. He had paid 2,000l. on his shares, and received 400l. for remuneration as liquidator:—Held, that the winding-up was equivalent to his dismissal, and that he was entitled to prove in the winding-up for 2,000l. subject to a set-off of the 400l. *Imperial Wine Company, In re, Shirreff's case*, 14 L. R., Eq. 417; 42 L. J., Ch. 5; 20 W. R. 966.

A person entered into an agreement with an insurance company to act as their agent for five years, and to transact no business except for the company, in consideration of which he was to receive a fixed salary and also a commission of 10l. per cent. on all business transacted. Before the five years were expired, the company was wound up voluntarily:—Held, that the agent was not entitled to prove against the company for the loss of his commission during the remainder of the term of five years. *English and Scottish Marine Insurance Company, In re MacLure, Ex parte*, 5 L. R., Ch. 737; 39 L. J. Ch. 685; 23 L. T. 685; 18 W. R. 1122.

By the articles of association of a company, manager was appointed; and it was provided that if he should at any time be deprived of or removed from his office for any other cause than gross misconduct the directors should pay to him a certain sum within one month from the time of his removal. The company was ordered to be wound up:—Held, that he was entitled to prove in the winding-up for the sum specified by the articles without any such deduction being made. *London and Scottish Bank, In re, Logan, Ex parte*, 9 L. R., Eq. 149.

Revocation, when Possible.—Mere advance made by a factor, whether at the time employed as such or subsequently, cannot have the effect of altering the revocable nature of an authority to sell, unless the advances are accompanied by an agreement that the authority shall not be revocable. *De Comas v. Probst*, 2 Moore, P. C. C. N. S. 158; 11 Jur., N. S. 417; 12 L. T. 682; 1 W. R. 595.

Whether such an agreement has been made or may be properly inferred, is a question upon the evidence for the jury. *Id.*

A factor to whom goods have been consigned generally for sale, and who has subsequently made advances to his principal on the credit of the goods, has no right to sell them contrary to the orders of his principal, on the latter neglecting on request to repay the advances, inasmuch as his authority to sell does not become by reason of the unpaid advances irrevocable, as an authority coupled with an interest. *Smart v. Sanders*, 1 C. B. 895; 17 L. J., C. P. 258; 12 Jur. 751.

3. RIGHT OF AGENT TO COMMISSION AND REMUNERATION.

a. Generally.

Conclusion of Bargain.—In general, where a binding bargain has been procured by a commission agent and accepted by the party employing him to procure orders, the agent is entitled

to his commission. *Lockwood v. Levick*, 8 C. B., N. S. 603; 29 L. J., C. P. 340; 7 Jur., N. S. 102.

Where such agent bargains with his employer to receive a commission "on all goods bought" by persons, orders from whom are obtained by him, and an order so obtained is accepted by the employer, who, however, is not able to execute the order, and derives no benefit from it, he is nevertheless liable for the commission. *Ib.*

Appointment as Sole Agent—Principal cannot effect Sales in Agent's District.—The plaintiff was appointed sole agent for the defendants in a certain district at a fixed scale of commission and subject to certain restrictions as to discount, &c., to be offered by him, but was unable to transact any business owing to the defendants interfering in his district, behind his back, and underselling him. In an action to recover commission on all sales effected by the defendants in the plaintiff's district since his appointment:—Held, that the defendants were not entitled to appoint any other agent in the district, nor were they entitled to effect any sales in the district except through the plaintiff's agency. *Snellgrove v. Ellingham Colliery Company*, 45 J. P. 408.

Orders sent after Termination of Service.—On a contract to pay a traveller commission without any express terms, there is no obligation to pay it on orders from customers originally obtained by the agent, but sent after he has ceased to be so. *Naylor v. Yearsley*, 2 F. & F. 41.

Fulfilment of Contract.—A. entered into a contract with B. to proceed to the coast of Africa, and there procure and ship, for B. in England, palm oil and other produce; A. to receive as a remuneration for his services a commission of 6l. per cent. on the net proceeds of the dry merchantable palm oil received by B.; the agreement further provided that A. should not be entitled to any commission on "any wet, dirty, or unmerchantable palm oil" that might be received:—Held, that A. was entitled to no commission in respect of palm oil which was in the understanding of the trade "wet" oil, though such wetness did not render the oil unmerchantable, but was compensated for by an allowance to the purchasers of from 1½ to 2 per cent. on the price. *Warde v. Stuart*, 1 C. B., N. S. 88.

By an agreement between A. and B., it was stipulated that A. should for a term receive half the profits arising from the sales of an article called Russian black, manufactured by him from the produce of certain quarries of B.:—Held, that A. was not entitled to claim anything in respect of Russian black not sold as such, but used by B., in the proportion of about one-third, mixed with cement manufactured and sold by him. *Fullwood v. Akerman*, 11 C. B., N. S. 737.

Sub-Agent.—If A. employs B. to procure him a loan on the usual terms, and B. employs C., who obtains it on other and different terms, A. will not be liable to C. either for commission or for remuneration, unless he ratifies these terms and recognizes his employment. *Mason v. Clifton*, 3 F. & F. 899.

Revocation.—The defendant employed the plaintiff to negotiate a loan on some of the de-

fendant's property, the plaintiff to be paid commission if he procured the loan, but none if he did not. Before the plaintiff had done anything in the matter, the defendant wrote to him, varying the terms on which he would accept the loan. The plaintiff endeavoured to obtain it on the latter terms, but failing to do so obtained an offer for a loan on the terms of the first authority, which the defendant refused to accept:—Held, that as the first authority had been revoked, the plaintiff was not entitled to a commission for what he had done, neither was he entitled to claim for his services in endeavouring to procure the loan under the substituted terms, inasmuch as he did not obtain it under those terms. *Toppin v. Healey*, 11 W. R. 466.

Held, also, that the plaintiff might have treated the revocation of the first terms of his employment as a breach of contract, and have had an action thereon against the defendant. *Ib.*

Broker—Necessity for Licence.—A broker cannot maintain an action for work and labour, and commission for buying and selling stock unless duly licensed by the mayor and aldermen of the city of London. *Cope v. Rowlands*, 2 M. & W. 149; 2 Gale, 231.

Fraudulent Agreement for.—The European Society, through their paid and confidential agent C., negotiated with the Etna Company, through their paid and confidential agent O., a transfer by the latter of a branch of their business to the former for 15,000l.; C. claimed from the Etna Company, as a commission or a bonus for his services in the transaction, 2,000l., which the latter having refused, he contrived that the purchase-money to be paid by his employers should be increased to 17,000l., out of which the Etna Company secretly agreed to pay him the 2,000l. On the winding up of the affairs of the Etna Company, O.—alleging that there was an agreement between C. and him that he should get half the commission or bonus—made a claim of 1,000l. against the latter company:—Held, that such a claim could not be allowed. *Owens, In re*, 7 Ir. R., Eq. 235. Affirmed, 7 Ir. R., Eq. 424.

Proof of Terms.—The fact that a party has agreed to sell goods on commission may be proved by oral evidence, though the terms as to its payment have been reduced into writing. *Whitfield v. Brand*, 16 M. & W. 282.

b. Business effected through Agent's Instrumentality.

When Agent entitled to.—In an action to recover for commission for the procuring of a loan, it is not enough to prove that the loan has indirectly, as a remote and casual consequence, resulted from the intervention of the party who sues; but it must be proved that the loan was obtained by means of his agency, or by means of some sub-agent of his, from the parties to whom he applied; and if all that appears is that the party to whom he introduced the subject, declining the proposal, mentioned it to a third party, who, not at his suggestion, but of his own mere motion, knowing nothing of the plaintiff, negotiated the loan on his own account with the party sued, the commission is not due. *Antrobus v. Wickens*, 4 F. & F. 291.

The defendants agreed with the plaintiff to remunerate him "in the event of their taking into partnership" one M., introduced by the plaintiff. The defendants afterwards entered into a written agreement with M., by which it was agreed that they should enter into partnership as and from a specified future day, when a formal deed of partnership should be executed, carrying out the terms of the agreement. This agreement recognized and adopted the agreement between the plaintiff and defendants. No partnership deed was ever executed, nor did M. ever in fact act as a partner of the defendants:—Held, that there was evidence of a "taking into partnership" within the meaning of the agreement between the plaintiff and defendants, so as to entitle the plaintiff to his commission. *Harris v. Petherick*, 39 L. T. 543.

K. promised R. 2½ per cent. commission if he would find a purchaser of his land at 3,000l. R. introduced to K. a person who took a lease for 1,000 years at 150l. a year, with the option of purchasing for 3,000l. within twenty years:—Held, that K. had practically found a purchaser, and was entitled to his commission. *Rimmer v. Knowles*, 30 L. T. 496; 22 W. R. 574.

An auctioneer and estate agent was employed to sell an estate, under an agreement by which he was to receive a commission of two and a half per cent. if the estate should be sold; and in case the estate should not be sold, he was to be paid 25l. as a compensation for his trouble and expense. Having put up the estate to auction, and failed to sell it, the agent, being asked by a person who had attended the sale who was the owner of the property, referred him to his principal; and ultimately that person, without any further intervention of the agent, became the purchaser:—Held, that the sale having been effected through the means of the agent, he was entitled to the stipulated commission. *Green v. Bartlett*, 14 C. B., N. S. 681; 32 L. J., C. P. 261.

A. having a ship to sell told W. that if he was the means of introducing a purchaser, a commission on the purchase-money would be paid to him. W. having an offer through B., A. agreed that, if successful, W. and B. should share the commission. That offer fell through, also a second offer from C. to B. After some interval C. wrote direct to A. introducing another person, who eventually bought the ship. The jury found that W. was authorized to find a purchaser, and that the purchaser was found through B.:—Held, that C., as agent of the purchaser, having acted on information received from B., W. was entitled to his commission, the chain of connection being sufficiently made out. *Wilkinson v. Alston*, 48 L. J., Q. B. 733; 41 L. T. 394; 44 J. P. 35—C. A.

B. was an auctioneer. C. put a ship into his hands for sale, and it was agreed that if it was not sold by auction, but if a subsequent sale were effected to any person, led to make an offer "in consequence of B.'s mention or publication for auction purposes," he was to be entitled to a commission. The ship was not sold by auction, but afterwards P., having been present at a conversation which led him to believe that S. would purchase the ship, wrote to B., "noting that he had the ship in his hands," to inquire the price, &c. P. then communicated with S., who ultimately became the purchaser, but not through the agency of P.:—Held, that there was evidence to go to the jury that the sale was effected in conse-

quence of B.'s mention or publication, within the meaning of the agreement, and that B. was entitled to his commission. *Bailey v. Chadwick*, 39 L. T. 429—H. L.

The plaintiffs, house-agents, were instructed by the defendant to offer a leasehold house for sale for which they were to receive a commission of 2½ per cent. on the amount of premium if they found a purchaser, but one guinea only for their trouble if the premises were sold "without their intervention." The particulars were entered on the plaintiffs' books, and they gave a few cards to view. U., who had observed on passing that the house was to be disposed of, but who had not then seen over it, called at the plaintiff's office and obtained a card to view the premises, the terms being written by the plaintiffs' clerk on the back of the card. U. went to the house a few days afterwards, but thought the price (2,200l.) too high, and he went away. U. had no further communication with the plaintiffs; but he subsequently renewed his negotiation with a friend of the defendants, and ultimately became the purchaser of the lease for 1,700l.:—Held, that there was evidence for a jury that U. had become the purchaser of the premises "through the plaintiffs' intervention," and consequently that they were entitled to the stipulated commission. *Mansell v. Clements*, 9 L. R., C. P. 139.

At the trial the judge put the following question to U.:—"Would you, if you had not gone to the plaintiffs' office and got the card, have purchased the house?" and, overruling an objection by the defendant's counsel, received his answer, which was, "I should think not."—Semble, that the answer was properly received. *Id.*

A. was appointed agent of B. at a salary of 200l. per annum, and he was in addition to receive a commission of 5 per cent. upon the first year's rent for every house which he should let on B.'s estate. In an action by A. for commission for letting houses for B., the evidence was that the agreement for the letting was entered into with another agent, K., but that the tenants were introduced to K. by A.:—Held, that, under the terms of the agreement, A. was entitled to the commission. *Bray v. Chandler*, 18 C. B. 718.

On what Claimable.]—A house agent can claim commission only on rent obtained as a proximate consequence of his act; this is to be generally ascertained from the agreement which he has himself prepared; an option to take on a house is not exercised if the tenancy is continued upon an agreement for a different rent obtained through the intervention of another house agent; and a trade custom to pay commission under such circumstances is irrational and bad. *Curtis v. Nixon*, 24 L. T. 706.

c. Business Interrupted or Prevented by Principal.

Company wound up.]—A company employed a broker to dispose of their shares, on the terms that he should be paid 100l. down, and 400l. in addition, upon the allotment of the whole of the shares of the company. The broker disposed of a considerable number of shares when the company was wound up:—Held, that the broker was prevented earning the 400l. by the act of the company, and was therefore entitled to recover a proportion of 400l. *Inchbald v. Western*

Neilgherry Coffee, Tea, and Cinchona Company, 17 C. B., N. S. 733; 34 L. J., C. P. 15.

A company engaged a person to act as their agent for five years at a fixed salary, and also for a commission of 10 per cent. on the net profits in each year. The company was wound up before the termination of the five years:—Held, that he was not entitled to any compensation by way of damages for loss of commission during the unexpired part of the five years. *English and Scottish Marine Insurance Company, In re, MacLure's claim*, 5 L. R., Ch. 737; 39 L. J., Ch. 635; 23 L. T. 685; 18 W. R. 1122. See further cases, ante, cols. 11, 12.

"Subject to Approval of Solicitor."—The plaintiff's claim was for commission on the sale of a piece of land by A. to the defendant, one term of the plaintiff's contract being that A.'s title should be approved by the defendant's solicitor. The defendant broke off the sale of his own accord, so that A.'s title was never submitted to the defendant's solicitor:—Held, that the plaintiff could not succeed without proving that the defendant's solicitor had approved A.'s title, or else that such a title was submitted to him, as it was unreasonable for him to disapprove. *Clark v. Wood*, 9 Q. B. D. 276; 47 L. T. 144; 30 W. R. 931—C. A.

Refusal of Terms.—The defendant employed the plaintiff to find a purchaser for some land, at a commission of 1l. 10s. per cent. on the purchase-money if a sale was effected. The plaintiff found a purchaser, but the defendant refused to complete the sale:—Held, that he could sue on a quantum meruit for the work and labour done, as he had performed his part of the contract, and the defendant prevented its completion. *Prickett v. Badger*, 1 C. B., N. S. 96; 26 L. J., C. P. 33; 3 Jur., N. S. 66.

The defendant agreed with the plaintiff in the following terms:—"In the event of your procuring me 2,000l., or such other as I shall accept, I agree to pay you a commission of 2½ per cent. on any money received." The plaintiff introduced the defendant to a building society who offered to advance him 1,620l. on certain terms. This offer the defendant accepted, but as he declined to accede to certain requirements of the society the arrangement fell through and no money was advanced:—Held, that the plaintiff was entitled to his commission on the sum which the society had agreed to advance. *Fisher v. Drewitt*, 48 L. J., Ex. 22; 39 L. T. 253; 27 W. R. 12—C. A.

Revocation of Authority.—Where the authority of an agent employed to sell on commission is revoked by the principal before a sale has been effected, the right of the agent to remuneration for what he has done in endeavouring to effect a sale depends on the terms on which he was employed. *Simpson v. Lamb*, 17 C. B. 603; 25 L. J., C. P. 113; 2 Jur., N. S. 91.

The plaintiffs, who were clerical agents, were employed by the defendant to sell an advowson, upon the terms that they should be paid commission at the rate of 5l. per cent. upon the purchase-money when the contract was completed. As the purchase-money was likely to be large, the plaintiffs agreed to forego a claim of three guineas which they ordinarily made for entering

such property on their books, and for the trouble of answering inquiries respecting it. The defendant having afterwards sold the advowson himself, and revoked the plaintiffs' authority to sell:—Held, that the plaintiffs were not entitled to recover anything, as they had not effected the sale, and there was no evidence of their having done more than was ordinarily covered by the charge of three guineas, which they had agreed to forego. *Id.*

Agent not informed of unusual Terms.—Where an agent employed to borrow money upon leasehold security finds a person able and willing to lend, but the negotiations go off by reason of such person discovering unusual covenants which the agent was not informed of, the agent is entitled to the whole of the agreed commission for procuring the loan. *Green v. Lucas*, 33 L. T. 584—C. A. Affirming 31 L. T. 731.

L. agreed to pay G. a commission of 2 per cent. "for procuring him on loan 20,000l. upon the security of certain leasehold property at Southwark," having three days before such agreement furnished G. with two valuations of the property, each of them stating the lease to be for a term of ninety-nine years, and settling the value at about 37,000l., and one of them assuming that the lease "contained no arbitrary or restrictive clauses, but only the usual covenants." Upon the strength of these valuations, G. applied for a loan to a provident institution, the directors of which agreed to advance it, "subject to the title and all other questions proving to be satisfactory." Upon examination of the lease on behalf of the institution, it was discovered that the lease, instead of being a lease for ninety-nine years absolutely, contained a proviso for re-entry under certain conditions, which constituted a substantial deterioration of its value, whereupon the directors refused to make the advance:—Held, that G. was entitled to the whole of the agreed commission. *Id.*

Half Commission—Business taken from Agent before Completion.—An agent who has the business taken out of his hands before completion is by the custom of merchants entitled to half the commission which he would have earned by completing it. *Spain (Queen) v. Parr*, 39 L. J., Ch. 73; 21 L. T. 555; 18 W. R. 110.

Merchants at Manilla received instructions from the government there to undertake the transport and shipment of a quantity of tobacco to merchants in London, to effect the insurance, and to pay all the necessary charges and expenses in relation thereto. The merchants at Manilla were to be entitled to charge 2½ per cent. on the amount, valued at about 47,000l. The Supreme Government of Spain thinking the officer at Manilla had acted incautiously in this respect, refused to allow the amount of the ordinary commission in the account, having directed the tobacco to be sold by their own agents here:—Held, that the consignees were entitled to a moiety of the amount of the ordinary commission, being 1½ per cent. instead of 2½ per cent. *Id.*

Business Ineffectual or Useless.—A shipbroker employed to sell a ship, which, when put up for sale, was bought in, is not entitled to

a commission on the sale. *Mestacr v. Atkins*, 1 Marsh. 76; 5 Taunt. 381.

A shipbroker who has procured a bargain for the hire of a vessel, is, by the usage in the city of London, entitled to receive from the owner a certain commission on the amount of freight, if the contract is perfected, but not otherwise:—Held, that when a broker had negotiated the hire of a vessel, and a memorandum for a charter was signed by the parties, but the bargain afterwards went off, and the ship was not employed, the broker could not maintain an action against the shipowner to recover the commission, or a compensation for his work and labour. *Read v. Rann*, 10 B. & C. 438.

Even where the contract is not completed by the act of the owner. *Broad v. Thomas*, 7 Bing. 99; 4 M. & P. 732; 4 C. & P. 338.

d. Amount Payable.

On Bad Debts.—By agreement, an agent was to have a commission on sales effected, or orders executed, by him; the principal to be responsible for bad debts, and the agent to draw his commission monthly. By the custom of the trade, commission was not allowed on sales which produced bad debts:—Held, notwithstanding, that, under the terms of this agreement, he was entitled to commission on bad debts. *Bower v. Jones*, 8 Bing. 65; 1 M. & Scott, 140.

Construction of Contract.—The following letter was addressed to an African captain and supercargo by his employers: "Your commissions are 6l. per cent. on the net proceeds of your homeward cargo, after deducting the usual charges as arranged by the African Association, viz. 4l. per ton from the gross sales of the oil when taken from the quay, and 4l. 15s. when warehoused:—"Held, that the commission was payable only on the sums actually realized, after deducting bad debts as well as other charges. *Caine v. Horsfull*, 1 Ex. 519; 17 L. J., Ex. 25.

A., being possessed of a leasehold house and of building land held on lease, the former of which was subject to an annual rent of 75 guineas, and the latter to a rent of 50l., and also to a covenant to lay out a certain sum in building, employed B., an estate agent, to dispose of the whole for him upon the terms of commission mentioned in a printed paper as follows:—"For the sale of property by private contract. On the first 100l., 5l. per centum (and in no case less than 5l.); from 100l. to 5,000l., two-and-a-half per centum; from 5,000l. to 10,000l., one-and-a-half per centum; on the sum exceeding 10,000l., one per centum. For letting or disposal of the leases of estates or houses. Unfurnished, 5l. per centum on one year's rent, and 5l. per centum on the premium or sum obtained for fixtures, furniture, &c. on lease; 5l. per centum on the first year's rent, and two-and-a-half per centum on the second year's rent, and 5l. per centum on premium or sum obtained for fixtures, &c. On letting building land, one year's standing ground-rent. For large estates one-half year's ground-rent." B. having disposed of the premises to M. for 1,300l., the two leases were assigned to M., subject to the covenants for payment of the rents:—Held, by Erle, C. J., Williams, J., and Willes, J., that B. was only entitled to a commission on the 1,300l., under the first branch of the printed scale, namely, five per centum on the

first 100l., and two-and-a-half per centum on the remainder. *Biggs v. Gordon*, 8 C. B., N. S. 63.

Held, by Byles, J., that he was also entitled to a commission on the amount of the yearly rent under the second branch of the scale. *Ib.*

The defendant, being in want of additional capital in his business, on the 10th of June, 187 wrote to the plaintiffs (accountants in London with whom he had been in correspondence on the subject) as follows:—"The premises of the B. works in this town are my property solely but the business of it is carried on by myself and my partner. In case of your introducing a purchaser of all the premises, or part of them of whom I shall approve, or in case of your introducing capital which I should accept, I could pay you a commission of 5 per cent. on the amount in either case, provided no one else is entitled to a commission in respect of the same introduction." The plaintiffs succeeded in introducing W. to the defendant, who advanced him by way of loan 10,000l., upon which he received the agreed commission. Some few months afterwards the defendant and W. entered into an agreement for a partnership, in which occasion W. made a further advance of 4,000l. by way of capital to the concern. The plaintiffs claimed commission upon this further advance; and, in an action brought to enforce their claim, they admitted that the advance of the 4,000l. was not contemplated at the time of the advance of the 10,000l., but that the 4,000l. was advanced solely in consequence of the negotiation for the partnership between the defendant and W.:—Held, that they were not entitled to commission on this second advance. *Tribe v. Taylor*, 1 C. P. D. 505.

Agent refusing Principal's Offer—Services afterwards Performed.—A., a supercargo, sailed to Calabar in charge of a ship called the Magistrate, his commission being 5l. per cent. Some time after his departure, the principals dispatched another ship, the Windermere, to Calabar, with instructions to A. to find a cargo for her, and to consider her "in one turn" with the Magistrate and offering him, in respect of this second ship, commission of 2½ per cent. A. wrote to his principals rejecting the 2½ per cent. commission; but notwithstanding this, he proceeded to load the Windermere, that course being in his view the best for his principals:—Held, that as he had acted on the instructions of his principals in loading the Windermere, he was bound by the offer as to commission, and could not recover more than 2½ per cent. in respect of the cargo of that ship. *Moore v. Maxwell*, 2 C. & K. 554.

No Contract or Custom Proved.—Where a custom-house agent entered into a custom-house bond with respect to goods consigned to him by the plaintiff, and claimed a percentage on the sum mentioned in the bond, and no contract or usage for the payment of such was proved:—Held, that the plaintiff was not entitled to any such percentage; and that, therefore, no question as to the reasonableness of the amount claimed could be put to a witness. *Hull v. Gurney*, 2 C. & K. 644.

Discount allowed by Insurance Companies—To whom belonging.—The 10 per cent. discount usually allowed by insurance companies on the punctual payment of the premium belongs, in the absence of agreement to the contrary, not to

the insurance agent, but to his principal. *Spain (Queen) v. Parr*, 39 L. J., Ch. 73.

When no Provision made.]—An auctioneer took an absolute assignment of chattels, &c., under a bill of sale by way of mortgage, and afterwards conducted the sale of them by auction under an agreement with another incumbrancer:—Held, that he was entitled to charge the usual commission on such sale, although no provision for a commission had been made either in the bill of sale or in the agreement. *Miller v. Beale*, 27 W. R. 403.

Charge for Extras.]—A. acted under a written agreement as the commission agent of B., in the sale of goods, and was paid a commission. B. was a contractor with the Admiralty for the supply of a variety of articles, on the sale of which A. was paid his commission, and A. attended on a number of occasions at Somerset House, where the patterns of these articles were inspected by the government officers. A. sought to charge B. for these attendances in addition to his commission:—Held, that if in giving these attendances A. was only acting in the discharge of his business as an agent, he was not entitled to charge for the attendances; but that, if these attendances were matter beyond his duty as an agent, he was entitled to be paid for them separately. *Marshall v. Parsons*, 9 C. & P. 656.

e. When Payable.

Upon what Event.]—A., a clerical agent, was employed to sell an advowson for B., upon the terms contained in a circular, in which it was stipulated that the commission should become payable upon the adjustment of terms between the contracting parties in every instance in which any information had been derived at, or any particulars had been given by, or any communication whatsoever had been made from A.'s office, however and by whomsoever the negotiation might have been conducted, and notwithstanding the business might have been subsequently taken off the books, or the negotiation might have been concluded in consequence of communications previously made from other agencies, or on information otherwise derived, or the principals might have made themselves liable to pay commission to other agents; and that no accommodation that might be afforded as to time of payment or advance should retard the payment of commission. A contract of sale having been arranged through A.'s agency, and duly executed, and a deposit paid on the 14th of October, 1862, the residue of the purchase-money being payable on the 31st of December:—Held, that A. was entitled to his commission at all events on the 31st of December, although the full purchase-money had not, for some unexplained reason, then been paid. *Lara v. Hill*, 15 C. B., N. S. 45.

A. negotiated for the exchange of certain advowsons between B. and C., and B. contracted to pay A. 100l. for commission, "one-third down and the remaining two-thirds when the abstract of conveyance is drawn out." B.'s abstract of title was delivered to C., but nothing further was done in the matter, in consequence of C. declining to proceed with the exchange. In an action for the recovery of the balance of the commission:—Held, that A. could not recover, as the

event had not happened for which the commission was to be paid. *Alder v. Boyle*, 4 C. B. 635; 16 L. J., C. P. 232; 11 Jur. 591.

A surveyor was retained by the defendant to negotiate with the Commissioners of Woods and Forests for the sale to them of certain premises of the defendant, for which he was to receive a commission of 2l. per cent. "on the sum which might be obtained, either by private treaty, arbitration, or trial by jury." Private treaty proving unavailing, a jury was empanelled, by whom the value of the property was assessed at 4,000l.; but, in consequence of a defect in the defendant's title, arising out of an annuity charged upon part of the premises, which the commissioners required the defendant to buy off, the money was not paid to him, but was placed in the hands of the accountant-general, to await the adjustment of the difference. The surveyor was not previously aware of the existence of this charge:—Held, that he was, nevertheless, not entitled to his commission until the money awarded was actually received by the defendant. *Bull v. Price*, 5 M. & P. 2; 7 Bing. 237.

In the Case of Del credere Commissions.]—An action lies to recover del credere commissions for guaranteeing sums insured upon policies; such commissions being due upon entering into the contract of guarantee. *Caruthers v. Graham*, 14 East, 578.

A plaintiff declared that the defendant was indebted to him for commission due for his having guaranteed the payment of goods sold by him, as the factor of the defendant, to third persons, and at his request:—Held, good after verdict. *Solly v. Weiss*, 2 Moore, 420.

f. Effect of Misconduct.

Loss of Commission.]—An agent cannot recover commission, or even a compensation for his trouble, if he executes his duties in such a manner that no benefit results therefrom. *Hamond v. Holiday*, 1 C. & P. 384.

Nor is he entitled to commission where he has been guilty of gross misconduct in selling goods. *White v. Chapman*, 1 Stark. 113.

A broker purchased goods on commission at a month's credit, and paid duties on them, and sent them to the place of the purchaser's abode, consigned to his own order; the seller, being fearful of the purchaser's credit, procured the broker to delay the arrival of the goods till the month's credit expired, and to tender them to the buyer on payment of the price, whereupon they were refused:—Held, that the broker could neither recover the price, duties, nor commission. *Hurst v. Holding*, 3 Taunt. 32.

Where a broker is employed by a shipowner to procure a charterparty, if the negotiation goes off on account of any fault in the broker, he is not entitled to recover anything in the shape of remuneration; nor is he, in such case, entitled to recover for any expenses which he may have been put to, unless such expenses are unusual, and have been incurred in consequence of the shipowner's having urged him to extraordinary expedition in the matter. *Dalton v. Irwin*, 4 C. & P. 289.

Set-off in Action.]—H. shipped rice consigned to B. abroad, for sale on commission by B. for

the benefit of H. B., according to agreement, made advances to H. upon the rice, and incurred expenses in connexion therewith, and sold it, and claimed to have earned commission. The proceeds realized by the sale, however, were insufficient to reimburse B. the amounts so advanced, and alleged to have been earned. To an action by B. to recover the balance, after crediting H. with the amount realized by the sale, of the amount of such advances and expenses, and for the commission so alleged by B. to have been earned, H. pleaded that B., by neglecting to take proper care of the rice, and by mismanaging the sale, had caused the proceeds to be insufficient to meet the amount due to B. :—Held, that it did not afford an answer, as it amounted to an attempt to set off a claim for unliquidated damages against a legal debt of a definite and an ascertained amount, and that such a plea could not be construed as a plea of never indebted, inasmuch as the general issue in this shape must deny the existence of a debt which the plea expressly admitted. *Best v. Hill*, 8 L. R., C. P. 10; 42 L. J., C. P. 10; 27 L. T. 490; 21 W. R. 147.

Bribery of Agent—Liability to Refund.—The defendants contracted to pay the plaintiff a commission for superintending repairs to be executed by them on certain ships belonging to the Great Eastern Railway Company. The plaintiff at the time of such contract being made was in a position of trust in relation to the railway company, having been employed by them as an engineer to advise them as to the repairs, and the contract between the defendants and plaintiff was made in part in consideration of a promise that the plaintiff would use his influence with the railway company to induce them to accept the defendants' tender for the repair of the ships. The jury found that the contract, though calculated to bias the mind of the plaintiff, had not, in fact, done so, and that he had not in consequence thereof given less beneficial advice to the company as to the defendants' tender than he would otherwise have done :—Held, that the plaintiff could not maintain an action for commission under the contract, on the ground that, even although the plaintiff had not been induced to act corruptly, the consideration for the contract was corrupt. *Harrington v. Victoria Graving Dock Company*, 3 Q. B. D. 549; 47 L. J., Q. B. 594; 39 L. T. 120; 26 W. R. 740.

—Recovery by Principal.—Commission received by an agent or a trustee of a purchaser from a vendor without the knowledge of his principal is a bribe; it is a profit which the principal has a right to extract from the agent whenever it comes to his knowledge. *Phosphate Sewage Company v. Hartmont*, 5 Ch. D. 394—457—per James, L. J.

4. LIABILITY OF AGENT FOR NEGLIGENCE.

Voluntary Agents.—A person is liable for negligence in procuring a policy of insurance, though he did it gratuitously. *Wilkinson v. Coverdale*, 1 Esp. 75.

If A., a general merchant, undertakes voluntarily, without reward, to enter a parcel of goods to B., together with a parcel of his own of the same sort, at the Custom-house, for exportation,

but makes the entry under a wrong denomination, whereby both parcels were seized; and A., having taken the same care of the goods as B. as of his own, not having received any reward and not being of a profession or an employment which necessarily implied skill in what he had undertaken, is not liable to an action for the loss occasioned to B. *Shiells v. Blackburne*, 1 H. Bl. 158.

Acting on Best Advice.—An agent who act upon the best advice he is able to get in the affairs of his principal, is not liable to damages arising from that act. *Miles v. Bernard*, Peake Add. Cas. 61. And see *Reece v. Rigby*, 4 B. & A. 202.

When Action lies.—A broker was employed by his principal to sell, and as selling broker he sold for him "to arrive" goods on the term that they were "fair average quality in opinion of selling broker." The buyers having on arrival of such goods refused to take them, the broker went and inspected them and gave his opinion that they were not of fair average quality, according to the contract :—Held, that he was not liable to an action at the suit of his principals for not using due skill in order to form a correct opinion of the quality of the goods, as there was no contract by him, express or implied, to exercise any skill whatever in forming such opinion. *Pappa v. Rose*, 7 L. R. C. P. 32; 41 L. J., C. P. 11; 25 L. T. 468; 2 W. R. 62. Affirmed, 7 L. R., C. P. 525; 41 L. J. C. P. 187; 27 L. T. 348; 20 W. R. 784—Ex. Ct.

A house agent who charges commission to a landlord for letting his house is bound to use due and reasonable care in ascertaining the solvency of the tenant. *Hayes v. Tindall*, 1 E. & S. 296; 2 F. & F. 444; 30 L. J., Q. B. 362; L. T. 403; 9 W. R. 664.

An agent for the purchase of a public-house is liable in damages to his employer for negligently conducting the purchase, although he advises his employer to go and examine the business for himself, and the employer does so. *Smith v. Barton*, 15 L. T. 294.

Brokers employed to sell goods are bound to do so in the usual way, and if it is usual to send the seller an estimate of value, in order that he may be enabled to fix a reserved price, they ought to do so. And whether it is so or not, they are bound, for their own guidance, to make a careful estimate of the value; and if they sell, by public auction, at a price much below the fair value not having made such an estimate, it will be evidence of negligence, and of a loss caused thereby, for which they will be liable. *Solomon v. Barker*, 2 F. & F. 726.

The defendants, merchants at B., who had acted there as brokers for the plaintiffs, who were merchants at L., wrote to the plaintiffs proposing to them to purchase a quantity of scrap-iron of a specified quality. The plaintiff desired to have an offer of cost of freight to Rotterdam. The defendants stated the price but their inability to make an offer as to freight as they had then no ship available. Before the plaintiffs had closed with the offer, the defendants proposed a ship for the conveyance of the iron. The plaintiffs accepted the purchase, but objected to the ship as too small to take the whole cargo, desiring the defendants to look out for another. Thereupon the defendants, a

agents for both parties, entered into and accepted the contract of sale, and transmitted the same to the plaintiffs. They afterwards engaged a vessel to convey the iron, receiving the same, and caused it to be shipped, assuring the plaintiffs that the cargo was considered a first-rate description of scrap-iron. The profit of the defendants was derived from commission from the seller and from the shipowner. In an action against them, for not using proper and reasonable care, skill, and diligence in accepting and shipping the iron:—Held, that their employment as brokers and shipping agents did not raise a duty to examine the iron for the plaintiffs, there being no evidence of usage or contract that they should do so. *Zwischenbart v. Alexander*, 1 B. & S. 234; 30 L. J. Q. B. 254; 7 Jur., N. S. 1157; 4 L. T. 412; 9 W. R. 670—Ex. Ch.

The plaintiff and his two partners employed the defendants as accountants for hire, to make out the accounts of the firm, and of the separate balance of each partner. The defendants made out the plaintiff's separate balance so erroneously and negligently, that, relying on their statement, he was a considerable loser thereby:—Held, that the plaintiff might sue alone for this misfeasance, and that it was no variance to allege that he had employed the defendants. *Storey v. Richardson*, 6 Bing. N. C. 123; 8 Scott, 291; 4 Jur. 26.

An action for breach of duty, but not trover, lies against a broker who is authorized to sell goods for a certain price, but sells them at an inferior price. *Dufrene v. Hutchinson*, 3 Taunt. 117.

Trover does not lie against a person who takes out goods to India for the vendor under an agreement to sell them for what he could get, and retain what he could get above a certain price, but who left them to a third person to be disposed of, on quitting India. *Cromley v. Coxe-well*, 2 B. & P. 438.

No action is maintainable. *Ib.*

— **Measure of Damages.**—The plaintiff, a merchant in London, gave orders to the defendants, commission agents in Hong Kong, to purchase for him a quantity of a certain kind of opium. The defendants upon such orders purchased and shipped to the plaintiff opium which they erroneously supposed to be of the description ordered, but which was really of an inferior description. The plaintiff sought to recover as damages in an action against the defendants the difference between the value of the opium ordered and that of the opium actually shipped by the defendants, on the ground that the relation between the defendants as commission agents and himself was that of vendor and vendee of the opium:—Held, that the true measure of damages was not the difference between the value of the goods ordered and that of those shipped, but the loss actually sustained by the plaintiff in consequence of the opium not being of the description ordered. *Cassaboglou v. Gibbs*, 9 Q. B. D. 220; 51 L. J., Q. B. 593; 47 L. T. 98; 46 J. P. 568. Affirmed, 11 Q. B. D. 797; 52 L. J., Q. B. 538; 48 L. T. 850; 32 W. R. 138—C. A.

A., in Holland, commissioned B. in London to purchase and ship tobacco of the best quality. B. employed C. as his broker for that purpose, who accordingly made a purchase from D. On the arrival of the tobacco in Holland, it turned out to be of very bad quality, when A. brought

an action and recovered against B.:—Held, that B. was entitled to recover from C. the whole of the damages he had sustained in the action brought against him by A., although he had received a bought note from C. in which the tobacco was not described as of the best quality. *Mainwaring v. Brandon*, 2 Moore, 125.

A party employing another to present a bill for acceptance is entitled to recover nominal damages against such agent if he fails to present it; although no real damage whatever is occasioned by the neglect, the bill and costs having been paid by other persons liable on it. *Van Wart v. Wolley*, M. & M. 520.

Merchants in London received from a mere stranger abroad a bill of lading in a letter, requesting them to effect an insurance; they declined doing so, but bona fide indorsed the bill of lading to a friend of his, who failed:—Held, that the merchants were liable to the consignor for the amount. *Corlett v. Gordon*, 3 Camp. 472.

An agent who applies money remitted to him to his own use is liable for interest, but not if he suffers it to lie dead in his hands. *Rogers v. Boehm*, 2 Esp. 704.

The London agent of the plaintiff, a Parsee merchant at Bombay, having a claim against him, partly for a debt, not disputed, and partly for a liquidated demand on a guarantee, which was disputed, wrongfully transferred to himself certain shares of the plaintiff's, under a power of attorney, in satisfaction of his supposed claim. The plaintiff sued him for the improper transfer:—Held, that he was entitled to recover the full value of the shares. *Dantra v. Stiebel*, 3 F. & F. 951.

5. DUTIES ARISING FROM FIDUCIARY RELATIONSHIP.

Agent a Trustee.—An agent who is empowered to retain in his own hands his principal's money, for the purpose of investment, is a trustee for his principal. *Burdick v. Garrick*, 5 L. R., Ch. 233; 39 L. J., Ch. 369; 18 W. R. 387.

— **Defence of Statute of Limitations.**—A gentleman resident in America by power of attorney authorized two people in England, one of whom was a solicitor, to get in and sell his property here and reinvest the proceeds, and generally deal with it for his benefit; he died intestate in 1859, whereupon the agents paid the monies which they had then received under the power, and which had not been reinvested, into a bank to the account of the firm of which the solicitor was a member; in 1867 letters of administration were taken out to the intestate by his widow, who filed a bill against the agents for an account:—Held, that the agents were trustees for their principal, and could not set up the Statute of Limitations against his personal representative. *Ib.*

Possession of Agent—Acquisition of Title to Real Estate by.—The possession of an agent is the possession of the principal; and the principal may acquire a possessory title to real estate by receiving the rents for twenty years through an agent, although that agent is the person really entitled to the estate. *Williams v. Pott*, 12 L. R., Eq. 149; 40 L. J., Ch. 775.

A person claiming, without any real title, to be entitled to land is a person wrongfully claiming within the meaning of 3 & 4 Will. 4, c. 27, s. 9; and that section applies, although the claim may be put forward under a mistake, and without any improper intention to deprive others of their property. *Ib.*

An agent or a servant who is allowed to occupy premises belonging to his principal for the convenient performance of his duties, acquires no estate therein, although he is also allowed to use the premises for carrying on therein an independent business of his own. *White v. Bayley*, 10 C. B., N. S. 227; 30 L. J., C. P. 253; 7 Jur., N. S. 948.

Receipt of Rent by Agents barring Statute of Limitations.—So long as an agent is in receipt of the rent of land, the Statute of Limitations (3 & 4 Will. 4, c. 27), s. 3, will not run against his employer; and if a person commences to receive rents as the agent for another, and afterwards continues to receive such rents, without paying them over, he must be presumed to receive as agent till the contrary is shewn. *Smith v. Bennett*, 30 L. T. 100.

Disclosure of Interest by Agent.—An agent for sale who takes an interest in a purchase negotiated by himself is bound to disclose to his principal the exact nature of his interest; and it is not enough merely to disclose that he has an interest, or to make statements such as would put the principal on inquiry. *Dunne v. English*, 18 L. R., Eq. 524; 31 L. T. 75.

In such a case the burden of proving that a full disclosure was made lies on the agent, and is not discharged merely by the agent swearing that he did so, if his evidence is contradicted by the principal, and not corroborated. *Ib.*

Agent Dealing with Principal.—An agent cannot turn himself into a principal and deal with his real employers or principals on that footing without full and fair disclosure. *Williamson v. Barbour*, 9 Ch. D. 529; 50 L. J., Ch. 147; 37 L. T. 698.

An agent, employed to sell land, sold it to a company in which he was interested as a shareholder and a director:—Held, that he was entitled to no commission from his employer in respect of the sale. *Salomons v. Pender*, 3 H. & C. 639; 34 L. J., Ex. 95; 11 Jur., N. S. 432; 12 L. T. 267; 13 W. R. 637.

An agent employed to purchase cannot buy his own goods for his principal, neither can an agent, employed to sell, purchase for himself his principal's goods. Principals may either repudiate such transactions altogether, or adopt and take the benefit of them. *Bentley v. Craven*, 18 Beav. 75.

Although a confidential relation subsists between the beneficial owner and an agent employed by the trustee for the management of the trust property, yet there is no actual incapacity in the agent to purchase from the beneficial owner, even though the latter has not had the advantage of independent professional advice; in such a case, however, it is not sufficient for the agent to shew that he gave the full value; he must go further, and shew that he dealt with the beneficial owner at arm's length, and after a full disclosure of all that he knew with respect to

the property. *King v. Anderson*, 8 Ir. R., £ 147.

Although a person who as principal employs a broker to transact business for him in a particular market, is bound by the usage of that market, though unknown to him, provided the usage one that merely regulates the mode of performing the contract, and does not change the intrinsic character of the contract, yet where the usage is one which gives the broker an interest at variance with his duty, as by converting him into a principal instead of a mere agent to establish privity of contract between two principals, such a usage is not binding on a principal who being ignorant of the usage, employs a broker whom the usage is known to perform the ordinary and accustomed duties belonging to the office or employment of a broker. The principal is not bound to inquire what the usage may be, or whether there is any particular usage affecting the market in which he proposes to deal. *Robinson v. Mollett*, 7 L. R., H. L. 802; 44 L. J., C. 362; 33 L. T. 544. Reversing 7 L. R., C. P. 841 L. J., C. P. 65; 26 L. T. 207; 20 W. R. 544 Ex. Ch. And 5 L. R., C. P. 646; 39 L. J., C. 290; 23 L. T. 185; 18 W. R. 1160.

A Liverpool merchant employed brokers in London to buy tallow for him in the London tallow market. They having other orders, bought in their own name a quantity sufficient to cover all their orders, and by letter they informed the merchant that they had bought on his account so many tons; but they did not mention the name of the seller. A few days after they sent him notice that they were ready to deliver to him so many casks of tallow in fulfilment or part fulfilment of his order, but they did not allude to any third party as the seller. He acknowledged the receipt of these notices without observation. There is a custom on the London tallow market for brokers when they receive orders to contract in their own names, and if their principals refuse to accept or deliver, to buy or sell against them and charge them with the loss. The merchant was ignorant of this custom. On becoming aware of it, and of the mode in which his order had been executed, tallow having in the meantime fallen, he refused to take the tallow: Held, that as the brokers were employed to act as brokers only, the custom which converted them into principals was inconsistent with their employment, and as the merchant was ignorant of it when he gave his orders, he was not bound by the custom. *Ib.*

Held, also, as the first notice sent by the brokers was that they had bought on his account, he was not thereby put on inquiry as to the custom or as to the name of the seller, and was not bound to accept when it turned out that his own brokers might in fact be the vendors, to pay them the difference between the price which they bought and that at which they sold in consequence of his having refused the contract. *See also cases, post*, col. 32.

Action by Agent for Goods Sold.—In the absence of evidence of custom otherwise, a broker may not treat himself as principal, and sue his employer as for goods bargained and sold. *White v. Benckendorff*, 29 L. T. 475.

The plaintiffs, as brokers, bought for the defendant upon the 6th January five tons of India rubber at 2s. 11½d. per pound, and sent him a bought-note in which the India rubber was

out as deliverable "during the month of January." A corresponding sold-note was sent to the sellers, at whose instance the plaintiffs struck out "during the month of January," and wrote "forthwith," but did not communicate the alteration to the defendant. On the 7th January, the defendant decided to throw up the contract, and sent an order to the plaintiffs to sell at 3s. The plaintiffs could only sell at 2s. 10d., and having paid the sellers at the rate of 2s. 11½d. sued the defendant for the difference:—Held, that the alteration was material—that the plaintiffs could not treat themselves as principals and recover for goods bargained and sold; and that the alteration being material the plaintiffs had paid to the sellers what the defendant was not bound to pay, and consequently could not recover for money paid to the defendant's use. *Ib.*

A prior contract (at the same price) having been made by the plaintiffs with other sellers, and cancelled at the instance of such sellers:—Held, per Brett, J., that in making such prior contract, the plaintiffs had exhausted their authority, and had no power to make another. *Ib.*

S. employed T. & Co., who were cotton brokers in London, to buy 500 bales of cotton for him, telling them to buy gradually at 8½d., if they could not do better. Cotton could not then have been bought at 8½d. They shortly afterwards passed to S. a bought-note, "Bought on your account 500 bales, &c., at 8½d." This was signed by T. & Co. as brokers, and at the bottom of the note, a charge of ¼ per cent. was made for brokerage. Before delivery of the cotton, S. became aware that they had not, at the time of their passing this bought-note, made any contract for him for the purchase of cotton, but that they had subsequently bought the 500 bales, in their own name, to enable them to make delivery to him, partly at 8½d. and partly at 7½d. per lb. S. would not have accepted the bought-note from them if he had known that they were thus acting as principals in the transaction. On becoming aware of the state of circumstances, S. refused to accept the cotton, and an action was brought to recover damages for such non-acceptance. It was proved that there was a custom in the London cotton market that, if a broker bought for his employer of an undisclosed principal, he was liable himself upon the contract:—Held, that the action was not maintainable, as no contract of sale had been made between T. & Co. and S. *Tetley v. Shand*, 25 L. T. 658; 20 W. R. 206.

T. & Co., before the expiration of the time for the delivery of the cotton, tendered marks of cotton not in accordance with the terms of the contract, but on S. rejecting the same, they, before the expiration of the time fixed for delivery, tendered marks of cotton in accordance with the contract:—Held, that they had not, by the first delivery, broken the contract so as to justify S. in refusing to accept the cotton subsequently tendered. *Ib.*

Moneys held in a Fiduciary Character—Advances for Particular Purpose misappropriated by Agent.—The defendants were brewers, and employed F. as their "malting agent." The regular course of business between the defendants and F. was as follows: F. occupied the malting premises, and took out the necessary licences. It was his duty to buy barley in his own name as principal for cash, to send in to the

defendants certain periodical accounts of the barley so bought from time to time and the prices of the same, to submit samples to the defendants, and if the barley was approved of by them to malt it and deliver the malt to the defendants, receiving a commission upon the quantity of barley steeped. The quantity of malt required by large brewers being very great, the brewer, and not the malting agent, provides the capital for the purchase of the barley. In the present case the defendants kept accounts at certain provincial banks, upon which F. was empowered to draw, and from time to time the defendants paid in lump sums to the credit of those accounts, in accordance with current requirements, as shown by the accounts sent in by F. of barley purchased, but these sums were not intended to, nor did they, represent any payments for any specific barley. F.'s business was to act as malting agent for the defendants exclusively. The defendants paid the duty as the same became payable upon the malt in F.'s premises. F. had fraudulently departed from the regular course of business. Instead of buying barley for cash and applying the balances at the provincial banks in payment for the same, he had been in the habit of sending in to the defendants fictitious accounts of barley purchased, misapplying the sums paid in for his own purposes, and providing the malt needed for the defendants' purposes by purchasing barley or ready-made malt on credit. He likewise from time to time sold barley which had been brought on to the maltings to raise money for his own purposes. The defendants believed, in consequence of the fictitious accounts and other false representations of F., that barley was from time to time purchased for cash, in accordance with the regular course of business, and on the faith thereof continued to pay sums of money into the banks for the purpose of paying for such barley, which they believed were so applied. F. subsequently absconded, leaving upon his premises barley to the value of about 22,000l., and malt to the value of about 35,000l., upon part of which duty had been paid by the defendants. The value of such malt and barley was less than the amount drawn from the banks and misappropriated by F. The defendants seized the barley and malt so left on F.'s premises, and, F. having been adjudicated bankrupt, the trustee in bankruptcy sued the defendants for the value of the same:—Held, that the moneys advanced by the defendants to provide for the purchase of the barley were impressed with a trust; that even if the barley and malt left on the premises of F. were not bought in accordance with the authority given to him, and the legal property in the same was not vested in the defendants, but in F., nevertheless F. was a trustee for the defendants, to the extent of the sums advanced by them, of such barley and malt, the same being either the product of trust moneys, or in substitution for the barley, in payment for which F. ought to have applied such trust moneys; that F. could not have set up his own breach of trust or have been heard to allege that the barley and malt was bought otherwise than according to the authority given to him; that the trustee in bankruptcy could not in this respect stand in a better position than F.; that the barley and malt were not in the order and disposition of F., as reputed owner thereof, it being notorious that "malting agents" are not usually the owners of

the barley and malt on their maltings; and that consequently the plaintiff could not recover. *Harris v. Truman*, 9 Q. B. D. 264; 51 L. J., Q. B. 338; 46 L. T. 844; 30 W. R. 533—C. A.

6. LIABILITY OF AGENT TO ACCOUNT.

a. Generally.

On Sale of Goods.—If goods are consigned to a factor for sale on commission, the law will raise a contract to account for such as are sold, to pay over the proceeds, and to deliver the residue unsold on demand; but an action does not lie against him for not accounting till after a demand made for an account. *Topham v. Brad-dick*, 1 Taunt. 572.

If a declaration in an action to recover the price of goods sent for sale on commission alleges that the defendant sold but did not account to the plaintiff, he must prove that a sale actually took place; and it will not be presumed, even at a distance of twelve months after the delivery of the goods. *Elbourn v. Upjohn*, 1 C. & P. 572.

Against Land Agent.—A landowner may maintain a suit in equity against the agent and manager of his estates, if the object of such suit is either to obtain an account (and in that case allegations of fraud or special circumstances are necessary), or to obtain the delivery up by the agent of documents in his hands belonging to the landowner. *Makepeace v. Rogers*, 4 De G., J. & S. 649.

Opening Account.—A firm of merchants, formerly carrying on business at Calcutta, sued a firm at Manchester, who had acted as their agents on commission for the purchase and shipping to India of Manchester goods, to have the settled accounts between the parties, extending back for a period of nearly twenty years, opened; and to obtain repayment of certain alleged overcharges made by the defendants in their accounts with the plaintiffs. The defendants were charged with having bought goods at one price and invoiced them to the plaintiffs at an increased price; that having been instructed to buy white goods, they purchased grey goods and got them bleached, charging the plaintiffs more than the price of the grey goods plus the cost of bleaching; that they had not credited the plaintiffs with the discounts allowed to themselves; that they had charged for insurances that they had never effected; that they had sold their own goods to the plaintiffs at a profit; and that they had overcharged the plaintiffs in other ways. The main defences raised were, that the plaintiffs knew of the charges, and that they were in accordance with the custom of the Manchester trade, and that as regarded the insurances which had been charged for but not effected, the defendants had themselves insured.—Held, that the plaintiffs did not know of the overcharges, and that there was no custom of the Manchester trade to make such overcharges. *Williamson v. Barbour*, 9 Ch. D. 529; 37 L. T. 698.

Held, also, that in a case between principals and agents, one case of proved fraudulent overcharge is sufficient to open the accounts between the parties, and that in the present case far more than enough had been proved to induce the court

to open the accounts, and that the usual decree for that purpose must be made. *Id.*

See further, *PRACTICE (Accounts)*.

b. For Profits.

In what Cases.—B. having bought shares in a company at 2l. per share, and knowing that K. was desirous to buy such shares, represented that he knew of some shares which were to be had for 3l. or less, and requested K. to give him authority to buy at that price. K. gave him authority, but told B. to do his best for him and to get them for less if possible. B. transferred his shares to K. at 3l. per share, pretending that another person was the vendor.—Held, that B. must account to K. for the difference between the price at which he bought and the price at which he sold the shares to K. *Kimber v. Barber*, 8 L. R., Ch. 56; 27 L. T. 526; 21 W. R. 65.

It is an inflexible rule of a court of equity that no agent can be allowed, in the matter of his agency, to make any profit for himself without the knowledge and consent of his principal, and the fact that the principal did not suffer any injury by reason of the dealing of the agent, cannot be taken into consideration in the application of the rule. *Parker v. McKenna*, 10 L. R., Ch. 96; 44 L. J., Ch. 425; 31 L. T. 739; 23 W. R. 271.

The plaintiff, in 1868, consigned a ship to G. & Co., in China, for sale, fixing a minimum price of \$90,000, and requiring cash payment. G. & Co. employed the defendant in Japan to sell the ship, with the same instructions. This was done with the knowledge and consent of the plaintiff. The defendant, having vainly attempted to sell the ship on the terms mentioned, took her himself for \$90,000, and about the same time resold her to a Japanese prince for \$160,000, payable as to \$75,000 in cash, and the rest on credit. The plaintiff was not informed that the defendant had purchased the vessel himself, or that he had resold it, till June, 1869, after the transaction was completed. The defendant paid \$90,000 to G. & Co., who remitted it to the plaintiff, and eventually obtained the whole amount of \$160,000 from the Japanese prince. In 1873 the plaintiff filed a bill in chancery to compel the defendant to account for the profit made by him in the resale of ship.—Held, first, that the relation of agent and principal was established between the defendant and the plaintiff, and existed at the time of the purchase and resale of the ship by the defendant, and that he was therefore liable to account to the plaintiff for the profit made by him in the transaction. *De Bussche v. Alt*, 8 Ch. D. 286; 47 L. J., Ch. 381; 38 L. T. 370—C. A.

Acquiescence or Laches, Effect of.—Held, secondly, that there had been no such acquiescence or laches on the part of the plaintiff as to disentitle him to relief. *Id.*

Where Rule does not Apply.—The rule that an agent must account to his principal for any secret profit made in the course of his agency does not apply where the principal is aware that the agent is remunerated by some allowance from the other parties, but is under a misapprehension (but not misinformed) as to its

actual extent. *Great Western Insurance Company of New York v. Cunliffe*, 9 L. R., Ch. 525; 43 L. J., Ch. 741; 31 L. T. 661.

A marine insurance company in New York employed merchants in this country as their agents to settle claims and grant insurances, and also to effect re-insurances. A percentage was paid by the company on the first two classes of business, but the agents were remunerated as to the re-insurances by the brokerage allowed to them by the underwriters. They charged the company the full amount of the premiums, but were allowed by the underwriters, first, 5 per cent. on the premiums; and, secondly, 12 per cent. on the balance (if any) payable by them to the underwriters on the account for the year, crediting the underwriters with the premiums (less the 5 per cent.), and debiting losses. This was according to the usual custom on the credit system as between brokers and underwriters, but the 12 per cent. allowance was for some time unknown to the company.—Held, that the agents were entitled to both the percentages. *Ib.*

—**Consignment of Goods for Sale on Commission.**—The plaintiff, a merchant at Manchester, from time to time consigned, for shipment and sale abroad, goods to the defendants, a firm of traders at Manchester, who, with another person, were merchants in India. The defendants shipped their own and the plaintiff's goods to India, where they were sold by the member of the firm there, who purchased with the proceeds of sale other goods, which he remitted to the defendants at Manchester. He also sent to the defendants at Manchester an account, in which the plaintiff's goods sold in India were placed to his credit, and certain bills of exchange for the amount of proceeds of sale, less commission, were debited. These bills, in fact, never existed, but the defendants, in their statements of account with the plaintiff, placed the amount of the imaginary bills to his credit, debiting him with the cash advances made to him on the goods, and paying him the balance.—Held, that the plaintiff was not entitled to an account of the profits on the goods purchased in India with the proceeds of the plaintiff's goods, the defendants being commission agents only. *Kirkham v. Peel*, 44 L. T. 195—C. A. Affirming 43 L. T. 171; 28 W. R. 941.

Claim for Damages against Agent, not included.—A claim against an agent in the nature of damages for neglect of duty cannot be passed as an item in taking an account between principal and agent, but must be enforced in an action at law. *Great Western Insurance Company of New York v. Cunliffe*, *supra*.

Duty to Pay over Profits.—Besides the duty, enforceable in equity, on the part of an agent to account to his principal or employer for all profits made by him in the course of his employment or service, there is also a legal duty incumbent upon him whenever any profits so made have reached his hands, and there is no account in regard to them remaining to be taken and adjusted between him and his employer, to pay over the money as money absolutely belonging to his employer. *Morrison v. Thompson*, 9 L. R., Q. B. 480; 43 L. J., Q. B. 215; 30 L. T. 869; 22 W. R. 859.

Money so received by an agent and not handed over to his principal may be recovered by the

latter as money had and received to his use. *Ib.*

The defendant having been authorized by the plaintiff to purchase on his behalf a particular ship as cheaply as she could be got, made an arrangement, without the plaintiff's knowledge, with the vendors' broker, who had a right to retain the excess of the purchase-money over 8,500*l.*, by which the defendant purchased the ship for 9,250*l.*, and retained for his own use 225*l.*, part of the excess.—Held, that the plaintiff was entitled to the amount so retained by the defendant, inasmuch as it was a profit acquired by an agent in connexion with his agency, without the sanction of his principal, and that it could be recovered as for money had and received. *Ib.*

7. INABILITY OF AGENT TO DISPUTE PRINCIPAL'S TITLE.

General Rule.—An agent cannot dispute the title of his principal; and, therefore, where a ship originally belonging to one of two part owners, had been conveyed to B. for securing a debt, and B. became the sole registered owner of the ship, and afterwards, as agent for both partners, insured the ship and freight, and charged them with the premiums, and, on a loss happening, received the money from the underwriters:—Held, that he was accountable to the assignees of the surviving partner for the surplus, after payment of his own debt, and not to the executors of the deceased partner to whom the ship originally belonged. *Dixon v. Hammond*, 2 B. & A. 310.

Where a merchant in Newcastle, who was in the habit of consigning goods to his agents in London, for sale, and of drawing upon them to certain amounts, had overdrawn his account and advised his agents that he would ship them twenty tons of alkali to cover his draft, and did accordingly ship the alkali on board a ship of the defendants, who were wharfingers between Newcastle and London, and received from the defendants' servant (the captain of the ship) a boat receipt, to the effect, that the goods were to be delivered to the plaintiffs:—Held, that the defendants were estopped from denying the plaintiffs' title to the goods upon their arrival in London. *Evans v. Nichol*, 4 Scott, N. R. 43; 3 M. & G. 614; 5 Jur. 1110. *And see ESTOPPEL.*

Defense of Jus tertii.—A contract, establishing between the contracting parties the relation of principal and agent, is made absolute in law by the latter acting under it; and an insurance broker cannot, as an agent, dispute the claim of his only known principal, on the ground that other persons were interested in the subject-matter of the insurance: their claims would be a question between the assured and the persons so claiming to be interested. *Roberts v. Ogilby*, 9 Price, 269.

The plaintiff, the elder brother and creditor of an intestate, being in possession of the goods of the intestate, under a bill of sale, said that he should not insist on his bill of sale, but that he should divide the goods with the other creditors, and he employed the defendant as auctioneer to sell the goods. After the sale by the defendant, the widow of the deceased gave the defendant notice, through her attorney, not to pay the plaintiff, but to retain the money until all the creditors came in, that it might be divided rateably amongst them. No letters of administration were taken

out:—Held, that the defendant was *primâ facie* bound to account to the plaintiff, from whom he had received the goods; and even if he would have been at liberty to set up the *ius tertii*, and shew as a defence against the plaintiff, that he was bound to account to a third person, still that he was liable, no title being shewn by him in any third person. *Crosskey v. Mills*, 1 C. M. & R. 298. See *Dickenson v. Naul*, 4 B. & Ad. 638.

A wharfinger had malt deposited with him, on account of B., and B., as a security for money advanced by the plaintiff, made a sale of the goods to him, with a condition annexed for repurchase by B., at such an advanced price as to make the transaction usurious. The wharfinger, on notice of the sale, transferred the malt in his books from B. to the plaintiff, and held it at the disposal of the plaintiff. B. afterwards became bankrupt; his assignees claimed the malt on the ground that the transaction with the plaintiff was usurious, and that the property had never passed; but they eventually compromised with the plaintiff:—Held, afterwards, in an action against the wharfinger for the proceeds of the malt, as money had and received to the use of the plaintiff, that he could not set up the *ius tertii* in the assignees, which they themselves had abandoned. *Betteley v. Reed*, 3 G. & D. 561; 4 Q. B. 511; 12 L. J., Q. B. 172; 7 Jur. 507.

The plaintiff seized goods belonging to R. under a distress for rent of a house alleged to have been demised by him to R., and having seized them he delivered them to the defendant, an auctioneer, for the purpose of selling them. When the sale was about to begin, R. gave notice to the defendant that he must not sell the goods, or if he did sell them, that he must retain the proceeds for him, R., as the distress was void, and as the relation of landlord and tenant did not exist between himself and the plaintiff. This was true, and the distress was void altogether. The defendant did sell the goods, but kept the proceeds for R.:—Held, that he was entitled to set up the *ius tertii*, and had a good defence to an action by the plaintiff. *Biddle v. Bond*, 6 B. & S. 225; 34 L. J., Q. B. 137; 11 Jur., N. S. 425; 12 L. T. 178; 13 W. R. 561. And see BAILMENT.

8. ON SALE OR PURCHASE OF GOODS.

Liability for Price.—In what Cases.]—An agent who sells goods on credit is not liable to his principal until he is paid by the vendee, unless the delay in payment was occasioned by his own neglect. *Varden v. Parker*, 2 Esp. 710.

If an agent discloses the name of the vendee, he is not liable for the price to his principal, unless he acts under a *del credere* commission. *Alson v. Sylvester*, 1 C. & P. 107.

Goods were consigned to two for sale by commission; upon a dissolution of partnership, the commission to sell was assumed by one:—Held, that, having sold, he was rightly sued for money had and received, which action could not have been maintained against both, although an action for not accounting would have laid against him. *Wells v. Ross*, 7 Taunt. 403.

Where booksellers undertook to manage the sale of a library, to prepare and beat the expense of printing catalogues and advertising the sales, and settling with the auctioneers, for a commission of 12½ per cent., to include every expense except king's duty and the removal of the books

from the country; and also engaged "to responsible, together with the auctioneers, for the proceeds of the sales:—Held, first, that the employment of certain auctioneers to some of the books, at the particular desire of the owner of the library, did not release the booksellers from their responsibility, in conjunction with those auctioneers. *Cholmondeley v. Pay*, 8 C. & P. 482.

Held, secondly, that the booksellers were released from such responsibility by the circumstance of the attorney of the owner of the library taking the promissory notes of those auctioneers instead of requiring certain bills of the purchasers, which they ought to have given, unless he tied up his hands from proceeding against the auctioneers until those bills became due, without first obtaining the consent of the booksellers who were to be responsible together with them. 2

The plaintiff employed the defendant, who was a corn-factor, to sell a cargo of corn, which accordingly sold to C. on the 15th May. Information was afterwards received that before the sale the corn had already been sold, on the 24 April, by the captain of the vessel chartered to the plaintiff. This was not known at the time either of the parties. C. subsequently gave notice to the defendant that he repudiated the contract on the ground that the cargo did not exist at the time of the sale to him. The plaintiff sought to recover the price of the cargo from the defendant who was a factor, on a *del credere* commission:—Held, that the defendant was not liable for the amount, as it was the sale of a cargo which did not exist at the time. *Couturier v. Hastie*, 5 H. Cas. 673; 25 L. J., Ex. 253; 2 Jur., N. S. 1241.

A commission to sell and transfer stock "where the funds should be at 85 per cent., or above that price," is a particular commission under which an agent is bound to sell when the funds reach 85, and he has not a general authority to act for his employer, so that he may defer selling till the funds should reach a higher price than 85. *Bertram v. Godfray*, 1 Knapp, P. C. C. 381.

A mercantile house that had accepted such a commission, and had not sold when the funds reached 85:—Held, therefore, in equity to have made the stock their own from that time, and ordered to account to their employer for the price of it, with interest; he in return accounting to them for the dividends he had subsequently received in ignorance of the fact of the funds having reached that price. *Id.*

If a broker, being employed to sell goods, send them for a bill at a given date, and draws on the buyer for the amount, he is answerable on the bill to his principal. *Le Feuvre v. Lloyd*, 1 Mar. 318; 5 Taunt. 749.

Guarantee against Loss.]—A broker when bought goods for his principal, agreed for 10 per cent. to indemnify him from any loss on the re-sale:—Held, that this undertaking was discharged when the principal had a fair opportunity of selling to advantage, but neglected it, though he was afterwards obliged to sell at a loss. *Curtis v. Edensor*, 3 T. R. 524.

Indorsing Bills.]—An agent purchasing foreign bills for his principal, and indorsing them to him without qualification, is liable to the principal for his indorsement, however small the commission which he gets upon the purchase. *Goupy v. Harden*, 2 Marsh. 454; 7 Taunt. 159; Holt. 3

Neglect of Instructions—Power to repudiate Acts.—The plaintiff instructed the defendants, cotton brokers, to purchase for him 50 bales of cotton. The defendants, being also employed by other principals, made a contract in their own names for the purchase of 500 bales, and having informed the plaintiff that they had purchased 50 for him, he paid them part of the purchase-money:—Held, that the plaintiff was entitled to recover back the money, as upon a failure of consideration, since the defendants had never made the contract which he had authorized them to make. *Bostock v. Jardine*, 3 H. & C. 700; 34 L. J., Ex. 142; 11 Jur., N. S. 586; 11 L. T. 577; 13 W. R. 970.

—Delay in signifying Dissent.—A. consigned and shipped goods to India for sale, and in his letter of instructions to his agent B., directed him to invest the proceeds in specified articles of merchandise or in bills at the exchange of the day, and remit them to England. B., instead of complying with this order, invested the proceeds in a commodity not specified in his letter of instructions, and informed A. of the purchase by letter, and transmitted a bill of lading for the goods, which reached A. on the 29th May, who notified to an agent of B., on the 7th August, his dissent from what had been done, the goods having in the meantime been lost at sea:—Held, that the laches of A., in delaying his notice of dissent so long, discharged B.'s liability; and that the jury was warranted in finding that A. had assented to the purchase made by B. *Prince v. Clark*, 2 D. & R. 266; 1 B. & C. 186.

Power of Agent to compel Principal to Refund.]—If a factor takes a security, payable to himself, from a purchaser of goods, and gives his own security to his principal, without giving the name of the purchaser; the factor cannot compel his principal to refund the money paid him, on failure of the purchaser. *Simpson v. Swan*, 3 Camp. 291.

Selling for Credit instead of Ready Money.]—A declaration stated that the defendant was retained by the plaintiffs as their broker, to sell goods, and deliver the same, according to the terms of the contract, to such person as should become the purchaser. It then alleged that he sold the goods to P., and P. purchased at certain times of delivery, the amount to be paid on delivery:—Held, that this amounted to an express contract by the defendant with the plaintiffs to deliver what he sold for ready money only. *Boorman v. Brown (in error)*, 2 G. & D. 793; 3 Q. B. 511; 11 C. & F. 1.

Held, also, that an action of tort was maintainable against the defendant for delivering without the price being paid. *Id.*

If consignees abroad, on a *del credere* commission, specially indorse bills to one of their partners in London for the proceeds of goods, they having advanced money on the goods to the consignor, the consignees must bear the loss on the bills being dishonoured while in the partner's hands. *Lucas v. Groning*, 1 Stark. 391; 2 Marsh. 460; 7 Taunt. 164.

A declaration stated, that in consideration that the plaintiff would employ the defendant as a coal factor to sell coals on account of the plaintiff, the defendant promised the plaintiff that he would not sell the coals otherwise than for ready

money, and alleged for breach that the defendant sold the coals otherwise than for ready money, to wit, at two months' credit:—Held, that the action was not sustained by the production of the following letter of instructions given by the plaintiff to the defendant, and by proof of a sale of the coals at 15s. 6d. per ton, at a credit of two months: "Please sell for me 250 tons of anthracite coal, at such a price as will realize me not less than 15s. per ton, net cash, less your commission for such sale." *Boden v. French*, 10 C. B. 886.

A., a merchant at Liverpool, circulated catalogues of certain goods to be sold by auction, subject to the following condition:—"Payment to be made on the delivery of bills of parcels, by good bills on London, to the satisfaction of the sellers, not exceeding three months' date, to be made equal to cash in four months." B., a broker at Liverpool, sent a catalogue to C., a merchant in London, who in return gave him directions to buy certain lots, which B. bought accordingly. Before the sale began, the auctioneer stated that payment by known buyers was to be on the usual credit, two and two months; B., as a known buyer, received the goods without giving bills, and forwarded them to C. in London, with an invoice, stating that payment was to be equal to cash at four months; and a few days afterwards B. drew on C. for the amount, at four months from the day of sale, which bill C. accepted and paid at maturity. Within two months from the sale B. failed, never having given bills to A. for the price of the goods; and A., finding that C. was B.'s principal, sued him for the value:—Held, that he could not recover, as C. would naturally be induced by A.'s catalogue to suppose that B. had given bills for the goods at the time of the delivery, and therefore accepted B.'s draft under a mistake occasioned by A.: and, per Parke, J., the broker B. had not any authority from C. to make a contract for goods to be paid at two and two months, and consequently C. was not bound by it. *Horsfall v. Fountleroy*, 10 B. & C. 755.

Directory or Discretionary Instructions.]—The plaintiffs, who were London merchants, sent to the defendants, who were commission agents in China, goods, to be sold by the latter, on the terms contained in the following letter: "If tea is not obtainable at our limits you may invest one-half of the whole proceeds in silk, at prices not exceeding, &c. If silk is obtainable much below these prices, you may substitute it in part for tea, even if the latter is to be had within our limits, at your discretion:—"Held, that, on looking at the whole of the letter, the words "you may invest" were to be construed as directory, and not as giving the defendants a discretionary power. *Entwistle v. Dent*, 1 Ex. 812; 18 L. J., Ex. 138.

Selling Goods bought for Principal.]—In an action against an agent by his employer, for selling goods bought for his principal, a custom allowed as a defence that, in case of default by the principal, the agent might (being personally liable on the purchase) sell on his own account. *Lienard v. Dresslar*, 3 F. & F. 212.

9. ON RECEIPT OF MONEY.

Upon Defeasible Contract.]—Money received by

an agent under a defeasible contract, ceases to be received to the use of the principal when the contract is defeated; and the agent may shew this as a defence against the principal, though the fraud was entirely his, and the principal was innocent of it. *Murray v. Mann*, 2 Ex. 538; 17 L. J., Ex. 256; 12 Jur. 634.

Illegal Disbursements.—Money deposited with an agent, and expended by him in illegal disbursements, cannot be recovered from him by the principal, if the principal was at the time aware of the illegal disbursements, or if he subsequently assented to them. *Bayntun v. Cattle*, 1 M. & Rob. 265.

Paid under False Pretences.—There is a remedy in equity as well as at law, by a principal against his broker or agent, to recover a sum of money paid to the broker on his untrue representation, that he had entered into a contract for his principal, which alleged contract had in fact no existence. *Wilson v. Short*, 6 Hare, 366; 17 L. J., Ch. 289; 12 Jur. 301.

Wrongful Sale or Pledge of Goods.—When a factor has raised money by a wrongful pledge of the goods of his principal, it is competent to the latter, in taking the account between himself and the factor, to abandon the goods and treat the money raised thereon as money had and received to his own use. *Bonzi v. Stewart*, 4 M. & G. 295; 5 Scott, N. R. 1.

Where Agent has appropriated Sums as Payment.—A factor in London purchased from time to time silk for R., and paid for the same. Remittances were made by R. generally, and not on account of any particular purchase. A general account current was kept by the factor, and then rendered to and checked by R., and the next account began with the balance of the preceding one. After the purchase of a certain lot of silk by the factor (which R. sold shortly afterwards to the plaintiff), two such accounts were delivered and balances struck in favour of R., shewing that the factor had, subsequently to the purchase of this silk, received remittances from R. amply sufficient to cover both its price, and also the preceding items of the account against him. Subsequently, the balance being much against R., the factor sold this lot of silk to recoup himself:—Held, that the accounts shewed an election by the factor to appropriate the remittances about the time of the purchase of this lot of silk in payment of the advance on account thereof, and that he was therefore not entitled to sell it, as against the plaintiff, to recoup himself. *Siebel v. Springfield*, 9 L. T. 324; 12 W. R. 73.

Form of Receipt.—A. being a stranger, deposited for a particular purpose, in the hands of B., a country banker at J., 800*l.* in local bank notes; 635*l.* of which had been issued by C. at D.; B. transmitted the whole of the notes immediately to C., and was credited with the amount in account by the latter, who reissued the notes, and stopped payment:—Held, that A. was entitled to recover the whole amount of the notes from B. as cash received by the latter to his use. *Gillard v. Wise*, 7 D. & R. 523; 5 B. & C. 134. And see *Price v. Holbeck*, 2 Doug. 654.

The plaintiff, a merchant in London, consigned cottons to the defendant and his partners, com-

mission agents at Bombay, with directions to sell the same, and remit the proceeds to the plaintiff in good bills on London. The goods were accordingly sold by the defendant and his partners in Bombay, and produced eight rupees and upwards per piece, but no remittance either in money or bills having been made to the plaintiff, an action was commenced against the defendant, who had come over to England:—Held, that the plaintiff was not prevented from recovering in an action for money had and received, by reason of the proceeds having been received, not in English, but in foreign money. *Ehrensperger v. Anderson*, 3 Ex. 148; 18 L. J., Ex. 132.

When an agent who receives money for a party pays it to another agent of that party, he is bound to pay it in cash, and not merely settle it in an account between that agent and himself, unless he can shew an authority from his principal, and that there was an account between the principal and that agent, with a balance in favour of the agent. *Hanley v. Cassan*, 11 Jur. 1088.

When a person is employed to receive money for another, and he employs a third person to receive it for him, an action for money had and received will not lie against the first, without evidence that the money came to the hands of such third person. *Matthews v. Haydon*, 2 Esp. 509.

Remitting Money received to Principal.—A defendant being employed to procure payment of a bill, and to remit the produce direct to the plaintiff, remitted it to a third person, whereby it got into the hands of the plaintiff's creditors:—Held that the defendant was not liable for money had and received. *Duncan v. Skipwith*, 2 Camp. 68.

A defendant is not liable for a loss where he had collected some debts for the plaintiff, and sent them by the post, according to his direction. *Warwicke v. Noakes*, Peake, 67.

Loss occasioned by Negligence of Sub-Agents.—M. employed R. & Co., bankers in Edinburgh, to obtain for him payment of a bill drawn on a person resident at Calcutta. R. & Co. accepted the employment, and wrote promising to credit him with the money when received. R. & Co. transmitted the bill in the usual course of business to C. & Co. of London, and by them it was forwarded to India, where it was duly paid. R. & Co. wrote to M. announcing the fact of its payment, but never actually credited him in their books with the amount. The house in India failed:—Held, that R. & Co. were the agents of M. to obtain payment of the bill; that payment having been actually made, they became ipso facto liable to him for the amount received; and that he could not be called on to suffer any loss occasioned by the conduct of their sub-agents, between whom and himself no privity existed. *Mackersy v. Ramsays*, 9 C. & F. 818.

Loss due to Principal.—The defendant, the salaried manager of a bank, was appointed treasurer to guardians of the poor under the Poor Law Consolidated Order. A treasurer's account between him and the guardians was duly kept according to the Poor Law Orders; moneys were from time to time paid into the bank of which he was manager to the account of the guardians, and orders signed by the guardians in conformity with the orders were cashed like cheques payable to order. The defendant received no

salary or remuneration, and the guardians received interest on their balance when it exceeded 3,000*l*. A person in the service of the clerk to the guardians who was employed to fill up the orders for signature by them, drew a number of orders in such a way that the amounts for which they were drawn could be increased by the insertion of words and figures in the blank spaces; and after signature of the orders, he increased the amounts accordingly. He also forged indorsements to orders so increased in amount, and to others not so increased, and obtained payment of them at the bank. In an action by the guardians against the defendant for the amount of the orders so paid, it was found as a fact that the payment by the treasurer's clerks of the excess was due solely to the fact that they were misled by want of proper caution on the part of the guardians and their clerk in signing the orders fraudulently prepared for their signature:—Held, first, that the negligent drawing of the orders disentitled the guardians to complain of the payment of the excess. *Halifax Union (Guardians) v. Wheelwright*, 10 L. R., Ex. 183; 44 L. J., Ex. 121; 32 L. T. 802; 23 W. R. 704.

Held, secondly, that as to the payment on forged indorsements, the account at the bank was in effect the account of the guardians; that the bank was protected by 16 & 17 Vict. c. 59, s. 19; and that as by the act and direction of the guardians the only receipt of moneys on their behalf was a receipt by the bank, the defendant was not chargeable in any other way than as the bank was chargeable; and also that if the account at the bank was regarded as the defendant's account, still, being so kept by the order of the guardians, they could not make any claim against him which he could not enforce against the bank. *Ib*.

10. AGENTS MAKING PAYMENTS FOR PRINCIPAL.

Direction to Pay—Whether Irrevocable.—A direction to an agent to pay over the proceeds of a sale is not revocable, if founded upon a valuable consideration. *Metcalf v. Clough*, 2 M. & R. 178.

Where a customer directed his bankers to hold a certain sum of money from his private account, at the disposal of S., and the bankers accepted the order, but the customer countermanded it before any actual appropriation or payment made:—Held, that such order was revocable, and the bankers, having paid the money to S., after such countermand, were liable to the customer. *Gibson v. Minet*, 9 Moore, 31; 2 Bing. 7; 1 C. & P. 247; R. & M. 68.

Although where an agent has money in his hands belonging to his principal, who orders him to pay it over to a third person, but before payment the principal countermands such order, and the agent afterwards pays it over, he does so in his own wrong; yet, where advances were made under an agreement, amounting to the appropriation of the proceeds of a specified cargo by a particular ship, which the agent remitted accordingly:—Held, that he was not responsible for such payment, although his principal had countermanded the order subsequently to the agreement under which the advances were made. *Fisher v. Miller*, 7 Moore, 527; 1 Bing. 150.

Deductions.—A. consigned goods to B., with directions to pay over the net proceeds to C. B.

employed D. to dispose of them. In an action by C. to recover the proceeds from D., D. is entitled to make the same deductions for freight, &c., as B., who was the owner of the ship in which the goods were brought, might have made. *Blackburn v. Kymmer*, 1 Marsh. 223; 5 Taunt. 584.

11. RIGHT OF AGENT TO INDEMNITY AGAINST LOSS.

Loss due to Agent's Negligence—Damages.]

—Commission agents were authorized by principals to sell on their account certain oats; the agents sold the same with a warranty, but without disclosing the names of their principals: the oats not answering the warranty, the agents were compelled to make a reduction in the price:—Held, that they could not recover the damage they thus sustained from their principals, as they had chosen to sell in their own names, and as there was no privity of contract between them and their principals which would create a guarantee that the oats were of a specific quality. *Johnson v. Osborne*, 3 P. & D. 236; 11 A. & E. 549; 1 Jur. 943.

Recovery of Expenses.—Where an agent has a general authority to receive and sell goods, and out of the proceeds to repay himself his advances, charges and commission; the costs of an action, with a reference thereof, against a wrong-doer, who withholds the possession of the goods, bona fide incurred for the recovery of the goods, are legal charges upon the goods, and may be set off by the agent in an action brought against him by his principal for the balance of the proceeds of the goods. *Curtis v. Barclay*, 7 D. & R. 539; 5 B. & C. 141.

On the 14th of May, 1861, the plaintiff, as broker, bought for the defendant, at a public sale, three lots of sugar, in bags, the lots being numbered 67, 68 and 69, the prompt day being the 20th of July. By the terms of sale, payment was to be made either by cash on the 20th of July, by acceptance at seventy days from the day of sale, or on delivery of the warrants, interest at the rate of five per cent. per annum being allowed to the expiration of seventy-three days from the day of sale if payment was made within twenty-one days. On the 25th of May, the plaintiff (according to the usage of the trade), at the request of the defendant, paid the price of lot 67, and obtained a warrant of it, and cleared it at the Custom-house. He, at the same time, but without any special instructions from the defendant, paid the price of lots 68 and 69, and obtained the warrants for the same. The effect of this payment was, that the risk of loss by fire was transferred from the seller to the buyer. It was the common course for brokers, when so employed, to clear before prompt one of several lots of sugar in bags bought under one contract, to pay the price and obtain warrants for all the lots, the broker taking the discount under the conditions of sale. The defendant not only knew that this was the common course among brokers, and that it had been pursued in former instances in relation to sugars bought for him by the plaintiff; but he was informed by a clerk of the plaintiff, shortly after the 25th of May, that the plaintiff had so paid the price of lots 67 and 68, and obtained the warrants. On the 22nd of June, the defendant sent instructions to the plaintiff to clear lot 68. On the same day, and

before those instructions could, in the usual course of business, be acted upon, a fire broke out at the bonded warehouse where the sugars were deposited, and they were destroyed:—Held, that the plaintiff was entitled to recover from the defendant the money so paid by him in respect of lot 68, on the 25th of May, as money paid to his use. *Sentance v. Hawley*, 13 C. B., N. S. 458; 7 L. T. 745.

Agent to Buy Shares—Recovery of Difference paid.]—If a party authorizes a broker to buy shares for him in a particular market, where the usage is that, when a purchaser does not pay for his shares within a given time, the vendor, giving the purchaser notice, may re-sell, and charge him with the difference; and the broker, acting under the authority, buys at such market in his own name; such broker, if compelled to pay a difference on the shares through neglect of his principal to supply funds, may sue the principal for money paid to his use. *Pollock v. Stables*, 12 Q. B. 765; 5 Railw. Cas. 352; 17 L. J., Q. B. 352; *S. P.*, *Bayliffe v. Butterworth*, 1 Ex. 425; *Bayley v. Williams*, 7 C. B. 886; 18 L. J., C. P. 273.

Stockbrokers and members of the London Stock Exchange, on the 28th of August, 1856, at the request of A., bought for him twenty shares in a bank, to be paid for on the settlement day, which was on the 15th of September, and duly forwarded to him the usual brokers' contract note. The bank stopped payment on the 3rd of September, and ultimately became bankrupt on the 11th. A. repudiated the transaction, and gave the brokers notice not to pay the price on his account. They having been compelled according to the rules of the Stock Exchange to pay for the shares on the settlement day, sent A. the certificates and transfers, and, upon his declining to accept them, sued him for money paid:—Held, that they were entitled to recover, notwithstanding the stoppage of the bank, and the refusal of the directors to consent to a transfer of the shares. *Taylor v. Stray*, 2 C. B., N. S. 175; 3 Jur., N. S. 540. Affirmed, 2 C. B., N. S. 197; 26 L. J., C. P. 287; 3 Jur., N. S. 964—Ex. Ch.

In equity the liability of a principal to indemnify his agent is not confined to actual losses, but extends to all the liabilities of the agent incurred on behalf of the principal. *Lacey v. Hill*, *Crawley's claim*, 18 L. R., Eq. 182; 43 L. J., Ch. 551; 30 L. T. 484; 22 W. R. 586.

C., broker for H., entered into contracts for purchase of stock for the next settling day, 15th of July, 1870. The contracts were in the usual form, subject to the rules and usages of the Stock Exchange, and the broker's notes from time to time sent to H. also had these words. When that day arrived C., by request of H., and relying on a promise of H. to settle on that day the amount then due to C. for brokerage and losses, continued the contracts till next settling day. H. did not settle his account on the 15th. On the 16th the Norwich Bank, in which he was partner, stopped payment, and H. became in fact insolvent. C. was thereupon declared a defaulter on the Exchange. According to the rules, all his transactions were immediately closed. No loss accrued to the principal by the closing of the transactions before the next settling day. Subsequently C. was re-admitted to the Stock Exchange, on payment of a composition, but not the full amount of his debts.

After such re-admission, members of the Stock Exchange were in effect forbidden by the rules of the Exchange to sue him for the balance of previous losses without the leave of the committee, which was rarely, if ever, granted, but no legal release was given to him. In a creditors' suit instituted for administering the estate of H., C. claimed for the whole amount shewn to be due to him for brokerage and losses, by an account made up on the footing of all transactions being closed on the day of the insolvency of H., the amount of claim being calculated on the full amount of the liabilities of C. in respect of the contracts for stocks, and not the amount that he had actually paid on those contracts:—Held, first, that on the insolvency of H., the transactions might be closed according to the rules of the Stock Exchange, without affecting the right of C. to an indemnity from H. *Id.*

Held, secondly, that C. not having had a legal release from claims under the contracts, but being still liable in law for the full amount, was entitled to claim against the estate of H. for the full amount of losses on the contract, including not only what he had actually paid, but also the amount for which he was legally liable. *Id.*

Other Cases.]—Quære, whether a commission agent is entitled to be indemnified out of the proceeds of his principal's goods sold by him against all liabilities incurred by him on account of his principal, including the amount of an accommodation bill drawn by the principal and accepted by such agent. *Hood v. Stallybrass*, 3 App. Cas. 880; 38 L. T. 826; 27 W. R. 1—P. C.

If a broker advances money, and gives his acceptances on the credit of goods lodged in his hands, the owner cannot demand them without a full indemnity; and giving his counter-acceptances, or those of any other person, to the amount of those given by the trader, and becoming payable at the same time, is not a sufficient indemnity. *Pulteney v. Keymer*, 3 Esp. 182.

12. AGENT'S LIEN.

For General Balance.]—A factor has a lien on his principal's goods for the general balance due to him. *Godin v. London Assurance Company*, 1 W. Bl. 104.

If A. deposits goods with B. for sale, and B. promises to pay the proceeds to A. when sold, B. has no lien on them (if not sold) for the balance of his general account arising upon other articles. *Walker v. Birch*, 6 T. R. 258.

Bills.]—Bills remitted to a factor or a banker, while unpaid, are in the nature of goods unsold, and, on failure of the factor, must be returned to the principal, subject to such lien as the factor may have thereon. *Zinck v. Walker*, 2 W. Bl. 1154.

Goods must be in Possession.]—A factor has no lien on goods for a general balance, unless they come into his actual possession. *Kinloch v. Craig*, 3 T. R. 119, 783; 4 Bro. P. C. 47.

A factor can only claim a lien for his general balance upon goods which come to his hands as factor. *Dixon v. Stanfield*, 10 C. B. 399.

Policy of Insurance.]—A. & Co., who carried on business at Hull as merchants, factors, ship

and insurance brokers and general agents, had had various dealings as factors with B. & Co., of London. Whilst these dealings were going on between them, B. & Co. wrote to A. & Co. requesting them to get a policy of insurance effected for them on a ship, for a voyage from the Downs to South America, and thence to the West Indies. A. & Co. procured the insurance to be effected. B. & Co. remitted them the premiums, the policy remaining in the hands of A. & Co. :—Held, that A. & Co. were not entitled to hold the policy as a lien for the general balance due to them as factors from B. & Co. *Id.* See also *Mildred v. Maspons*, post, col. 48.

As a Surety.—A factor who becomes surety for his principal, has a lien on the goods sold by him for his principal, to the amount of the sum for which he has so become surety. *Drinkwater v. Goodwin*, Cowp. 251.

If a broker advances money, and gives his acceptances on the credit of goods lodged in his hands, he has a lien on them, and may retain them until the owner gives him a full indemnity. *Pulteney v. Keymer*, 3 Esp. 182.

For Sums Due in futuro.—A principal gave notice to his factor of an intended consignment of a ship to him for the purpose of sale, and in consequence drew bills on him, which the factor accepted: and then the principal died, and his executors directed the captain of the ship to follow his former orders; who, thereupon, delivered the ship into the possession of the factor, who sold the same :—Held, that the factor had a lien upon the proceeds, as well for the amount of money disbursed by him for the necessary use of the ship on its arrival, and for the acceptances by him actually paid, as for the amount of his outstanding acceptances not then due. *Hammonds v. Barclay*, 2 East, 227.

Not Transferable.—The right of lien being personal cannot be transferred by any tortious act of the broker. *McCombie v. Davies*, 7 East, 5; 3 Smith, 3.

Agreement as to.—An agreement by a broker that he will sell goods for his principal, and pay over the whole proceeds without setting off a debt then due to him from his principal, is not binding upon the broker so as to deprive him of his legal right of lien. *McGillivray v. Simpson*, 9 D. & R. 35; 2 C. & P. 320.

Right of Crown conflicting.—Goods in the hands of a factor, on which he had a lien for advances, were seized by the crown under an extent :—Held, that the lien of the crown overrode that of the factor. *Att.-Gen. v. Trueman*, 11 M. & W. 694; 13 L. J., Ex. 70. See *Att.-Gen. v. Walsley*, 12 M. & W. 179; 13 L. J., Ex. 66.

Personal Remedy as well as Lien.—In what Cases.—Where a factor makes advances he has a personal remedy against the principal as well as a lien on the fund; and this is the same whether the factor has or has not a del credere commission, except that when the factor having a del credere commission has sold the goods, he cannot sue the principal for advances which are covered by the price of the goods, that price being warranted to the principal by the guarantee arising

out of the commission. *Graham v. Ackroyd*, 10 Hare, 192; 22 L. J., Ch. 1046; 17 Jur. 657.

Where the owner of goods was indebted to a factor in a sum exceeding their value, and consigned them to him for sale; and the factor, being indebted to S. in more than their worth, sold them to him, and afterwards became bankrupt; and on a settlement of accounts between S. and the assignees of the factor, the former allowed credit to them for the price of the goods, and then proved the residue of his claim against the estate :—Held, that, as the factor had a lien on the whole price of the goods, such settlement of accounts between the vendee and the assignees was a good answer to an action against the vendee for the price of the goods, brought either by, or on the account of, the original owner. *Hudson v. Granger*, 5 B. & A. 27.

In Case of Bankruptcy.—W. was appointed agent of a company for the sale of goods manufactured by them. Part of the arrangement was that the company should draw on W. against the goods assigned to him as agent. W. accepted a bill for 200*l.* at four months' date; before the bill arrived at maturity the company was ordered to be wound up, and the goods then in possession of W. were taken by the liquidators and sold by them. W. honoured the bill when it arrived at maturity :—Held, that W. had a lien on the goods to the extent of the payment by him in respect of the bill, and that he was entitled to be repaid the amount paid by him, out of the proceeds of the sale of the goods. *Pavy's Patent Felted Fabric Company, In re*, 1 Ch. D. 631; 45 L. J., Ch. 318; 24 W. R. 507.

S., who had for many years traded as a timber merchant in his own name, entered into an agreement with F. & Co., who were also timber merchants, to carry on his business thenceforth as their agent at a remuneration by way of a share of profits. The business was thenceforth carried on under this agreement, but in the name of S. as before. S. dealt with the timber in his possession as if he were the absolute owner of it (except as between himself and F. & Co.), and there was nothing done to inform the outside world of the change which had taken place. In the course of the business F. & Co. drew bills on S., which he accepted in his own name to be protected by F. & Co. Both F. & Co., and afterwards S. filed liquidation petitions. Before S.'s liquidation F. & Co.'s trustee demanded the timber in his hands, which was refused :—Held, that to the extent of the current bills S.'s estate had a lien on the timber. *Faucus, In re, Buck, Ex parte*, 3 Ch. D. 795; 34 L. T. 807.

III. RIGHTS AND LIABILITIES OF PRINCIPALS AND THIRD PARTIES.

1. ACTION BY PRINCIPALS ON CONTRACTS OF AGENTS.

When Principals Undisclosed.—When a contract is entered into by an agent in his own name, the principal may sue upon it, even though it is in part to be performed by the agent personally. *Phelps v. Prothero*, 16 C. B. 370; 24 L. J., C. P. 225; 1 Jur., N. S. 1170.

Although an agent enters into an agreement for the purchase of an estate in his own name, and appears to act on his own account, yet, on

the vendor's default in completing the purchase, the principal may maintain an action for the deposit in his own name. *Norfolk (Duke) v. Worthy*, 1 Camp. 337.

The rule that an undisclosed principal may sue and be sued upon mercantile contracts made by an agent in his own name, subject to any defences or equities which without notice may exist against the agent, is applicable to policies of marine insurance under the Canadian as well as under the English law. *Browning v. Provincial Insurance Company of Canada*, 5 L. R., P. C. 263; 28 L. T. 853; 21 W. R. 587.

But in assumption on a charter-party executed not by the plaintiff but by a third person who in the contract described himself as "owner of the ship:"—Held, that evidence was not admissible to shew that such person contracted merely as the plaintiff's agent. *Humble v. Hunter*, 12 Q. B. 310; 17 L. J., Q. B. 350.

If a broker enters into a contract for an undisclosed principal, the latter may sue on such contract in his own name; and a rule of the Exchange, on which the contract was made, which declares that a contract made by a broker for an undisclosed principal shall be regarded as the contract of the broker only, does not control this right, even although the principal was cognizant of such rule. *Humphrey v. Lucas*, 2 C. & K. 152; *S. P., Langton v. Waite*, 6 L. R., Eq. 165; 37 L. J., Ch. 345.

— **Notice—Means of Knowledge.**—A. intrusted B. with goods for sale as his factor. B., to A.'s knowledge, sold the goods to C. B. sold as his own, and C. did not, in fact, know that he was in this transaction the agent or factor of A. In an action by A. against C. for the price of the goods, C. pleaded that he believed at the time of sale, the goods were absolutely the property of B., and that B., being indebted to him at that time in a sum more than sufficient to pay for the goods, he sought to set off that amount as against it. Demurrer, on the ground that the plea should have gone on to allege, not merely that C. believed the goods to be the sole property of B., but that he had no means of knowing to the contrary, and that he had no notice that the goods were the property of A.:—Held, that the plea was good; that in its present shape it sufficiently averred want of notice; and semble, that even if the plea did not amount to an allegation of want of notice, the absence of notice would be matter of evidence, and need not appear in the plea. *Borries v. Imperial Ottoman Bank*, 9 L. R., C. P. 38; 43 L. J., C. P. 3; 29 L. T. 689; 22 W. R. 92.

— **Privity of Contract—Foreign Principals.**—When a foreign correspondent instructs his English agents to order goods for him in this country, the person contracting with the agent to supply such goods is not, although he knew for whom the goods were intended, liable to an action for breach of his contract, at the suit of the principal. *Die Elbinger Actien-Gesellschaft v. Clays*, 8 L. R., Q. B. 313; 42 L. J., Q. B. 151; 28 L. T. 405.

A foreign company entered into negotiations through S. & Co., London commission merchants, for the supply, by C., of certain railway wheels and axles; and he, in consequence, had an interview on the 29th of January at S. & Co.'s office with S., one of the partners, and H., the

managing director of the foreign company; and C. signed in a diary of S. the following entry: "Mr. C. offers to supply 150 sets of wheels and axles (describing them) at 31l. per set, to be delivered free on board at Hull during February and March. This offer to remain open until the 3rd of February." On the 3rd of February S. & Co. telegraphed and wrote, "We confirm the order for 150 sets of wheels and axles," repeating the terms of the offer. Some of the sets were delivered by C., the invoices being made out to S. & Co., and they paid for them; but the delivery of most of the sets was after March, and the company sued for a breach of the contract. At the trial it was objected that the contract was with S. & Co., and not with the company. The judge left it to the jury to say whether the contract was with S. & Co., or with the company. The jury found for C.:—Held, that the direction and verdict were right. *Ib.*

When a foreign principal orders goods of a broker here, who buys them in his own name, though the vendor knows he is acting as agent, and the broker pays the vendor the purchase-money, which he afterwards receives from his principal, and it turns out that the goods were not in existence at the time of the contract, the principal cannot recover back the money paid from his agent, the broker, but must proceed against the vendor for it. *Risborough v. Bruckner*, 3 C. B., N. S. 812; 27 L. J., C. P. 90.

The defendants, an English firm, traded with D., a Spanish shipping agent at Havannah. The plaintiffs, who were Spanish merchants at Havannah, consigned a cargo of goods to the defendants through the agency of D. The defendants knew that D. was acting for a third party who was alluded to as the "interesado," but the name of the plaintiffs was not disclosed. The defendants effected an insurance in London on the ship in the name of themselves and for the benefit of all parties interested. The ship having been lost, the policy-money was paid to the defendants, and D. being insolvent, the plaintiffs claimed the whole of the money after deducting the premiums and expenses. The defendants claimed a lien for the balance of their general account due from D.:—Held, that there was privity of contract between the plaintiffs and defendants, and that the plaintiffs had a right of action against the defendants for the balance of the policy-moneys. And further, that the defendants had no lien on the money, or right of set-off for the balance of their general account due from D. *Hernando v. Mildred*, 9 Q. B. D. 530; 51 L. J., Q. B. 604; 47 L. T. 318; 30 W. R. 862.—C. A. Affirmed in H. L., sub nom. *Mildred v. Maspons*, 8 App. Cas. 874; 53 L. J., Q. B. 33; 32 W. R. 125.

The plaintiffs, who were landowners in New Zealand, were in the habit of shipping wheat from New Zealand to England for sale on the London market, taking bills of lading which made the wheat deliverable to themselves in London, and indorsing these bills to M. and T., merchants and factors at Glasgow, with instructions to sell the wheat in London. M. and T. having no house or agency in London were themselves in the habit of indorsing these bills of lading to the defendants, who were corn-factors and brokers in London, for the purpose of their selling there the wheat. When any sales were effected, M. & T. delivered account sales to the plaintiffs in the usual form, deducting a del

credere commission of 3l. per cent., whilst the terms upon which the defendants were employed by M. and T. were different, being a factorage of 2l. per cent. and not a del credere commission. The indorsement of the bills of lading by the plaintiffs to M. and T. and by M. and T. to the defendants, was in each case only for the purpose of selling the wheat and without the intention of passing any property in it. The plaintiffs knew that the sales effected for them by M. and T. in London were made by brokers employed by M. & T., but the plaintiffs were in no way parties to the particular contracts of sale nor were their names disclosed upon them. The defendants effected sales of certain cargoes of wheat which had been so consigned for sale by the plaintiffs in the above mode, and paid the proceeds into their own account with their bankers, and from time to time made remittances to M. & T. on account of them; but upon reference to the defendants' books of account the proceeds of the particular cargoes could be separated and identified. M. and T. carried on a business at Leith as well as at Glasgow, and they employed the defendants in respect of both, and when they stopped payment, which they did, they were indebted to the defendants upon the Leith account but not on the Glasgow account. The plaintiffs having brought an action against the defendants for the net balance of the proceeds of the said cargoes of wheat after deducting the remittances made to M. and T. in respect thereof, but without giving credit due to them from M. & T. on other transactions, the jury found at the trial first, that the plaintiffs did not, through their agents, employ the defendants to sell and account for the proceeds of the wheat; secondly, that the defendants knew, or had reason to believe, that M. and T. were acting in the sales as agents for a third person:—Held, that the plaintiffs were not entitled to recover, as there was no privity of contract between them and the defendants, and the defendants did not stand in any fiduciary character towards the plaintiffs so as to entitle the latter to follow the proceeds of their property in the defendants' hands, and as whatever right the plaintiffs might have had as owners to claim the wheat before it had been sold, they had no right, after such sale, to the proceeds, without giving credit for the sum due to the defendants from M. and T., on their general account. *New Zealand and Australian Land Company v. Watson*, 7 Q. B. D. 374; 50 L. J., Q. B. 433; 44 L. T. 675; 29 W. R. 694—C. A.

— **Right of Third Party to Sue.**—A. and B. agreed with C., on behalf of a company intended to be formed, that A. and B. should sell and the company buy a certain business, and it was a term of the agreement that sixty guineas should be paid to J. and P., solicitors, for their expenses and charges in registering the company. The memorandum of association adopted this agreement, and the directors subsequently ratified it. An order having been made for winding up the company, J. and P. claimed to prove for the sixty guineas:—Held, that a contract between A. and B. and the company, to which J. and P. were in no way parties, that the company should pay money to J. and P., would not entitle J. and P. to proceed against the company. *Gregory v. Williams* (3 Mer. 582) explained. *Empress Engineering Company, In re*, 16 Ch. D. 125; 43 L. T. 742; 29 W. R. 342—C. A.

The mere fact that a company has received and adopted the benefit of services performed by a solicitor employed by the promoter in transactions preliminary to the formation of the company, even where the company has agreed with the promoter to pay such preliminary expenses, will not give the solicitor any right to sue the company except through the promoter. There is a distinction where a statutory obligation to pay is specially imposed upon the company. *Rotherham Alum and Chemical Co., In re, Pearce, Ex parte*, 25 Ch. D. 103; 53 L. J., Ch. 290; 32 W. R. 131—C. A.

In May, 1863, a father, on the occasion of the admission of his son as an underwriting member of Lloyd's, addressed to the managing committee of that body a letter, by which he held himself responsible for all his son's engagements in that capacity. Lloyd's was then a voluntary association, governed by certain bye-laws, under which a person once admitted a member could not be excluded from membership except in the event of his bankruptcy or insolvency. In 1871 the society was incorporated by act of parliament, all the rights of the committee on behalf of the members being vested by the act in the corporation. In 1876 the father died, and notice of his death was shortly afterwards given to Lloyd's. In 1878 the son became bankrupt and thereupon ceased to be a member of Lloyd's:—Held, that the committee of Lloyd's, and the corporation of Lloyd's as their successors, were trustees of the benefit of the guarantee for all the persons, whether members or outsiders, with whom the son had contracted engagements as an underwriting member, and that the corporation could maintain an action to enforce the guarantee against the father's estate for the benefit of all those persons; on the ground, as to the outsiders, that the brokers, through whom the son's engagements with them were contracted, were trustees for their principals of the right which they themselves had to call on their own agents, Lloyd's, to enforce the guarantee for their benefit. *Lloyd's v. Harper*, 16 Ch. D. 290; 50 L. J., Ch. 140; 43 L. T. 481; 29 W. R. 452—C. A.

Where A. enters into a written contract with B. alone, for the purpose of giving B. a security for the repayment of money which the recitals shew to have been in fact advanced by C. and D. jointly with B; C. and D. are entitled to sue on the agreement either directly or through B. as trustee for them. *Flower v. Buller*, 15 Ch. D. 665; 49 L. J., Ch. 784; 43 L. T. 311; 28 W. R. 948.

2. LIABILITY OF PRINCIPAL TO THIRD PARTY.

a. On Contracts.

i. In what Cases.

General Principle.—The principal in a business who holds out an agent to the world as ostensible principal, and carries on the business under the management of and in the name of such agent, is bound by all such acts and contracts of the agent as are incidental to the ordinary conduct of the business, and such liability as to the rest of the world cannot be restricted by any private arrangement between them. *Edmunds v. Bushell*, 1 L. R., Q. B. 97; 35 L. J., Q. B. 20; 12 Jur., N. S. 332.

When one has so acted as from his conduct to

lead another to believe that he has appointed some one to act as his agent, and knows that that other person is about to act on that behalf, then, unless he interposes, he would, in general, be estopped from disputing the agency, though in fact no agency existed. *Pole v. Leask*, 9 Jur., N. S. 829.

Where a trader allows his agent to hold himself out as being the real owner of the concern, carrying on the business on his own account, and the agent accordingly deals with a creditor of his own, on the terms that the goods supplied by him to such creditor shall be taken in satisfaction of the debt, at the prices invoiced to him, there is, in fact, no sale of the goods, and the trader cannot recover from him the price in an action ex contractu. *Ramosotti v. Bowring*, 7 C. B., N. S. 851; 29 L. J., C. P. 30; 6 Jur., N. S. 172.

Authority of Agent.]—The defendant owned a jeweller's shop at Lewes, living himself at London, and visiting the shop monthly. The shop was managed by a shopman, from whom the plaintiff had for some years received orders at Lewes, in the defendant's name, for goods, which were sent to the shop, and afterwards paid for by the defendant. The shopman absconded and came to London, and ordered jewellery there of the plaintiff in the defendant's name, which he carried away with him :—Held, that the previous course of dealing justified the plaintiff in assuming that the shopman had general authority to order goods for the shop on the defendant's credit, and that the defendant was therefore liable for the goods obtained by the shopman in London. *Summers v. Solomon*, 26 L. J., Q. B. 301; 3 Jur., N. S. 962.

A., in London, authorized B., a broker in Liverpool, to buy goods for him on certain terms. B. bought the goods on terms which so far differed from the authority, as to omit a stipulation which was contained in the authority, and to express one which was not therein mentioned; but both these were stipulations which would have been by custom annexed to the contract, unless expressly excluded :—Held, that, as the effect was the same as if the contract had been made in the very words of the authority, it was within the scope of the broker's authority to make such a contract, and that it was binding on the principal. *Heyworth v. Knight*, 17 C. B., N. S. 298; 33 L. J., C. P. 298; 10 Jur., N. S. 866.

Written communications passed between two brokers, in which the terms of a sale of goods were proposed and assented to. The letter of the buying broker finally accepting the offer, concluded with these words: "contract, we presume, in due course." The contract was sent, and was accepted by the buying broker, but was repudiated by his principal, as not within the scope of the broker's authority :—Held, that the contract contained in the previous written communications, which was within the scope of the broker's authority, was not the less binding on the principal, by reason of the subsequent sending of the unauthorized contract. *Id.*

The licensed owner of a public-house is not liable for spirits supplied to the person whom he has left in possession of the premises as manager of the business, although the invoices are made out in his name, if he has only authorized such manager to deal with particular persons, and the spirits were not supplied by one of them. In such a case there is no evidence of liability on

the part of the owner to be left to the jury. *Dawn v. Simmins*, 41 L. T. 783; 28 W. R. 144 J. P. 264—C. A.

Secret Instructions.]—Where an agent clothed with ostensible authority, no priv instructions prevent his acts within the scope that authority from binding his principal. Wh his authority depends, and is known to th who deal with the agent to depend, on a writ mandate, it may be necessary to produce account for the non-production of that writ in order to prove what was the scope of agent's authority. *National Bolivian Navigation Company v. Wilson*, 5 App. Cas. 209; L. T. 70. Per Blackburn (Lord).

Special Instructions.]—A factor having authority to sell for money is not entitled to barter. *Guerreiro v. Peile*, 3 B. & A. 616.

Effect of Custom.]—If an agent is employed by a principal to deal in a market, the usage and customs of that market are imported into and become part of the contract between them and bind as well the principal as the agent. *Duncan v. Hill*, 6 L. R., Ex. 255; 40 L. J., 137; 25 L. T. 59; 19 W. R. 894.

Where a contract which requires notice of shipment of goods to be given by the vendor to purchaser is made at Liverpool by one broker acting for both parties, by the usage of trade there, it is sufficient if notice of the shipment given by the vendor to the broker :—Held, that this usage of trade was binding on a London merchant, who employed a broker at Liverpool to make a contract for him there. *Graves v. Legg*, 2 H. & N. 210; 26 L. J., Ex. 316; 3 Jur. N. S. 519—Ex. Ch.

A person who employs a broker to transact business for him in a market, with the usages which the principal is unacquainted with, gives him authority to contract upon the footing of such usages, provided they are only such as relate to the mode of performing the contract, and do not change its intrinsic character. *Robinson v. Mallett*, 7 L. R., H. L. 802; 44 L. J., C. P. 362; L. T. 544. Reversing 7 L. R., C. P. 84; 41 L. C. P. 65; 26 L. T. 207; 20 W. R. 544.

In order to avoid a sale made by a broker, may be shewn that, by the custom of that particular trade, the authority of the broker expires with the day on which it was given. *Dickins v. Lilwall*, 4 Camp. 279; 1 Stark. 128.

So, by the custom of London, where goods are sold by a broker to be paid for by bill, the vendor has a right to annul the contract with a reasonable time, if he is dissatisfied with the sufficiency of the purchaser. But the intimations of his dissent must be made as soon as he has had an opportunity of making inquiry; and five days were considered too long. *Hodgson v. Davies*, 2 Camp. 533.

When Implied.]—An agent cannot sell the goods of his principal without authority; but such authority to sell may be implied from circumstances. *Dyer v. Pearson*, 4 D. & R. 648; B. & C. 38.

A purchaser of hemp lying at a wharf, had at the time of his purchase, transferred into the wharfinger's books into the name of the broker who effected the purchase for him, and who in ordinary business it was to buy and sell hemp :

Held, that this gave the broker an implied authority to sell it, and that his sale and receipt of the money bound his unknown principal. So, if it had been transferred into the names of the principal or broker. *Pickering v. Bush*, 15 East, 38.

Brokers in the usual habit of buying and paying for, and of selling and receiving the value for sugars on speculation, in their own names, and upon their own judgment, for their principal; sometimes, when the market was low, under an unlimited authority as to quantity and price; at other times under special instructions to buy; but guided from time to time by special instructions to sell, and limited in respect of price, and advised from time to time by their principal as to the probable rise or fall of the market; but keeping only a general account with their principal of the sums advanced to and received for him, without accounting separately for each particular lot purchased and re-sold; may bind him by a re-sale of a particular parcel of sugars before purchased and paid for in their own names and lodged in their own warehouse, though sold under the price directed by their principal, for whom they received the money, but afterwards failed; the general authority of the brokers to sell, so as to bind their principal in respect of the purchaser, being to be collected from their general dealing, and not merely from their private instructions as to the particular parcel of goods. *Whitehead v. Tuckett*, 15 East, 400.

A., a widow, married B., whom she believed to be a single man. She was not the personal representative of her deceased husband, but she was possessed of furniture which had been his property, and which after her marriage with B. continued in the house in which they lived. B. sold and delivered those goods to C., with A.'s concurrence, and C. paid B. for them. After this it was discovered that B. was a married man, and that his marriage with A. was void. This was unknown either to A. or to C. till after the sale. A. sued C. for the value of the goods:—Held, that the property being in the personal representative of her deceased husband, she could not maintain an action against any one but as a wrong-doer, and that as C. had taken the goods with her concurrence, he was not a wrong-doer as against her. And that, even on the supposition that the goods belonged to her, she had constituted B. her agent to sell, and could not dispute the sale made by him as her agent to an innocent party. *Waller v. Drakeford*, 1 El. & Bl. 749; 22 L. J., Q. B. 274; 17 Jur. 853.

When Instructions Uncertain.—If a principal gives an order to an agent in such uncertain terms as to be susceptible of two different meanings, and the agent bona fide adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorized, because he meant the order to be read in another sense of which it is equally capable. *Ireland v. Livingstone*, 5 L. R., H. L. 395; 41 L. J., Q. B. 201; 27 L. T. 79. Reversing 5 L. R., Q. B. 516; 39 L. J., Q. B. 282—Ex. Ch.

L. sent an order by letter to T. & Co., commission agents at the Mauritius, to ship him 500 tons of sugar at a certain price,—"fifty tons more or less of no moment, if it enables you to get a suitable vessel." T. & Co. purchased and shipped about 400 tons, construing the letter as

an order to purchase up to 500 tons, and assuming that the words "fifty tons more or less" had reference only to the capacity of the ship. L. refused to take the sugar, on the ground that his letter was an order for a shipment by one vessel of at least 450 tons and not more than 550 tons:—Held, that as the letter was capable of the construction T. & Co. had put upon it, L. was bound to accept the sugar. *Ib.*

When a principal orders his agent to purchase a certain quantity of goods, and the parties appear to have contemplated that the whole might not be obtainable at once, the order will be construed as divisible, and the agent will be authorized to buy a smaller quantity if the whole is not to be had. *Johnston v. Kershaw*, 2 L. R., Ex. 82; 36 L. J., Ex. 44; 15 L. T. 485; 15 W. R. 354.

Limitation of Powers.—The powers of an agent are limited by the limitation of the powers of the principal. *Montreal Assurance Company v. McGillivray*, 13 Moore, P. C. C. 87; 8 W. R. 165.

Contracts which would not be binding on a principal, as ultra vires, do not become binding by means of their having been entered into through the medium of an agent. *Ib.*

Evidence of Authority.—A. was the owner of a saw-mill, and B. was his foreman. B., as the agent of A., but without any express authority, entered into a contract in writing to supply C. with a quantity of Scotch-fir staves:—Held, that this contract was binding on A., inasmuch as B. must be presumed to have had a general authority to enter into such a contract as the one in question. *Richardson v. Cartwright*, 1 C. & K. 328.

The plaintiff, having sold and delivered to the defendants granite blocks, which they refused to accept, on the ground that the blocks were of dimensions different from those for which they had contracted; and a dispute having thus arisen, the plaintiff wrote to the defendants a letter containing the following passage:—"I have seen E., and he has consented to see you on the subject of the granite, and I have authorized him to do so, and if possible come to some amicable arrangement in the matter." Shortly afterwards E. went to the defendants, and, on behalf of the plaintiff, agreed with them that on payment of 50l. the granite should be theirs, and no further claim in respect of it made by the plaintiff. The plaintiff repudiated the agreement made by E., and sued the defendants for the price of the granite:—Held, that the plaintiff's letter to the defendants constituted E. his agent, with power to make the agreement which in fact he did make, and that the plaintiff was therefore bound by it. *Trickett v. Tomlinson*, 13 C. B., N. S. 663; 7 L. T. 678.

B. employed C. to raise money, and C. procured 160l. from A., which he handed to B., from whom he took a cheque for that sum payable to him (C.) or bearer. C. subsequently applied to B. for payment of the cheque. In an action by A. against B. on the cheque:—Held, that C. was clearly B.'s agent, and that delivery to him supported the averment in the declaration of a delivery to A. *Samuel v. Green*, 10 Q. B. 262; 16 L. J., Q. B. 239; 11 Jur. 607.

— **Onus of Proof.**—The burthen of proof is

on the person dealing with any one as an agent, through whom he seeks to charge another as principal. He must shew that the agency did exist, and that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from disputing it. *Pole v. Leask*, 9 Jur., N. S. 829.

Agreement with Agent to Pay Fixed Sum.]—The plaintiffs claimed 37*l.* from the defendant for use and occupation of a house, and authorized him to pay the amount to a person whom they named. She called on the defendant, and he then expressed his readiness to pay the amount, but she (having also an interest in the property) refused to receive it. No actual tender was made. The plaintiffs sued the defendant for the use and occupation, claiming 238*l.* The defendant paid 37*l.* into court:—Held, that as soon as the defendant expressed to the agent his readiness to pay the 37*l.* there was a concluded agreement between him and the plaintiffs for that amount, and that the plaintiffs could not recover more. *Gretton v. Mees*, 7 Ch. D. 839; 38 L. T. 506; 26 W. R. 607.

Contract made by Wife of Lunatic.]—The plaintiff was a tradesman, and the defendant had given his wife authority to deal with the plaintiff, and had held her out as his agent and as entitled to pledge his credit. Afterwards the defendant became insane, and whilst his malady lasted his wife ordered goods from the plaintiff, who accordingly supplied them. At the time of supplying the goods the plaintiff was unaware that the defendant had become insane. The defendant afterwards recovered his reason, and then refused to pay for the goods supplied to his wife by the plaintiff:—Held, that the defendant was liable for the price of the goods. *Drew v. Nunn*, 4 Q. B. D. 661; 48 L. J., Q. B. 591; 40 L. T. 671; 27 W. R. 810—C. A.

In an action for the price of necessary repairs done to the defendant's house, it appeared that he was a lunatic, and that the work was done by order of his wife, with knowledge on the part of the plaintiff of the husband's lunacy. The wife had always received a sufficient allowance from her husband's estate:—Held, that the husband was not liable, as, under the circumstances, the wife had no more authority to pledge his credit than she would have had if he had been sane, and had provided her with means for all necessities. *Richardson v. Du Bois*, 5 L. R., Q. B. 51; 39 L. J., Q. B. 69; 21 L. T. 635; 18 W. R. 62; 10 B. & S. 830.

Contracts on behalf of Foreign Principals.]—A commission merchant has no authority (in the absence of express evidence to the contrary) to pledge the credit of his foreign constituent. The fact that the foreign constituent and the commission merchant have agreed to share the profit and loss on the purchases made by the latter, will not affect the rule. *Hutton v. Bullock*, 9 L. R., Q. B. 572; 30 L. T. 648; 22 W. R. 956—Ex. Ch.

Therefore, when H. F. & Co., merchants in London, bought goods in their own name from the plaintiff for shipment to the defendant in Rangoon, charging the defendant a commission upon such purchases, and it was agreed between H. F. & Co. and the defendant that such purchases should be on their joint account, and the

plaintiff took in payment for the goods the acceptances of H. F. & Co., which were afterwards dishonoured:—Held, that the plaintiff could not recover from the defendant the price of the goods. *Id.*

At the time of making a contract of sale, the party buying the goods represented that he was buying them on account of persons resident in Scotland, but did not mention their names, as the seller did not inquire who they were, but afterwards debited the party who purchased the goods:—Held, that the seller might afterwards sue the principals for the price. *Thompson v. Davenport*, 9 B. & C. 78; 4 M. & R. 110.

A merchant, though in one sense agent for his foreign correspondents, is not by mercantile usage entitled to pledge their credit as purchasers for what he buys in the home market on their account. *Poirier v. Morris*, 2 El. & Bl. 89; L. J., Q. B. 313; 17 Jur. 1116.

The right of the seller of goods to resort to undisclosed foreign principal is barred by a circumstance which shews that the enforcement of that right would operate unjustly. *Smith v. Smyth v. Anderson*, 7 C. B. 21; 18 L. J., C. 109; 13 Jur. 211.

A foreign principal is in no case liable to an action, at the suit of the vendor, for the price of goods purchased by an agent resident in England. *Id.*

Contracts on Behalf of Home Principals.]—The right of the vendor to sue a home principal, when discovered, is undoubted, provided that the vendor has not elected to charge the agent exclusively at all events; provided also that the state of accounts between the principal and his agent is not such as would make it unjust that the former should be sued. *Id.*

See also *Hudson v. Granger*, ante, col. 46.

Contract ultra vires of Agent to Knowledge of Third Party.]—An association was not registered under the Companies Act. Persons became members by effecting mutual policies; members were empowered also to effect "special rate policies." The applicants were not members, but had taken out a "special rate policy signed per procuration by J. & S., the manager who gave and accepted on their personal liability a bill of exchange for the amount assured. In a similar case, the amount assured had been disallowed by the Appeal Court as a claim made on the association. J. & S. became insolvent and their acceptance was dishonoured. De V & Co. claimed that the amount of the premium should be repaid them by the members of the association:—Held, that they were not entitled to have the premiums repaid, because, first, they well knew, J. & S. had no power, as agent, to grant such a policy to non-members; and secondly, there was no failure of consideration as J. & S. had made themselves personally liable. *Arthur Average Association, In re, De Winton case*, 34 L. T. 942.

ii. Notice of Authority.

Duty to Inquire as to Agent's Authority.]—A society or company had an unlimited power to borrow, but had, nevertheless, given secret order to its agent not to borrow beyond a certain amount, I should have thought, nevertheless, the society was bound, because the plaintiffs would

not have been called upon to inquire as to any secret authority; but where a society or a company has upon the face of its constitution—that is, either by the statute or statutory rules under which it is constituted—only a limited authority to borrow, then it seems to me that a person dealing with such a society or company must either inquire or run the risk. *Chapleo v. Brunswick Building Society*, 6 Q. B. D. 696; 50 L. J., Q. B. 372; 44 L. T. 449; 29 W. R. 529—C. A. Per Brett and Baggallay, L.JJ.

Notice—Means of Knowledge of Third Party.]

—W., as agent for the defendant, had occasionally employed B. to purchase wools, which purchases had been ratified by the defendant. In June, 1839, the defendant wrote to B., to say he would have nothing to do with any purchases made by him. This letter, it appeared, had been communicated to the plaintiff, but at what time was left uncertain. In July B. bought wools of the plaintiff, then lying at his premises, and they were sent to a warehouse of another person where they were weighed and packed by B. (together with other wools) in sheets, which the defendant was in the habit of sending there for the purpose of packing such wools. The wools in question were not paid for, and it was in the course of dealing that wools were not to be removed from such warehouse till payment. In an action to recover the price of the wools:—Held, that there was sufficient evidence to warrant the jury in finding that B. was the defendant's agent for the purchase, and that the plaintiff had not had notice of the countermand of his authority. *Doddsley v. Varley*, 4 P. & D. 448; 12 A. & E. 632; 5 Jur. 316.

Indorsement on Bills of Exchange.]—An agent who has received from his principal bills indorsed on account of such principal (by which means their negotiability is restrained), cannot deposit them with his bankers as a security for advances; the special indorsement is a sufficient notice to the bankers that the bills are not the property of the party from whom they receive them, to enable him to pledge them. *Truttel v. Barandon*, 1 Moore, 543; 8 Taunt. 100.

The acceptance or indorsement of a bill of exchange, expressed to be per procuration, is a notice to the indorsee that the party so accepting or indorsing professes to act under an authority from some principal, and imposes upon the indorsee the duty of ascertaining that the party so accepting or indorsing is acting within the terms of such authority. *Alexander v. Mackenzie*, 6 C. B. 766.

But an acceptance in the words "for Richardson and Son, Thomas Popple," is not equivalent, according to the mercantile law, to the form, "per proc. Richardson and Son, Thomas Popple." The former expression does not, like the latter, import a special and a limited authority to do a specific act; nor does it put the drawer of a bill, accepted in that form, upon discovery or inquiry, whether the agent has exceeded his authority or not. *O'Reilly v. Richardson*, 17 Ir. C. L. R. 74.

iii. Evidence of Liability.

Signature of Agent—Banker Protected.]—A signature "Smith & Co., per S. Kingsford, agent," is a signature per procurationem, and

such a signature on a cheque drawn payable to Smith & Co. is sufficient to justify a banker in paying the cheque so indorsed, and the banker is protected by 16 & 17 Vict. c. 59, s. 19. *Charles v. Blackwell*, 1 C. P. D. 548; 45 L. J., C. P. 542; 35 L. T. 162; 24 W. R. 737.

— **Construction of Contract.]**—K. entered by letter into a contract with the plaintiff for the sale of 300 tons of muriate of potash. At the commencement of the letter, K. said that he bought as agent for the defendant. Delivery at the rate of 50 tons per month. Cash payment to be made by K. fourteen days from receipt of bills of lading. A commission of 1 per cent. to be paid to K. The letter was not signed by him as agent:—Held, that on the true construction of the contract, whatever K.'s position might be, the defendant was the buyer, and therefore liable to the plaintiff. *Concordia Chemische Fabrik auf Actien v. Squire*, 34 L. T. 824—C. A.

— Employing Illiterate Agent to Sign.]

A man who can read, who sends an agent who cannot read to sign a document or to enter into a contract in which a document must to his knowledge be signed, cannot dispute his liability on the document so signed on the ground that his agent could not read its contents. *Foreman v. Great Western Railway Company*, 38 L. T. 851.

Admission of Agent to bind Principal.]—At the trial of an action for the loss of a parcel of money sent via a railway, addressed to the plaintiffs at W., a police superintendent, as witness for the plaintiffs, gave evidence to the effect that the station-master at W. had made a statement as to the absconding of a porter, a servant of the railway company:—Held, that the evidence was admissible on the ground that the station-master, at the time he made the statement, was acting within the scope of his duty, and, being the agent of the company, they were bound by his statement, and could be looked upon as having made it themselves. *Kirkstall Brewery Company v. Furness Railway Company*, 9 L. R., Q. B. 468; 43 L. J., Q. B. 142; 30 L. T. 783; 22 W. R. 876.

An Irish railway company contracted with the plaintiff to carry certain pigs from a station in Ireland through to London, part of the journey being performed on the London and North-Western Railway. In an action against the Irish company, a letter from J. T., an agent of the London and North-Western company, to the plaintiff, which contained evidence of delay, was held to be admissible. *Ruddy v. Midland Great Western Railway Company*, 8 L. R. Ir. 224.

Where an agent had been employed to pay money for work done, and the workmen were referred to him for payment, and he assented to it, an acknowledgment or a promise by him to pay was sufficient. *Burt v. Palmer*, 5 Esp. 145.

— **Husband and Wife.]**—In an action against a husband for goods supplied to his wife for her accommodation while he occasionally visited her, a letter written by the wife, acknowledging the debt within six years, was admissible

to take the case out of the statute. *Gregory v. Parker*, 1 Camp. 394.

But as the 9 Geo. 4, c. 14, s. 1, directed that no acknowledgment or promise shall be sufficient to take a case out of the statute unless in writing "and signed by the party chargeable thereby," an acknowledgment contained in a letter which was written by the wife of the debtor in his name and at his request was insufficient, because the statute gave no authority to an agent to make the acknowledgment. *Hyde v. Johnson*, 3 Scott, 289; 2 Bing. N. C. 776; 2 Hodges, 94.

See also EVIDENCE—LIMITATIONS, STATUTE OF.

iv. Discharge of Principal.

When Principal has Paid over Money to Agent.]—When goods are sold to an apparent principal for ready money, the seller must at his peril obtain immediate payment, and if the buyer is only an agent contracting in his own name, and receives the price forthwith from his principal, the seller who omits to enforce immediate payment cannot at a subsequent time recover the value of the goods from the principal upon the failure of the agent to pay over to the seller their price. *MacClure v. Schmeil*, 20 W. R., 168.

A vendor who has given credit to an agent, believing him to be the principal, cannot recover against the undisclosed principal if the principal has bona fide paid the agent at a time when the vendor still gave credit to the agent and knew of no one else as principal. *Armstrong v. Stokes*, 7 L. R., Q. B. 598; 41 L. J., Q. B. 253; 26 L. T. 872; 21 W. R. 52.

If an agent buys goods on credit for an unnamed principal, payment by the principal to his agent of the price of the goods before the credit expires, may, under some circumstances, deprive the vendor of his right to sue the principal. *Smith or Smyth v. Anderson*, 7 C. B. 21; 18 L. J., C. P. 109; 13 Jur. 211.

When a principal authorizes his agent to pledge his credit, and the latter makes a purchase on his behalf, and thereby creates a debt, the principal is not discharged by payment to the agent, if the money is not paid over to the seller, unless the latter, by his conduct, makes it unjust that the principal should be sued; as, for example, where the seller, by his words or conduct, induces the principal to believe that a settlement has been come to between the seller and the agent, in consequence of which the principal pays the amount of the debt to the agent. *Heald v. Kentworthy or Kenworthy*, 10 Ex. 739; 24 L. J., Ex. 76; 1 Jur., N. S. 70.

Under what Circumstances a Defence to Action by Seller for Price.]—The defendants employed C., a broker, to buy oil for them. C. accordingly bought of the plaintiffs, informing them at the time of the sale that he was buying for principals, though he did not tell them who those principals were. The terms of the sale were "cash on or before delivery;" but, though it is not infrequent in the oil trade in such a case to require payment before delivery, there is no invariable custom to that effect. The plaintiffs delivered the oil to C. without insisting on prepayment, and the defendants, not knowing

that the plaintiffs had not been paid, paid. Shortly afterwards C. stopped payment, and the plaintiffs thereupon sued the defendants for the price:—Held, that, as the plaintiffs at the time of the sale knew the broker was buying for principals, and not on his own account, the fact of the defendants having paid the broker did not preclude the plaintiffs from suing them for the price, unless, before such payment, they had by their conduct induced the defendants to believe that they had already been paid by the broker; and that the mere omission on the part of the plaintiffs to insist on prepayment was not, in the absence of an invariable custom to that effect, such conduct as would reasonably induce such belief. *Heald v. Kenworthy* (10 Ex. 739; 24 L. J., Ex. 76) followed. *Armstrong v. Stokes* (7 L. R., Q. B. 598) discussed. *Irvine v. Watson*, 5 Q. B. D. 414; 49 L. J., Q. B. 531; 42 L. T. 810—C. A. Affirming 5 Q. B. D. 102; 49 L. J., Q. B. 239; 42 L. T. 51; 28 W. R. 353.

On a Promissory Note after Payment to Agent.]—Where an agent tendered the amount of a note for his principal, on condition of having the note given up, which could not be done from its being mislaid, and afterwards failed with the money in his hands:—Held, that the principal was still liable on the note, but without interest from the time of the tender. *Deane v. Dunn*, 3 Camp. 296. And see *Stewart v. Fry*, 1 Moore, 74; 7 Taunt. 339.

Delay—Alteration of Position.]—The seller has the right to resort to the undisclosed principals on a contract made by the broker in his own name, and not affected by their delaying to do so until parties to whom the broker had resold had become insolvent; the original purchaser not having paid the brokers in the meantime, nor otherwise altered their position. *Campbell v. Hick*, 28 L. J., Ex. 70.

In order to discharge a principal from his liability for a debt contracted by his agent, the principal must shew that the creditor has himself misled him into supposing that he had elected to give exclusive credit to the agent, and that the principal has been prejudiced by this supposition. Mere delay in enforcing payment from the agent will not be sufficient for the purpose. The plaintiff sold stores for a ship to T. who was ship's husband and managing owner. The defendant was part owner of the ship, and was also interested jointly with T. in the adventure for which the ship was being fitted out. The plaintiff applied to T. for payment, but did not obtain it. Three months after the goods were supplied, and again two years after that the defendant settled accounts with T. and gave him credit for the price of the goods, supposing that they had been paid for. More than three years after the goods had been supplied, T. having become bankrupt, the plaintiff for the first time applied for payment to the defendant, and brought his action for the debt:—Held, that there had been no such conduct on the part of the plaintiff as would discharge the defendant from his liability. *Irvine v. Watson* (5 Q. B. D. 102), *Heald v. Kenworthy* (10 Ex. 745), and *Smethurst v. Mitchell* (28 L. J., Q. B. 241) considered. *Davison v. Donaldson*, 9 Q. B. D. 623; 4 Asp., M. C. 601; 47 L. T. 564; 31 W. R. 277—C. A.

If one takes the security of the agent of the principal with whom he dealt, unknown to the principal, and gives the agent a receipt as for the money due from the principal, in consequence of which the principal deals differently with his agent, on the faith of such receipt, the principal is discharged, although the security fails. Otherwise, if the principal does not shew that he was injured by means of such false voucher. *Wyatt v. Hertford (Marquis)*, 3 East, 147.

Gratuity given to Agent.]—When a secret gratuity is given to an agent with the intention of influencing his mind in favour of the giver of the gratuity, and the agent, on subsequently entering into a contract with such giver on the behalf of the principal, is actually influenced by the gratuity in assenting to stipulations prejudicial to the interests of his principal, although the gratuity was not given directly with relation to such principal contract, the transaction is fraudulent as against the principal, and the contract is voidable at his option. *Smith v. Sorby*, 3 Q. B. D. 552, n.

By Arrangement with Agent without Principal's Knowledge.]—Where a broker who had sold goods for the plaintiff to the defendant made an arrangement with the plaintiff unknown to the defendant, altering the time of payment:—Held, that the plaintiff had thereby taken the broker as his debtor, and had discharged the defendant. *Thornton v. Meux, M. & M.* 43.

v. Election.

Effect of.]—Where an agent having made a contract in his own name has been sued on it to judgment, no second action is maintainable against the principal. *Priestly v. Fearnie*, 3 H. & C. 977; 11 Jur., N. S. 813; 34 L. J., Ex. 173; 13 L. T. 208.

What Amounts to.]—P. carried on business in London as agent for K. & Co., paper manufacturers at Vienna. D. ordered of P. paper, addressing the order to him personally, which he acknowledged by letter, and promised to supply the paper in certain quantities and at certain times as he obtained the goods from K. & Co. Some of the parcels were delivered, but D., being unable to obtain any more from P., who alleged default in K. & Co., wrote to them stating their position, and P.'s excuses. In an action against P. for breach of contract in not delivering the paper:—Held, that the letter of P. to D. agreeing to supply the paper amounted to a contract binding on P. personally, and that the subsequent letter of D. to K. & Co. was not an election by D. to substitute K. & Co. as the party bound in the place of P. *Dramburgh v. Pollitzer*, 28 L. T. 470; 21 W. R. 682.

The seller of goods to an apparent principal upon discovering that the buyer is only an agent may so conduct himself by demanding payment from, and taking proceedings against the agent, that he will be deemed to have elected to look to the agent only for payment, and will be debarred from any remedy against the real principal. *MacClure v. Schmeil*, 20 W. R. 168. And see *Smith v. Anderson*, ante, col. 56.

— **Affidavit of Proof in Bankruptcy.]**

—The mere fact of filing an affidavit of proof against the estate of an insolvent agent to an undiscovered principal, after the undiscovered principal is known to the creditor, is not a conclusive election by the creditor to treat the agent as his debtor. *Curtis v. Williamson*, 10 L. R., Q. B. 57; 44 L. J., Q. B. 27; 31 L. T. 678; 23 W. R. 236.

B. purchased goods of the plaintiffs: he was the agent of the defendants, his undisclosed principals. B. became insolvent, and the plaintiffs then became aware that the defendants were principals. With this knowledge the plaintiffs' clerk sent an affidavit of proof of the debt due to them against the estate of B., whose affairs were being liquidated by arrangement. The plaintiffs endeavoured to prevent the affidavit of proof from being filed, but were unsuccessful:—Held, that the mere filing of the affidavit of proof formed no obstacle to the plaintiffs suing the defendants for the price of the goods sold to B. *Borries v. Imperial Ottoman Bank*, 9 L. R., C. P. 38; 43 L. J., C. P. 3; 29 L. T. 689; 22 W. R. 92.

A. and B. were both in the habit of sending goods to C., a factor, for sale; in the course of his dealings with C., B. purchased of him goods belonging to A., which were invoiced to him by C. in his own name, though, upon the balance of accounts between them, C. was indebted to B. A. afterwards filed an affidavit in the Court of Bankruptcy, in which he alleged that C. was justly and truly indebted for goods belonging to him sold and delivered by C., as the factor or agent of A., to B., and for which goods C. received payment by means of goods sold and delivered to him by B., and which goods were used by C. in his trade of a cheesemonger. Upon this affidavit a fiat was worked out against C. to its termination:—Held, that this affidavit did not estop A. from suing B. for the price of the goods, or afford sufficient evidence to sustain a plea of payment in that action. *Morgan v. Couchman*, 14 C. B. 101; 2 C. L. R. 53; 23 L. J., C. P. 36.

Proof of.]—C., a broker, was authorized by the defendant to buy cotton for him, but not to disclose his name. C.'s credit not being good enough to enable him to obtain a contract upon his own sole responsibility, he gave the plaintiffs the name of his principal, and bought and sold notes were exchanged between the plaintiffs and C., in which the latter was named as the buyer. C. sent the defendant an advice note informing him that he had bought the cotton of the plaintiffs "for him," and the defendant did not repudiate the transaction. An invoice was made out to C., and the market falling, C. was called upon by the plaintiffs to accept and pay for the cotton, and threatened with legal proceedings. Failing to obtain payment from C., the plaintiffs sued the defendant:—Held, that the fact of his name being disclosed at the time of the contract did not preclude the plaintiffs from having recourse to him; that parol evidence of the circumstances under which the contract was made was admissible; and that the insertion of C.'s name in the contract, though his principal was known at the time, and the subsequent demands upon C. for payment, did not necessarily amount to an election on the part of the plaintiffs to give credit to C., and to him only. *Culder v. Dobell*, 6 L. R., C. P. 486; 40 L. J., C. P. 224; 25 L. T. 129; 19 W. R. 978—Ex. Ch.

b. Other Acts of Agent.

i. Generally.

Scope of Authority.—An agent cannot bind his principal by any act or declaration which is out of the scope of his authority. *Olding v. Smith*, 16 Jur. 497.

Doctrine of Respondeat Superior not to be extended.—I agree that the court ought to be very careful how it extends the doctrine "respondeat superior." It has been carried in our law very far indeed. *Smith v. Keal*, 9 Q. B. D. 351; 47 L. T. 143; 31 W. R. 76. Per Jessel, M.R.

Infringement of Patent by Agent.—A patent consisted of the application of cards or strips of leather covered with wire to rollers at "wide distances." A person who contracted to clothe rollers and supplied to a "nailer" cards of such width that when applied to the rollers they must of necessity leave wide spaces, and who himself paid the nailer, was held to have infringed the patent, though he alleged that his business was that of a cardmaker only, and did not include the nailer's work. *Semble*, the conclusion would have been the other way if he had merely supplied the cards without making the nailer his agent. *Sykes v. Howarth*, 12 Ch. D. 826; 48 L. J., Ch. 769; 41 L. T. 79; 28 W. R. 215.

Act of Bankruptcy by Agent.—A man cannot commit an act of bankruptcy by an act of his agent which he has not authorized, and of which he is not cognizant. *Blain, Ex parte, Savers, In re*, 12 Ch. D. 522; 41 L. T. 46; 28 W. R. 334.

ii. Fraud.

Acts within Scope of Authority.—Fraud will vitiate any transaction, though the principal does not personally take any part in the fraud, if the agent does, for the principal is civilly responsible for the acts of his agent. *Doe d. Willis v. Martin*, 4 T. R. 39.

A local manager of a branch bank, while engaged at the bank, suggested to a lady who had a deposit account, that higher interest might be obtained for her money if she purchased two houses for a sum which would pay off a mortgage held by a third person upon them, and also a lien held by the bank. She assented, and gave him her deposit note, for which he gave her a fresh deposit note for the difference between the amount of the former note and the purchase-money, and retained the residue for the purpose of making the investment. This money the local manager appropriated to his own use, and the bank refused to bear the loss:—Held, in an action against them, that they were liable, the jury having found that the manager intended and induced the lady to believe that he was acting as the agent of the bank, and also that as local manager he had authority from the bank to make an assignment of an equitable mortgage. *Thompson v. Bell*, 10 Ex. 10; 2 C. L. R. 1213; 23 L. J., Ex. 321.

But where the agent of a wharfinger, whose duty it was to give receipts for goods actually received at the wharf, fraudulently gave a

receipt for goods which had never been received, the principal was held not to be responsible, because it was not within the scope of the agent's authority, in the course of his employment, to give such a receipt. *Coleman v. Riches*, 16 C. B. 104; 3 C. L. R. 795; 24 L. J., C. P. 125; 1 Jur., N. S. 596.

A miller was in the habit of purchasing wheat, and directing the sellers to deliver the wheat at the landing-place, at Bristol, of a wharfinger and carrier, to be carried by him from Bristol to Cardiff. B., his agent at Bristol, gave receipts to the sellers for the wheat when delivered, and the miller was accustomed to pay for the wheat upon the production of such receipts, but there was no contract between him and the wharfinger that receipts should be given, on the faith of which the former might pay:—Held, that B. had a limited authority to give receipts only when wheat had been delivered; and, therefore, where B. fraudulently signed a receipt for wheat delivered, when none in fact had been delivered:—Held, to be not an act done within the scope of his authority, as agent, for which his principal was responsible to the miller, who had paid to the seller the price of the wheat, on the faith of the receipt being true. *Id.*

In the winding up of an unincorporated building society an application was made by the liquidator under s. 165 of the Companies Act, 1862, for the purpose of rendering J., the former secretary of the society, liable for various sums of money which had been received and misappropriated by his private clerk. The moneys in question were sums which became payable to members of the society. The directors had at different times, in the presence of J., and with his concurrence, handed over the cheques for these moneys to J.'s private clerk, who was not an officer of the society. Upon the question whether, under these circumstances, J. was liable:—Held, that the delivery of the cheques having taken place in the presence of J., with his knowledge, and to some extent by his direction, had the same effect in law as if the cheques had been handed to him and he had passed them over to his clerk, and that J. was consequently liable to make good the moneys misappropriated. *Mutual Aid Permanent Benefit Building Society, In re, James, Ex parte*, 49 L. T. 530.

Holding out Agent as Authorized to Borrow Money in Excess of Prescribed Limits—Personal Liability of Directors.—By the certified rules of an unincorporated building society the directors might borrow money not exceeding a prescribed amount. Loans were made to the society through its secretary, who was also acting treasurer; the usual course of business was that he delivered to the lenders a receipt and undertaking on behalf of the directors to give promissory notes signed by the directors, and subsequently exchanged such notes for the receipt and undertaking. After a total amount had been borrowed exceeding that limited by the rules, the plaintiffs paid a sum to the secretary as a loan to the society, and received from him the usual receipt and undertaking, but no promissory notes. This sum he appropriated to his own use. In an action against the society and directors the jury found that the society held out the secretary to the plaintiffs as having authority to receive the loan on their behalf on the terms on which it was received, and that the

directors did the same:—Held, by Lord Coleridge, C. J., that as the money had been borrowed in excess of the total amount limited by the rules, the society was not liable; but that, although there was no fraud on the part of the directors, they were personally liable. *Chaples or Chaplin or Chaples or Charles v. Brunswick Benefit Building Society*, 9 Q. B. D. 696; 50 L. J., C. P. 372; 44 L. T. 449; 29 W. R. 529—C. A.

Fraudulent Mortgage by Agent.—A husband, being about to leave England for a residence in India, executed an assignment by deed to his wife, who was to remain in England, of a leasehold dwelling-house, "to hold the same unto" the wife, "her executors, administrators and assigns, as her separate estate." No trustees were appointed; the husband and wife being the only parties to the deed. The title-deeds were allowed to remain in the possession of the wife. The wife having parted with possession of the deeds (all but the assignment) to an agent, in order to raise a sum of 200*l.* upon them for the wife, and having asked for a return of the deeds without success, the agent, by forging the name of the husband to a mortgage deed and other instruments, raised a sum of 1,200*l.*, which he appropriated to his own use:—Held, that there was no negligence on the part of the wife so as to bar her title to relief against the mortgagees. *For v. Hawks*, *Hawks v. For*, 13 Ch. D. 822; 49 L. J., Ch. 579; 42 L. T. 622; 28 W. R. 656.

Fraudulent Act of Agent of which Principal gets the Benefit.—A secretary and financial agent of a company, having authority to get bills discounted, forged bills and got them discounted. He paid the proceeds into a bank to the account of a firm to which he belonged, and in his character of a member of that firm drew cheques on the account in favour of the company; and it was alleged that out of the amounts so drawn, he actually made payments for the benefit of the company:—In the winding up of the company it was held, that an inquiry must be directed what amount of the proceeds of the bills had been applied, directly or indirectly, for the benefit of the company, and that a claim for the amount when ascertained would be good. *Japanese Curtains and Patent Fabric Company, In re, Shooldred, Ex parte*, 28 W. R. 339.

The plaintiffs and the defendant having each lodged their respective India bonds with the same bankers, who afterwards privily and without the defendant's authority, sold his bonds, and, upon his demand of them, delivered up to him the India bonds of the plaintiffs, to the same total amount, and payable to the same obligee (being always the treasurer of the company, who indorsed such bonds in blank before they were circulated), but having different numbers, and for different separate sums, and therefore manifestly distinguishable from his own bonds, though the defendant did not know that they were the property of another, but was told by the bankers that they had exchanged his original bonds for these:—Held, that the defendant, having sold the plaintiffs' bonds so received from his own agents, who had acted *malâ fide* in passing them to him, was liable to answer

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over to the plaintiffs for the amount. *Glyn v. Baker*, 13 East, 509.

Fraud on Principal—Rights against Third Party.—Where an agent has made an agreement with a contractor which amounts to a fraud on his principal, the principal may rescind the contract with the contractor and receive back money paid under it. *Panama and South Pacific Telegraph Company v. India Rubber, Gutta Percha, and Telegraph Works Company*, 10 L. R., Ch. 515; 45 L. J., Ch. 121; 32 L. T. 517; 23 W. R. 583.

Where a draft for money was intrusted to a broker to buy exchequer bills for his principal, and the broker received the money and misapplied it by purchasing American stock and bullion, and afterwards absconded, but was taken before he quitted England, and thereupon surrendered to the principal the securities for the American stock and the bullion, who sold the whole and received the proceeds:—Held, that the principal was entitled to withhold the proceeds from the assignees of the broker, who became bankrupt on the day on which he so received and misapplied the money. *Taylor v. Plumer*, 5 M. & S. 562; 2 Rose, 415.

Lien of Customer on Goods Fraudulently Pledged.—A horsedealer supplied a customer with a pair of horses, for which he paid 170*l.*, but finding the horses not according to warranty, she returned them. Thereupon the dealer sent another pair no better than the former, requesting the customer to keep them until he could furnish her with a better pair. This she did, until the dealer became bankrupt, without having repaid the 170*l.*, when it was found that the horses did not belong to him but to an employer, for whom he was agent to sell, but not to pledge, the horses:—Held, that the horses were in the bankrupt's order and disposition; and that the customer could not enforce a lien on them as against the trustee in bankruptcy. *Roy, Ex parte, Silenos, In re*, 7 Ch. D. 70; 47 L. J., Bk. 36; 37 L. T. 508; 26 W. R. 82.

Putting in Fraudulent Defence.—Where a solicitor has put in a fraudulent defence for his client without the knowledge of the client, the client is not bound by the act of the solicitor. *Williams v. Preston*, 20 Ch. D. 672; 51 L. J., Ch. 927; 47 L. T. 265; 30 W. R. 555.

iii. False Representations.

Principal not authorising Representations.—An owner of a house employed an agent to sell it. The agent described it as being free from rates and taxes, and did not know it to be otherwise; but it was in fact liable to certain rates and taxes, as the owner knew. On the faith of the agent's description, a party bought the house:—Held, that he might maintain an action for deceit against the owner of the house, though it did not appear that he had instructed his agent to make any representation as to rates or taxes. *Fuller v. Wilson*, 3 Q. B. 58; 2 G. & D. 460—Ex. Ch.

A principal is liable in an action of deceit for the false and fraudulent representations of his agent as to the quality and value of an article, whereby a person has been induced to purchase

D

it for more than its worth, notwithstanding that the principal neither authorized nor knew of the fraudulent conduct of his agent. *Udell v. Atherston*, 7 H. & N. 172; 30 L. J., Ex. 337; 7 Jur., N. S. 777; 4 L. T. 797.

A timber merchant's traveller, with full knowledge of certain defects in a log of mahogany, induced a party to purchase and pay for it, by representing it to be sound. The timber merchant was neither aware of the defect nor did he authorize his traveller to make such misrepresentation. In an action of deceit by the purchaser against the timber merchant:—Held, per Pollock, C. B., and Wilde, B., that the principal was responsible for the fraud of his agent. Per Martin, B., and Bramwell, B., that the principal was not responsible. *Ib.*

Employing Agent Ignorant of Defect.]—The defendant's son, acting for the defendant, and with the defendant's authority, represented that certain sheep, which he sold to the plaintiff, were all right. The defendant had fraudulently concealed from his son that the sheep had the rot, and fraudulently gave the son authority to sell them for the best price, intending that the son should represent that they were sound:—Held, that the defendant was liable in an action to recover damages for fraudulent misrepresentation. *Ludgate v. Love*, 44 L. T. 694; 45 J. P. 600—C. A.

Where a principal purposely employs an agent ignorant of the truth, in order that such agent may innocently make a false statement believing it to be true, and may so deceive the party with whom he is dealing, the representation by the agent becomes a misrepresentation by the principal so as to vitiate the contract. *Ib.*

Liability of Principal.]—A master is answerable for every such wrong of his servant or of his agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master is proved; and there is no distinction between the case of fraud and the case of any other wrong. *MacKay v. Commercial Bank of New Brunswick*, 5 L. R., P. C. 394; 43 L. J., P. C. 31; 30 L. T. 180; 22 W. R. 473.

When one has suffered, and another has profited by, the fraudulent representation of an agent of the latter, made within the scope of his authority, the former is entitled to recover damages. *Ib.*

An action of deceit may be maintained against a company, whether it is incorporated or not incorporated, in respect of the fraud of its agent. *Ib.*

An officer of a banking corporation, whose duty it was to obtain the acceptance of bills of exchange in which the bank was interested, fraudulently, but without the knowledge of the president or directors of the bank, made a representation to A., which, by omitting a material fact, misled him, and induced him to accept a bill in which the bank was interested; and he was compelled to pay the bill:—Held, that he could recover from the bank the amount so paid. *Ib.*

In an action of deceit, whether against a person or against a company, the fraud of the agent may be treated for the purposes of pleading as that of the principal. *Ib.*

— Of Director for Acts of Co-Directors.]

—A company formed to work a mine was compelled from want of funds to cease working: money was then advanced to them by some of the directors, and amongst them Barnett and Baldwin. Afterwards, at a general meeting of the company, held in order to provide for the existing deficit and for working expenses, the directors were authorized to issue debentures on such terms and for such amounts as they in their discretion might think fit. The directors accordingly authorized the secretary to employ a firm of brokers to place the debentures. The brokers prepared and issued a prospectus, bearing the names of Bell and others as directors, and containing statements as to the condition and prospects of the company, on the faith of which the plaintiff and others purchased debentures. The money thus raised was paid to the company's bankers, and part of it was applied by the directors on behalf of the company to repay the advances made by Barnett and Baldwin. The debentures having become worthless, the plaintiff brought an action for damages against Bell and others in respect of the statements in the prospectus, some of which were alleged to be fraudulent. The jury found that the prospectus contained statements of facts which were false to the knowledge of the brokers, and by which the plaintiff was induced to part with his money; that none of the false statements were made by Bell personally or by his authority; that the brokers had authority to issue a prospectus, but no authority to include in it statements which were fraudulent; and that Bell derived no benefit from the money raised by the debentures:—Held, that Bell was not liable. By Cockburn, C. J., and Brett, L. J., on the ground that though a party as director to the receipt of money, Bell was not aware of the falsehood of the statements contained in the prospectus, and derived no personal benefit from the receipt of the money. By Bramwell, L. J. that Bell had been guilty of no moral fraud and not being the principal of the brokers could not be held to have impliedly undertaken for the absence of fraud in them in issuing the prospectus. *Weir v. Bell*, 3 Ex. D. 238; 47 L. J. Ex. 704; 38 L. T. 929; 26 W. R. 746—C. A.

But by Cotton, L. J., that Bell was liable in an action to the plaintiff, for it was his duty as director to ascertain whether the statements in the prospectus were true or false. *Ib.*

A director of a company is not liable for fraud (such as the issue of a fraudulent prospectus) committed by his co-directors, or by any other agent of the company, unless he has either expressly authorized or tacitly permitted its commission. *Cargill v. Bower*, 10 Ch. D. 502; 4 L. J., Ch. 649; 38 L. T. 779; 26 W. R. 716.

Signature of Agent not Sufficient to satisfy Lord Tenterden's Act as to Representation.]

—F 9 Geo. 4, c. 14, s. 6, a false representation as to the credit of another person, in order to maintain an action, must be signed by the person making it, and not by an agent. The plaintiff sued J. and G. jointly for a false representation with respect to the solvency of S. William Russell. J. was sued as the public officer of a banking company formed under Geo. 4, c. 46, and G. was the manager at one of their branches. The plaintiff was a customer of the S. bank, and requested the manager

that bank to inquire for him as to Sir William Russell's credit. The manager wrote a letter addressed to the manager of the banking company, requesting information whether Sir William Russell was responsible to the extent of 50,000*l.* G. replied in his own name, signing his letter as manager, and giving a favourable account of Sir William Russell's responsibility. The plaintiff, in consequence of this letter, supplied Sir William Russell with goods, for which he never was paid, in consequence of his insolvency. The statement made by G. was false to his knowledge. The banking company had no knowledge, otherwise than through G., that such letter had been written, and gave him no express authority to write the letter; but the writing of such a letter was an act done within the scope of the general authority conferred on G. as manager:—Held, that the signature of G. to the letter could not be considered the signature of the banking company itself. *Swift v. Jewesbury*, 9 L. R., Q. B. 301; 43 L. J., Q. B. 56; 30 L. T. 31; 22 W. R. 319—Ex. Ch.

Held, also, that the letter was the representation of G., and not the representation of the banking company. *Ib.*

Held, also, that G. was liable personally for the false representation. *Ib.*

The signature of an authorized agent is not a sufficient signature within 9 Geo. 4, c. 14 (Lord Tenterden's Act), s. 6, whereon to charge a party making a false representation. *Williams v. Mason*, 28 L. T. 232; 21 W. R. 386.

C. M. and A. M. were trading as M. & Son. A. M., the son, wrote to the plaintiff a letter signed "M. & Son," in which he represented G. to be solvent. This letter was shewn to, and tacitly ratified by C. M., the father. G. proving insolvent:—Held, that, notwithstanding the ratification of the letter by C. M., the letter was not signed by the "party to be charged," within the meaning of the above statute, so as to make him liable for any false representation therein. *Ib.*

Liability to Penalties for.—The Queensland Constitution Act, 1867, by s. 6, enacts that any person who shall, directly or indirectly, hold or enjoy any contract for or on account of the public service, shall be incapable of sitting or voting as a member of the legislative assembly; and a. 7 imposes a penalty on any person so disqualified so sitting or voting. The respondent, being part-owner of a ship which had been chartered by the government, sat and voted as a member of the legislative assembly. The respondent had instructed his agents, who were also part-owners, not to charter the ship to the government, and that if they did, the contract should be made with such part-owners only who should be held to have chartered the respondent's share at a rate fixed independently of such contract. The government had no knowledge that the respondent was a part-owner:—Held, that under these circumstances the respondent was not liable to the penalties imposed by the act. *Freeman v. Cooke* (2 Ex. 654) approved. *Miles v. McIlvorraith*, 8 App. Cas. 120; 52 L. J., P. C. 17; 48 L. T. 639; 31 W. R. 591—P. C.

iv. Negligence.

Adjoining Owners, Liability of—Dangerous or Hazardous Work.—The defendant was the owner of a house standing at the corner of two

streets, between a house belonging to the plaintiff and a house occupied by B. The defendant being desirous of rebuilding his house employed a competent architect and competent builders to rebuild it. The defendant's new house was a storey higher than the old house, and the basement was lower. After the house had been nearly finished, the workmen employed by the builders began to fix a staircase; in so doing they negligently and without the knowledge of the defendant or his architect, cut into a party-wall dividing the defendant's new house and B.'s house. In consequence the defendant's house fell; and the girders having become displaced, injury was done to the plaintiff's house, for which he now sued the defendant. The fixing of the staircase was not in itself a hazardous operation, if it had been carried out with ordinary skill:—Held (Holker, L. J., dissenting), that an action was maintainable against the defendant for the injury done to the plaintiff's house. *Bower v. Peate* (1 Q. B. D. 321) considered. *Percival v. Hughes*, 9 Q. B. D. 441; 51 L. J., Q. B. 388; 46 L. T. 677—C. A.

Damage having been done by the wrongful acts of a contractor or his workmen, employed under a contract and specification, to a neighbour's vault, it was held under the circumstances that both the employer and contractor were liable for it, and judgment was given for the plaintiff, with costs against the defendants. *Lemaitre v. Davis*, 19 Ch. D. 281; 51 L. J., Ch. 173; 46 L. T. 407; 30 W. R. 360; 46 J. P. 324.

During the removal of refuse grains from a brewery, in pursuance of a contract, and under the superintendence of the foreman of the brewers, so far as the removal inside the brewery was concerned, some of the grains were spilt upon the footpath in front of the brewery. The plaintiff, while passing the brewery, stepped upon the grains and fell and sustained injuries. In an action for damages against the brewers:—Held, that it was no answer on their part to say that the accident arose through the negligence of the contractor's men. *Duke v. Courage*, 46 J. P. 453.

A steward, manager, or agent is not liable for damage done by the negligence of those employed by him in the service of his principal; for, the principal, or those actually employed, only are liable. *Stone v. Cartwright*, 6 T. R. 411. *And see further, NEGLIGENCE.*

v. Trespass.

General Rule.—A principal is not liable in trespass for the act of his agent unless he authorized it beforehand, or subsequently assented to it with knowledge of what had been done. *Freeman v. Rosher*, 13 Q. B. 780; 18 L. J., Q. B. 340.

Wrongful Distress.—The defendants received, on behalf of the owners, the rent of a house, of which the plaintiff was tenant. Rent being in arrear, the defendants signed, as agents for the owners, a warrant of distress, and delivered it to a broker to be executed. Before it was actually executed, the plaintiff tendered to the defendants the amount due, which they refused to receive, on the ground that a distress warrant had issued. The plaintiff subsequently tendered the amount to the broker, who refused to receive it unless certain alleged costs of distress were also paid. The broker having subsequently dis-

trained:—Held, that the distress was unlawful, and that the defendants were not mere agents conveying an authority from the landlords, but persons committing a wrongful act; and therefore liable for the damages sustained by the plaintiff. *Bennett v. Bayes*, 5 H. & N. 391; 29 L. J., Ex. 224; 8 W. R. 320.

The right of A. to do an act, e.g. to distrain on the property of B., depends on the authority he really has, not on what he says he has. *Snell v. Finch*, 13 C. B., N. S. 651; 32 L. J., C. P. 117; 9 Jur., N. S. 333. See also *ante*, AGENCY GENERALLY.

vi. Malicious Prosecution.

Authority of Bank Manager to Prosecute on Behalf of Bank.—In an action for a malicious prosecution against an incorporated banking company the jury found that the same had been authorized on behalf of the bank by W., the acting manager, and were directed by the judge that it was to be inferred from W.'s position as manager that he had sufficient power under the circumstances for directing a prosecution. A rule nisi to enter a nonsuit or for new trial was discharged:—Held, on appeal, that assuming the prosecution to have been authorized by W., the direction to the jury to the effect that it was to be inferred from W.'s position that he had authority to direct the prosecution, was on the evidence incorrect. *Bank of New South Wales v. Ouston*, 4 App. Cas. 270; 48 L. J., P. C. 25; 40 L. T. 500.

The arrest, and still less the prosecution of offenders, is not within the ordinary routine of banking business, and therefore not within the ordinary scope of a bank manager's authority. Evidence accordingly is required to shew that such arrest or prosecution is within the scope of the duties and class of acts such manager is authorized to perform. That authority may be general, or it may be special and derived from the exigency of the particular occasion on which it is exercised. In the former case it is enough to shew commonly that the agent was acting in what he did on behalf of the principal; but in the latter case evidence must be given of a state of facts which shews that such exigency is present, or from which it might reasonably be supposed to be present. Rule made absolute for a new trial. *Id.*

A railway company, though a corporation, is liable to an action for false imprisonment if the act is committed by the authority of the company; the authority need not be under seal, but it lies on the plaintiff to give evidence justifying the jury in finding that the company's servants who imprisoned him or some of them had authority from the company to do so. *Goff v. Great Northern Railway Company*, 3 El. & El. 672; 30 L. J., Q. B. 148; 7 Jur., N. S. 286; 3 L. T. 850.

Action against Corporation.—An action for a malicious prosecution will lie against a company. *Sterrens v. Midland Railway Company* (10 Ex. 352) not followed. The employment of policemen by a railway company to protect their property is an act within the scope of the incorporation of the company. *Edwards v. Midland Railway Company*, 6 Q. B. D. 287; 50 L. J., Q. B. 281; 43 L. T. 694; 29 W. R. 609; 45 J. P. 374.

3. EFFECT OF FACTORS ACTS.

a. Generally.

Intention of Acts.—The intention of the Factors Act (5 & 6 Vict. c. 39) is that, where a third person has intrusted goods or the documents of title to goods to an agent, who in the course of such agency sells or pledges them, he shall be deemed by that act to have misled any one who bonâ fide deals with the agent, and makes a purchase from or an advance to him without notice that he was not authorized to sell the goods or to procure the advance. *Cole v. North-Western Bank*, 10 L. R., C. P. 354; 44 L. J., C. P. 233; 32 L. T. 733—Ex. Ch.

The statute was meant to apply to those cases where one person has given an apparent authority to another, and a third person has dealt with that other in the belief that the authority really existed. *Id.*

Pledge after Revocation.—An agent "intrusted with and in possession of goods, or of the documents of title to goods," within the Factors Acts (6 Geo. 4, c. 94 & 5 & 6 Vict. c. 39), is a person who is intrusted as agent for sale; and consequently one whose authority to sell has been revoked cannot make a valid pledge of goods which had been intrusted to him for sale, but which he has wrongfully retained after his authority has been revoked, and the goods demanded from him by his principal. *Fuentes v. Montis*, 4 L. R., C. P. 93; 38 L. J., C. P. 95; 19 L. T. 364; 17 W. R. 208—Ex. Ch.

Further Pledge.—A factor by pledging goods in his possession or under his control, as agent, for an amount which does not exhaust their value, has not thereby parted with his control over the goods, so as to preclude himself from making a further pledge for the balance of their value, which shall be valid as against the principal. *Portalis v. Tetley*, 5 L. R., Eq. 140; 37 L. J., Ch. 139; 17 L. T. 344; 16 W. R. 503.

Cotton was consigned for sale by A. to B. B. deposited the bill of lading with C., a broker, and authorized him to receive and sell the cotton, and subsequently made a further pledge to D. of the balance of the net proceeds of the cotton by order in writing communicated and assented to by C.:—Held, that the pledge to D. was valid as against A. *Id.*

Bonâ fide Advance.—A merchant who has enabled his factor to raise money fraudulently can claim no redress against the party who has bonâ fide made the advance. *Vickers v. Hertz*, 2 L. R., H. L. (Sc.) 113.

The goods or symbols of property intrusted to the factor may be regarded by unsuspecting third parties as his own, and dealt with accordingly under the Factors Act (5 & 6 Vict. c. 39). *Id.*

A factor, after depositing dock warrants with the defendant, as a security for the advance of money, withdrew them from his hands and substituted other dock warrants for silk belonging to the plaintiffs, the defendant having no notice that the factor was not the true owner:—Held, that this transaction was not protected by 6 Geo. 4, c. 94, there being no advance of money on the faith of such warrants. *Bonzi v. Stewart*, 4 M. & G. 295; 5 Scott, N. R. 1.

Advance on Promise to lodge Warrants.]—A wool broker gave to a bank, to secure an advance, a letter of hypothecation on certain wools, promising to lodge warehouse warrants for them next day. The bank made repeated application for the warrants, but did not obtain them. After a few days, the broker having left his house, the bankers by pressure obtained the keys of his warehouse, where the wool was stored, and took possession. Part of the wool had belonged to a customer of the broker, but he was under advances and made no claim:—Held, that the bank acquired a valid charge on the wool under the provisions of the Factors Act (6 & 7 Vict. c. 39). *North-Western Bank, Ex parte, Slee, In re*, 15 L. R., Eq. 69; 42 L. J., Bk. 6; 27 L. T. 461; 21 W. R. 69.

In leaving his house the broker was, as it turned out, absconding:—Held, that the bank had no notice of this. *Id.*

— Nature of Advance—Antecedent Debt.]—A., a manufacturer, having consigned goods to C., who had acted as his agent, C. being liable, together with B., on a bill of exchange which had become due, obtained from B. 300*l.*, for the purpose of taking up the bill, and at the same time deposited with B., A.'s goods. A. having brought an action to recover back the goods, the judge told the jury that, if they thought the transaction was only a circuitous mode of paying the bill, on which B. was liable, it was not within 5 & 6 Vict. c. 39, s. 1:—Held, that the direction was right, and that the transaction was not protected by the statute. *Learoyd v. Robinson*, 12 M. & W. 745; 13 L. J., Ex. 213.

The 5 & 6 Vict. c. 39, does not apply to pledges for antecedent liabilities (whether they may or may not have ripened into debts), where no actual advance is made at the time of the pledge. *Macnee v. Gorst*, 4 L. R., Eq. 361; 15 W. R. 1197.

H. requested W. to purchase cotton for him, to be delivered and paid for on a future day. W. made such purchase in his own name through C., a broker. When the cotton was ready for delivery, the price had fallen and C. refused to pay for it, unless provided with security sufficient to cover the difference between the contract price and the value at the price of the day. H. accordingly indorsed and deposited with W., who indorsed and deposited with C., a bill of lading of goods consigned to H., and C. thereupon completed the purchase of the cotton. Such goods were in fact consigned to H. as the plaintiff's factor:—Held, that the deposit of the bill of lading was valid as against the plaintiff, and that it was not made in respect of an antecedent debt due from H. to W. *Jewan v. Whitworth*, 2 L. R., Eq. 692; 36 L. J., Ch. 127.

L. and P. bought goods for M., not disclosing the fact that they bought as agents, and were, therefore, as between them and the vendors, personally liable to pay. On the day before the day of payment, M. asked L. and P. to make him an advance on the security of one of K.'s cargoes, to enable him to pay for those goods. L. and P. did so, and the goods were thus paid for through L. and P. They knew that the cargo pledged did not belong to M., but nothing further; and they did not know whether the goods bought by M. were bought on his own account or not:—Held, that as M. was not at the time of the advance indebted to L. and P. in respect of the

goods bought, though they were sureties for the payment, the pledge was not a pledge to secure an antecedent debt within the meaning of 5 & 6 Vict. c. 39, s. 3, and was valid, there being nothing in the circumstances to give them notice that M. was violating his duty to his principal. *Kaltenbach v. Lewis*, 24 Ch. D. 54; 51 L. J. 881; 48 L. T. 844; 31 W. R. 731—C. A. Varying 45 L. T. 666; 30 W. R. 356.

B., having sold 500 sacks of flour to H., consigned them to him by sea, with 500 more to sell on commission. The captain of the vessel executed and handed to B. two duplicate bills of lading, expressed to be "to order or assigns;" and one of them having been forwarded by B. to H. unindorsed, the latter, on the 9th of February, 1878, deposited it with a discount company (who carried on business in the same town as himself) to secure an advance of 600*l.* then made to him. On the 11th of February H., who, in the meantime, and without informing B. of the transaction of the 9th, had obtained from him the duplicate bill of lading duly indorsed, deposited it also with the company, at whose instance he, on the 13th, further executed to them a letter of lien, ante-dated the 9th, upon the whole cargo, in respect both of the 600*l.* advance and of about 800*l.* the amount of certain bills of exchange previously discounted for him by the company, and just reaching maturity. The vessel arrived shortly afterwards, and the company discovered that H. was owner of only half the flour, whereupon B. having brought an action to have his own half relieved from the company's lien:—Held (by Ball, C., and Deasy, L. J., dissentiente Fitzgibbon, L. J.), that the plaintiff was entitled to the relief sought. *Blake v. Belfast Discount Company*, 5 L. R., Ir. 410—C. A.

Money need not Pass.]—It is not necessary, in order that a purchase may be protected under 6 Geo. 4, c. 94, s. 4, that money should actually pass; the section applies equally where the goods are transferred in consideration of an antecedent debt. *Thackrah v. Fergusson*, 25 W. R. 307.

Notice of Agent's Mala fides.]—Under 5 & 6 Vict. c. 39, a contract with an agent for the pledge of goods will be valid as against the principal, though the person dealing with the agent knows him to be only an agent in respect of the goods pledged, provided that the person so dealing acts bona fide and without notice that the agent is acting mala fide and beyond his authority. *Navulshaw v. Brownrigg*, 2 De G., M. & G. 441; 21 L. J., Ch. 908; 16 Jur. 979.

To deprive the pledgee of the protection of the statute, he must be fixed with knowledge that the agent is so acting as above stated, and no mere suspicion will amount to notice; nor will the knowledge that the agent has power to sell the goods constitute notice that he has not power to pledge them. *Id.*

Where an agent intrusted with a document of title to goods pledges it mala fide, or without authority, it is necessary, in order to deprive the transaction of the protection given by 5 & 6 Vict. c. 39, s. 1, and to bring it within the proviso of s. 3, that the jury should find categorically that the lender had notice of the agent's mala fides or want of authority. *Gobind Chunder Sein v. Ryan*, 9 Moore, Ind. App. 140; 8 Jur., N. S. 343;

5 L. T. 559; 10 W. R. 155; *S. P., Douglas v. Ewing*, 6 Ir. C. L. R. 395.

To prove such notice it is sufficient to shew that the circumstances attending the transaction were such as that a reasonable man, and a man of business, applying his understanding to them, would certainly infer that the agent had not authority to make the pledge, or that he was acting *malâ fide* in respect thereof against his principals. *Ib.*

Bankers having, at the request of I. L., made advances to S. L., and having a lien on certain goods in their possession in respect thereof, it was agreed between the bankers and I. L. that, in consideration of the delivery of those goods to I. L., the latter should deliver to the bankers certain other goods intrusted to I. L. by the plaintiff, his principal, to be held as a lien by the bankers in place of the other goods, and also in respect of any future advances to be made to S. L., and which I. L. requested the bankers to make, and which agreement was carried out, and further advances made to S. L., in pursuance of such request:—Held, that the bankers having no notice of the plaintiff's title, the transaction was protected by 5 & 6 Vict. c. 39. *Sheppard v. Union Bank of London*, 7 H. & N. 661; 31 L. J., Ex. 154; 8 Jur., N. S. 264.

—**Pleadings.**—To a plea setting up these facts to detain by the owner of the goods against the bankers, he replied, first, that he was induced to intrust I. L. with the possession of the goods by the fraud of I. L.; secondly, that the agreement by I. L. to deliver the goods by way of pledge was not made, nor were the goods delivered to the bankers in the ordinary course of business; and, thirdly, that the goods first deposited with the bankers were not I. L.'s goods, nor had the bankers any lien thereon from I. L.:—Held, that the facts disclosed by the plea constituted an answer to the action under 5 & 6 Vict. c. 39, and that neither replication avoided the plea. *Ib.*

b. Documents within the Acts.

Bill of Lading.—Under 6 Geo. 4, c. 94, s. 2, an intrusting with the bill of lading for the purpose of the sale of goods, was not an intrusting with a dock warrant, which represented those goods, notwithstanding that the possession of the bill of lading enabled the holder of it to obtain possession of the dock warrant. *Hatfield v. Phillips*, 12 C. & F. 343; 14 M. & W. 665.

Delivery Orders.—Nor were delivery orders within 6 Geo. 4, c. 94, s. 2. *Jenkins v. Osborne*, 7 M. & G. 678; 8 Scott, N. R. 505; 13 L. J., C. P. 196; 8 Jur. 1139.

East India Warrants.—Nor East India warrants. *Evans v. Trueman*, M. & M. 453; *Taylor v. Kymer*, 3 B. & Ad. 320.

Stock Certificates.—The Neapolitan government raised money upon certain certificates de rentes, or bonds. With each certificat or bond was delivered a document called a "bordereau," annexed to which was a series of coupons, or receipts, for successive half-yearly payments of the rentes, or dividends. When the coupons attached to the bordereau were all made use of, the holder of the certificat and remaining bor-

dereaux was entitled to receive from the Neapolitan government a new bordereau, with a new set of coupons; both these instruments referred to the certificat, and they were never sold in the London market without being accompanied by the certificat. The plaintiff being possessed of certain of these certificates and bordereaux, deposited the latter with his broker, for the purpose of his procuring from the Neapolitan government new bordereaux, retaining the certificat in his own hands. The broker, having procured new bordereaux with coupons, fraudulently pledged them with the defendant. In detinue by the original owner, it was left to the jury to say—first, whether the bordereaux and coupon (unaccompanied by the certificates) were negotiable securities, passing by delivery, in the same manner as bank notes, exchequer bills, and the like instruments; secondly, whether the defendant had exercised due caution in receiving them from the broker, without inquiring for the certificates to which they referred:—Held, that the direction was right; and the jury having found a verdict for the plaintiff, the court refused to disturb it. *Lang v. Smith*, 5 M. & P. 78; 7 Bing. 28.

Certificates of railway stock are not good within the meaning of 5 & 6 Vict. c. 39. *Fremman v. Appleyard*, 1 N. R. 30; 32 L. J., E. 175; 7 L. T. 282.

Receipts.—Where in order to save trouble delivery orders were not signed, but an arrangement was made that delivery should be made to persons producing cash receipts from the cashier of the holders of the bill of lading, such receipts cannot be considered as a document of title within s. 5 of the Factors Act, 1877 (40 & 41 Vict. c. 39). *Kemp v. Falk*, 7 App. Cas. 586; 52 L. J., Ch. 167; 47 L. T. 457; 31 W. R. 128; 5 Asp. M. C. 1—H. L. (E).

Warrants.—Where a factor, the consignee of goods for sale, and indorsee of the bills of lading had landed and warehoused the goods, and taken the wharfinger's certificates and dock warrants in his own name, and then pledged the certificates and dock warrants for an advance of money on his own account:—Held, that such pledge was not protected by 6 Geo. 4, c. 94, s. 2, in an action of trover, by the real owner of the goods. *Close v. Holmes*, 2 M. & Rob. 22.

A. purchased and paid for East India bills the warrants for which he sent to B. his broker with bills to nearly their value drawn upon C. which he accepted. B. did not pay his acceptances when due, but received from A. the acceptances of A. to nearly the same amount, for the purpose of taking up his own acceptances, by which he applied to his own use, and afterwards pledged the warrants with C. In trover for the warrants by A. against C.:—Held, that by 6 Geo. 4, c. 94, s. 8, B. not having paid his own acceptances, had no lien upon the warrants which he could transfer to C.; and that therefore C. had no right to detain them as against A. *Fletcher v. Heath*, 1 M. & Rob. 335; 7 B. & C. 517.

Security of Furniture.—The 5 & 6 Vict. c. 39 applies to mercantile transactions, and not to the cases of advances made upon the security of furniture used in a furnished house—not in the way of trade—to the apparent owner of such furniture, such apparent owner afterwards appearing to be the agent intrusted with the

custody of the furniture by the true owner. *Wood v. Rowcliffe*, 6 Hare, 191.

c. Agents intrusted with Possession.

Warehouse Keepers.—A warehouse keeper who has goods deposited with him as such is not "an agent intrusted with the possession" of them, within the Factors Act (5 & 6 Vict. c. 39), although he is also a broker, and is usually employed to sell the goods, but always upon specific instructions for that purpose received from the principal. *Cole v. North-Western Bank*, 10 L. R., C. P. 354; 44 L. J., C. P. 233; 32 L. T. 733—Ex. Ch. Affirming 9 L. R., C. P. 470; 43 L. J., C. P. 194; 30 L. T. 684; 22 W. R. 861.

One Slee carried on the business of a sheep's wool broker in Liverpool, and also that of a warehouse keeper. In his capacity of warehouse keeper he was in the habit of receiving from the plaintiffs, merchants in London, bills of lading for sheep's wool and goats' wool to arrive in Liverpool, which when landed was deposited in his warehouses, under directions to send the plaintiffs a report and valuation, but he was not authorized to sell without specific instructions. The sheep's wool so deposited with him was usually sold by Slee and the proceeds received by him for the plaintiffs. The goats' wool Slee never sold, he not being a goats' wool broker. Having wools of the plaintiffs of both descriptions in his warehouse, but not having received any instructions as to the sale of either, Slee professed to pledge the whole with the defendants, bankers in Liverpool, by a letter in which he undertook to hold them as trustee for the defendants, to secure the sum advanced:—Held, that Slee was not, as to any of the wools so agreed to be pledged, "an agent intrusted with the possession" within the Factors Act (5 & 6 Vict. c. 39). *Ib.*

Wharfingers.—A wharfinger, who was also a flour factor, having flour sent to him to keep till further orders, was not an agent intrusted with the flour within 6 Geo. 4, c. 94, s. 4, so as to give validity to a sale by him of the flour. *Munk v. Whittenbury*, 2 B. & Ad. 484; 1 M. & Rob. 81.

Merchant's Clerk.—A clerk to a wine merchant, who is authorized by his employer to sign delivery orders per procuration, and who by doing so obtains the possession of dock warrants relating to goods belonging to his master, and afterwards obtains an advance of money upon the security of such dock warrants, is not an agent intrusted with the possession of documents within the meaning of the statute, so as to give validity to the contract, and his employer may recover possession of such warrants from the person with whom they are pledged, though the advance was made *bonâ fide*. *Lamb v. Attenborough*, 1 B. & S. 831; 31 L. J., Q. B. 41; 8 Jur., N. S. 280.

Insurance Agents.—Merchants in London upon the instruction of shipping agents at Havannah with respect to a cargo of tobacco to be consigned to the London merchants and after receiving the shipping documents, effected policies of marine insurance in the ordinary form on behalf and for the benefit of all parties whom it might concern. The Havannah agents shipped

and consigned the tobacco in their own names, but were in fact acting as commission agents for Havannah merchants to whom the tobacco belonged; and the London merchants before effecting the policies had notice that the Havannah agents had an unnamed principal. A total loss having occurred the London merchants received the policy-moneys, but before receipt had notice that the moneys were claimed by the Havannah principals:—Held, also, by Lord Blackburn, that the case fell within the Factors Act (6 Geo. 4, c. 94), s. 1. *Sed quære*, by Lord Fitzgerald. *Mildred v. Maspons*, 8 App. Cas. 874; 53 L. J., Q. B. 33; 32 W. R. 125—H. L. (E.). Affirming 9 Q. B. D. 530; 51 L. J., Q. B. 604; 47 L. T. 318; 30 W. R. 862—C. A., sub nom. *Hermano v. Mildred*.

Pictures were deposited by the owner with J. (whose ordinary business was that of an agent for procuring business for two insurance offices in Liverpool), with instructions then or subsequently given to sell them for him for a certain commission:—Held, that J. was an agent intrusted with the possession of goods, and consequently that the owner was bound by a contract of pledge *bonâ fide* made with him. *Heyman or Hayman v. Flewker*, 13 C. B., N. S. 519; 32 L. J., C. P. 132; 9 Jur., N. S. 895.

Forwarding Agent.—The plaintiffs, being silk manufacturers in Germany, appointed, in addition to other agents in London, Fahrnbach to act as their agent in London. The course of business was as follows:—It was Fahrnbach's duty to call upon certain named customers of the plaintiffs and get orders for silks. These orders he then transmitted to the plaintiffs, giving a list of the buyers, and of the quantities ordered by each buyer. The goods ordered were then sent over together from Germany to Fahrnbach, whose duty it then was to forward to each buyer the amount purchased by him. It did not appear that Fahrnbach, in the usual course of business, was allowed to represent himself to buyers as principal in the transactions. Fahrnbach, in the course of the business, from time to time collected the money due from the customers, and accepted bills drawn upon him by the plaintiffs for the amount of the invoices of goods sent to him from Germany. Fahrnbach pledged some of the goods so sent over to him with the defendant for advances. The pledging was in fraud of his instructions, but the defendant, in making the advances, acted *bonâ fide*, and without knowledge of the fraud. In an action to recover the goods so pledged, or their value:—Held, that Fahrnbach was not an agent intrusted with the possession of the goods within the meaning of the Factors Acts (4 Geo. 4, c. 83; 6 Geo. 4, c. 94; and 5 & 6 Vict. c. 39). That he was, in the first portion of his duty, merely an agent to make contracts, and in the second portion merely a forwarding agent. *Hellings v. Russell*, 33 L. T. 380.

Goods to be returned to Sender—Pledge not Protected.—Where there is a power by law to sell, a purchaser may obtain, from the vendor, even as against the true owner, a good title, but that cannot extend, by implication, to a pledge. Barrow was a leather merchant in London. Bonnell was a tanner in Canada. Barrow agreed to pay Bonnell 14d. per pound for every hide tanned by Bonnell in the mode of the country, and Bonnell was to procure freight, and send

back the hides. Barrow sent out a large number of the hides; they were tanned, and freight was procured for them, but in the meantime Bonnell had obtained from the Toronto Bank advances, on his own account, on bills, and hypothecated the hides to the bankers as security for such advances, engaging to hand over to them the bills of lading if his bills of exchange were not duly honoured. They were not duly honoured, and the bankers (who had acted in entire ignorance of the transactions between Barrow and Bonnell) claimed to retain the bills of lading and the hides until their demands were satisfied:—Held, that, under the circumstances of the case, Bonnell could not, under any law, English or Canadian, claim to be a factor or agent of Barrow entitled to pledge Barrow's goods, and that consequently the bankers could not set up any title to the goods, as derived from him, against the real owners. *City Bank v. Barrow*, 5 App. Cas. 664; 43 L. T. 393—H. L. (E.).

Not intrusted by Owner with Document.]—H., a merchant dealing in tobacco and a broker in that trade, had fifty hogsheads of that article lying in bond in his name in the docks. The warrants for them had been issued to him. The plaintiff bought the tobacco from H. and paid for it, but he left the dock warrants in the possession of H., and took no steps to have any change made in the books of the dock company as to the ownership of the tobacco. H. being the ostensible owner of the tobacco, fraudulently obtained advances on the pledge of a portion of the tobacco from the defendants respectively, and handed to them the dock warrants. Both the defendants acted in good faith, and took fresh warrants from the dock company:—Held, that H. was not intrusted by the plaintiff as his factor or agent with the documents of title, within 6 Geo. 4, c. 94, s. 2; and that the conduct of the plaintiff, in leaving the indicia of title in H.'s hands and thus enabling him to obtain advances on the security of the goods, was not such as to disentitle the plaintiff to recover their value from the defendants. *Johnson v. Credit Lyonnais Company*, and *Johnson v. Blumenthal*, 3 C. P. D. 32; 47 L. J., C. P. 241; 37 L. T. 657; 26 W. R. 195—C. A. Affirming 2 C. P. D. 224; 36 L. T. 253.

A foreign owner of goods consigned them to a factor in London, to whom he indorsed the bill of lading in blank, and transmitted it, with instructions to receive and sell the goods. The factor received the goods, paid the freight and charges thereon, and entered them in his own name at the Custom-house; by reason of which, and without the privity or express assent of the owner, he obtained a dock warrant, which he pledged for advances beyond the amount, for which, as a factor, he had a lien on the goods:—Held, that, under these circumstances, he was not intrusted with the dock warrant within 6 Geo. 4, c. 94, s. 2. *Hatfield v. Phillips*, 12 C. & F. 343; 14 M. & W. 665.

In order to make the factor a party intrusted with the dock warrant, within the meaning of this act, it must appear that the owner of the goods intended that the factor should be possessed of it at the time of the pledge, or that he should exercise the power which the possession of the bill of lading gave him, of obtaining the dock warrants, whenever he in his discretion might think fit. *Phillips v. Huth*, 6 M. & W. 572.

The plaintiffs, cloth manufacturers, were ap-

plied to by E., who was a factor and a commission agent, for a sample of their cloths, on the representation that he could get them a purchase. The sample having been sent, E. afterwards to the plaintiffs that he had got them an order for a certain number of ends at a stated price. The plaintiffs required to know the firm, and S. being mentioned as the firm, they sent the goods to the warehouse of E., who was to pass them on to S. after seeing the process of perching performed upon them, for which he was to receive a commission from the plaintiffs of 1s. per end. E. had no authority from S. and he sold the goods to the defendants, who were cloth merchants, and bought them bona fide:—Held, per Wightman and Crompton, J.J., that E. was an agent intrusted with the cloths within 6 Geo. 4, c. 94, s. 4, and 6 Vict. c. 39, s. 4, and consequently the purchase of them from E. by the defendants was protected. Per Blackburn, J., that E. being in possession of the goods, he was, according to 5 & 6 Vict. c. 39, s. 4, to be taken to be intrusted with them by the owner, unless the contrary was shewn, and that was a question for the jury. *Baines v. Swinson*, 4 B. & S. 270; 32 L. Q. B. 281; 8 L. T. 536; 11 W. R. 945.

M., a merchant and factor of London, employed by V., a merchant in Holland, to negotiate sale as a commission agent, obtained and transmitted to V. an offer from L. and F. to purchase a quantity of oil. V. accepted the offer, and subsequently shipped a quantity of oil in pursuance of the contract, and sent the bill of lading, special indorsed to L. and F., to M., in order that it might be exchanged for L. and F.'s acceptance of V. draft. Before this, M., without any authority from V., agreed to cancel the contract with L. and F. and when the bill of lading arrived, M. procured L. and F. to indorse it in blank and deliver it to him, by falsely representing that the special indorsement had been made by mistake. M. then caused the oil to be warehoused in his own name and immediately pledged it to the plaintiff security for an advance of 350l.:—Held, that the pledge was not protected by the Factors Acts. 6 Geo. 4, c. 94 & 5 & 6 Vict. c. 39). *Vaughan Moffat*, 38 L. J., Ch. 144.

d. At Common Law before the Statutes

Factor—Right to Pledge.]—The mere circumstance of a principal's drawing bills on his factor, to whom goods were consigned, to be provided for out of the proceeds of such goods, did not authorize the factor to pledge them for the purpose of raising money to meet the bill. *Gill v. Kymer*, 5 Moore, 503; *S. P.*, *Field v. Kymer*, 2 B. & B. 639.

Neither could a factor pledge the goods of his principal by indorsement and delivery of the bill of lading, any more than by the delivery of the goods themselves, though the indorsee knew that he was a factor. *Newson v. Thornton*, 6 Ea. 17; 2 Smith, 207; *S. P.*, *Guichard v. Morgan*, 4 Moore, 36.

A factor could not pledge, unless the owner of the goods armed him with such indicia of proper as to enable him to deal with them as his own. *Boyson v. Coles*, 6 M. & S. 14.

Where goods were delivered to a person on contract of sale and return:—Held, that he had no authority to pledge them. *Delaney Barker*, 2 Stark, 539.

Lien on Goods.]—Where goods were consigned to a factor, to be sold on account of the consignor, and a bill of lading was sent to deliver the goods to the factor or his assigns, who afterwards indorsed and delivered the bill of lading, together with the goods, to the defendant as broker, with instructions to do the needful, and they made advances to him on the credit of those and other goods, without knowing that he was not the owner of them :—Held, that the defendant could not retain the goods against the consignor until payment of the debt due to them from the factor on account of these advances. *Martini v. Coles*, 1 M. & S. 140.

Right of Owner to Recover.]—Where a factor pledged the goods of his principal, the latter might recover the value of them in trover against the pawnee, on tendering to the factor what was due to him, without any tender to the pawnee. *Daubigny v. Duval*, 5 T. R. 604.

So a pawnee for a valuable consideration, who claimed under the tortious act of the broker, had no right to retain the goods against the principal in trover for the amount of the lien which the broker had on the goods, for a balance due from the principal at the time of such pledge, the lien being personal and not transferable by such tortious act of the broker. *McCombie v. Davies*, 7 East, 5 ; 3 Smith, 3.

IV. RIGHTS AND LIABILITIES OF AGENT AND THIRD PARTIES.

1. ACTIONS BY AGENT.

Principal Undisclosed.]—A person contracting as agent for an unknown and an unnamed principal may himself sue as principal, unless the defendant relied on his character as agent only, and would not have contracted with him as principal if he had known him so to be. *Schmalz v. Avery*, 20 L. J., Q. B. 228 ; 15 Jur. 291.

Brokers bought goods on account of H., and by his authority. The purchase was made in their own names, but the vendor was told that there was an unnamed principal. They afterwards, under a general authority from H., contracted to sell the same goods, which the vendor had not yet delivered. H., on hearing of the latter contract, told the brokers that he would have nothing to do with the goods, either as buyer or seller, and in this they acquiesced. The vendor then refused to deliver the goods, and the brokers sued him for damages sustained by them in consequence :—Held, that the renunciation of the contract by H., and their acquiescence in it, formed no objection to their right to recover. *Short v. Spackman*, 2 B. & Ad. 962.

As Agent, but really Principal.]—Where a party made a written contract for the sale of goods, in which he described himself as the agent of A., and the buyer accepted and paid the price of a portion of the goods, and had then notice that the plaintiff was himself the real principal in the transaction, and not the agent of A. :—Held, that the plaintiff might sue in his own name for the non-acceptance of and non-payment for the residue of the goods. *Rayner v. Grote*, 15 M. & W. 359 ; 16 L. J., Ex. 79.

By Trustees.]—The plaintiffs chartered a vessel of the defendants to carry a cargo from Liver-

pool to Calcutta. The charterparty contained a clause that the vessel was to be consigned to E. & Co., merchants at Calcutta, on the usual terms. One of those terms was, that E. & Co. might procure the homeward freight at 5l. per cent. commission. The defendants consigned the vessel to E. & Co., but contracted with another party for the homeward freight. The plaintiffs having agreed with E. & Co. for a share in the commission, brought an action against the defendants for their breach of contract, but failed to prove in what proportion the commission was to be divided :—Held, that as the clause was inserted for the benefit of E. & Co., the plaintiffs were entitled to recover as trustees on their behalf, notwithstanding they failed to shew their interest in the commission. *Robertson v. Wait*, 8 Ex. 299 ; 22 L. J., Ex. 209.

Principal Disclosed—Form of Contract.]—The manager of an unincorporated association who, save as such manager, is a total stranger to the consideration, cannot sue in his own name upon a contract made with him as manager for his disclosed principals, although by the contract itself the manager was empowered to sue on it. *Corner v. Irwin*, 10 Ir. R., C. L. 354.

In whose Name.]—When a del credere agent sells for a disclosed principal he cannot sue the purchaser on the contract of sale in his own name. *Bramble v. Spiller*, 21 L. T. 672 ; 18 W. R. 316.

A broker cannot sue in his own name upon contracts made by him as broker. *Fairlie v. Fenton*, 5 L. R., Ex. 169 ; 39 L. J., Ex. 107 ; 22 L. T. 373.

A broker signed and delivered a bought-note for cotton in the following form : "I have this day sold you on account of T., &c. (Signed) E. F., broker :"—Held, that he was not a contracting party, and could not sue the defendant for breach of the contract in refusing to accept the cotton. *Id.*

A broker signing a contract note as selling as broker for undisclosed principals cannot sue in his own name on the contract. *Sharman v. Brandt*, 6 L. R., Q. B. 720 ; 40 L. J., Q. B. 312 ; 19 W. R. 936—Ex. Ch.

An agent, who insures for another with his authority, may sue for the insurance-money in his own name. *Provincial Insurance Company of Canada v. Ledue*, 6 L. R., P. C. 224 ; 43 L. J., P. C. 49 ; 31 L. T. 142 ; 22 W. R. 929—P. C.

2. LIABILITY OF AGENT.

a. On Contracts.

Election by Third Party.]—If the seller of goods, knowing at the time that the buyer, though dealing with him in his own name, is in truth the agent of another, elects to give the credit to such agent he cannot afterwards recover the value against the known principal ; but if the principal is not known at the time of the purchase made by the agent, it seems that, when discovered, the principal or the agent may be sued at the election of the seller : unless where, by the usage of trade, the credit is understood to be confined to the agent so dealing ; as particularly in the case of principals residing abroad. *Patterson v. Gandasequi*, 15 East, 62. See also cases ante, col. 61.

Notice of Agency.—The circumstance of persons selling goods being described in the catalogue of sale as sworn brokers, is not sufficient notice to the purchaser that they are only agents, to prevent him from dealing with them as principals. *Thornton v. Mear, M. & M.* 43.

When a party gives an order for another, and at the time tells the tradesman for whose use he orders the goods, he is not personally liable, unless the tradesman refuses to deliver them to the order of the person for whom they are directed, but will only give credit to the agent who ordered them. *Owen v. Gooch*, 2 Esp. 567.

Where really Principal.—Where a defendant bought goods of the plaintiffs in the name and upon the credit of Smith & Co., but whose purchases were made in reality on his own account, he was held to be liable. *Railton v. Hodgson*, 15 East, 67.

Where a son had ostensibly appeared as the proprietor and conductor of the business in a trade, not an extensive one, and the father, to whom the business really belonged, was superannuated and incapable of conducting it:—Held, that the son was liable on contracts connected with the business. *Turrell v. Collet*, 1 Esp. 321.

On Documents.—When no Principal.—Where a contract is signed by one who professes to be signing as agent, but who has no principal existing at the time, and the contract would be wholly inoperative unless binding upon the person who signed it, he is personally liable on it: and a stranger cannot by a subsequent ratification relieve him from that liability. *Kelner v. Baxter*, 2 L. R., C. P. 174; 36 L. J., C. P. 94; 15 L. T. 213; 15 W. R. 278.

If a person describes himself in a written contract as an agent for a principal not named, he is liable upon the contract, if proved to be the real principal. *Carr v. Jackson*, 21 L. J., Ex. 137.

A party who executes an instrument in the name of and expressly as agent for another, cannot be treated as a party to the instrument, so as to be sued upon it, unless he is shown to be the real principal. *Jenkins v. Hutchinson*, 13 Q. B. 744; 18 L. J., Q. B. 274; 13 Jur. 763.

Admissibility of Evidence to shew Non-Liability.—Where a defendant on the face of a written agreement has contracted as a principal, it is competent to him, by way of equitable plea to an action against him, to shew that, in fact, he signed as agent for a third party, and that the plaintiff verbally agreed that he should not be responsible as a principal. *Wake v. Harrop*, 6 H. & N. 768; 30 L. J., Ex. 273; 7 Jur., N. S. 710. Affirmed, 1 H. & C. 202; 31 L. J., Ex. 451—Ex. Ch.

In an action on a charterparty executed, not by the plaintiff but by a third person, who in the contract described himself as "owner of the ship":—Held, that evidence was not admissible to shew that such person contracted merely as the plaintiff's agent. *Humble v. Hunter*, 12 Q. B. 310; 17 L. J., Q. B. 310; 12 Jur. 1021.

In an action on a written agreement, purporting on the face of it to be made by the defendant and subscribed by him for the sale and delivery by him of goods above the value of 10*l.*, it is not competent for him to discharge himself on an issue on the plea of non assumpsit, by proving

that the agreement was really made by him to the authority of and as agent for a third person: and that the plaintiff knew those facts at the time the agreement was made and signed. *Higgins v. Senior*, 8 M. & W. 834.

When Agent is Personally Liable
—A contract for the conveyance of goods from Liverpool to Australia was entered into as follows: "It is this day mutually agreed between J. and R. W., owners of the ship *Jessica*, of the first part, and S. J. C., of the other part," that the ship should be ready by a given day to take on board certain goods, and should proceed therewith to Geelong, and there deliver the same. The rates of freight determined upon by the parties to this agreement are as under, &c.; "one-third to be paid in London, on receipt of bills of lading, and the remainder by the Geelong and Melbourne Railway Company at Geelong;" "goods to be taken on board at Liverpool, at ship's expense;" and the agreement was signed, J. & R. W. S. J. C.:—Held, that S. J. C. was personally bound by this contract, and entitled to sue for breach of it. *Cooke v. Wilson*, 1 C. B., N. S. 153; 26 L. J., C. P. 15; 2 Jur., N. S. 1094.

A person signing a contract in his own name without qualification, is not exempted from liability on the contract by merely describing himself in the body of the contract as agent for a named principal, without words expressly or by necessary implication shewing that he only signs as agent. *Paice v. Walker*, 5 L. R., Ex. 173; 39 L. J., Ex. 109; 22 L. T. 547; 18 W. L. 789.

Walker and Strange signed a contract for the sale of wheat in the following form: "Sol A. J. Price, Esq., London, about 200 quarters wheat (as agents for John Schmidt & Co., Danzig). Signed, Walker and Strange:"—Held, that they were personally liable upon the contract. *Id.*

A broker signed and sent to the plaintiffs note of a contract in the following terms:—"Messrs. Southwell,—I have this day sold to your order and for your account to my principals five tons of anthracene, payment in cash in fourteen days after delivery, less 2½ per cent. discount and 1 per cent. brokerage. W. A. Bowditch. In an action for goods sold and delivered:—Held, that in the absence of usage making the broker personally liable, he was not personally liable upon the contract. *Southwell v. Bowditch*, 1 C. P. D. 374; 45 L. J., C. P. 630; 35 L. T. 196; 24 W. R. 838—C. A.

The defendant, who was an agent of the Bel side Colliery Company, with whom B., W. & Co. had previously contracted for a supply of coal, gave to B., W. & Co. an undertaking as follows: "I undertake to load the ship *Der Versuch* with Bebside coals in ten colliery working days. On account of Bebside Colliery, W. S. Hoggett. This undertaking was obtained by B., W. & Co. because the plaintiff, the captain of the ship *Der Versuch*, refused (without such an undertaking being procured for him) to sign a charterparty whereby B., W. & Co. chartered the ship *Der Versuch* to carry a cargo of coals to Elsinore, in which no provision was made for payment of damages for detention in loading. The undertaking made no mention of the person contracted with by it, but it was communicated by B., W. & Co. to the plaintiff, who then signed the charterparty. The ship being detained beyond

the ten days, the plaintiff applied to the defendant for compensation; this the defendant at first refused, but afterwards offered 20*l.*, which was declined by the plaintiff. The plaintiff then sued on the undertaking to recover damages for such detention:—Held, that there was evidence that the undertaking was a contract between the plaintiff and defendant, and that, even independently of the offer of 20*l.* there was such evidence, and that the defendant had rendered himself personally liable. *Weidner v. Hoggett*, 1 C. P. D. 533; 35 L. T. 368.

Where a contract in writing for the sale of goods is entered into by one who describes himself as agent, and as making the contract "as agent and on behalf of" his principal, naming him, the party so making the contract is not personally liable. *Green v. Kopke*, 18 C. B. 549; 25 L. J., C. P. 297; 2 Jur., N. S. 1049.

By a charterparty it was agreed between the plaintiff, owner of the ship *N.*, and the defendants, of London, merchants, that the ship should proceed to *T.*, and there load from the factors of the merchants, a full and complete cargo at the merchants' risk and expense, which the merchants bound themselves to ship; and being so loaded, should proceed to *Memel*, and deliver the same on being paid freight, half to be paid on unloading, in cash, and the remainder by good bill on London; thirty running days to be allowed the merchants for loading at *T.* and discharging at *Memel*. "By authority of and as agents for *S.* of *Memel*, *R.* & *F.*, *J. M. L.*" (signatures of the defendants and the plaintiff). In an action for demurrage:—Held, that the defendants were contracting parties, and therefore were personally liable. *Lennard v. Robinson*, 5 El. & Bl. 125; 24 L. J., Q. B. 275; 1 Jur., N. S. 853.

A memorandum of charterparty was expressed to be made "between *P.*, of the good ship *C.*, and *W.*, agent for *E. W. & Son*," to whom the ship was to be addressed; it was signed by *W.* without any restriction:—Held, that he was personally liable as charterer. *Parker v. Winlow or Winalo*, 7 El. & Bl. 942; 27 L. J., Q. B. 49; 4 Jur., N. S. 584.

A charterparty made in London between the shipowner and the defendants, "as agents of *S. F.*, of Anamaboo, merchants and charterers," was signed, "for *D.*" (the plaintiff), "owner, *H. G.*, as agent. For *S. F.*, of Anamaboo, *G. Brothers*" (the defendants), "as agents." The charterparty was partly written and partly printed, the words "merchants and charterers" being printed, and in the plural throughout it. The defendants, merchants in London, acted in England as agents for *S. F.*, a native of Africa, and residing at Anamaboo, in that country. By the charterparty the plaintiff's ship was chartered for a voyage from London to Africa and back, and freight was made payable on delivery of the return cargo:—Held, that the defendants were not personally liable, as principals, on the charterparty. *Deslandes v. Gregory*, 2 El. & Bl. 602; 30 L. J., Q. B. 36; 6 Jur., N. S. 651; 8 W. R. 585—Ex. Ch.

A charterparty was entered into between plaintiffs, shipowners, and defendants "as agents for charterers." It was signed by the defendants without any qualification, but contained a clause that the ship was to load "from the agents of the said freighters," and a ceaser clause that, the charter being entered into on behalf of others, all liability of charterers should cease on

completion of loading and payment of advance. In an action for breach of the charterparty, the defendants by their statement of defence denied their personal liability:—Held, on demurrer, that the defendants were liable on the charterparty. *Hough v. Manzanos*, 4 Ex. D. 104; 48 L. J., Ex. 398; 27 W. R. 536.

If a man describes himself in the beginning of an agreement to grant a lease, as making it on behalf of another, but in a subsequent part of it says that he will execute the lease, he is personally liable. *Norton v. Herron*, 1 C. & P. 643; R. & M. 229.

Where *A.*, an auctioneer, being employed to sell an estate, belonging to *B.*, entered into and signed an agreement with *C.* for the purchase, in his own name, as agent of *B.*, and *B.* shortly afterwards signed it, and added, "I hereby sanction this agreement, and approve of *A.*'s having signed the same on my behalf:"—Held, that *A.* was not personally responsible. *Spittle v. Larender*, 5 Moore, 270; 2 B. & B. 452.

A contract was made in London, as follows: "Contract between Messrs. *V. T.*, of Morlaix, in France, and *M. M.*, of London. *M. M.* engages himself hereby with Messrs. *V. T.*, from, &c., to, &c., for the proper and merchantable cutting of French provisions at Morlaix, on receiving a free passage out to Morlaix from London, and back again, and wages of 80*s.* sterling per week; Messrs. *V. T.* finding the requisite tools." This contract was signed, "for *V. T.*, *C. K.*, *M. M.*:"—Held, that the contracting parties were *V. T.* and *M. M.*, and that *C. K.*, by signing on behalf of *V. T.*, did not render himself personally liable. *Mahony v. Kekulé*, 14 C. B. 390; 23 L. J., C. P. 54; 18 Jur. 313.

A written agreement was expressed to be made "between *C.* for and on behalf of *N.*, of the first part, and *T.* of the second part." By it *C.*, on the part of *N.*, agreed to let *T.* premises for a term of years, *T.* paying rent to *C.* for the use of *N.* No auction to be held on the premises without the consent in writing of *C.* on the part of *N.* *T.* to take a lease and execute a counterpart when called upon to do so by *C.* on the part of *N.* *C.* signed this in his own name. *N.* did not sign it. In an action by *T.* against *C.* for not completing the lease:—Held, that it sufficiently appeared to be the intention of the parties that *C.* should himself contract, and that therefore he was personally liable. *Tanner v. Christian*, 4 El. & Bl. 591; 24 L. J., Q. B. 91; 1 Jur., N. S. 519.

Liability on Invoices or Bought and Sold Notes.—The plaintiff bought a quantity of hemp by auction at the rooms of the defendants, who were brokers in Liverpool. The defendants delivered an invoice in their own names as sellers. On payment being made by the plaintiff, the defendants gave him an order on *C.* and *D.* for the goods, which, on presentation, was refused, and the plaintiff could not obtain the delivery of the goods:—Held, that the defendants were bound by the representation in the invoice, and could not offer evidence to shew that they sold as agents for *C.* and *D.*, and that the plaintiff knew *C.* and *D.* to be the principals at the time of the sale by auction. *Jones v. Littledale*, 1 N. & P. 677; 6 A. & E. 486.

A., a broker employed by *B.* to sell railway shares, agreed with *C.*, *D.*'s broker, to sell him fifty shares, of which *A.* afterwards informed his

clerk at his office, who made an entry in the book as of a sale from A. to C.; and a contract note to the same effect was sent to C. A. subsequently saw the entry in the book, and altered it, by writing the name of B. as seller, and directed another note to be sent to C., with the name of B. as seller. A fresh note was accordingly sent the same evening, or the next morning, but C. received them both together the next morning. C. did not return the first note, nor did A. request to have it returned. In an action by D. against A. for breach of the agreement, in not completing the sale, the judge left it to the jury to say whether the second note was a correction of a mistake in the first, and told the jury that if the defendant had entered into a written contract in his own name, he could not afterwards set up that he was acting as broker merely; and that, although known to be a broker, if he signed the contract in his own name he was liable:—Held, no misdirection. *Magee v. Atkinson*, 2 M. & W. 440.

D. entered into the following contract with R.: "22nd March, 1860. From J. D., corn broker, to Mr. R., Liverpool. I have this day sold to you two cargoes of French maize, to consist of 800 to 1,000 quarters, shipment all April, from the port of Bordeaux, at 33s. 3d. per 480 lbs., cost and freight, payment in London, less sixty days' interest and one per cent. brokerage. Mr. Walker, London, will send contracts." On the following day Walker forwarded contracts for the two cargoes on behalf of T., of Bordeaux, the owner of the maize, but omitting the stipulation as to the brokerage. R. remonstrated, and D. said he would write to Walker; but R., in order to obtain the cargoes, was subsequently compelled to pay the 33s. 3d., without any deduction for brokerage:—Held, that D. was responsible for the failure of Walker to send the contracts stipulated for. *Reid v. Dreaper*, 6 H. & N. 813; 30 L. J., Ex. 208.

Auctioneers not disclosing Principals.]—A. bought at auction three lots of one hundred railway shares each, one of the conditions of sale being, that "the balance of the purchase-money shall be paid at the office of the auctioneers on the day following the sale, except in cases where any special transfers are required, and to such the utmost expedition will be given." After the sale, A. received the three hundred shares, together with a bill of parcels describing the transaction as a sale of three hundred shares, and paid the price. The name of the owner of the shares was not disclosed at the time of the sale; but upon A. applying for a transfer, the constitution of the company requiring a transfer by deed, the auctioneers informed him that they were only agents in the transaction, and referred him to B., as their principal, and as the party who alone could procure the transfer to be executed. In an action against the auctioneers for not transferring:—Held, that, inasmuch as they had not disclosed their principal at the time of sale, they were personally liable. *Franklyn v. Lamond*, 4 C. B. 637; 16 L. J., C. P. 221; 11 Jur. 780.

Contracts on Behalf of Foreign Principals.]—There is no rule of law that a person contracting in England as agent of a foreign principal resident abroad, is personally liable on the contract. *Green v. Kopke*, 18 C. B. 549; 25 L. J., C. P. 297; 2 Jur., N. S. 1049.

In all cases, whether the principal or agent is liable is a question of intention, to be ascertained from the terms of the contract and the surrounding circumstances. *Id.*

K., being agent in London of R., a foreign resident abroad, contracted by bought and sold notes to sell to the plaintiff tar, to be shipped from a foreign port. The sold-note, which was signed by K., as agent, ran, "Sold on behalf of R., Gothenburg;" and the bought-note, signed by the plaintiff, "Bought through K. of R.:"—Held, that K. was not liable on the contract. *Id.*

Fruit brokers in Liverpool gave a fruit merchant the following sold-note: "We have this day sold to you, on account of James Morand & Co., Valencia, 2,000 cases Valencia oranges, of the brand James Morand & Co., at 12s. 9d. per case free on board, shipment from commencement of season to not later than the 7th of December next," and signed it without any addition. The purchaser having brought an action against the brokers for non-delivery of the oranges:—Held, that the words "on account of James Morand & Co." shewed an intention to make the foreign principals, and not the brokers, liable, and that the brokers were not liable upon the contract. *Gadd v. Houghton*, 1 Ex. D. 357; 46 L. J., Ex. 71; 35 L. T. 222; 24 W. R. 975—C. A.

Where the act of the principal is lawful in the country where it is done, and the authority under which such act is done is complete, binding and unquestionable there, the servant who does the act cannot be made responsible in the courts of this country (of which he is a subject) for the consequence of such acts, merely by reason of a personal disability, imposed by the law of this country upon him for contracting such engagement. *Dobree v. Napier*, 3 Scot 201; 2 Bing. N.C. 781.

A. having set up some mill machinery at Roanne, in France, for a French millowner there was requested by him to engage an overlooker to manage the machinery, and, on the 7th of December, 1876, a written agreement was drawn up and signed by A. and B., at Bury, in the following terms: "I hereby agree on behalf of M. B. P., Roanne, France, to engage B. as overlooker, at the rate of 4l. per week, with travelling expenses there and back. The sum of 30s. p. week to be paid to his wife every fourteen days B. proceeded to Roanne, receiving 10l. from A. and entered on his duties as overlooker at the mill there, and continued there in that capacity till the middle of October, 1877, when he returned to England. During his stay in France the 30l. was paid to his wife every fortnight by the defendant at Bury, and upon his leaving France a sum of 12l. was paid to him by A.'s agent. Roanne to enable him to return to England. The remainder of his wages under the contract except a balance of some 17l., was regularly paid by the French millowner. For this balance B. now sued the defendant:—Held (diss. Kell C. B.), that the word "on behalf of" in the box of the contract made it immaterial that B. signed the document in his own name without qualification, and that he did not thereby render himself personally liable. *Ogden v. Hall*, L. T. 751.

Express Terms in Contract as to.]—By charterparty between shipowners and the defendants' agents in England for foreign charters it was agreed that the ship should proceed to

and there load in regular turn in the customary manner, from the defendants, a full and complete cargo of coffee. It was also agreed that as the defendants were acting for foreign principals all their liability in every respect, and as to all matters and things as well before and during, as after the shipping of the cargo, should cease as soon as they had shipped the cargo. The defendants having loaded and shipped the agreed cargo, the shipowners afterwards sued them for not having shipped it in regular turn:—Held, that the action could not lie, for that the charterparty limited the defendants' liability to the actual shipment of the cargo and protected them from responsibility for any irregularity or delay in the shipment. *Milvan v. Perez*, 3 El. & El. 495; 30 L. J., Q. B. 90; 7 Jur., N. S. 336; 3 L. T. 736; 9 W. R. 269.

A memorandum for a charterparty, made between the shipowners and the defendant, "as agent for the freighter" (no principal being named), after providing for demurrage over and above the laying-days, at 7l. per day, stated, that "it is further agreed that this charter, being concluded by the defendant for another party, the liability of the former, in respect and as to all matters and things as well before as after the shipping of the cargo, shall cease as soon as they have shipped the cargo:—Held, that he was not liable, upon this memorandum, for demurrage at the port of discharge. *Oglesby v. Yglesias*, El., Bl. & El. 930; 27 L. J., Q. B. 856.

Liability by Custom in Trade.]—M. and W., brokers, being employed by P. to purchase raisins, sent the following, addressed to F. and D.: "We have this day sold for your account to our principal, to arrive per steamer from Trieste, 50 to 70 tons of good sound Chesne raisins, usual market terms. Customary allowances. M. and W., brokers." A portion of the raisins was accepted and paid for by M. and W. on behalf of P., whose name was declared before delivery. P. having subsequently made default in accepting the residue:—Held, in an action by F. and D. against M. and W. for not accepting the residue, that evidence of a custom in the fruit market, that if the principal's name is not declared on the contract, the broker is personally liable on default of the principal, was admissible. *Fleet v. Murton*, 7 L. R., Q. B. 126; 41 L. J., Q. B. 49; 26 L. T. 181; 20 W. R. 97.

Held, also (dubitante Cockburn, C. J.), that evidence of an analogous usage in the colonial trade was properly admitted to prove the usage in the fruit trade. *Ib.*

An agent contracting and signing, as such, for an undisclosed principal, may be rendered personally liable on the contract, if a custom, among merchants in the course of ordinary trade constantly entering into similar contracts, can be shewn to exist, that an agent so signing shall be personally liable in the event of his not disclosing his principal's name within a reasonable time, and evidence is admissible to prove the existence of such a custom and, by inference, the implied presence of such a term in the written contract—a liability so incurred not being considered as inconsistent with the general terms of such a contract. *Hutchinson v. Fatham*, 3 L. R., C. P. 482; 42 L. J., C. P. 260; 29 L. T. 103; 22 W. R. 18.

In an action upon a charterparty expressed to be made between the shipowners and T. & Co.,

"as agents to merchant," and signed "T. & Co., as agents for merchant:—Held, that although T. & Co. were *prima facie* not personally liable upon this contract, yet that parol evidence was admissible to prove a custom of trade rendering agents who enter into such an agreement for an unnamed principal themselves personally liable if the name of their principal was not disclosed within a reasonable time, and that the jury was justified in finding a delay of two months before the name of the principal was given, was unreasonable. *Ib.*

According to the usage of the London dry goods market, a broker who buys for an undisclosed principal is personally liable to the seller for the price of the goods. *Imperial Bank v. London and St. Katharine Docks Company*, 5 Ch. D. 195; 46 L. J., Ch. 335; 36 L. T. 233.

D., a broker, bought of C. for undisclosed principals a quantity of gum sandrac then lying at the St. Katharine Dock, to be paid for on Saturday, March 18th, and obtained a delivery order from C., which he gave to his principals on the faith of their representation that the goods were wanted for immediate shipment. D.'s principals, however, pledged the delivery order with a bank, and on the evening of March 17th they stopped payment. On the morning of March 18th the bank sent the delivery order to the dock office in the city with a request for a warrant, which they were told would be ready on Monday. Notice of the delivery order having been lodged was sent by the dock company in due course to their warrant office at the dock, where, through a mistake of the messenger, it did not arrive until 3 P.M., and in the meantime a clerk of D., who had, in accordance with the usage of the trade, paid the price of the goods to C. that morning, applied at the warrant office in C.'s name for a warrant for the goods, which was made out and given to him, as the goods were clear in the cargo ledger. C. indorsed the warrant to D., and in consequence of what had happened, the dock company on the Monday refused to act on the bank's delivery order. In an action by the bank against the dock company, D. and C.:—Held, that D. was entitled to the goods, for the bank had never obtained either actual or constructive possession of the goods, and that D., having paid the price of the goods as surety for his principals, was, notwithstanding his prior application for the delivery order and indorsement thereof, entitled by virtue of s. 5 of the Mercantile Law Amendment Act (19 & 20 Vict. c. 97), to the benefit of the unpaid vendor's lien subsisting in C. *Ib.*

b. On Bills and Promissory Notes.

Personal Liability—Trustees and Managers.]

—A bill directed as follows, "To Messrs. Jackson and Shepherd, joint managers of the Royal Mutual Marine Insurance Association," was accepted thus: "Accepted, J. J., W. S., as joint managers of the Royal Mutual Marine Association:—Held, that they were personally liable, and that the introduction of the word "as" before the words "joint managers" made no difference with respect to such liability. *Jones v. Jackson*, 22 L. T. 828.

A promissory note in this form, "On demand we promise to pay Mr. James Allan 200l., value received for the Second Gateshead Provident Building Society, and interest thereon, at 5 per

cent. per annum, payable half-yearly," signed thus: "G. M., C. D. G. J. N., trustees, T. N., secretary:"—Held, that the trustees were personally liable on the note. *Allan v. Miller*, 22 L. T. 825.

—**Directors of Companies.**—A person advanced money for purposes of a company in which he was a shareholder, and received a promissory note: "We, the directors of the Isle of Man Slate and Flag Company, Limited, do promise to pay to John Dutton 1,600l., with interest at the rate of 6l. per cent. per annum until paid." It bore the seal of the company, and was signed by four directors. The lender had stated that he would lend the money to the directors only:—Held, that the directors who had signed the note were personally liable upon it. *Dutton v. Marsh*, 6 L. R., Q. B. 361; 40 L. J., Q. B. 175; 24 L. T. 470; 19 W. R. 754.

A resolution to wind up a banking company voluntarily was confirmed on the 22nd, and advertised in the London Gazette on the 26th of November. On the 24th of the same month one of the directors, who had been appointed one of the liquidators, accepted, as director, a bill of exchange on the bank. This bill was afterwards indorsed for value to a person who had no notice that the bank was in liquidation:—Held, that the bill was not a bill of the company, and therefore that the holder could not prove against the company for the amount. *London and Mediterranean Bank, In re, Bolognesi, Ex parte*, 5 L. R., Ch. 567; 40 L. J., Ch. 26; 18 W. R. 976. See also COMPANY.

—**General Agent.**—A bill of exchange to pay to the drawer's order at three months after date 137l. 10s. value received in account (fire policy, No. 597), was directed to Henry Connah, Esq., general agent of L'Unione Compagnia D'Assicurazione Generale (Firenze), 8, York-street, Manchester, who wrote upon it: "Accepted, payable at 8, York-street, Manchester, on behalf of the company. H. Connah." In an action against him on this bill:—Held, that he was personally liable as acceptor. *Herald v. Connah*, 34 L. T. 885.

Agent presenting for Payment.—A. drew bills in favour of B. in India, upon the E. I. Co. in London, which the latter accepted: C., as the agent of B., indorsed the bills to D., and E., under the supposed authority of a power of attorney from B., which the E. I. Company had inspected; D. and E. indorsed the bills to their bankers and agents, F. & Co., with instructions to present them for payment when due. F. & Co. indorsed the bills, presented them for payment when due, received the money, and paid it over to their principals, D. and E. The power of attorney from B. did not authorize C. to indorse the bills, and B. having died, his administrator recovered the amount of them from the acceptors. The latter brought an action against F. & Co., upon an alleged undertaking by them that they were entitled to receive payment of the bills. The jury found that the plaintiffs paid the bills, not on the faith of the indorsement by the defendants, but on the faith of the power of attorney, and that the defendants received the money as agents, and paid it over to their principals before they knew that the first indorsement by C. was unauthorized:—Held,

that the action could not be maintained against them. *East India Company v. Tritton*, 5 D. & R. 214; 3 B. & C. 280.

c. For Moneys received for Use of Principal and Others.

Money paid to Agent by Mistake.—An action lies against an agent for money paid to him by mistake, although he has forwarded his account to his principal, and placed the sum to his credit. *Cox v. Prentice*, 3 M. & S. 344.

One Liverpool cotton broker bought cotton of another, each in his own name; in consequence of a mistake by a clerk of the selling broker, the buying broker paid over too much money. The selling broker gave credit to his undisclosed principal for the sum which he had received, the principal being largely in his debt:—Held, that the buying broker was entitled to recover back from the selling broker the sum so overpaid to him, the case not falling within the rule by which an agent is relieved from responsibility where he has bona fide paid over moneys received by him on account of his principals. *Newall v. Tomlinson*, 6 L. R., C. P. 405; 25 L. T. 382.

If money is paid by mistake to an agent, and placed by him to the account of his principal, but not paid over, an action for the money had and received to the use of the person so paying it by mistake will lie against the agent. The mere passing such money in account, or making rest, without any new credit given, fresh bills accepted, or further sums advanced for the principal in consequence of it, is not equivalent to the payment of it over. *Buller v. Harrison*, Cowp. 565.

A receipt signed by an agent for his principals is not evidence to support an action against him, to recover the money back. *Edden v. Read*, 3 Camp. 339.

To make it a defence to an agent that he has paid over money, it is necessary that the money should have been paid to the agent expressly for the use of the person to whom he has so paid it over. *Snowdon v. Davis*, 1 Taunt. 359.

Money retained for Special Purpose.—A. having received money as agent for B. and others, in specific proportions for each, paid it over to C. as a banker in his own name, and having drawn out part of it, directed C. not to pay away the remainder, except by his order:—Held, that C. was bound to hold the money for A., and that therefore B. could not recover the remainder of his share from C., though he had given C. notice that A.'s agency was at an end. *Pinto v. Santos*, 1 Marsh. 132; 5 Taunt. 447.

Where persons have received money for the express purpose of taking up a bill of exchange two days after it became due, and upon tendering it to the holders and demanding the bill, find that they have sent it back protested for non-acceptance to the person who indorsed it to them:—Held, that such persons, having received fresh orders not to pay the bill, were not liable to an action by the holders for money had and received, when, upon the bills being reprocurd and tendered to them, they refused to pay the money. *Stewart v. Fry*, 1 Moore, 74; 7 Taunt. 339. And see *Dent v. Dunn*, 3 Camp. 296.

Where a bill is drawn on an agent, and made

payable out of a particular fund, and the agent says he will pay it when he gets money from the principal, this is binding on him; and if he gets money at any subsequent time, he is bound to pay the bill. *Stevens v. Hill*, 5 Esp. 247.

Where no Action lies.—J., an attorney, who was accustomed to receive certain dues for the plaintiff, his client, went from home, leaving B., his clerk, at the office. B., in the absence of his master, received money on account of the dues for the client (which he was authorized to do), and gave a receipt, signed "B., for Mr. J." J. was in bad circumstances when he left home, and he never returned, but it did not appear that his intention so to act was known at the time of the payment to B. B. afterwards refused to pay the money over to the client, who brought an action against him for the money:—Held, that the action did not lie; for that the defendant received the money as the agent of his master, and was accountable to him for it, the master, on the other hand, being answerable to the client for the sum received by his clerk: and there was no privity of contract between the present plaintiff and the defendant. *Stephens v. Badcock*, 3 B. & Ad. 354.

A., B., and others were owners of a ship in the service of the East India Company. B. was managing owner, and employed C. as his agent for general purposes, and to receive and pay moneys on account of the ship; and C. kept a separate account in his books with B., as such managing owner. To obtain payment of a sum of money due from the East India Company on account of the ship, it was necessary that the receipt should be signed by one or more of the owners, besides the managing owner; and upon a receipt signed by B. and one of the other owners, C. received on account of the ship 2,000*l.* from the East India Company, and placed it to B.'s credit in his books, as managing owner. The part-owners having brought an action for money had and received, to recover the balance of that account:—Held, that C. had received the money as the agent of B., and was accountable to him for it; that there was no privity between the other part-owners and C., and consequently that the action was not maintainable. *Sims v. Brittain*, 2 N. & M. 594; 4 B. & Ad. 375.

A return cargo belonging to the plaintiff was consigned by the defendant to A. and B. to "be held at the orders of the latter," who had a lien on it; and the cargo was sold by them and their lien satisfied:—Held, that the plaintiff could not consider them as agents of the defendant, so as to entitle him to maintain an action against the defendant for the balance remaining in their hands. *Tennant v. Mackintosh*, 1 B. & A. 594.

Her Majesty by royal warrant "granted" booty of war to the secretary of state for India in council, "in trust" to distribute amongst the persons found entitled to share it by the decree of the judge of the Court of Admiralty, to whom the matter had been referred by the sovereign for that purpose, with a direction that doubts should be finally determined by the secretary of state unless her Majesty should otherwise order. An action having been brought against the secretary of state for India in council by K., on behalf of himself and all the other parties entitled, alleging

that a portion only of the fund had been distributed, and claiming an account and the distribution of the residue:—Held, that the warrant did not operate as a transfer of property or create a trust; and that the defendant, being merely the agent of the sovereign to distribute the fund, was not liable to account to any of the parties found entitled. *Kinloch v. Secretary of State for India*, 7 App. Cas. 619; 51 L. J., Ch. 885; 47 L. T. 133; 30 W. R. 845—H. L. (E.).

d. For Conversion of Goods.

Thirteen bales of cotton were fraudulently bought by B. from the plaintiffs' brokers; the defendants, who were cotton brokers, without notice of any fraud, bought, in their own name as principals, the cotton from B., and afterwards sold it to M. at the same price at which they had bought it, charging a commission. The defendants obtained B.'s signature to a delivery order, and took delivery of it from B.'s warehouse and conveyed it to a railway station, whence it was forwarded to M., by whom it was spun into yarn. The defendants in buying the cotton intended to act as brokers, believing the cotton would suit M. Afterwards the plaintiffs demanded the cotton from the defendants. The jury found that the cotton was bought by the defendants as agents in the course of their business as brokers, and that they dealt with it only as agents to their principal:—Held, by Martin, Channell, and Cleasby, BB., that the defendants were liable to the plaintiffs in trover for the value of the cotton; Kelly, C. B., Byles and Brett, JJ., dissentientibus. By Martin and Channell, BB., that the defendants having bought the cotton as principals from B., it was immaterial that they intended to deal with it only as agents to their principal: and that whoever deals wrongfully with the goods of another is equally liable whether he is an agent or a principal. By Cleasby, B., that by reason of the real principals not being known, and therefore not disclosed at the time the bargain was made, the defendants necessarily became the parties to the contract until the real principals being ascertained were adopted by the sellers, and by their dealing with the cotton became liable for a conversion. By Kelly, C. B., and Byles, J., that the defendants were not guilty of a conversion, inasmuch as they acted only as brokers, and exercised no dominion over the cotton in their own right and for their own benefit. By Brett, J., that a possession or detention, which is a mere custody or mere asportation made without reference to the question of the property in chattels, is not a conversion, and that the defendants, acting only as brokers by negotiating a bargain of purchase and sale and by passing a delivery order, were not guilty of a conversion. *Hollins v. Fowler*, 7 L. R., Q. B. 616; 41 L. J., Q. B. 277; 27 L. T. 168; 20 W. R. 868—Ex. Ch. Affirmed, 7 L. R., H. L. 757; 44 L. J., Q. B. 169; 33 L. T. 73.

The London agent, who was also a member of a firm which was commissioned to sell goods on behalf of the local government of a Spanish colony, was held to be justified in refusing to give them up to the Spanish consul-general in England till he had communicated, through his immediate principals, with the local government. *Spain (Queen) v. Parr*, 39 L. J., Ch. 73.

e. For Misrepresentation or Assumption of Authority.

General Rule.—If a person enters into a contract in writing on behalf of his principal, he is not personally liable on such contract, unless he had no authority to make it, or in making it exceeded his authority. *Dowman v. Williams (in error)*, 7 Q. B. 103; 14 L. J., Q. B. 226; 9 Jur. 454—Ex. Ch.

A promise in the following terms: "I undertake on behalf of E. to pay," is upon the face of it a promise as agent of another, and not as principal; and, in order to affect the party making it with a personal liability, it lies upon the party to whom it is made to prove either that there was no agency or authority, or that it was exceeded. *Ib.*

Contract "as Agent" without Authority.—If a person professes to contract as agent only, and contracts in such terms as may express the character of agent only, he cannot, on the ground of his having had no authority to contract as agent, be held liable as a contractor, in an action on the contract, whether that which he assumed to do was done in fraud or not. *Lewis v. Nicholson*, 18 Q. B. 503; 21 L. J., Q. B. 311; 16 Jur. 1041.

Warranty of Authority—Liability for Damages.—A party who makes a contract as agent thereby warrants that he has authority as agent to make the contract; and if he has no such authority, he is liable for the damages necessarily occasioned by a breach of his warranty, although he acted bona fide under a mistaken belief that he had authority as agent to make the contract. *Collen v. Wright*, 7 El. & Bl. 301; 26 L. J., Q. B. 147; 8 Jur., N. S. 363. Affirmed, 8 El. & Bl. 647; 27 L. J., Q. B. 215; 4 Jur., N. S. 357—Ex. Ch.

W., professing to act as agent for G., made an agreement with the plaintiff for the lease of a farm belonging to G., and signed it "W., agent to G., lessor." He had not, in fact, authority from G. —Held, that there was a contract on the part of W. that he had authority, on which he was liable. *Ib.*

If a person represents himself as having authority to do an act when he has not, and the other side is drawn into a contract with him, and the contract becomes void for want of such authority, he is liable for the damage which may result to the party who confided in the representation, whether the party making it acted with the knowledge of its falsity or not. *Cherry v. Colonial Bank of Australasia*, 38 L. J., P. C. 49; 21 L. T. 356; 17 W. R. 1031.

The warranty which the law implies in such cases depends on the position of the parties and on the nature and effect of the representation, but when ascertained, as a matter of fact, the legal effect is the same as if the warranty had been express. *Ib.*

The remedy by special action, where there is fraud or deceit, is a distinct matter. *Ib.*

By the articles of association of the T. Company, Limited, the directors, with the sanction of the company in general meeting, were empowered to borrow money on mortgage of the company's lands, or upon debentures, bonds, promissory notes, bills of exchange, and other transferable securities, or otherwise, as they should deem requisite for carrying on the works, &c. The plaintiff having been requested by the

defendants, who were three of the directors of the company, to advance money to the company agreed to advance 500*l.* upon having an agreement signed by the defendants to pay the 500*l.* and interest at the end of six months, upon the security of the machinery and tools of the company. The following agreement was afterwards written out and signed by the defendants and the plaintiff: "Agreement between the T. Company of the one part and W. M. [plaintiff] of the other part. In consideration for the advance of 500*l.* paid by the said W. M. to the said company, we the undersigned, three of the directors of the said company, hereby agree to repay the said sum of 500*l.*, with interest, in six calendar months from this date hereof. And we do hereby assign to the said W. M., as security for the said advance of 500*l.*, the machines and tools as invoiced to him 3rd June, 1878. . . ."—This document was not sealed with the seal of the company, nor countersigned by the secretary pursuant to the articles of association, nor did the defendants express that they signed on behalf of the company. The plaintiff, upon default in repayment of the loan at the expiration of six months, took possession of the machinery and tools, upon which the company obtained an injunction in the Chancery Division restraining him from dealing with the machinery, on the ground that the directors were not authorized to make the alleged assignment:—Held, after hearing parol evidence to explain the ambiguity of the agreement, that the defendants were personally liable to repay the 500*l.* *McCullin v. Gilpin*, 6 Q. B. D. 516; 44 L. T. 914; 29 W. R. 408; 45 J. P. 828—C. A. Reversing 49 L. J. Q. B. 558.

A person lent 70*l.* to a building society, and received a receipt signed by two directors of the society, certifying that he had deposited 70*l.* with the society for three months certain, to be repaid with interest after fourteen days' notice. The society was formed under 6 & 7 Will. 4, c. 32 and had no power to borrow money; and the lender being unable to get her money back from the society, sued the two directors:—Held, that they were liable to the lender in damages for breach of warranty of authority, they having, by signing the receipt, in effect represented that they had authority to make a binding contract of loan on behalf of the society, and so induce her to part with her money. *Richardson v. Williamson*, 6 L. R., Q. B. 276; 40 L. J., Q. B. 141.

Warranty of Title.—Where an auctioneer sells by auction standing corn with the straw for an unnamed principal, the price to be paid at once, and the crop to be removed immediately after it has arrived at maturity at the purchaser's expense, there is a contract by the auctioneer to give the purchaser all proper authority to enter upon the land and to cut and carry away the corn and straw, but there is no actual warrant of the validity of the title of his principal to sell. *Wood v. Baxter*, 49 L. T. 45.

Measure of Damages.—L. instructed his brokers to apply for fifty shares at 1*l.* each in a company which he named. They by mistake applied for and obtained an allotment to L. in another company. L. repudiated the shares, but his name was placed on the register. The company had at that time a very large number of shares unallotted, and in the opinion

of the court the shares were unsaleable in the market. The company was soon afterwards wound up, and the name of L. was removed on his application from the list of contributories. The official liquidator then claimed 50*l.* from the brokers by way of damages for their misrepresentation of authority:—Held, that the general rule as to measure of damages for breach of warranty of authority was applicable; that the liquidator was entitled to recover from the brokers the amount which the company had lost by losing the contract with L.; and that as L. was solvent and the shares unsaleable in the market, that loss was represented by the whole sum of 50*l.* payable for the shares. *National Coffee Palace Company, In re, Panmure, Ex parte*, 24 Ch. D. 367; 53 L. J., Ch. 57; 32 W. R. 236—C. A.

The defendant, acting as broker for both buyer and sellers, made a contract for the sale of some wool on certain terms. The sellers afterwards repudiated the contract, alleging (as was the fact) that they had not authorized the defendant to sell on those terms. The wool had been imported from California, and could therefore have been exported to America free of duty; and there was no other wool similarly circumstanced in the market. The defendant persisting that he had authority, the buyer filed a bill in chancery for specific performance against the sellers, and obtained an interim injunction; the bill was dismissed and the injunction dissolved, with costs, on the ground of the want of authority in the defendant. In an action by the buyer against the defendant, for the breach of his promise that he had authority:—Held, that the plaintiff could maintain the action, although the defendant was his agent as well as agent of the sellers; that the chancery suit was a reasonable course to adopt; and that the plaintiff was entitled to recover, as damages, the taxed costs of the chancery suit and the plaintiff's own costs taxed as between solicitor and client; and also the difference between the contract price of the wool and the value of that or similar wool, taking into account that it could have been exported duty free to America, and all the mercantile circumstances affecting the value. *Hughes v. Graeme*, 33 L. J., Q. B. 335; 12 W. R. 867.

The plaintiff instituted a suit in equity for specific performance of an agreement against G. The plaintiff gave notice, on hearing that G. denied the authority of W., to W. that the plaintiff would proceed with the suit at W.'s risk, unless W. gave him notice not to proceed; and in the event of his bill being dismissed on account of absence of authority, would hold W. liable. W. answered by denying all liability, but without retracting his assertion that he had authority. The bill was dismissed on the ground of his want of authority:—Held, that he was liable for the costs of the suit, they being, under the circumstances, a natural and direct consequence of the contract that there was authority. *Collen v. Wright*, 8 El. & Bl. 647; 27 L. J., Q. B. 215; 4 Jur., N. S. 357—Ex. Ch.

The defendant entered into a contract on behalf of R. for purchase of a ship then being built by the plaintiff, and required extra work to be done to it. R., having given no authority to the defendant to purchase the ship, repudiated the contract, and the plaintiff resold it at a loss. In an action against the defendant for breach of the implied warranty that he had authority to enter into the contract for R.:—

Held, that the plaintiff could recover as damages the loss on the resale, as well as the cost of the extra work. *Simons v. Patchett*, 7 El. & Bl. 568; 26 L. J., Q. B. 195; 3 Jur., N. S. 742.

A declaration stated that the defendant falsely and fraudulently represented to the plaintiffs that he was authorized by J. to order, and did order, certain stone for the building of a church, to be charged to J. and others, and did falsely and fraudulently write to the plaintiffs a letter (set out); and that the plaintiffs, relying on the representation of the defendant, supplied the stone, whereas the defendant had no authority to order it, and J. refusing to pay for it, the plaintiffs brought an action against him for the price and failed in it, and were obliged to pay J.'s costs, and their own costs:—Held, first, that the declaration was sufficient, even if the letter set out did not itself shew a false representation of authority; and secondly, that the plaintiffs were entitled to recover, by way of damages, not only the price of the stone supplied, but the costs which they had paid in the action against J. *Randell v. Trimen*, 18 C. B. 786; 25 L. J., C. P. 307.

An agent professed to let premises by parol agreement for a term of seven years on account of his principal, and put the tenant in possession, no proper lease having been executed. Afterwards the principal brought an ejectment against the tenant, which the latter defended unsuccessfully, upon consulting the agent and his attorney, and being guided by their advice. Thereupon the tenant sued the agent for pretending to have authority to let for seven years, and claimed to recover the costs of the unsuccessful defence to the ejectment:—Held, that these costs were not recoverable. *Pow v. Davis*, 1 B. & S. 220; 30 L. J., Q. B. 257; 7 Jur., N. S. 1010; 4 L. T. 399.

The plaintiff was the holder of a nearly-expired lease of premises for twenty-one years. The defendant, professing to act as the agent of the landlord, agreed with the plaintiff that the landlord should renew the lease. The plaintiff then assigned to B. the residue of the lease and all interest under this agreement. The landlord refused to grant the new lease because the defendant acted without authority, and B. had to leave. The plaintiff brought a suit in chancery for specific performance, in which the landlord and the defendant swore there was no authority, and the bill was dismissed. B. then brought an action against the plaintiff, and recovered damages and costs:—Held, in an action by the plaintiff against the defendant, first, that in the absence of proof that the defendant had not persisted in his representation and told the plaintiff not to bring the suit, he was entitled to recover the costs of the chancery suit; secondly, that the plaintiff was entitled to a sum arrived at by capitalizing the difference between the rent he was to have paid and the actual annual value of the premises, as and for the value of the term; but, thirdly, that as in the particular case a re-sale was not in the contemplation of the parties, he could not recover the damages and costs in B.'s action. *Spedding v. Nevell*, 4 L. R., C. P. 212; 38 L. J., C. P. 133.

2. Fraud and False Representation.

Nature of Liability—Wrongful Acts—Generally.—The rule that an agent who induces persons to deal with his principal by means of false representations is personally liable to make

good his representations, does not extend to an incorrect statement of a matter of law. *Beattie v. Ebury*, 7 L. R., Ch. 777; 41 L. J., Ch. 804; 27 L. T. 398; 20 W. R. 994; *S. C.*, in H. L., 7 L. R., H. L. 102; 44 L. J., Ch. 20; 30 L. T. 581; 22 W. R. 897.

Three directors of a railway company, by a letter to the company's bankers, requested them to honour the cheques of the company signed by two of the directors, and countersigned by the secretary of the company. Cheques to a large amount were accordingly drawn, signed in this manner, and were paid by the bank:—Held, that this letter did not amount to more than a representation that the directors had the ordinary authority of railway directors to bind their company, and that it did not render the directors personally liable to the bank for the moneys paid in respect of such cheques. *Ib.*

In the absence of fraud, an agent acting within the scope of his authority is not personally liable for a misrepresentation made by him on behalf of his principal. *Eaglesfield v. Londonderry (Marquis)*, 38 L. T. 303; 26 W. R. 540—H. L. Affirming 4 Ch. D. 693; 35 L. T. 822; 25 W. R. 190—C. A.

All persons directly concerned in the commission of a fraud are to be treated as principals, and must not be permitted to excuse themselves on the ground that they acted as the agents or servants of others; for the contract of agency or of service cannot impose any obligation on the agent or servant to commit or assist in the committing of fraud. *Cullen v. Thompson*, 4 Macq. H. L. Cas. 441; 9 Jur., N. S. 85; 6 L. T. 870.

If a person employed as the agent of another in the sale of any property has notice that what he is about to sell is not his principal's, and he yet continues to sell, he is personally liable for the produce of the sale. *Hardacre v. Stewart*, 5 Esp. 103.

The plaintiff sued G., a manager, for false representations as to the credit of a customer; G. on being written to by the plaintiff, signed his reply as manager giving a favourable account of the credit of the customer. This representation was false to G.'s knowledge, and the plaintiff, on supplying goods to the customer, suffered loss:—Held, that G. was personally liable. *Swift v. Jewesbury*, 9 L. R., Q. B. 301; 43 L. J., Q. B. 56; 30 L. T. 31; 22 W. R. 319—Ex. Ch.

Liability for Acts of Sub-Agent.]—As a general rule one agent is not responsible for the fraudulent acts of the other unless he does something which makes himself a principal in the fraud. *Cargill v. Bower*, 10 Ch. D. 502; 47 L. J., Ch. 649; 38 L. T. 779; 26 W. R. 716.

A principal agent is not responsible for the act of a sub-agent with respect to a representation made in favour of his principal; and therefore the directors of a company cannot be held personally liable for a fraudulent representation made by an agent of the company, unless they have induced or authorized him to make it. *Bear v. Stevenson*, 30 L. T. 177—P. C.

A company was in negotiation with S. for an advance upon the security of sheep and wool, the property of the company; an agent of the company wrote, in answer to a question of S., "The mortgage to N. is the only incumbrance on the sheep and wool:" in fact there were two other outstanding incumbrances, but at the time of writing the agent had them both in his posses-

sion on behalf of the company, under an agreement that they should be paid off out of the advance to be made by S., which was in fact done:—Held, that there was no evidence that the agent was guilty of making a false representation of the position of the company. *Ib.*

S. & Co. employed F. as their agent to make advances on goods. F. employed a sub-agent to make such advances, with power to draw on S. & Co. for the amount. The sub-agent fraudulently drew on S. & Co. for an amount not advanced:—Held, that such sub-agent was acting within his authority, and that F. was liable for the act of his sub-agent. *Swire v. Francis*, 3 App. Cas. 106; 47 L. J., P. C. 18; 37 L. T. 554.

Refunding Commission in Case of Fraud.]—A company being unable to get its shares taken up, the directors resolved to give 2s. 6d. per share to any one who found persons to take shares. B., the secretary and solicitor of the company, proposed for the allotment of 2,000 shares to a client of his. The directors approved, and ordered 250l. to be paid to B. The shares were duly allotted to K., the company's engineer, and by him transferred to R. B., who was chairman of the company and the father of B. The directors knew that R. B. was the person really taking up the shares. The company was wound up, and, upon a summons for the purpose, it was held that B. must refund to the liquidator the sum of 250l. which he had received. *Stapleford Colliery Company, In re, Barrow's case* (No. 2), 49 L. J., Ch. 253; 42 L. T. 12; 28 W. R. 341.

g. Torts of Principal.

There is no agency as between wrongdoers; each of them is personally liable. *Hugh v. Abergavenny (Earl)*, 23 W. R. 40.

Where there was a dispute between the plaintiff and one of the defendants about a weir situate on the plaintiff's land, and the other defendant was charged with intending to enter forcibly on the land and destroy the weir:—Held, that the last-mentioned defendant could not sustain a demurrer to a bill for injunction on the ground that he had no interest in the subject-matter of the dispute, and was a mere agent acting on the orders of the principal defendant. *Ib.*

Importation and Transhipment of patented Article—Custom-house Agents.]—A patent was granted in England for an invention rendering nitro-glycerine less dangerous. Foreigners imported into England an article compounded of nitro-glycerine and other substances which they had manufactured abroad according to the patent process. The respondents, acting as Custom-house agents for the importers, passed the article through the Custom-house, and obtained permission (as required by the Explosives Act, 1875) for landing and storing it in magazines belonging to the importers:—Held, that the respondents being only Custom-house agents for the importers, and not themselves the importers, and having neither possession of nor control over the goods, their acts did not amount to an exercise or user of the patent, and that no action could be maintained against them for an infringement of the patent. *Nobel's Explosives Company v. Jones*, 8 App. Cas. 5; 52 L. J., Ch. 339; 48 L. T. 490; 31 W. R. 388—H. L. (E.).

PRINCIPAL AND SURETY.

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I. NATURE OF CONTRACT.

1. OPERATION OF THE STATUTE OF FRAUDS.

a. What Promises within.

To Debtor.—A promise to a debtor to pay his debt to a third person is not a promise to answer for the debt of another, within the statute, which applies only to promises made to the person to whom another is answerable. *Eastwood v. Kenyon*, 11 A. & E. 438; 3 P. & D. 276; 4 Jur. 1081.

To pay Debt of another.—A promise to pay the debt of another is within the statute, and void, if not in writing. *Fish v. Hutchinson*, 2 Ld. Ken. 537; 2 Wils. 94.

So, a parol promise to pay the debt of another, and also to do some other thing, is void. *Chater v. Beckett*, 7 T. R. 201.

And the plaintiff cannot separate the two parts of such a contract. *Ib.*

In a letter written by the defendant to the plaintiff relating to a proposed mortgage, the following words are not a sufficient guarantee within the Statute of Frauds: "I will take any responsibility myself respecting it, should there be any." *Holmes v. Mitchell*, 7 C. B., N. S. 361; 28 L. J., C. P. 301; 6 Jur., N. S. 73.

A testator appointed his son and three other persons his executors and trustees. The son disclaimed and renounced probate, and afterwards purchased a portion of the testator's property. The other legatees raised a claim for losses incurred by the trustees, and the son's solicitor wrote on his behalf to the claimants, agreeing to pay 300*l.* in satisfaction of the losses:—Held, that this letter was not within the Statute of Frauds, as an agreement to answer the debt, default, or miscarriage of another; and that it was not invalid for want of consideration. *Orrell v. Coppock*, 26 L. J., Ch. 269; 2 Jur., N. S. 1244.

To Pay upon Completion of Work.—A board of health had been formed in a town, L. being its chairman. M., a contractor, had, under the orders of the board, formed a main sewer in the town, and, under the orders of the board, had purchased pipes which would be required to be used in making the connecting drains between certain private houses and the main sewer. The board had, under 11 & 12 Vict. c. 63, s. 69, given notice to the inhabitants of certain streets to make these connecting drains, the effect of the notice being that if the inhabitants did not make these connecting drains the board might make them and charge the expenses on the defaulting inhabitants. The notice was disregarded. No subsequent resolution was passed by the board. M. was about to take away his carts and working materials, when L. said to him, "What objection have you to making the connexions?" to which M. answered, "None, if you or the board will order the work, or become responsible for the payment:" and L. replied, "M., go on and do the work, and I will see you paid." M. did the work, and the board refusing to pay, sued L. for the amount:—Held, that the words of L. were properly left to the jury as evidence to sustain a claim against him personally, and that they did not constitute a promise to pay the debt of another, so as to come within the operation of the Statute of Frauds. *Lakeman v. Mountstephen*, 7 L. R., H. L. 17; 43 L. J., Q. B. 188; 30 L. T. 437; 22 W. R. 617. Affirming 7 L. R., Q. B. 196; 41 L. J., Q. B. 67; 25 L. T. 755—Ex. Ch.

When the promise is made to answer for the debt or default of a third person, and there is no actual, but only a supposed liability on the part of that third person, the promise is equally void, whether it is in writing or not. But where the promise is made in respect of a future contemplated liability on the part of a third person, such a promise is within the 4th section of the Statute of Frauds. *Ib.*

A. having commenced certain business for B., which he had undertaken, refused to proceed without a promise from C. to pay the further expenses:—Held, that C. was not liable on such

a promise without a note in writing. *Barber v. Fox*, 1 Stark. 270.

W. undertook to complete the carpenter's work in H.'s house and find all materials; W. being delayed for want of credit or funds to procure timber, it was supplied by M. on H.'s signing the following undertaking: "I agree to pay M. for timber to house in A. C. out of the money that I have to pay W., provided that W.'s work is completed:—Held, that this was not a guarantee to pay if W. should fail, but a direct undertaking to pay when the work should be completed. *Dixon v. Hatfield*, 2 Bing. 439; 10 Moore, 42.

H. was employed to do work on certain houses, and the defendant was employed as surveyor over him, and to receive moneys to be paid to H. for such work; and, in consideration that the plaintiff would provide and deliver to H. such materials as should be required to enable him to do the work, the defendant promised the plaintiff to pay him for them out of such moneys received by him as should become due to H. for that purpose:—Held, that the defendant's promise was an original and not a collateral one. *Andrews v. Smith*, 2 C., M. & R. 627.

Upon Sales.—Though a tradesman is induced to send goods upon credit to another, by a promise made in these words, "If you do not know him, you know me, and I will see you paid;" yet this is void by the statute, not being in writing. *Matson v. Wharam*, 2 T. R. 80; *S. P.*, *Peckham v. Faria*, 3 Dougl. 13.

A parol promise to pay for goods sold to B., if B. did not pay for them, though made before delivery of the goods, is a collateral undertaking within the statute. *Jones v. Cooper*, Cowp. 227; Lofft, 769; 2 T. R. 80.

A count averring that A. made a bill of sale of goods to the plaintiff in consideration of a debt of 122l. 19s. due from A. to the plaintiff, and that the plaintiff being about to sell the goods, the defendant undertook to pay him the debt, if he would forbear to sell, does not shew with sufficient distinctness that it is a promise to pay the debt of another, so as to bring the case within the statute. *Barrell v. Trussel*, 4 Taunt. 117.

A. introduced B. to C., an upholsterer, and A., in B.'s premises, asked C. if he had any objection to supply B. with some furniture, and that if he would, he would be answerable. C. asked A. how long credit he wanted, and A. replied, "he would see it paid at the end of six months." C. agreed to it, and A. gave him the order, and the goods were supplied accordingly. At the end of six months, B. not having paid the amount, C. applied to A. for payment, and he paid the money. The entry in C.'s books was, "Mr. B. per Mr. A.:"—Held, that the jury was warranted in finding that the undertaking on the part of A. was not a collateral undertaking. *Simpson v. Penton*, 2 C. & M. 430; 4 Tyr. 315.

A. sold goods to B., who, being unable to pay, transferred them to C., who promised A. to pay for them:—This is a new sale to C., and not a mere promise by C. to pay the debt of B. *Browning v. Stallard*, 5 Taunt. 450.

A. applied to B. for goods, who asked for a reference; A. referred him to C., who on being applied to, inquired the amount of the order, and on what terms the goods were to be furnished, and on being told, said, "You may send them,

and I'll take care they are paid for at the time." He was afterwards written to, to accept a bill for the amount, to which he replied that he was not in the habit of accepting bills, but that the money would be paid when due. After this, B. the seller, wrote to C. about the goods, and spoke of them in his letter as goods which C. had guaranteed; and the attorney of the assignees of B. (who afterwards became bankrupt), wrote to A. for the money, and threatened process; but this letter was a circular, written in pursuance of a list made out for him by B., and without knowledge of the circumstances under which the debt was contracted:—Held, that on this evidence C. was not primarily liable, but only as a guarantor of the debt of A. *Rains v. Story*, 3 C. & P. 130.

Sale of Shares.—The defendant and P. agreed for the sale by P. to the defendant of the "put or call" of fifty foreign railway shares, at certain price per share premium, at any time on or before the 18th of February, 1844. Before that day the defendant agreed to resell the option to the plaintiff, and to guarantee the performance of the agreement by P. On the 16th February the plaintiff called the shares (i.e. required the delivery of them, pursuant to the agreement) but it was at the same time verbally agreed between him and the defendant and P., that the shares should be delivered by P. to the plaintiff not on the 18th February, but on the 2nd March, at Paris:—Held, that this was not an agreement for the defendant to be answerable for the default of P., but an original promise by the defendant for the delivery of the shares by P., for which note in writing was not required by the Statute of Frauds. *Hargreaves v. Parsons*, 13 M. & W. 561; 14 L. J., Ex. 250.

Promise to pay Bills.—A., an agent for some manufacturers, sold to B., who likewise acted as an agent, a quantity of shoes, and received bills exchange in payment; B., being pressed to indorse them, refused, but wrote a letter to A., which he inclosed the bills, and added, "thou shouldst they not be honoured when due, he, I would see them paid:—"—Held, that this was sufficient agreement, within the statute, to bind B. to pay for the goods in default of his principal. *Morris v. Stacey*, Holt, 153.

In an action on a bill of exchange where the defendant had indorsed it as surety for the acceptor:—Held, that as the action was brought on the bill, and not on the guarantee, the agreement to become surety could be proved by parol evidence. *Wilkinson v. Unwin*, 7 Q. B. 636; 50 L. J., Q. B. 338; 46 L. T. 123; W. R. 458—C. A.

Promissory Notes.—A. at the request of a son on a verbal offer by B. to indemnify him against loss, joined with C. in a joint and several promissory note, which he was afterwards compelled to pay:—Held, that the offer to indemnify A. was not an agreement within the Statute of Frauds, s. 4, and, therefore, need not be in writing, and that A., having afterwards become the executor of B., was entitled to retain the amount paid by him on the note as a debt due to him from B.'s estate. *Wildes v. Dudlow*, 19 L. Eq. 198; 44 L. J., Ch. 341; 23 W. R. 435.

To Discount Bills.—The plaintiff had contracted to supply goods to C. & Co., to

paid for in cash on each delivery. C. & Co., being desirous of obtaining the goods at a month's credit instead of cash, the defendant (who had an interest in the performance of the work upon which the goods were to be used) promised the plaintiff that if he would supply the goods to C. & Co., drawing upon them at one month, and would allow him (the defendant) 3l. per cent. upon the amount of the invoice, he would pay the plaintiff cash, and take C. & Co.'s bill without recourse; in other words, buy the bill of him:—Held, that this was a contract to answer for the debt or default of another, within the Statute of Frauds. *Mallet v. Bateman*, 1 L. R. C. P. 163; 35 L. J., C. P. 40; 12 Jur., N. S. 122; 13 L. T. 410; 14 W. R. 225; 1 H. & R. 109—Ex. Ch. See further, cases, *post*, col. 121.

Credit, to whom Given.]—The defendant having employed a builder to erect some houses, and given a guarantee for a supply of materials to the builder to a certain amount, and afterwards an order for a further supply, and more materials having been supplied on the order of the builder, the defendant being constantly on the premises:—Held, that it was for the jury whether he had so acted as to lead the plaintiff to believe that the latter supply was to be on his credit. *Smith v. Rudhall*, 3 F. & F. 143.

A tradesman delivered goods to A., at the request and credit of B., who said, before the delivery, "I will be bound for the payment of the money, as far as 800l. or 1,000l." This promise of B. not being in writing, is void, if it appears that credit was given to A. as well as to B. *Anderson v. Hayman*, 1 H. Bl. 120. And see *Croft v. Smallwood*, 1 Esp. 121.

A mother took her son to school, and saw the master; but no evidence was given of what passed at this time; afterwards a bill was delivered to the boy's uncle, who said it was quite right to deliver the bill to him, for he was answerable:—Held, that the Statute of Frauds did not apply, and it was proper to leave it to the jury to say, under those circumstances, whether the original credit was not given to the uncle. *Darnell v. Fealt*, 2 C. & P. 82.

Forbearance to Sue.]—A promise by the defendant to pay the debt of a third person whom the plaintiff had sued, in consideration of staying proceedings in the action, is within the statute. *Fish v. Hutchinson*, 2 Wils. 94; 2 Ld. Ken. 537.

A promise by a party to execute a bail-bond on a writ to be sued out against A., in consideration of the plaintiff forbearing to arrest A. on a writ already sued out, is not a promise to answer for the debt of another under the statute. *Jarmin v. Algar*, 2 C. & P. 249; R. & M. 348.

A. having wrongfully, and without the licence of B., ridden his horse, and caused its death, a promise by a third person to pay the damage thereby sustained, in consideration that B. would not bring any action against A., is a collateral promise within the statute, and must be in writing. *Kirkham v. Marter*, 2 B. & A. 613; 1 Chit. 382.

Where the consideration in a guarantee was expressed to be the forbearing to sue for immediate payment:—Held, that no other consideration could be implied. *Oldershaw v. King*, 2 H. & W. 517; 27 L. J., Ex. 120; 3 Jur., N. S. 1152—Ex. Ch.

A guarantee for payment of the debt and costs

in an action pending against a third person, unless paid by a certain day, was in writing, but did not stipulate for forbearance of the action. An action having been brought on the guarantee, the declaration alleged a stay of further proceedings in the first action as the consideration for the promise:—Held, that no such consideration appeared on the written instrument, or could necessarily be implied from it, as to satisfy the statute. *Cole v. Dyer*, 1 Tyr. 304; 1 C. & J. 461.

The plaintiff's agent wrote to the defendant:—"I have this morning received the most peremptory instructions to settle this account. Be good enough to arrange something by to-morrow." The defendant in reply:—"I undertake to pay 500l. on the account between my late brother, Mr. O. D. Hughes, and your client on or before this day three weeks:—"The plaintiff did not expressly agree to forbear suing, but did in fact forbear for three weeks:—Held, that the correspondence, together with the plaintiff's actual forbearance for three weeks to sue, constituted a good and binding promise to pay on the part of the defendant. *Wynne v. Hughes*, 21 W. R. 628.

A promise to pay damages by a third person, in case the plaintiff will withdraw a record for trial, is not within the statute. *Read v. Nash*, 1 Wils. 305.

A suit in chancery was pending between A. and B., which C. conducted for A., as A.'s attorney. An agreement made between B. and C., with the consent of A., purporting, that in consideration of the suit being put an end to, B., the defendant in equity, promised to pay C., the attorney, the costs due to him from A., the plaintiff in equity, is an agreement by B., the defendant, to pay the debt of another, and, therefore, it ought to be in writing. *Tomlinson v. Gell*, 1 N. & P. 588; 6 A. & E. 564; W., W. & D. 229.

Forbearance to Distrain.]—A promise to pay rent to a landlord going to distrain, by a person who is in the possession of the goods under a bill of sale, by which the landlord is induced to forego his distress, is not a contract within the statute, and, therefore, good without being in writing. *Williams v. Leper*, 2 Wils. 302; 3 Burr. 1806.

An auctioneer, employed to sell goods on certain premises, for which rent was in arrear, was applied to by the landlord for the rent, the landlord saying it was better to apply so than distrain. The auctioneer answered, "You shall be paid; my clerk shall bring you the money:—"Held, that an action lay on this promise without any note in writing. *Bampton v. Paulin*, 4 Bing. 264; 12 Moore. 497.

A., being indebted to his landlord for half a year's rent of a farm, due on the 25th of March, an auctioneer was about to sell the goods of A. on the premises in the month of August. On the day of the sale the landlord came there to distrain for his rent. The auctioneer, in consideration that the landlord would not distrain, verbally promised to pay, not only the rent due, but the rent that would become due at the Michaelmas following:—Held, that the promise to pay the accruing rent was a promise founded on a new consideration distinct from the demand which the landlord had against A., and therefore void by the Statute of Frauds; and that the promise being entire and in the commencement void in part, was void altogether. *Thomas v. Williams*, 10 B. & C. 664.

The defendant, in consideration of the plaintiff's withdrawing a distress for rent, undertook to pay the sum due for rent out of the sale of the produce of the effects:—Held, that it was a positive engagement to pay, if the goods were sufficient; and therefore, in an action on the guarantee, proof that the goods produced the amount of rent, entitled the plaintiff to recover, although there were prior claims. *Stephens v. Pell*, 2 C. & M. 710; 4 Tyr. 6.

A landlord, having authorized a distress for rent, is responsible for the necessary expenses; and although the plaintiff was sent by the defendant to take possession of the goods distrained, and he promised to pay him, the latter will not be liable without a note in writing. *Colman v. Eyles*, 2 Stark. 62.

Discharge from Execution—Persons.—Where a defendant taken on a ca. sa. is discharged out of custody by consent of the plaintiff, the debt itself is extinguished; and therefore a promise by a third person to pay that debt on condition of that discharge is an original promise, and not within the statute. *Goodman v. Chase*, 1 B. & A. 297.

A declaration alleged that the plaintiff recovered against S. 3,007l. 12s., and sued out a ca. sa., indorsed to levy 2,611l. 7s. 3d. and interest on 2,578l., besides sheriff's poundage and officer's fees; by virtue of which writ the sheriff arrested S., and detained him in custody; and thereupon, and whilst S. was in custody, in consideration that the plaintiff would procure his release, on payment of poundage and officer's fees, he, the defendant, promised the plaintiff to pay to him 500l., part of the damages and interest, within one month, and to give a bond for payment of the remainder in five years:—Held, that the contract was not one required to be in writing by the Statute of Frauds. *Butcher v. Stewart*, 11 M. & W. 857; 1 D. & L. 508; 12 L. J., Ex. 391; 7 Jur. 774.

M. having obtained in a county court a warrant of commitment against H., in default of payment of 34l., H. was arrested upon this warrant by the plaintiff. M. at the same time gave instructions to the plaintiff to release H., on payment of 17l. The defendant thereupon verbally promised the plaintiff that if he would release H. he would pay him 17l., or re-deliver H. into his custody on the following Saturday. The plaintiff accordingly released H.; but the defendant neither paid the money nor re-delivered H., in accordance with his undertaking:—Held, that for this default the plaintiff might recover; for that the promise was not one to answer for the debt, default, or miscarriage of another person, within the statute. *Reader v. Kingham*, 13 C. B., N. S. 344; 32 L. J., C. P. 108; 9 Jur., N. S. 797; 7 L. T. 789; 11 W. R. 366.

An undertaking, that if the plaintiff would discharge A. out of custody, the defendant would pay the debt at all events, is not such a guarantee to pay the debt of another as is required to be in writing; but an undertaking that if the plaintiff would discharge A. and take his bill for the debt, the defendant, without indorsing it, would pay in case A. dishonoured it, must be in writing. *Maggs v. Amos*, 4 Bing. 474; 1 M. & P. 294.

—**Property.**—B., holding A.'s warrant of attorney for 340l., signed judgment thereon, and

sued out a f. fa. A. having other creditors, his brother-in-law, C., looked into his accounts, and with the assent of B. and the rest of the creditors had all A.'s property conveyed to him, upon his undertaking to pay A.'s creditors in full. B. relinquished his execution against A.; but, after waiting some years for payment of his debt, was eventually obliged to sue C. On objection that his promise was to answer for the debt, default or miscarriage of another, and should, therefore have been in writing:—Held, that it was an original promise, and not within the Statute of Frauds. *Bird v. Gammon*, 3 Bing. N. C. 883; 1 Scott, 213; 3 Hodges, 224.

Although a promise on a consideration not to sue out execution on a judgment against another is at its commencement by parol, yet if it afterwards is acknowledged in writing to a third party, it is not within the statute. *Longfellow v. Williams*, Peake's Add. Cas. 225.

Promise to pay Debt on Assignment.—A promise in writing to pay a debt to be transferred from the promiser's account to that of a third party, his agent, is valid as a guarantee, and parol evidence to identify the debt is admissible. *Brunton v. Dullens*, 1 F. & F. 450.

Where A., being indebted to B. & Co. for goods sold, upon being released from his liability assigned to the latter a debt which was due to him from C. & Co.; and notice of the assignment was given to a partner in the house of C. & Co. who promised in the name of the firm to pay the debt to B. & Co. out of the partnership funds:—Held, in an action by B. & Co. against C. & Co. for money had and received, that the promise was not within the statute. *Lacy v. McNeile*, 4 D. & R. 7.

A. was indebted to B., and C. who resided abroad, was indebted to A. A. proposed to assign to B. the debt owing from C. to him, which B. agreed to accept. A. wrote to C.'s agents in this country, "As soon as you have funds belonging to C. pay on my account to B. 291l. 18s., and I will credit C., having received his order to this effect." C.'s agents verbally promised B. to pay him, as they had funds of C. in hand. A. afterwards ordered C. to pay to another creditor the debt owing from C. to A., and C. gave an undertaking to pay that creditor, with a memorandum stating, that, as it was alleged that a payment had been made by some person to A. on account of C., it was declared that, should C. prove such payment to have been made, the amount should be deducted. C. having refused to pay the debt to this latter creditor, on the ground that the agents were liable to pay it to B.:—Held, that C.'s promise to pay was not a promise to pay the debt of a third person within the statute. *Hodgson v. Anderson*, 5 D. & R. 735; 3 B. & C. 84.

A. being insolvent, a verbal agreement, entered into between several of his creditors and B. whereby B. agreed to pay the creditors 10s. in the pound, in satisfaction of their debts, which they agreed to accept, and to assign their debt to B., is not within the statute, not being collateral promise to pay the debt of another but an original contract to purchase the debts. *Anstey v. Marden*, 1 N. R. 124; 2 Smith, 426.

A., who was agent for the plaintiff, being desirous of retiring, the defendant applied for the agency. A. was indebted to the plaintiff, and also claimed a commission for introducing customer. It was agreed that the plaintiff should allow A.

25*l.* on that account, and that the defendant on taking the agency should allow the plaintiff to retain six months' salary, which amounted to 52*l.* In an action by the plaintiff for money received by the defendant as such agent, to which he pleaded a set-off for six months' salary :—Held, that this was not an undertaking to answer for the debt of another. *Walker v. Hill*, 5 H. & N. 419.

Where a person assigns a debt or contract to which he is entitled, and guarantees to the assignee the due discharge of it, his guarantee is not within the statute, because the debt or liability guaranteed is due to himself and not to the assignee, and the statute intends only promises to answer for debts and defaults in respect of which the promisee himself is the creditor. *Hargreaves v. Parsons*, 13 M. & W. 561.

Promise on Abandonment of Lien.]—If a tradesman, having goods in his possession, upon which he has a lien, parts with the goods on the promise of a third person to pay the demand, such promise is not within the Statute of Frauds. *Houlditch v. Milne*, 3 Esp. 86.

A broker, having a lien on certain policies of insurance effected for his principal, for whom he had given his acceptances, the defendant promised that he would provide for the payment of the acceptances as they became due, upon the brokers giving up to him such policies, in order that he might collect for the principal the money due thereon from the underwriters; which was accordingly done, and the money was afterwards received by the defendant :—Held, that this was not a promise for a debt or default of another within the Statute of Frauds; and that the broker might recover against the defendant, as well for the breach of agreement in not providing for the payment of the acceptances, as also upon a count for money had and received. *Castling v. Aubert*, 2 East, 325.

A., through the agency of B., a broker, sold a parcel of linseed to C., who, through the same broker, sold at an increased price to D. The time for D. to pay the price was to arrive before that fixed for the payment by C. D. sent a clerk to the broker for the delivery order for the seed. The broker took him to A., from whom the clerk obtained the order, upon the faith of his engagement that D. would pay A. for the seed. D., on the following day, sent the broker a cheque for 900*l.* on account, the precise quantity not having then been ascertained. Upon the seed being afterwards measured, it was found that the amount payable to A., under his contract with C., was 971*l.* 15*s.* 6*d.* In an action by A., against D., to recover the difference between that sum and the 900*l.* cheque :—Held, that the agreement by D.'s clerk was not a contract or a promise to pay the debt of a third person, within the Statute of Frauds, the seed, the giving up the delivery order for which was the consideration for that promise, being the property of D., subject only to A.'s lien for the contract price. *Fitzgerald v. Dressler*, 7 C. B., N. S. 374; 29 L. J., C. P. 113; 5 Jur., N. S. 598.

Charterparty—Retention of Ship.]—The owners of a ship hired on charterparty by S., refused to let her sail till certain disputes about the freight between them and S. were settled by S. giving security; whereupon the defendant, in

consideration that the owners would let S. sail without giving security, undertook to get M. to sign a guarantee for a payment of the freight set forth, and deliver it to the owners within a week :—Held, that this was not an undertaking for the debt, default, or miscarriage of another within the statute. *Bushell v. Bevan*, 4 M. & Scott, 622; 1 Bing. N. C. 103.

—Stop on Freight.]—A declaration stated that the plaintiff, a shipbroker, was retained by the shipowner to procure a charter for a ship, on the terms that the plaintiff should collect the freight, and thereout retain his commission; that the plaintiff did procure a charterparty; that the defendants, in consideration of the plaintiff's abandoning his right of collecting the freight, promised to pay him his commission. The facts were that the plaintiff agreed with the shipowner to procure a charter for the ship, and that he should be authorized to collect the freight on the supposed voyage, as a security for his commission. The ship having sailed and returned, the defendants, as brokers of the then owners, put a stop on the freight. A written agreement, on which the action was brought, was afterwards made, and signed by the plaintiff, the defendants, and the charterers, that the stop should be taken off the freight, that the commission on the charterparty payable to the plaintiff should be paid to him by the defendants, and that no person signing that agreement should put any stop on the freight :—Held, that the agreement was an agreement to answer for the debt of another, within the statute, and not a transfer of liability. *Gull v. Lindsay*, 4 Ex. 45; 18 L. J., Ex. 355.

Indemnity on Prosecution of Action.]—A promise by the indorser of an unpaid note to indemnify the holder if he will proceed to enforce payment against the other parties on the note, must be in writing, or it is void under the Statute of Frauds. *Winckworth v. Mills*, 2 Esp. 484.

Where a party desires an action brought against another person to be defended, in which action he is concerned, and may be benefited by the event; and such action is defended, and the party fails, he is liable to pay the expenses of the defence; nor is it within the Statute of Frauds in such case requisite to have a note in writing. *Howes v. Martin*, 1 Esp. 162.

An occupier of land, at the request of the defendant, and upon a promise of indemnity, resisted a suit of the vicar for tithes :—Held, that this was not a promise required by the Statute of Frauds to be in writing. *Adams v. Dansey*, 6 Bing. 506; 4 M. & P. 245.

Becoming Bail.]—If the plaintiff becomes bail for a stranger, in consideration of the defendant's request, and of the defendant promising to indemnify the plaintiff against the consequences, no action lies upon such promise, unless it is in writing. *Green v. Cresswell*, 10 A. & E. 453; 2 P. & D. 430; 4 Jur. 169.

The plaintiff having promised to indemnify G. against the consequences of a bail-bond into which G. had entered at the plaintiff's request, and G. being forced to make a payment in consequence, it was agreed between the plaintiff and the defendant, that the plaintiff should obtain the money by discounting a bill drawn by

the plaintiff, and accepted by the defendant. The plaintiff sued the defendant on the bill, and he pleaded that it was accepted for the plaintiff's accommodation:—Held, that a jury might find for the defendant on this issue, although the plaintiff was not liable on his promise to indemnify, it not being in writing. *Cresswell v. Wood*, 10 A. & E. 460.

To Co-Surety.—A promise by one co-surety to another is not within the 4th section of the Statute of Frauds, and need not be in writing. *Thomas v. Cook*, 3 M. & R. 444; 8 B. & C. 728.

b. Sufficiency of Note or Memorandum.

Generally.—A memorandum written by the plaintiff's clerk, in the presence of the defendant, that "the latter had called to say that he would be responsible for goods delivered to Mr. H.," is not a sufficient undertaking within the Statute of Frauds. *Dixon v. Broomfield*, 2 Chit. 205.

The defendant addressed the following letter to the plaintiff relating to a proposed mortgage of leasehold property: "I saw Mr. L. this day, and I told him he had better call on you, as he seemed very anxious to have the mortgage completed, and I thought he offered very fair terms; but do as you please about it. I will take any responsibility myself respecting it, should there be any." After the letter had been received, the plaintiff had an interview with Mr. L., and on the faith of such letter lent 400*l.* to A. on the leasehold security:—Held, that the letter was not a sufficient guarantee within the Statute of Frauds, as the whole promise could not be made out without reference to parol evidence. *Holmes v. Mitchell*, 7 C. B., N. S. 361; 28 L. J., C. P. 301; 6 Jur., N. S. 73.

Indorsement.—Where A. by letter entered into an agreement with B., who acknowledged its terms by writing a memorandum at the foot of a copy of the letter, and signing it; and afterwards C. became guarantor for B. to A. by an indorsement on the back of the copy of the same letter, referring to the terms of the agreement therein contained:—Held, in an action on the guarantee, that the reference by the indorsement to the terms of the agreement as forming part of one transaction, was a sufficient memorandum of the consideration within the statute. *Stead v. Liddard*, 8 Moore, 2; 1 Bing. 196.

The plaintiff, at the request of the defendant, sold to C. some wine, to be paid for by bills, and received from the defendant the following guarantee, signed by him: "Upon your handing me your two drafts upon C. for 200*l.* and 146*l.* at six months from this date, I undertake to get them accepted by him, and to see that they are duly paid." It was afterwards discovered that the draft for the sum mentioned as for 146*l.* should have been for 150*l.*; and accordingly the plaintiff drew bills for 200*l.* and 150*l.*, which the defendant got accepted by C., and gave to the plaintiff, and then wrote across the guarantee as follows: "I have received the two drafts (one being for 150*l.* instead of 146*l.*, there being an error in the invoice of 4*l.*), both accepted by C." The plaintiff signed this receipt, but not the defendant. The plaintiff having declared on the instrument as a contract, in consideration that the plaintiff would, at his own expense, procure

stamps for and draw two bills, one for 200*l.* and the other for 150*l.*, at six months, and deliver them to the defendant, he would get them accepted and see them paid:—Held, that the instrument was a valid memorandum of the contract declared on, within the Statute of Frauds, since the indorsement, having been made for the purpose of correcting the mistake and being written by the defendant on the same piece of paper as the original undertaking, must be considered as authenticated by the signature of the defendant. *Bluck v. Gompertz*, 7 Ex. 862; 21 L. J., Ex. 278.

Reference to other Documents.—Action on an Irish judgment. Plea, that the judgment was recovered against the defendant as surety for Scott Brothers, for moneys advanced by the plaintiff to them; that after the judgment recovered, the plaintiff settled with Scott Brothers and that there was nothing due upon the judgment for moneys advanced. Replication, that the deed was executed between the plaintiff and Scott Brothers, whereby, after reciting the judgment and various disputed accounts, an agreement was made between the plaintiff and Scott Brothers, for the settlement of all disputes, in which it was agreed that the plaintiff should advance 800*l.* to a banking company, which he had guaranteed to them, and 200*l.* to Scott Brothers, and that the debt from Scott Brothers should be fixed at 1,000*l.*, and that the agreement should be without prejudice to the security of the judgment against the defendant. Averment that after the making of the deed, and before the execution by the plaintiff, in consideration that the plaintiff would execute it, and would advance 800*l.* and 200*l.*, the defendant promised that the judgment should stand security for the repayment of 1,000*l.* and interest. Averment of performance by the plaintiff, and that 800*l.* and 200*l.* had been advanced, but never repaid. Rejoinder traversing the promise as alleged. To prove this issue, the plaintiff put in the following letter from the defendant, and another surety dated before the execution of the deed by the plaintiff: "We hereby consent to the with deed being executed by and between the parties without prejudice to the rights and remedies of the plaintiff, under his judgment for 10,000*l.* recover 1,000*l.*" This letter had been annexed to the deed, and was intended to have been seen therewith to the defendant for signature, but the letter alone was sent, and the defendant signed without seeing the deed. Semble, that this was not a promise to pay the debt of another within the Statute of Frauds; but that if it was, the deed was a sufficient memorandum in writing, as the letter signed by the defendant incorporated much of the deed as formed the consideration of his promise. *Macrory v. Scott*, 5 Ex. 907; L. J., Ex. 90.

Where the defendant undertook to guarantee to the assignees of a bankrupt the payment of 100*l.* due to the estate of the bankrupt from for articles delivered to the latter for the use of his trade, so that the guarantee should not be put in force against the defendant for two years from its date; and the defendant, previously to the guarantee, wrote a letter to the assignees proposing the terms on which it was to be given, and afterwards recognized it:—Held, that the correspondence and guarantee were to be taken together, and constituted a sufficient

consideration for the promise, although it was objected that no consideration was expressed on the face of the guarantee itself. *Coe v. Duffield*, 7 Moore, 252.

For whom Intended.—A defendant wrote, signed, and handed to T. and O. the following document: "Sir, I beg to inform you that I shall see you paid to the sum of 800*l.* for the ensuing building which you undertake to build for Messrs. T. and O., Thomas Lake." He intended it to be handed over by T. and O. as a guarantee to J., who was then negotiating with T. and O. to erect for them the building referred to. T. and O., however, having agreed with the plaintiff, instead of J., that the plaintiff should erect the building, delivered the document to the plaintiff, without the defendant's knowledge or authority. The defendant afterwards heard of and ratified this delivery. The plaintiff, having erected the building, sued the defendant on the document, as a guarantee:—Held, that the document was not a sufficient written agreement, or note or memorandum thereof, by the defendant, to answer for the debt or default of T. and O.; inasmuch as the name of the person for whom the document was intended did not in any way appear upon the face of it, so that it did not contain the names of both the parties to the contract. *Williams v. Lake*, 2 El. & El. 349; 29 L. J., Q. B. 1; 6 Jur., N. S. 45; 1 L. T. 56.

The defendants, who were in partnership as railway contractors, under the name of W., A. & Co., contracted with a railway company to do certain works. U. and R. made a sub-contract with the defendants to do part of the work, and for that purpose, requiring coals to make bricks, A., without the knowledge or assent of his co-partners, signed in the name of the firm, and delivered to the plaintiffs a guarantee, not addressed to any person, for payment of coals to be supplied to U. and R. The plaintiffs having pointed out the omission, a clerk of W., A. & Co., by the direction of A., wrote to the plaintiffs, stating that the guarantee was intended for them. The clerk also, without the knowledge of the other partners, wrote to the plaintiffs certain letters amounting to evidence of an account stated in respect of the amount due on the guarantee:—Held, that the guarantee and subsequent letter constituted a sufficient note in writing within the statute. *Brettel v. Williams*, 4 Ex. 623; 19 L. J., Ex. 121.

A guarantee not addressed to any one will enure to the benefit of those to whom and for whose use it is given. *Walton v. Dodson*, 3 C. & P. 162.

Payment of Consideration, by whom.—“I hereby guarantee you the payment of the proceeds of the goods you have consigned to my brother, and also any future shipments you may make in consideration of 2*s.* 6*d.* paid me,” is a sufficient memorandum within the statute to make, the subscriber liable to the vendor, notwithstanding it does not expressly disclose by whom the 2*s.* 6*d.* was paid. *Dutchman v. Tooth*, 5 Bing. N. C. 577; 7 Scott, 710.

The intentment will be, that it was paid by the party to whom the memorandum was given. *Ib.*

2. STAMP.

Necessity of.—Where the consideration did

not appear on the face of the guarantee, a stamp was held nevertheless necessary. *Whitfield v. Moegen*, 1 F. & F. 290.

Relating to Sales of Goods.—A broker, when he bought goods for his principal, agreed for a half per cent. to indemnify him from any loss on the resale; the agreement, if reduced to writing, need not be stamped, because it is a contract relating to the sale of goods. *Curry v. Edensser*, 3 T. R. 524.

So a guarantee for the payment of goods thereafter to be purchased by a third person to a certain amount, is within the exception in the stamp act as a contract relating to the sale of goods, and does not require to be stamped. *Warrington v. Furber*, 8 East, 242; 6 Esp. 89; *S. P.*, *Watkins v. Vince*, 2 Stark. 368.

Charterparty.—A guarantee for the due performance of a charterparty does not require to be stamped as a charterparty or an agreement for the charter of any ship, or any memorandum, letter, or any other writing between the captain or owner of any ship and any other person, for or relating to the freight or conveyance of goods on board such ship, within 5 & 6 Vict. c. 79, s. 2. *Rein v. Lane*, 2 L. R., Q. B. 144; 8 B. & S. 83.

Collateral Purposes.—A declaration stated, as the consideration of a promise, the giving up of a certain guarantee; plea, that the plaintiff did not give up the guarantee:—Held, that the guarantee might be given in evidence, though unstamped. *Haigh v. Brooks*, 3 P. & D. 452; 10 A. & E. 309.

H., being a tenant to E., G. signed the following document: "August 2nd. According to Mr. H.'s request, the land at B., under Mr. E., I will be bound for until next Lady-day, rent 48*l.*" This document being tendered in evidence in an action by S. against H. for money paid to the landlord:—Held, that it required an agreement stamp. *Glover v. Hackett or Halkett*, 2 H. & N. 487; 26 L. J., Ex. 416; 3 Jur., N. S. 1083.

3. PARTIES.

Relationship of Parties generally.—There are three kinds of cases between which it seems important to distinguish. (1) Those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the creditor thereby secured is a party; (2) those in which there is a similar agreement between the principal and surety only, to which the creditor is a stranger; and (3) those in which, without any such contract of suretyship, there is a primary and a secondary liability of two persons for one and the same debt, the debt being, as between the two, that of one of those persons only, and not equally of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid. *Duncan, Fox and Company v. North and South Wales Bank*, 6 App. Cas. 11; 50 L. J., Ch. 355; 43 L. T. 706; 29 W. R. 763—H. L. (E.)

A. and B. desiring to borrow money of a bank, the bank refused unless C. would join to secure them; C. agreed to join, and A., B. and C. drew a cheque, and the money was paid to them:—

Held, that this was a joint, and not a joint and several liability; and that C. was in the nature of a surety only. *Other v. Iverson*, 3 Drew. 177; 24 L. J., Ch. 654; 1 Jur., N. S. 568.

Signature by Agent.—By 9 Geo. 4, c. 14, s. 6, a false representation as to the credit of another person, in order to maintain an action, must be signed by the person making it, and not by an agent. The plaintiff sued J. and G. jointly for a false representation with respect to the solvency of Sir William Russell. J. was sued as the public officer of a banking company formed under 7 Geo. 4, c. 46, and G. was the manager at one of their branches. The plaintiff was a customer of the S. bank, and requested the manager of that bank to inquire for him as to Sir William Russell's credit. The manager wrote a letter addressed to the manager of the banking company, requesting information whether Sir William Russell was responsible to the extent of 50,000*l.* G. replied in his own name, signing his letter as manager, and giving a favourable account of Sir William Russell's responsibility. The plaintiff, in consequence of this letter, supplied Sir William Russell with goods, for which he never was paid, in consequence of his insolvency. The statement made by G. was false to his knowledge. The banking company had no knowledge, otherwise than through G., that such letter had been written, and gave him no express authority to write the letter; but the writing of such a letter was an act done within the scope of the general authority conferred on G. as manager:—Held, that the signature of G. to the letter could not be considered the signature of the banking company itself. *Swift v. Jewesbury*, 9 L. R., Q. B. 301; 43 L. J., Q. B. 56; 30 L. T. 31; 22 W. R. 319—Ex. Ch.

The signature of an authorized agent is not a sufficient signature within 9 Geo. 4, c. 14 (Lord Tenterden's Act), s. 6, whereon to charge a party making a false representation. *Williams v. Mason*, 28 L. T. 232; 21 W. R. 386.

C. M. and A. M. were trading as M. & Son. A. M., the son, wrote to the plaintiff a letter signed M. & Son, in which he represented G. to be solvent. This letter was shewn to, and tacitly ratified by C. M., the father. G. proving insolvent:—Held, that notwithstanding the ratification of the letter by C. M., the letter was not signed by the "party to be charged," within the meaning of the above statute, so as to make him liable for any false representation therein. *Id.*

Joint and Several Guarantees.—A. and B. gave a joint and several guarantee to be responsible for the printing account of a company; B. afterwards became the secretary of the company; A. was sued separately on the guarantee, and pleaded equitably, that he gave it on the faith that some other person than B. should be secretary, which the plaintiff well knew, and assented to, and that he had never consented that B. should be secretary:—Held, bad. *Burridge v. Child*, 10 Jur., N. S. 106.

A declaration by A. against B. upon a guarantee is supported by proof of a document drawn up in the plural number, and concluding, "as witness our hands," but signed by B. alone. *Norton v. Powell*, 4 M. & G. 42.

A., as principal, and three sureties, B., C. and D., executed a bond to E. for the fidelity of A. in certain duties for which he was employed by

E., the bond being in the following form: "We, A., B., C. and D., are held and firmly bound to E. in the sum of 50*l.* each, to be paid to E. his executors, administrators and assigns; to which payment, well and truly to be made, we hereby bind us, and each of us, our and each of our heirs, executors, and administrators, and every of them, by these presents:—"Held, that the bond was the separate bond of each obligor, binding each to pay the sum of 50*l.* in the event of default by the principal; and, that, therefore, the payment of 50*l.* by B., one of the obligors, after breach, was no answer to an action on the bond against another obligor, C. *Armstrong v. Cahill* 6 L. R., Ir. 440.

A firm of bankers took a continuing guarantee for advances to a customer in the form of a joint and several bond from two sureties. One of the sureties died, and after notice thereof the bank made further advances to the customer:—Held that the surviving surety was liable to the bank in respect of such advances. *Beckett v. Addyman*, 9 Q. B. D. 783; 51 L. J., Q. B. 597—C. A.

The defendants had given the plaintiffs a guarantee, which, after stating the consideration, was in the following form: "We undertake and guarantee that the 400*l.* and interest shall be duly paid to you when the acceptance arrives at maturity, in the proportion of 200*l.* each." This was signed by both the defendants:—Held, that they were not liable jointly for the whole amount. *Fell v. Goslin*, 7 Ex. 185; 21 L. J., Ex. 145.

Action by one of several Parties.—E., as attorney for the executors of M., having sold an estate to a share of the proceeds of which W. was entitled, as legatee of M., and the defendant claiming W.'s share of such proceeds under an agreement with W., the executors paid the amount to the defendant on receiving from him a guarantee addressed to E., and also to the executors of M. to indemnify them and each of them against any action by W.:—Held, that they might sue on this guarantee, without joining E. *Place v. Delegal*, 4 Bing. N. C. 426; 1 Arn. 185; 6 Scott 249.

F. covenanted with the three plaintiffs to complete certain houses by a day fixed, on three several parcels of land mortgaged to the three plaintiffs respectively, and they covenanted to advance moneys to enable him to do so. In consideration of this arrangement the defendant jointly and severally guaranteed to the plaintiff that F. should duly fulfil his covenant; and it was agreed that their joint and several liability should not exceed 100*l.* F. having made default:—Held, that the three plaintiffs were entitled to recover in a joint action on this guarantee, in respect of damages sustained by any one of them to the extent of 100*l.* *Pugh v. Springfield*, 3 C. B., N. S. 2; 27 L. J., C. P. 225. And see *S. C.* 4 C. B., N. S. 364.

Where a man covenants with two or more jointly, yet if the interest and cause of action of the covenantees be several and not joint, the covenant shall be taken to be several, and each of the covenantees may bring an action for his particular damages, notwithstanding the words of the covenant are joint. *Palmer v. Sparshot*, 4 M. & G. 137; 4 Scott, N. R. 743.

By Partners.—One partner has no incidental authority to bind another in the name of the firm

by a guarantee of the debt of a third person ; and therefore it is necessary in such case to give some evidence of authority from him who did not sign, for his subsequent recognition. *Duncan v. Louwades*, 3 Camp. 478.

But a subsequent parol acknowledgment of the other partner is evidence of such an authority. *Id.*

A partner may give a guarantee, where the obligation has reference to business connected with the partnership, and where the guarantee is notified to the firm, and they do not dissent from it. *Nolte, Ex parte*, 2 Glyn & J. 295.

A., B. and C. were railway contractors in partnership, and had entered into a contract to do certain work for a railway company. D. had entered into a sub-contract to do part of the work, for which part bricks were required ; and it was necessary that D. should have coals to burn the bricks. In order to induce the plaintiff to supply D. with coals, A., without the previous knowledge or subsequent assent of his co-partners, entered into a guarantee, in the name of the firm, to secure the payment of the price of the coals to be supplied to D. by the plaintiff :—Held, that B. and C. were not liable on the guarantee. *Brettel v. Williams*, 4 Ex. 623 ; 19 L. J., Ex. 121.

To Member of Firm.—A guarantee for goods addressed to one of two partners may be declared on as given to both, if it appears that the partner to whom it was addressed did not carry on any separate business. *Waltm v. Dodson*, 3 C. & P. 162.

Where a guarantee was given personally and individually to one of several partners in a firm :—Held, that an action should be brought in the names of all the firm, as it appeared that the guarantee was intended for the benefit of all. *Garratt v. Handley*, 7 D. & R. 144 ; 4 B. & C. 664 ; 1 C. & P. 483.

If a plaintiff has been applied to to lend money to A., and the plaintiff requests a firm of which he is a member to do so, and they advance the money, debiting A. in their books ; the plaintiff cannot maintain an action against a third person, who has guaranteed the repayment of the money to be advanced to A. by the plaintiff. *Id.*

A., a member of a firm of A. Brothers, of South America, went to Hong Kong, to enforce a debt due by B. & Co. of that place to his firm. Upon B. & Co. being threatened with proceedings, they applied to C. & Co. for assistance. C. & Co. agreed to advance B. & Co. the money to pay their debt by remitting the amount to A. & Co., and afterwards, in pursuance of this agreement, and in consideration of A.'s not proceeding to sue B. & Co., gave an undertaking in writing, whereby C. & Co. promised to remit the amount to A.'s agent in London, at the expiration of six months, whereon A. gave B. & Co. a receipt in full for the debt due to the firm of A. & Co. C. & Co. afterwards repudiated their obligation to remit the amount to A. & Co. A. brought an action against C. & Co. :—Held, that the contract being entered into with A. personally, upon his undertaking not to sue B. & Co., constituted a personal agreement ; and that A. was entitled to sue C. & Co. in his own name, without joining his partners in the action. *Agacio v. Forbes*, 14 Moore, P. C. C. 160 ; 4 L. T. 155.

Guarantee to Inhabitants of Town.—The defendant, on occasion of there being a great run upon a banking house, went to the bank and told the holders of notes issued by the bank, who were waiting for payment, that he had come to a resolution to support the bank with 30,000*l.*, at which the holders present were satisfied, and said they would take no more money than was necessary, and would keep the rest of their notes till they got again into currency ; and afterwards the defendant signed the following written paper : " I do hereby authorize G. B. to assure the inhabitants of Pembroke and its vicinity, that I do hereby undertake to be accountable for the payment of the notes issued by the Milford bank, as far as the sum of 30,000*l.* will extend to pay :"—Held, that the bank having afterwards stopped payment, the defendant was not liable upon this undertaking to an action by an individual holder, who had taken the notes after notice of such undertaking, but before the stoppage. *Phillips v. Bateman*, 16 East, 356—Ex. Ch.

Evidence as to.—A letter addressed by the defendant to Mr. G., who was the plaintiff's attorney, stating that " the bearer, D. Williams, has a sum of money to receive from a client of mine some day next week, and I trust you will give him indulgence till that day, when I undertake to see you paid," and signed by the defendant, is evidence to charge him with the debt due from Williams to the plaintiff, upon parol proof of its amount, and that Mr. G., to whom it was addressed, was the attorney of the plaintiff, and received the letter in that character from Williams the bearer, and not as the principal and creditor. *Bateman v. Phillips*, 15 East, 270.

Authority of Agent.—The managing clerk of the firm, without the knowledge of B. and C., wrote letters to the plaintiff, containing evidence of an account stated respecting the amount due under a guarantee :—Held, that as the giving the guarantee was not a partnership business, the letters of the clerk respecting it were not evidence of an account stated as against B. and C. *Brettel v. Williams*, 4 Ex. 623 ; 19 L. J., Ex. 121.

Evidence that a son had in three or four instances signed bills of exchange for his father, is sufficient, in an action on a guarantee, to warrant the production and reading an instrument which purports to be a guarantee by the father in the handwriting of the son. *Watkins v. Vinos*, 2 Stark. 368.

4. WHEN CONCLUDED.

What is an Acceptance of Offer.—The defendant being desirous of having goods shipped to R. & Co., his agents in India, applied by letter on the 9th July, 1868, to the plaintiffs, who were manufacturers of edge tools, carrying on business at Sheffield, asking the price of certain tools to be sent out to India to the firm of R. and Co. The plaintiffs in reply stated their lists of prices, and that their terms were cash settlement in England within a few weeks. On the 11th of the same month the defendant wrote to them as follows : " I shall be very glad that you should come to an arrangement with R. & Co. that they should be your agents there ; but that requires direct correspondence between you and

them. I am quite willing to guarantee the first shipment." The same day the plaintiffs inclosed a list of prices, and requested a confirmation of the order, which the defendant accordingly sent. The goods, amounting in value to 800*l.*, were accordingly shipped to R. & Co. in India. Other shipments followed. The sum of 300*l.* only having been paid by R. & Co. in respect of this first shipment, the plaintiffs in July, 1871, wrote to the defendant, "We sincerely hope it may not be necessary to act upon your letter of the 11th July, 1868." In two letters which the defendant subsequently wrote to the plaintiff he never disclaimed his liability, but on the 26th September, 1871, he wrote, "As the event on which I expressed my willingness to guarantee never took place, it never became effective." R. & Co. having stopped payment, and there being 530*l.* still due upon the first shipment of goods, the plaintiffs sued the defendant upon his guarantee:—Held, that there was an express offer of a guarantee, and an intimation of acceptance. *Sorby v. Gordon*, 30 L. T. 528.

A written proposal to pay a moiety of the debt of another, if the creditor will, at a specified time of meeting, accept the proposal and discharge the debtor, is not binding unless the creditor accedes to the terms in writing. *Gaunt v. Hill*, 1 Stark. 10.

A written undertaking was given by the defendant to A. (to whose house the plaintiffs had declined to furnish goods on their credit alone), to the following effect: "I understand that A. & Co. have given you an order for rigging. I can assure you, from what I know of A.'s honour and probity, you will be perfectly safe in crediting them to that amount; indeed, I have no objection to guarantee you against any loss from giving them this credit;" which paper was handed over by A. to the plaintiffs, together with a guarantee from another house, which they required in addition; and the goods were thereupon furnished:—Held, that the paper did not amount to a guarantee, there being no notice given by the plaintiffs to the defendant that they accepted it as such, nor any consent of the defendant that it should be a conclusive guarantee. *McIvor v. Richardson*, 1 M. & S. 557.

Guarantee in the following form: "F. informs me that you are about publishing an arithmetic for him. I have no objection to being answerable as far as 50*l.*; for my reference apply to B." Signed G. T. B. wrote this memorandum, and added "witness to G. T., J. B." It was forwarded by B. to the plaintiffs, who never communicated their acceptance of it to G. T. In an action against the latter on a guarantee:—Held, that the plaintiffs, not proving any notice of acceptance to the defendant, were not entitled to recover. *Mozley v. Tinkler*, 1 C., M. & R. 692; 5 Tyr. 416; 1 Gale, 11.

In an action on a guarantee, the plaintiff gave in evidence a letter in the handwriting of the defendant, but without date, in which the latter stated, "I have no objection to guarantee the payment of the rent as far as each quarter, during Mr. T. Want's continuance in possession:" he also proved that T. Want rented certain premises from him. This is not sufficient, without shewing that the plaintiff accepted the defendant's offer. *Symmons v. Want*, 2 Stark. 370.

In an action on articles of agreement, under which a banking company was to make advances to a firm, to be guaranteed by the defen-

dants at a limited rate of interest, and in consideration of the guarantee the banking company was to release a debt due from the firm, the performance of the agreement extending over several years, a plea, that it was not executed on behalf of the company, "nor otherwise agreed to" by them (it appearing that the defendants brought it to the company, executed it, and left it with them, who had acted upon it by making the advances at the specified rate of interest, but had never executed it):—Held, that the plea was not supported, and that the company was entitled to recover. *Liverpool Borough Banking Company v. Eccles*, 4 H. & N. 139; 28 L. J., Ex. 122.

Time for.]—In an action for goods sold, the defendant pleaded that the defendant and M. agreed with the plaintiffs that M. should give a guarantee for payment of the debt by instalments, and that the guarantee was given and was accepted by the plaintiffs in satisfaction. Replication, denying the agreement, and the acceptance of the guarantee. It was proved by Mr. L., the plaintiff's attorney, that he had asked him to propose to the plaintiffs to accept his guarantee, and that Mr. L. having consented to do so, M. signed a guarantee, which was on the next day sent by Mr. L. to the plaintiffs, who kept it three weeks, and then returned it:—Held, that if the plaintiffs did not return the guarantee within a reasonable time, they must be taken to have accepted it; and that, unexplained, three weeks was an unreasonable time. *Pope v. Andrews*, 9 C. & P. 565.

Mutual Mistake.]—The plaintiffs' agent entered into a contract to supply bricks to a builder at certain prices "to be taken within four months from the date thereof. Month's account, and bill at five months from date thereof. The due performance of this contract by" the builder being guaranteed by the defendant. This was signed by the defendant, but he and the plaintiff's agent both understood and agreed that he was thereby guaranteeing only the acceptance of bills by the builder. The plaintiffs always believed the defendant had guaranteed the payment of the bills, and heard nothing of the agreement of their agent with the defendant. The agent had received no authority from the plaintiffs to assent to such a guarantee as the defendant intended, and the plaintiffs supplied the bricks on the faith of the guarantee, as they interpreted it:—Held, that the contract was a guarantee for the payment of these bills, and that this was not such a mutual mistake between the parties as to constitute an equitable ground of defence to an action upon the guarantee. *Haymen v. Gover*, 25 L. T. 903.

5. ON ACCEPTANCE OR PAYMENT OF BILLS OR NOTES.

Effect of Acceptance.]—The acceptor of a bill of exchange knows that by his acceptance he does an act which will make him liable to indemnify any indorser of it who may afterwards pay it. The indorser is a surety for the payment to the holder, and, having paid it, is entitled to the benefit of any securities to cover it deposited with the holder by the acceptor, *Duncan, For & Co. v. North and South Wales Bank*, 6 App. Cas. 11; 50 L. J., Ch. 355; 43 L. T. 706; 29 W. R. 763—H. L. (E).

Proof or Guarantee by Parol.]—In an action on a bill of exchange, where the defendant had indorsed it as security for the acceptor:—Held, that, as the action was brought on the bill and not on the guarantee, the agreement to become surety could be proved by parol evidence. *Wilkinson v. Unwin*, 7 Q. B. D. 636; 50 L. J., Q. B. 338; 46 L. T. 123; 29 W. R. 458—C. A.

A., wanting money, he and the defendant applied to the plaintiff to draw a bill, to be accepted by A., and indorsed by the defendant, and the defendant promised the plaintiff that she should not be called upon. The jury found that A. and the defendant were both principals in the transaction:—Held, that the plaintiff, having paid the bill, was entitled to receive the amount without proof of a promise in writing under the Statute of Frauds. *Batson v. King*, 4 H. & N. 739; 28 L. J., Ex. 327.

A., at the request of and on a verbal offer by B. to indemnify him against loss, joined with C. in a joint and several promissory note, which he was afterwards compelled to pay:—Held, that the offer to indemnify A. was not an agreement within the Statute of Frauds, and need not be in writing, and A., having afterwards become the executor of B., was entitled to retain the amount paid by him on the note as a debt due to him from B.'s estate. *Wilde v. Dudlow*, 19 L. R., Eq. 198; 44 L. J., Ch. 341; 23 W. R. 435.

A., as agent for some manufacturers, sold to B., who likewise acted as an agent, a quantity of shoes, and received bills of exchange in payment; B., being pressed to indorse them, refused, but wrote a letter to A., in which he inclosed the bills, and added, "that, should they not be honoured when due, he, B., would see them paid:—Held, that this was a sufficient agreement to bind B. to pay for the goods in default of his principal. *Morris v. Stacey*, Holt, 153.

Discounting Bills.]—The plaintiff had contracted to supply goods to C. & Co., to be paid for in cash on each delivery. C. & Co. being desirous of obtaining the goods at a month's credit instead of cash, the defendant (who had an interest in the performance of the work upon which the goods were to be used) promised the plaintiff that if he would supply the goods to C. & Co., drawing upon them at one month, and would allow him (the defendant) 3l. per cent. upon the amount of the invoice, he would pay the plaintiff cash and take C. & Co.'s bill without recourse; in other words, buy the bill of him:—Held, that this was a contract to answer for the debt of another, and must be in writing. *Mallet v. Bateman*, 1 L. R., C. P. 163; 35 L. J., C. P. 40; 13 L. T. 410; 14 W. R. 225; 1 H. & R. 109—Ex. Ch.

M. drew bills upon the B. and A. company, and a banking company, under an agreement with M., guaranteed the acceptors (also a company) that they would supply them with funds to meet the bills. S. discounted the bills, being informed by M. of the guarantee of the banking company, but he gave no notice to the banking company or to the acceptors. Afterwards the banking company and the acceptors suspended payment and were wound up. M. also executed a deed of composition with his creditors:—Held, that S. had no equity to rank as a creditor of the banking company in respect of the guarantee. *Barned's Banking Company, In re, Stephens*, *Ex parte*, 3 L. R., Ch. 753; 19 L. T. 198; 16 W. R. 1162.

Principal or Surety.]—Where two persons give a joint note for the debt of one, it is necessary, in order to give the other the rights of a surety as against the creditor, to shew that he was only a surety, that the creditor knew him to be so, and that he accepted him as such. *Strong v. Foster*, 17 C. B. 201; 25 L. J., C. P. 106; 4 W. R. 151.

A person appearing on the face of an instrument to be a principal debtor, jointly with another, cannot at law set up, as against third parties, that he was only a surety. *Ib.*

A., being a customer of a bank, got B. to join him in a note to the bank, and sent the note to the bank, intimating that he had got B. to join him in it, but the note was not entered in A.'s account. After it became due, A. had a balance at the bank larger than the amount of the note. In an action on the note, by the bank against B., he pleaded that he was only surety, and was accepted as such by the bank; that the bank gave A. time for the payment of the note, and forbore to enforce payment, and the bank might have obtained payment from A. if they had not given him time:—Held, that even if B. could say in equity that he was surety, the plea was not proved, that it did not appear that he was accepted as surety, that there was no evidence that time had been given to A. so as to discharge B., and that the bank did not, by refraining from appropriating A.'s balance to the payment of the note, discharge B. from his liability on it. *Ib.*

A bonâ fide holder of a bill or note cannot be prejudiced in the rights which he has, according to the terms of the instrument, by knowledge that the acceptor or maker is surety for another, and where there is no specific agreement at the time when he takes the instrument to receive it from the acceptor or maker as a surety only. *Manley v. Boycott*, 2 El. & Bl. 46; 22 L. J., Q. B. 265; 17 Jur. 1118.

If one maker of a note signs as surety only for the other, and the payee has notice of this when he takes the note as security for money advanced to the principal, he cannot give time to the principal without the consent of the surety. If he does so, the surety is discharged in equity, although the payee has never agreed to treat him otherwise than as a principal liable upon the note, for an equity arises from the relation of principal and surety, and notice thereof to the payee, and if the surety is sued on the note after such time given, he may set up the defence by a plea on equitable grounds. *Greenough v. M'Clelland*, 2 El. & Bl. 424; 30 L. J., Q. B. 15; 6 Jur., N. S. 772; 2 L. T. 571; 8 W. R. 612—Ex. Ch.; *S. P., Taylor v. Burgess*, 5 H. & N. 1; 22 L. J., Ex. 7.

One of the makers of a joint note may shew that he was a mere surety for the other party, and so known to the plaintiff, the payee of the note; and that the plaintiff has taken a composition from the principal debtor. *Hall v. Wilcox*, 1 M. & Rob. 58.

Appropriation of Balance of Current Account to Payment of Note.]—The plaintiffs lent 1,000l. to B., one of their customers, upon the security of a joint and several promissory note, payable on demand, made by B. and the defendant, a solicitor, and also upon the deposit of the deeds of a house of which B. was the owner, together with a memorandum signed

by B. that the deeds were deposited as security for any general balance not exceeding 1,000*l.*, which might then or thereafter be due to the plaintiffs from him. The memorandum contained an undertaking by B. to execute a legal mortgage of the house, but this undertaking was not carried out. Subsequently, in March, 1875, an arrangement was entered into without the knowledge of the defendant, between the plaintiffs and B., whereby it was agreed that the plaintiffs should not press for repayment of the loan, but that B. should pay instead a higher rate of interest than that on which the loan was originally made, and this higher rate was afterwards debited to B. in his current account. The loan and current account were always kept distinct, and for some months subsequent to this arrangement the plaintiffs always had a balance exceeding 1,400*l.* to the credit of B. The plaintiffs having pressed for the execution of a legal mortgage with the usual power of sale, the defendant's partner, on behalf of and in the name of his firm, prepared a legal mortgage to the plaintiffs, another solicitor acting for B. This mortgage, which was executed by B., secured the payment to the plaintiffs of any sum not exceeding 1,500*l.*, which might thereafter be due to the plaintiffs upon B.'s general account, with interest at 6 per cent., and also contained a covenant for payment three months after demand, and a power of sale in case of default. In an action brought upon the promissory note against the defendant, after default made by B.—Held, that the defendant had signed and was liable upon the promissory note as principal, and that as there was no evidence to shew that the plaintiffs had agreed to accept the defendant merely as surety, he was not entitled to be treated as such. *York City and County Banking Company v. Bainbridge*, 43 L. T. 732; 45 J. P. 158.

The defendants signed a note as security for a loan from a club of which they were members. By the rules certain payments were made at every monthly meeting for particular purposes:—Held, that the defendants, who signed as sureties for the other defendant, had no right to set off these monthly payments by the principal, as made on account of the sum secured by the note. *Wright v. Hickling*, 15 L. T. 245.

Presentment Unnecessary.—Where a party guarantees the payment of a promissory note, if it is not duly honoured and paid by the maker, according to its tenor and effect, he is liable on his guarantee, if the note is not paid by the maker when due, without any presentment to him for that purpose. *Walton v. Mascoll*, 13 M. & W. 452; 2 D. & L. 410; 14 L. J., Ex. 54.

A. guaranteed to B., that if B. would furnish C. with goods on credit, and draw upon C. from time to time for the price of them, A. would pay for the goods. B. supplied C. accordingly, and drew upon him, for the price of the goods, a bill, which C. accepted, but did not pay at maturity. In an action against A. by B. for the value of the goods, he was not able to prove presentment of the acceptance to C. for payment, nor notice of dishonour to A.—Held, that it was not requisite for B. to produce such proof; for since A. was not a party to the bill, but only a collateral security, he was not entitled to take advantage of the provisions of the law merchant respecting transactions on bills of exchange or promissory

notes; nor could he set up any laches on the part of B. with respect to the bill in question unless he had sustained special damage thereb. *Hitchcock v. Humphrey*, 6 Scott, N. R. 540; M. & G. 559; 12 L. J., C. P. 235; 7 Jur. 423.

Interest.—A party who guarantees the payment of a bill of exchange by the acceptor liable for interest upon it, if it is not paid when due. *Ackerman v. Ehrensperger*, 16 M. & W. 99; 16 L. J., Ex. 3.

Lending Acceptance.—Where a plaintiff lends his acceptance to a defendant:—Held, that the term implied a contract of indemnity, and might be declared on as such. *Reynolds v. Doyle*, M. & G. 763; 2 Scott, N. R. 45; 1 Drink. 1.

Bill Brokers—Custom as to implied Authority from Acceptor to make themselves Liable to the Bankers.—It being proved to be the common and almost invariable practice of bill brokers in the city of London not to indorse each bill of exchange which they have discounted for customer when they rediscount it with the bankers, but to give to the bankers a general guarantee for all bills which they rediscount with them:—Held, that when an accommodation bill is drawn and accepted for the purpose of raising money for the drawer and the acceptor the drawer in discounting the bill with bill brokers in the city of London has an implied authority from the acceptor to deal with them in the ordinary course of their business, and consequently, that the bill brokers have an implied authority from the acceptor to make themselves liable on the bill under their guarantee to the bankers, and are, in the event of the bankruptcy of the acceptor, entitled to prove against his estate for what they have paid to the bankers in respect of the bill under their guarantee. *Bischoff v. Forster*, 15 Ch. D. 400; 50 L. Ch. 18; 43 L. T. 165; 29 W. R. 144—C. A.

See also cases under **BILLS OF EXCHANGE.**

When Delay Discharges Surety.—See II. *infra*.

6. CONSTRUCTION AND EFFECT.

a. Generally.

For the Court.—In an action on a guarantee alleged to be contained in a letter and telegram in which there were no words of doubtful true meaning, and the extrinsic facts not being controversial:—Held, that the question, whether the words used amounted to a contract of guarantee, was for the determination of the court alone. *Bank of Montreal v. Munster Bank*, 1 Ir. R., C. L. 47.

Form of Instrument.—The following words were held not to constitute a contract of guarantee: "Our friends H. and M. have purchased a cargo from G. Last year there was delay and trouble owing to bills of lading coming from different lots, and through more than one source and without insurances being perfected. If you obviate a repetition of this now you will oblige us much. On presentation of cash order, and a documents at Union Bank, payment will be promptly made. Excuse this trouble." *Id.*

A. & Co. bought certain wools of B. & Co., payable by the buyers' acceptance at eight months; but before the sale was completed, B. & Co. requiring some security in consideration of 11. per cent. obtained the following instrument from C., signed by him: "Gentlemen, in consideration of 11. per cent. I hereby guarantee the due and correct payment of half the amount of 136 bales of wool sold to A. & Co., as per contract," &c. Before the bill given to A. & Co. fell due, a fiat in bankruptcy issued against C., and shortly afterwards against A. & Co., and no dividend was declared under either fiat. The bill was duly presented, and remaining unpaid:—Held, that the instrument was a guarantee. *Willis, In re*, 4 Ex. 530; 19 L. J., Ex. 30.

Where A. wrote an order to B. to deliver two pipes of spirits to C., and it was objected that it did not amount to a guarantee, but was a mere order for the delivery of goods, without any promise to pay for them:—Held, that the effect of the order was either to make A. the principal debtor for or in the place of C., or to make him answerable for the debt, if C. should make default. *Langdale v. Parry*, 2 D. & R. 337.

b. Continuing Guarantees.

Termination of—Effect of Death and Notice.]

—A continuing guarantee is not ipso facto revoked by the death of the guarantor. But notice of the death of the guarantor and of the existence of a will, given to the holder of the guarantee, is constructive notice of the determination of the guarantee as to future advances. *Coulthart v. Clementson*, 5 Q. B. D. 42; 49 L. J., Q. B. 204; 41 L. T. 798; 28 W. R. 355.

A. desiring to become an underwriting member of Lloyd's, B. gave a guarantee to the committee of that body on behalf of A., in which he held himself responsible "for all his engagements in that capacity."—Held (affirming the decision of Fry, J.), that the guarantee was not determined by the death of the guarantor or by notice of his death. *Calvert v. Gordon* (3 M. & R. 124) followed. *Lloyd's v. Harper*, 16 Ch. D. 290; 50 L. J., Ch. 140; 43 L. T. 481; 29 W. R. 452.—C. A. Affirming 49 L. J., Ch. 217; 42 L. T. 218; 28 W. R. 419.

A firm of bankers took a continuing guarantee for advances to a customer, in the form of a joint and several bond. One of the sureties died and, after notice thereof, the bank made further advances to the customer. Held, that the remaining surety was liable for such advances. *Beckett v. Addyman*, 9 Q. B. D. 783; 51 L. J., Q. B. 597.—C. A.

A guarantee was determinable by six months' notice. The guarantor died, leaving as his executor the debtor on whose behalf the guarantee was given. The creditors to whom the guarantee was given continued to make advances to the debtor, knowing that there was no personal estate to answer the guarantee:—Held, that, under the circumstances, the creditors were not entitled to the benefit of the guarantee for their advances subsequent to the death. The death alone did not determine the guarantee. *Harriss v. Fawcett*, 8 L. R., Ch. 866; 42 L. J., Ch. 502; 29 L. T. 84; 21 W. R. 742. Affirming 15 L. R., Eq. 311; 28 L. T. 182; 21 W. R. 504.

A. having guaranteed thus: "To C. D. I request you will credit E. F., and in consideration thereof I guarantee the running balance:"

—Held, that this promise was not revoked by A.'s death without notice to C. D. from the executor. *Bradbury v. Morgan*, 1 H. & C. 249; 31 L. J., Ex. 462; 8 Jur., N. S. 918; 7 L. T. 104.

—**Withdrawal.**—Semble, that a general guarantee under seal may, under certain circumstances, be withdrawn upon the terms of paying all that may be due under it at the time of giving notice of withdrawal. *Burgess v. Ere*, 13 L. R., Eq. 460; 41 L. J., Ch. 515; 26 L. T. 540; 20 W. R. 311.

Upon a bond conditioned for a collecting clerk truly accounting for and paying over moneys received by him from time to time, and at all times during his continuance in the service, the obligor cannot discharge himself from further liability by giving notice on a particular day that from thenceforward he will not remain surety. *Calvert v. Gordon*, 3 M. & R. 124; 7 B. & C. 809.

Nor can the personal representative of the obligor discharge himself by such notice. *Ib.*

A surety may protect himself, by stipulating in the guarantee that he shall be at liberty to determine his liability at the expiration of a specified time after notice. *Ib.*

A company, by deed, guaranteed the defendants, upon their gross annual returns, against loss in their business, during the term of two years, by purchasers of goods becoming bankrupt. The guarantee was subject to the following condition: "Every guarantee shall be made for a specified term, but all guarantees upon gross annual returns, floating risks, or rent, whatever may be the original term of the same, shall, from the expiration of such original term, be treated as a renewed contract of the like nature and conditions, unless either the member interested therein or the board of directors shall give two calendar months' notice of an intention not to renew the same."—Held, that in the event of no notice being given, the guarantee became a renewed contract for any one period of two years from the expiration of the original term, and was not from time to time renewable. *Solvency Mutual Guarantee Company v. Ffrance*, 7 H. & N. 5; 31 L. J., Ex. 193; 7 Jur., N. S. 899.

To an action on the deed of guarantee, the defendants pleaded that, at the expiration of the original term, the guarantee was rescinded:—Held, no objection to the plea that it did not state that the guarantee was rescinded by deed. *Ib.*

To an action on the agreement for the guarantee for non-payment of the money falling due on the renewal of the original term, it is a good plea that the defendant had exonerated the plaintiff from giving notice of an intention not to renew, and the agreement was mutually rescinded, and that no claim had been made since the expiration of the original term in respect of the agreement as renewed. *Ib.*

A guarantee to secure moneys to be advanced to a third party on discount, to a certain extent, "for the space of twelve calendar months," is countermandable within that time. *Offord v. Davies*, 12 C. B., N. S. 748; 31 L. J., C. P. 319; 9 Jur., N. S. 22; 6 L. T. 579; 19 W. R. 758.

Discharge in Bankruptcy.—The uncondi-

tional discharge of a debtor in liquidation does not release his sureties, although they do not assent to, but protest against, his discharge. *Ellis v. Wilmot*, 10 L. R., Ex. 10; 44 L. J., Ex. 10; 31 L. T. 754; 23 W. R. 214; *S. P., Jacobs, Ex parte, Jacobs, In re*, 10 L. R., Ch. 211; 44 L. J., Bk. 34; 31 L. T. 745; 23 W. R. 251; and *Clegg v. Gilbey*, 2 Q. B. D. 209; 46 L. J., Q. B. 325; 35 L. T. 927; 25 W. R. 311.

The defendant gave the plaintiff a guarantee, to the extent of 200*l.*, but revocable at his option on giving him notice in writing; and afterwards became bankrupt, and obtained his certificate of conformity, under the 12 & 13 Vict. c. 106, but did not give notice to determine the guarantee:—Held, that his liability was a contingent liability within s. 178, and that the certificate was a bar to all claims under the guarantee. *Boyd v. Robins*, 4 C. B., N. S. 749; 27 L. J., C. P. 299; 4 Jur., N. S. 1084.

What are Continuing.]—P., who had annually given C. a guarantee expressly limited for a year, by each of which P. guaranteed the amount "for the time being due" from F. to C. for coals sold to him, gave C., during the currency of the last of these annual guarantees, a guarantee which, after reciting that F. was indebted to C. in 2,205*l.* 3*s.* 9*d.*, in addition to his liability upon two acceptances of P. for 750*l.* each, indorsed by F. to C., and that C. was pressing for the immediate payment of the 2,205*l.* 3*s.* 9*d.*, was as follows: "Now I do hereby, in consideration of your forbearing to take immediate steps for the recovery of the said sum, guarantee the payment of and agree to become responsible for any sum of money for the time being due from F. to you, whether in addition to the 2,205*l.* 3*s.* 9*d.* or not:—Held, that this was a continuing guarantee, and extended to a debt due from F. to C. for goods supplied after the guarantee had been given, and that there was therefore a good consideration for such guarantee. *Coles v. Pack*, 5 L. R., C. P. 65; 39 L. J., C. P. 63; 18 W. R. 292.

Amounts Due.]—A father gave his son a promissory note for 2,000*l.*, which was indorsed by the son, and discounted by a banking company, who took from the father an agreement under seal, that in consideration of their discounting the note, certain deeds of the father's deposited at the same time should remain a security for all money due or to become due from the son to the company on any account whatsoever. At the date of the agreement the son owed the company 3,000*l.* upon a running account, and the amount was subsequently increased to 5,000*l.* The father having died:—Held, that the agreement was a continuing guarantee, and that the bank was entitled to prove against the father's estate, not only for the 2,000*l.*, the amount of the note, but for all sums due to them from the son. *Burgess v. Eve*, 13 L. R., Eq. 450; 41 L. J., Ch. 515; 26 L. T. 540; 20 W. R. 311.

Where a bond which, on the face of it, appears to be a simple money bond, is given to secure a sum certain with interest, it must be construed, so far at least as regards the surety, as given to secure the debt then existing, and not to cover floating balances. *Walker v. Hardman*, 4 C. & F. 258; 11 Bligh, 299. See *Pease v. Hurst*, 5 M. & Rob. 88; 10 B. & C. 122.

Prima facie, a continuing guarantee limited in amount to secure a floating balance is, as between surety and creditor, a guarantee of so much only of the debt as does not exceed the sum named in the limitation, for it is to be presumed that the surety does not contemplate the creditors allowing the debtor to become indebted to him beyond that amount. No such presumption arises where the debt, in respect of which the bond is given, is an ascertained amount exceeding the sum named in the limitation. *Ellis v. Emmanuel*, 1 Ex. D. 157; 46 L. J., Ex. 25; 34 L. T. 553; 24 W. R. 832.

Until Notice.]—The plaintiffs (of whom D. had been in the habit of buying goods, having heard of a bill of sale given by D. to the defendants, declined to let D. have certain goods which he had then bought of them without a telegram from the defendants that they would be answerable for them. They sent such telegram, and D. had the goods, and in due time paid for them. By the post of the same day or which the telegram was dispatched, the defendants sent to the plaintiffs a letter, in which after referring to the telegram, and stating that they had done business with D. for five years and had never known anything dishonest in his transactions, they wrote, "What you have heard was done to protect him from a dishonest tradesman, and will in no way, we hope, be to the injury of his creditors. Having every confidence in him, he has but to call upon us for a cheque and have it with pleasure, for any account he may have with you. When to the contrary, we will write you:—Held, that this letter was a continuing guarantee for the amount of goods D. should buy of the plaintiffs until they should hear from the defendants to the contrary. *Nottingham Hide, Skin, &c., Company v. Bottrill*, L. R., C. P. 694; 42 L. J., C. P. 256; 29 L. T. 134; 21 W. R. 739.

Action against one of the obligors of a joint and several bond. By the condition which recited an agreement by a banking firm, to discount bills, and otherwise to advance to one of the obligors any sums of money not exceeding any one or more times or times 200*l.* upon security, the bond was to be void, if the obligor or any or either of them, should pay to the banking firm, and any other person who should become a partner in the firm, all such sums not exceeding 200*l.*, as the firm or any future partner should advance the obligor on bills, &c. which he might from time to time draw upon or get discounted by them, within three months after notice to pay such sums:—Held, first, that the bond was a continuing security. *Batson Spearman*, 3 P. & D. 77; 9 A. & E. 298.

Held, secondly, that an averment that 200*l.* was due, and that notice thereof had been given to the defendant, was no notice to him to pay and so the non-payment by him no breach of the condition shewn. *Id.*

Until Payment.]—R. & Co. being about to open an account with the Union Bank, the defendant and one Black signed the following guarantee:—"In consideration of the Union Bank agreeing to advance and advancing to R. & Co. any sum or sums of money they may require during the next eighteen months, not exceeding in the whole 1,000*l.*, we hereby jointly and severally guarantee the payment of all

such sum as may be owing to the bank at the expiration of the said period of eighteen months." 1,000*l.* was placed by the bank to the credit of R. & Co.'s drawing account, and R. & Co. were debited with 1,000*l.* in a loan account. R. & Co. from time to time drew cheques against, and paid money to the credit of, their drawing account. Over 1,000*l.* was thus paid in by R. & Co., and they were not debtors on the drawing account when it was finally closed. The loan account remained unaltered. The bank sued the defendant for 1,000*l.* on the guarantee, and after the commencement of the action Black paid the bank 500*l.* in discharge of his liability. The defendant did not plead this payment:—Held, that the guarantee was a continuing one, and that the defendant's liability was not discharged by the payments made by R. & Co. *Laurie v. Scholfield*, 4 L. R., C. P. 622; 38 L. J., C. P. 290.

—**Limited Credit.**—Certain of the directors of a company guaranteed personally to the company's bankers the drafts of the agent of the company to the extent of 1,000*l.*, and 1,000*l.* further, undertaking to provide the bankers with funds to meet the acceptances before maturity. The company kept a current account with the bankers, and the drafts of its agent were from time to time honoured and debited to this current account. One of the guarantors died, and his estate was under the administration of the court. The company's current account had been constantly overdrawn; at the date of the testator's death it was overdrawn to the amount of 1,605*l.* 18*s.* 6*d.*; and the company was now in liquidation:—Held, that the guarantees given were a continuing security not satisfied by the earlier credits in the current account, and that, therefore, the bankers were entitled to prove against the testator's estate for the sum of 1,605*l.* 18*s.* 6*d.* and interest at four per cent. from the date of the testator's death. *Broth, In re, Browning v. Baldwin*, 40 L. T. 248; 27 W. R. 644.

Other Cases.—The defendant gave to the plaintiff, a cattle dealer, a guarantee in the following words:—"50*l.* I, J. M., of &c., will be answerable for 50*l.* sterling that W. Y., of &c., butcher, may buy of Mr. J. H.:"—Held, a continuing guarantee to the extent of 50*l.*, as it appeared from the circumstances under which the guarantee was given that the parties contemplated a continuing supply of stock to W. Y. in his trade of a butcher. *Heffeld v. Meadows*, 4 L. R., C. P. 596; 20 L. T. 746.

Where, by a written guarantee, A. becomes bound to B. for any debt C. may contract with him, not exceeding 100*l.*, the guarantee is not extinguished by one dealing between B. & C. to that amount, but extends to any debt of 100*l.* which C. may afterwards owe to B. *Merle v. Wells*, 2 Camp. 413.

A guarantee by the defendant to the plaintiff "for any goods he hath or may supply W. P. with, to the amount of 100*l.*," is a continuing or standing guarantee to that extent for goods which may at any time have been supplied to W. P. until the credit is recalled, although goods to more than 100*l.* have been before supplied and paid for. *Mason v. Pritchard*, 12 East, 227; 2 Camp. 436.

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An undertaking to be answerable to a given amount for any goods supplied by A. to B., after goods to that amount have been supplied and paid for, still remains in force while A. supplies B. with goods on the same footing, until revoked by the surety. But as soon as A. alters the credit on which he supplies the goods to B., the surety is discharged. *Bastow v. Bennett*, 3 Camp. 220.

"I hereby agree to guarantee the payment of goods, to be delivered in umbrellas and parasols to I. and E. S., according to the custom of their trading with you, in 200*l.*;" and the custom of trading between the plaintiff and I. and E. S. being to make up monthly accounts of goods delivered, and for I. and E. S. to give acceptances for the amount of each monthly account, is a continuing guarantee. *Hargrave v. Smeed*, 3 M. & P. 573; 6 Bing. 244.

"In consideration of your supplying my nephew V. with china and earthenware, I guarantee the payment of any bills you may draw on him on account thereof, to the amount of 200*l.*," is a continuing guarantee, and the defendant is liable upon it, although, after it was given, goods to a greater amount than 200*l.* have been supplied to and paid for by V. *Mayer v. Isaac*, 6 M. & W. 605; 4 Jur. 437.

The following guarantee, "In consideration of your agreeing to supply goods to K. at two months' credit, I agree to guarantee his present or any future debt with you to the amount of 60*l.* Should he fail to pay at the expiration of the above credit, I bind myself to pay you within seven days from the date of receiving notice from you," is a continuing guarantee. *Martin v. Wright*, 6 Q. B. 917; 9 Jur. 178.

"In consideration of your extending the credit already given to my son, and agreeing to draw upon him at three months from the 1st of the following month for all goods purchased up to the 20th of the preceding month, I hereby, at your request, guarantee the payment, and agree to pay you any sum that shall be due and owing to you on his account for goods supplied," is a continuing guarantee. *Hitchcock v. Humphrey*, 6 Scott, N. R. 540; 5 M. & G. 559; 12 L. J., C. P. 235; 7 Jur. 423.

"In consideration of the plaintiff having agreed to stay all further proceedings at law against the defendant, I hereby undertake, and promise and agree with the plaintiff, that, if J. B. M. shall die in the lifetime of his father, I will, within six months after his father's decease, pay the plaintiff 165*l.*," is a guarantee continuing, and may be declared on as executory. *Tanner v. Moore*, 9 Q. B. 1; 15 L. J., Q. B. 391; 11 Jur. 11.

A bond conditioned to indemnify and save harmless the obligees, for "such sums as they in their banking business should within ten years advance or pay, or be obliged to advance or pay for or on account of their accepting, discounting, &c., any bill of exchange, notes, &c., which A. should from time to time draw upon or make payable at their house; and also other sums which they, within the period aforesaid, should otherwise lay out, pay, &c., on the credit of A., or on his account; and also all such wages and allowances for advancing, paying, &c., such bills, &c., advances, payments, &c., engagements, and accommodations, not exceeding 5,000*l.* in the whole, together with interest on such advances, &c."—guarantees running accounts, and is not

satisfied by the first payment of 5,000*l.* *Williams v. Rawlinson*, 3 Bing. 71; 10 Moore, 362; R. & M. 233.

The following guarantee—"Whereas W. C. is indebted to you in a sum of money, and may have occasion for further purchases from you; as an inducement to you to sell him such goods, and continue your dealings with him, I agree and undertake to guarantee you in 100*l.*, payable to you in default on the part of W. C. for two months"—is a continuing guarantee. *Allan v. Kenning*, 2 M. & Scott, 769; 9 Bing. 618.

The defendant's son being indebted to the plaintiffs for goods supplied to the amount of 170*l.*, which was made up of several small monthly accounts, was pressed for payment or security. He thereupon paid 9*l.* in cash, and gave a promissory note for 61*l.*, and a guarantee by the defendant in the following terms: "In consideration of the credit given by the H. G. Co. to my son for coal supplied by them to him, I hold myself responsible as a guarantee for the sum of 100*l.*, and, in default of his payment of any accounts due, I bind myself to pay the H. G. Co. whatever may be owing, to an amount not exceeding 100*l.*" The supply of goods having been subsequently continued, and a further debt contracted, exceeding 100*l.*:—Held, that the defendant was liable to pay 100*l.* towards the price of the goods supplied to his son after the date of the guarantee. *Wood v. Priestner*, 2 L. R., Ex. 282; 36 L. J., Ex. 127—Ex. Ch.

A guarantee in the following words—"I hereby agree to be answerable for the payment of 50*l.* for T. Lerigo, in case T. Lerigo does not pay for the gin which he receives from you, and I will pay the amount," is not a continuing guarantee. *Nicholson v. Paget*, 1 C. & M. 48; 3 Tyr. 164; 5 C. & P. 395.

A written memorandum to guarantee the payment of A. to the extent of 60*l.* at quarterly account, bill two months, for goods to be purchased by him of the plaintiff, is not a continuing guarantee to that extent for goods to be supplied at any time to A. until the credit is recalled, but is applicable only to the first quarterly payment after it was given. *Melville v. Hayden*, 3 B. & A. 593.

A bond entered into by A. and B. to the plaintiff, to enable A. to carry on his trade, conditioned for the payment of all such sums not exceeding 3,000*l.*, which should at any time thereafter be advanced by the plaintiff to A., is not a continuing guarantee to the extent of 3,000*l.* for advances made at any time, but only a guarantee for advances once made to the extent of 3,000*l.* *Kirby v. Marlborough (Duke)*, 2 M. & S. 18.

"I hereby agree to be answerable to K. for the amount of five sacks of flour, delivered to T., payable in one month, Nov. 18th, T. G.," is a guarantee for flour, not exceeding five sacks delivered at one time, and not a continuing guarantee for parcels delivered at various subsequent periods, though not exceeding in the whole five sacks. *Kay v. Groves*, 6 Bing. 276; 3 M. & P. 634; 4 C. & P. 72.

A guarantee for the payment of coals to the amount of 50*l.*, for which the defendant would be answerable at any time, is not a continuing guarantee. *Bocill v. Turner*, 2 Chit. 205.

Amount of Liability on.]—See *post*, col. 154.

c. Conditional Guarantees.

Nature of Condition.]—A bank having advanced certain sums to a company, made a further advance upon the personal security of three of the directors. Five of the guarantors for the amount secured by an earlier bond signed an agreement that they would join the three directors in guaranteeing repayment to the bank of the further advance in equal proportions with the three directors. One of the five who signed this agreement stated by his affidavit that his signature (if he did sign) was obtained "on the express engagement and understanding" that the agreement should be signed by all the guarantors for the sum secured by the bond:—Held, that the words "express understanding" were utterly unmeaning, and that the court would never pay any attention to a statement that something was done on an express engagement, unless the engagement was spoken to in a manner which was admissible in evidence. *Dallas v. Walls*, 29 L. T. 599—C. A.

Prosecution of Servant for Embezzlement.]—By an agreement and a policy of insurance the defendants agreed to reimburse the plaintiff any pecuniary loss, to the amount of 1,000*l.*, which he might sustain by reason of any such fraud or dishonesty of A. in connection with his employment by the plaintiff, as should amount to embezzlement, and should be committed and discovered during the continuance of the policy. The policy provided (among other things) "that the employer shall, if and when required by the company, but at the expense of the company, if a conviction be obtained, use all diligence in prosecuting the employed to conviction for any fraud or dishonesty as aforesaid, which he shall have committed, and in consequence of which a claim shall have been made under this policy, and shall, at the company's expense, give all information and assistance to enable the company to sue for and obtain reimbursement by the employed or his estate of any money which the company shall have become liable to pay:—"Held, by Lords Blackburn and Watson (Lord Selborne, C., diss.), that the prosecution of A. for embezzlement was a condition precedent to the plaintiff's right of action upon the policy. *London Guarantee and Accident Company v. Fearnley*, 5 App. Cas. 911; 43 L. T. 390; 28 W. R. 893; 45 J. P. 4—H. L. (Ir.)

Completion in accordance with Contract—Surveyor's Certificate.]—The respondent advanced money to the appellant on a guarantee to be repaid "on the completion of six houses in accordance with a contract between myself and T." One of the terms of the contract was that the houses were to be built to the satisfaction of a surveyor, and payment was to be made upon his certificate. No such certificate had been given. In an action on the guarantee, brought by the respondent against the appellant, the jury found that, as a matter of fact, the houses were completed:—Held, that the respondent was entitled to recover, notwithstanding the absence of the certificate. *Lewis v. Hoare*, 44 L. T. 66; 29 W. R. 357—H. L. (E.).

Deviation.]—C. & Co., before their bankruptcy, guaranteed to A. the payment of 300*l.* for the erection of a sugar-mill for D. on the pro-

duction of a certificate from the engineer that the mill was erected according to the terms of a specification; A. produced a certificate of the erection of the mill, stating, however, a deviation from the original plan, with the consent of D.; upon which C. & Co., without making any objection to such deviation, informed A. that it was not in their power to pay the money:—Held, that A. might prove the 300l. under the fiat issued against C. & Co. *Ashwell, Ex parte*, 2 Deac. & Chit. 281.

Condition that Notice of Dishonesty should be given.—The guarantors, by their agreement, contracted to guarantee the plaintiff against loss sustained from any act of fraud or dishonesty by a rate collector, or from any failure on his part to collect and pay into the Bank of Ireland the rates to be collected by him, and produce to the plaintiff, as collector-general, the receipt of the bank for such payment, or from any failure on his part to deliver to the plaintiff true accounts of the moneys collected, and lists of the persons in arrear, "provided that the plaintiff should, within ten days after the discovery by him of any fraud or dishonesty of the 'said persons employed,' and of any matter in respect of which any claim may be intended to be made, give notice in writing, at the office of the society, as far as the case will admit, of all the particulars thereof; and after any such discovery, the guarantee herein contained shall, as to loss by any act of fraud or dishonesty, subsequent thereto, be at an end:—Held, that the proviso required notice to be given of such fraud or dishonesty only as would form the foundation of a claim under the guarantee and did not impose upon the plaintiff an obligation to give notice if he discovered that fraud or dishonesty had occurred on the part of the person employed, before the guarantee was entered into or the employment under himself commenced. *Byrne v. Muzio*, 8 L. R., Ir. 396.

Notice of Arrears.—The defendants were sureties for the repayment, by weekly instalments, of money borrowed by A. of a loan society. One of the rules of the society provided "that if any member becomes more than four weeks' payments in arrear the committee immediately inform the sureties of the same, and have power to institute legal proceedings against them." A. died, being more than four weeks' payments in arrear, but no application was made to the sureties until two years afterwards:—Held, that the rule was no part of the contract between the society and the sureties, and that the omission to give notice in pursuance of it did not afford an equitable defence to an action against the sureties. *Price v. Kirkham*, 3 H. & C. 437; 34 L. J., Ex. 35; 11 L. T. 314.

On Condition of Others Joining.—The defendant signed a guarantee upon a condition, orally agreed to, that M. should also sign as a co-security. M. did not sign, and subsequently, and without notice of the condition, the guarantee was signed by the plaintiff, who, having been obliged, upon the default of the principal debtor, to pay the whole debt, sought to recover contribution from the defendant in the ordinary course for money paid to his use:—Held, that condition was a good defence to the action. *Barry v. Moroney*, 8 Ir. R., C. L. 554—Ex. Ch.

A surety, who has contracted to become so on

the understanding that he is to be co-surety with another, is wholly released in equity if the intended co-surety does not execute. *Evans v. Bremridge*, 2 Kay & J. 174; 25 L. J., Ch. 102; 2 Jur., N. S. 134. Affirmed, 8 De G., M. & G. 100; 25 L. J., Ch. 334; 2 Jur., N. S. 811.

In an action against a surety on an equitable plea, founded on the non-execution of the security by a co-surety:—Held, that there must be evidence of an agreement by the plaintiff with the defendant that such co-surety should execute, or that the defendant executed on the faith of the other's doing so, and where the proposal of another surety came from the plaintiff, and was not at the time made a condition by the defendant, the defence failed. *Traill v. Gibbons*, 2 F. & F. 358.

A surety, who has executed a bond on the faith of its being executed by the principal debtor also, cannot be released from his obligation on the ground that the principal has never executed it, if the principal has executed an instrument on which the surety may sue him and become a specialty creditor of his. *Cooper v. Evans*, 4 L. R., Eq. 45; 36 L. J., Ch. 431; 15 W. R. 609.

To a declaration stating that T. was the lessee of certain tolls, and that S. and the defendant agreed to join with T. in a bond, conditioned for payment of the rent under the lease; and alleging as a breach that the defendant refused to join T. in the bond; the defendant pleaded, first, that at the time of tendering the bond to him, S. had not executed the same, nor was he present ready to execute it jointly with the defendant; and secondly, that S. died before the commencement of the suit, and that before his death the bond was not tendered to the defendant for execution, nor was he requested to execute it:—Held, that the pleas were bad. *Horne v. Ramsdale*, 9 M. & W. 329.

In an action for a balance due upon a note, it appeared that the amount had been advanced by the payee to one of the makers, on his undertaking that three other persons, of whom the defendant was one, would sign it with himself as his sureties. Two of the three did sign it, and the money was advanced. The defendant, when afterwards applied to, declined to sign it for some time, declaring that he had not authorized a note for so large an amount; but ultimately he signed it, and made payments upon account:—Held, that he was liable upon it for the balance. *Dodge v. Pringle*, 29 L. J., Ex. 115.

The defendant in two letters, addressed to C. J., the brother of the plaintiff's intestate, R. J., in the first of which he pressed C. J. to join, and to induce his brothers to join in a security for the repayment of money to be advanced to the defendant for carrying on a suit in chancery; and in the second he again urged, that they should lend their names for this purpose, and added, "I should consider it a matter of favour to myself, if your brothers will join, and I will see that they come to no harm." C. J., in consequence, joined in the security:—Held, that the letters amounted to an actual guarantee, on which the defendant was liable to the plaintiff; and not merely to a representation, with a view to the parties doing an act against the consequence of which they should afterwards be protected. *Jones v. Williams*, 7 M. & W. 493; 9 D. P. C. 252.

That Life Insurance should be effected.]—By a mortgage deed between the mortgagor and two others, as sureties, and the mortgagee, after reciting that the mortgagor was possessed of certain hereditaments, and of a policy of insurance on his life for —l., and that the mortgagee had agreed to lend him 1,000l. to be secured as therein provided, and that "upon treaty for the loan, it was agreed that the repayments should be further secured by the sureties joining in the deed;" the mortgagor mortgaged the hereditaments and the policy of insurance for —l., and all moneys assured or to become payable under it, as security for the debt. There were covenants by the mortgagor and the two other sureties to pay the interest, and to pay the premiums on the policy and any sums necessary for effecting another, if it should become void. There was a power of sale by the mortgagee of the hereditaments and the policy. The mortgagor covenanted that if the mortgagee should be unable to execute the power of sale, or if the proceeds should not be sufficient, he would pay the deficiency to the amount of 300l. To an action on this covenant it was pleaded that no policy was effected: and that one of the sureties had not executed the deed:—Held, first, that it was a condition precedent that a policy should have been effected. *Coyte v. Elphick*, 22 W. R. 541.

Held, secondly, that in the absence of express provision it was not a condition precedent that the other surety had signed. *Ib.*

To supply Deficiency on "Sale" being Completed.]—In consideration that the plaintiff would advance 1,200l. to a third person, on the mortgage of leasehold premises, the defendants promised that if, after any sale of the premises, duly made under the power of sale to be contained in the mortgage deed, the purchase-money should not be sufficient to satisfy the principal sum, and all interest, costs, charges and expenses which might be due in respect of the mortgage, they would immediately thereafter make good and pay to the plaintiff such deficiency, whether the same should be occasioned by any defect in the title to the premises or otherwise howsoever. The premises having been put up to auction under the power of sale, were knocked down to A. for 650l., and A. paid a deposit of 100l. and signed the usual contract; but he afterwards declined to complete the purchase, on the ground of the vendor's inability to produce the receipts for ground-rent; and the plaintiff brought an action against him to recover damages for his alleged breach of contract, which action was still pending:—Held, that a concurrent action against the defendants, upon their guarantee, was premature; the word "sale" in that instrument meaning a sale completed, so that the deficiency which was to be made good by the defendant could be ascertained. *Moor v. Roberts*, 3 C. B., N. S. 830.

To Pay out of "Receipts.]"—A contract, by way of guarantee, to pay over to the creditor moneys received as the proceeds of the property of the debtor, is conditional, not only upon the receipt of money, the proceeds of such property, but on the receipt of such money properly payable to him, and does not apply to money received only subject to a prior claim of a third party, and which, therefore, is not payable to

the creditor. *Jupp v. Richardson*, 26 L. J., Ex. 261.

Giving Satisfactory References.]—By a written guarantee in consideration that the plaintiff would stay execution upon a judgment against T., until a day named, the defendant undertook that the balance of debt and costs should be paid to the plaintiffs on or before that day, and if not paid by T., the defendant undertook to pay it, and, in consideration of the undertaking, the plaintiffs agreed to stay execution until that day if the defendant gave M. satisfactory reference as to his ability to pay the amount, but not otherwise; and if the references were not satisfactory, the guarantee to be given up within week:—Held, that, assuming the plaintiffs might waive the stipulation as to satisfactory reference it being a condition inserted for their benefit they could not enforce the guarantee against the defendant until they had given him notice of the waiver. *Morten v. Marshall*, 2 H. & C. 305; 1 L. J., Ex. 54; 9 Jur., N. S. 651; 8 L. T. 462.

Supply of a Certain Quantity of Goods.]—A declaration stated, that in consideration that the plaintiff, at the request of the defendant, would sell and deliver to S., on credit, goods of a price to an extent not exceeding 100l., the defendant promised the plaintiff, that, if S. did not pay for the same, he would do so on receiving three months' notice requiring payment. At trial, the following guarantee was proved:—"In consideration of your supplying S. with goods to the extent of 100l., I undertake to pay you the same, if he does not, on receiving three months' notice."—Semble, that there was variance between the declaration and the guarantee proved; but assuming the true construction of the guarantee to be, that the defendant was not to be liable until 100l. worth of goods had been supplied, the declaration might be amended accordingly. *Dimmock v. Stuart*, 14 M. & W. 758; 15 L. J., Ex. 65.

Advance—"Work to be Done as Security." H. & Sons being engaged, under a written contract in the erection of certain engineers' work for which iron and brass castings were required, and Hill, the founder from whom the castings were procured, having a claim against H. & Sons to the amount of 218l. for goods already supplied and refusing to continue to supply without retaining payment or security for that sum, consented to give H. a guarantee in the following term: "May 22, 1861. Mr. J. N. agrees to pay to Mrs. Hill, ironfounder, on H. & Sons' account 218l., being the amount owing to her by them together with interest, in six months from above date, providing he has work done as security for the same." In an action by representatives of Hill against N. on this guarantee:—Held, that it was a condition of liability thereon, that, at the end of the six months, work should have been done by H. & Sons for him in respect of which a debt should be due from him to them; and that the plan could not recover without producing the contract between H. & Sons and N., under which work was done. *Hill v. Nuttall*, 17 C. B., 262.

To induce Hill to go on with the casting the meantime, the following memorandum was drawn up and signed by her, by H. & Sons,

by N. "May 22, 1861. M. Hill agrees to make and deliver castings required for N.'s shed, as usual, and N. to pay for the same in monthly payments on H. & Sons' account:"—Held, that the representatives of Mrs. Hill were entitled to recover from N. the price of castings delivered to H. & Sons under this agreement, without shewing that they were used by them in the work done for N. *Id.*

Indemnity as to Costs—Further Proceedings.] A plaintiff, having been sued by C. on a cause of action, as to which he would have had an action over against the defendants, and they against other parties, and C. having been nonsuited in the former action, but having tendered a bill of exceptions, the plaintiff entered into a written agreement with the defendants, reciting that C. would consent to forego further proceedings if he was not called upon for costs by the now plaintiff on the nonsuit, and that they should pay an equal proportion of the costs, and that he should indemnify them from all further costs:—Held, that this was conditional on C.'s going no further, for that otherwise there would be no consideration; and that C. having moved for a new trial, the defendants were not liable. *Crick v. Warren*, 2 F. & F. 348.

A declaration, stating that the plaintiffs commenced an action against A. to recover a sum due to them from A., and another action against B., as a party liable in respect of the same debt; that in consideration that the plaintiffs would consent to stay the proceedings in the action against A. until a given day, and would proceed to trial with the action against B. at a certain sitting, or as soon after as the practice of the court would admit of, the defendant promised that he would indemnify the plaintiffs against all costs and expenses connected with the action against B., whether the same should be decided in favour of the plaintiffs or of B., and that he the defendant would pay the same costs and expenses when requested by the plaintiffs; that the plaintiffs did stay the proceedings in the action against A., and that they duly proceeded to trial with the action against B., and obtained a verdict thereon; that the verdict was afterwards set aside, and a new trial ordered, upon payment of costs by B.; that the plaintiffs again set down the cause for trial; that by the direction and at the request of the defendant, the record was withdrawn; and that the plaintiffs incurred and paid costs and expenses in connexion with the action, and assigning for breach the defendant's refusal to reimburse them,—discloses a good cause of action, the final determination of the action against B. not being a condition precedent to the plaintiffs' right to sue for costs, and the consideration being satisfied by the plaintiffs staying proceedings against A. and going to trial against B. *Wilson v. Brvan*, 7 C. B. 673; 18 L. J., C. P. 244.

Forbearance to Sue.]—Where A. at the request of W. & D., in consideration of the plaintiff having furnished goods to them, and of the plaintiff forbearing to take proceedings against them, guaranteed to the plaintiff a certain sum on the 13th December next:—Held, that forbearance till the 13th December was a condition precedent to the plaintiffs' right to sue A.; and that the guarantee was not general as to the time of forbearance, and that forbearance for

part of the time gave the plaintiff no right of action. *Rolt v. Cozens*, 18 C. B. 673; 25 L. J., C. P. 254; 2 Jur., N. S. 1073.

7. CONSIDERATION.

a. Generally.

Classification of Guarantees.]—Guarantees may be divided into two classes, the one in which the consideration is entire and the other in which the consideration is fragmentary, supplied from time to time, and therefore divisible. (a) An instance of the first is where a person enters into a guarantee that in consideration of the lessor granting a lease to a third person he will be answerable for the performance of the covenants. The moment the lease is granted there is nothing more for the lessor to do, and such a guarantee as that of necessity runs on throughout the duration of the lease. (b) In the other, where the consideration is supplied from time to time, it is reasonable to hold, unless the guarantee stipulates to the contrary, that the guarantor may at any time terminate the guarantee. Instances of the second class are more familiar. They are, where a guarantee is given, to secure the balance of a running account at a banker's, or a balance of a running account for goods supplied. *Lloyd v. Harper*, 16 Ch. D. 290; 50 L. J., Ch. 140; 43 L. T. 481; 29 W. R. 452—per Lush, L.J.

Lease.]—A declaration set out an agreement, whereby the plaintiff agreed to let, and T. to take, a house at a yearly rent, and the defendant thereby also agreed to see the rent paid by T., or to pay it for him:—Held, that the consideration for the defendant's promise was the letting of the house, and that it sufficiently appeared on the face of the agreement. *Cuballero v. Slater*, 14 C. B. 300; 23 L. J., C. P. 67.

Supply of Goods.]—An undertaking by A., at B.'s request, to supply such goods to C. as C. may require, and A. may think fit to supply, is not a sufficient consideration to support a promise. *Westhead v. Sproson*, 6 H. & N. 728; 30 L. J., Ex. 265; 7 Jur., N. S. 502; 4 L. T. 408; 9 W. R. 695.

A guarantee in writing to pay for any goods which the vendor delivers to a third person, is good within the statute, as containing a sufficient description, as well of the consideration of the promise (namely, the delivery of the goods when made), as of the promise itself. *Stadt v. Lill*, 9 East, 348; 1 Camp. 242; *S. P., Warington v. Furber*, 6 Esp. 89; 8 East, 242.

The plaintiff, being a merchant abroad, was in the habit of dealing with J. S., and having shipped goods for him to the amount of 1,026*l.*, and suspecting his solvency, requested the defendant to enter into a guarantee for the payment of the above sum; when he wrote a letter addressed to the plaintiff, stating, "that J. S. having accepted a bill drawn on him by the plaintiff for 1,026*l.*, he gave his guarantee for the due payment of the same, in case it should be dishonoured by the acceptor:"—Held, that this was a sufficient agreement to bind the defendant for the payment of the goods. *Boehm v. Campbell*, 3 Moore, 15.

A memorandum in the following terms:—"I undertake to pay R. J. the sum of 6*l.* 4*s.*, for a suit of clothes, ordered by D. P.,"—is a guaran-

which discloses, on the face of it, a sufficient consideration to support the promise. *Jarris v. Wilkins*, 7 M. & W. 410; 5 Jur. 9.

A declaration stating that, in consideration that A. would sell and deliver goods to B., the defendant promised A. to guarantee to him the payment of the amount of or the balance unpaid to A. for any goods then sold and delivered, and to be thereafter sold and delivered to, and of any money lent or to be lent to or paid for, C. by A., to the extent of 1,000*l.*, and that A. should be at liberty at any time thereafter to call upon B. for the payment of the 1,000*l.*, which might be applied by A. as A. thought proper, either in payment or part payment of any debt which might be due, or have been due to A., and should not have been paid by C., discloses a sufficient consideration for the promise. *Boyd v. Moyle*, 2 C. B. 644.

A guarantee as follows: "In consideration of your agreeing to supply S. with goods upon credit in the way of your trade (the amount to be in your own discretion), I hereby guarantee you the due and regular payment of such sum or sums as he may now or at any time, and from time to time hereafter owe to you. My liability under this guarantee is to be limited to principal sum in running account of 100*l.*."—discloses a sufficient consideration. *White v. Woodward*, 5 C. B. 810; 17 L. J., C. P. 209; 12 Jur. 439.

Joint Sale—Part Payment.—A declaration that B. and the defendant, joint owners of a horse and mare, agreed that the defendant should sell them, and pay one moiety of the proceeds to the plaintiff as the agent of B., who was abroad; that the defendant sold the horse to C. for 600*l.*, and the mare for 300*l.*, and did not receive the price of the horse, but took from the purchaser of the mare a note for 300*l.*, which the defendant indorsed to the plaintiff, as the agent of B., and the amount of which was received by the plaintiff as such agent; that the defendant afterwards requested the plaintiff, upon his own responsibility, to pay the defendant one moiety of the 300*l.* in the plaintiff's hands as such agent, and the plaintiff paid the defendant 50*l.*; that the defendant again requested the plaintiff, on his own responsibility, to pay the defendant 100*l.*, the residue of the moiety of the 300*l.*, which the plaintiff was willing to do, provided the defendant, in consideration of the 50*l.* and the sum of 100*l.* when paid, would undertake either to deliver to the plaintiff a bill of exchange for 233*l.* 3*s.* (being B.'s moiety of the proceeds of the sale of the horse, less the forfeits in respect of the same) drawn by the defendant upon and accepted by C. at two months, or pay the plaintiff 233*l.* 3*s.* in cash within two weeks; and thereupon the defendant delivered to the plaintiff the following undertaking: "In consideration of your having paid me 150*l.* on account of my share of the mare, I hereby undertake to deliver to you a bill for 233*l.* 3*s.*, drawn by me upon and to be accepted by C., at two months, or the above sum in cash within two weeks from this date."—Held, that the declaration disclosed a sufficient consideration for the defendant's promise. *Surtees v. Lister*, 7 H. & N. 1; 30 L. J., Ex. 369.

Withdrawing Note.—Action on the following guarantee:—"You will be so good as to withdraw the promissory note, and I will see you at

Christmas, when you shall receive from me the amount of it, together with the memorandum of my son's, making in the whole 45*l.*" A promissory note for 35*l.*, made by the defendant's son, and payable to the plaintiff, was proved at the trial. The guarantee was proved, and a subsequent admission by the defendant that he had to pay the plaintiff 45*l.* due from his son:—Held, that the consideration, viz., the withdrawing of the promissory note, was sufficient to satisfy the Statute of Frauds, though the amount and maker's name were not specified, there being no evidence of any other note to which the agreement could apply. *Shortrede v. Cheek*, 1 A. & E. 57; 3 N. & M. 366.

Withdrawing Summons.—A declaration stated that W. was indebted to the plaintiff in 236*l.* 14*s.*; that the plaintiff, according to the Bankrupt Act, 1849, filed an affidavit in bankruptcy against W., and caused a summons to be issued out of the Court of Bankruptcy, by which W. was required to appear before the court for the purpose of ascertaining whether he admitted the plaintiff's demand, or had a good defence, and which summons was pending at the time of the defendant's promise, and capable of being enforced; that in consideration that the plaintiff would withdraw the summons out of the court, the defendant promised and guaranteed to pay the plaintiff the 236*l.* 14*s.*; and that the plaintiff withdrew the summons out of the court of bankruptcy, of which the defendant had notice. Breach, non-payment of the 236*l.* 14*s.* Plea, that the defendant had not notice that the plaintiff had withdrawn the summons:—Held, that the words "withdraw the summons" meant the taking some step whereby W. might be exonerated from attending the court, which must be making some communication to him on the part of the plaintiff, or that it meant the taking some step in the Court of Bankruptcy, in either of which cases notice was not necessary, and, therefore, that the plea was bad. *Alhucen v. Prest*, 6 Ex. 720; 20 L. J., Ex. 404.

On Contract of Service.—A guarantee was given in the following terms:—"I hereby guarantee to you the sum of 250*l.* in case Mr. P. should make default in the capacity of agent and traveller to you."—Held, that the consideration sufficiently appeared on the face of the instrument. *Kennaway v. Trelicavan*, 5 M. & W. 498; 3 Jur. 1034.

A guarantee in the following words:—"Entertaining the highest opinion of C.'s integrity of character as well as propriety of conduct, we therefore hold ourselves responsible to you in 500*l.*, for his discharging faithfully and honestly any duty assigned to or trust reposed in him; and we are ready to execute bonds to that effect, and for that or any larger amount that may be necessary, whenever you require it,"—expresses a sufficient consideration, by necessary inference, viz., the employment of C. *Lysaght v. Walker*, 5 Bligh, N. S. 1.

An agreement in these words—"I agree to be security to you for J. C., late in the employ of Mr. P., for whatever (while in your employ) you may trust him with, and in case of default, to make the same good,"—discloses a sufficient consideration. *Newbury v. Armstrong*, 6 Bing. 201; 3 M. & P. 509; 4 C. & P. 59; M. & M. 389.

Assignment of Debts.]—An agreement as follows:—"I undertake, on behalf of Mr. Peate (in consideration of Mr. Dicken having this day given me an undertaking to procure Mr. Ward's cheque or note in favour of Mr. Peate for 150*l.*, on account of a debt due from Mr. Chambers to Mr. Peate), that Mr. Chambers shall have credit for that sum in his accounts with Mr. Peate, and that Mr. Ward shall stand in the place of Mr. Peate to that amount; and I further undertake that Mr. Peate shall not personally dispute Mr. Ward's right to deduct that sum from the accounts owing by the colliers of the Black Park Colliery to Mr. Chambers," shews a sufficient consideration moving from the plaintiff. *Peate v. Dicken*, 1 C. M. & R. 422; 3 D. P. C. 177; 5 Tyr. 116.

A., by letter, acknowledged to have received from B. 321*l.* 5*s.* By a contemporaneous account taken between these parties, it appeared that 146*l.* 3*s.* 6*d.*, part of the 321*l.* 5*s.*, was a sum due from C. to B., which A. allowed to be transferred to the debit of his account with B. A. was sued by B. for money lent:—Held, that A. was not liable for the 146*l.* 3*s.* 6*d.*, the arrangement amounting to a promise without consideration to pay the debt of another. *French v. French*, 2 M. & G. 644; 3 Scott, N. R. 121; 1 Drink. 159; 5 Jur. 410.

Taking Bills in Payment.]—The plaintiff having pressed W. for payment of a debt, the defendant, W.'s attorney, sent to the plaintiff a bill accepted by W. at two months, inclosed in a letter, in which the defendant said, "W. being disappointed in receiving remittances, and you expressing yourself inconvenienced for money, I send you his acceptance at two months." The plaintiff refused to take the bill, unless the defendant put his name to it; the defendant wrote on the back of the letter, "I will see the bill paid for W.:"—Held, that he was responsible, and that the consideration for the guarantee sufficiently appeared. *Emmott v. Kearns*, 5 Bing. N. C. 559; 7 D. P. C. 630; 7 Scott, 687; 3 Jur. 436.

Where the defendant signed and gave a guarantee to the plaintiff, stating that his ship was chartered; and that the charterer having paid one-half the freight, and given the plaintiff his acceptance for the remaining half at four months' date, the defendant engaged to be accountable to the plaintiff for the amount of the acceptance, should it not be paid when due:—Held, that the consideration clearly appeared on the face of such guarantee, as the bill would not have been taken unless thus signed. *Pace v. Marsh*, 8 Moore, 59; 1 Bing. 216.

When Void in Part.]—A contract to be answerable for a third person for goods furnished and goods to be furnished, which is bad in part for want of a consideration, and good as to the other part where the consideration is expressed, is not vitiated in toto by the bad part, but will sustain a count framed on the valid part of the undertaking, to which the objection does not apply. *Wood v. Benson*, 2 C. & J. 95; 2 Tyr. 98; 1 Price, P. C. 169.

Supplying Consideration by Parol Evidence.]—Since the statute 19 & 20 Vict. c. 97, s. 3, though parol evidence may supply the consideration for a guarantee, it cannot be admitted to explain

the promise. *Holmes v. Mitchell*, 7 C. B., N. S. 361; 28 L. J., C. P. 301; 6 Jur., N. S. 73.

Where the expression "for goods supplied" was used in a written guarantee:—Held, that parol evidence was admissible to shew that the parties meant not a past but a future supply of goods. *Hood v. Grace*, 7 H. & N. 494; 31 L. J., Ex. 98; 8 Jur., N. S. 43; 5 L. T. 359; 10 W. R. 85.

Before 19 & 20 Vict. c. 97.]—By the word "agreement," in the 29 Car. 2, c. 3, s. 4, must be understood the consideration for the promise, as well as the promise itself; and, therefore, where one promised in writing to pay the debt of a third person, without stating on what consideration, parol evidence of the consideration was inadmissible; and, consequently, such promise appearing to be without consideration upon the face of the written engagement, it was nudum pactum, and gave no cause of action. *Wain v. Warlters*, 5 East, 10; 1 Smith, 299.

An agreement to pay the debt of another must be in writing, and contain the consideration for the promise, as well as the promise itself; and parol evidence of the consideration could not be received. *Saunders v. Wakefield*, 4 B. & A. 595. And see *Goodman v. Chase*, 1 B. & A. 297.

There must be a good consideration for a promise in writing to pay the debt of another, as well as for any other promise. *Barrell v. Trussell*, 4 Taunt. 117.

To constitute a valid agreement to answer for the debt or default of a third person, within the statute, it was not necessary that the consideration should appear in express terms; it was enough if the memorandum was so framed that a person of ordinary capacity must infer from the perusal of it, that such and no other was the consideration upon which the undertaking was given. *Hawes v. Armstrong*, 1 Scott, 661; 1 Bing. N. C. 761; 1 Hodges, 179; *S. P.*, *Raikes v. Todd*, 8 A. & E. 846; 1 P. & D. 138; 1 W., W. & H. 619.

"As you have a claim on my brother for 5*l.* 17*s.* 9*d.* for boots and shoes, I hereby undertake to pay the amount within six weeks from this date—January 14, 1833."—Held, that no action lay on this undertaking, inasmuch as no consideration appeared on the face of the instrument. *James v. Williams*, 3 N. & M. 196; 5 B. & Ad. 1109; 2 D. P. C. 481.

So in a guarantee in the following form:—"1843, June 28th. Mr. P., I will see you paid for 5*l.* or 10*l.* worth of leather on the 6th of December, for T. L., shoemaker. Signed R. R.:" the consideration did not sufficiently appear on the face of the guarantee. *Price v. Richardson*, 15 M. & W. 539; 15 L. J., Ex. 345.

Action on the following guarantee:—"In consideration of your having this day advanced to our client, Mr. V. D., 750*l.*, secured by his warrant of attorney, payable on the 22nd of August next, we hereby, jointly and severally, undertake to pay the same on default, &c. Dated the 20th of June, 1840." The declaration stated, that, in consideration that the plaintiff would, on the 22nd of June, 1840, lend to V. D. 750*l.*, on the security of a warrant of attorney, payable on the 22nd of August next, and would forbear and give time to V. D. until the 22nd of August, the defendant promised:—Held, that the instrument was sufficiently ambiguous to admit of evidence to shew that the advance was not a past one,

but was made simultaneously with the execution of the guarantee, and that no amendment of the declaration was necessary. *Goldshede v. Swan*, 1 Ex. 154; 16 L. J., Ex. 284.

A declaration alleged, that L. had requested the plaintiff to sell and deliver to him goods in the way of his business; and the plaintiff, at L.'s request, consented to do so, provided the defendant would guarantee the payment, of which he, before the making of his promise, had notice; that afterwards, and before L. was indebted to the plaintiff for any goods, and when no goods delivered by the plaintiff to L. were unpaid for, and no money was due from L. to the plaintiff on any account whatever, the defendant, by writing addressed to the plaintiff, promised in the words following: "I hereby guarantee the payment of any sum or sums of money due to you from L., the amount not to exceed at any time 100l.;" that afterwards, the plaintiff supplied goods to L. for reasonable prices, amounting to 100l., and thereby allowed L. to become indebted to him in 100l.; that L. had not paid, or the defendant:—Held, that the circumstances stated in the declaration might be looked at to explain the meaning of the instrument. *Bainbridge v. Wade*, 16 Q. B. 89; 20 L. J., Q. B. 7; 15 Jur. 572.

Held, also, that the writing so explained shewed a good consideration for the defendant's promise, namely, the future advances by the plaintiff to L., so as to satisfy the Statute of Frauds. *Id.*

"In consideration of Messrs. E. R. & Co. giving credit to Mr. D. J., I hereby engage to be responsible to and to pay any sum not exceeding 120l. due to Messrs. E. R. & Co. by D. J.:"—Held, that the words "giving credit" might be shewn, by extrinsic circumstances, to apply to a particular credit agreed upon; and that the guarantee, therefore, disclosed a good consideration, and was not bad for uncertainty. *Edwards v. Jecobs*, 8 C. B. 436; 19 L. J., C. P. 50; 14 Jur. 131.

On the 20th of December, 1833, the following letter was written by the defendant in London to the plaintiff, who had succeeded T. M. in his business in Liverpool:—"When I had the pleasure of seeing you in London, I then told you I had not the least hesitation in becoming surety to you in the amount required for my brother, out, for a protection both to myself and him, I thought it highly necessary I should distinctly understand in what state his affairs were, in order that he may not, by any inadvertence, involve me, at which I am convinced he would grieve as much as myself. I still hold this mind, and before I sign any bond or instrument I must clearly see my way. In the meantime, in order to convince you it is furthest from my thoughts in any way to retard his business or prospects, I will hold myself responsible to you to the amount of 200l., in the event of his inability to meet it, with the full understanding that you are to consider this responsibility in the full and liberal light of the security I before entered into for him with Mr. M., your predecessor, and that, when a full statement of his affairs is laid before me, and such proving satisfactory, I then enter into the security you require; that the said sum of 200l. be void and of no effect, and not to be in force or added to the aforesaid security:"—Held, that this letter did not shew a consideration in writing, as required by the Statute of Frauds,

either in express terms, or by necessary inference, and therefore that it was void as a guarantee. *Bentham v. Cooper*, 5 M. & W. 621.

So an undertaking as follows:—"Messrs. Morley & Co. We hereby promise that your draft on William Clarke, Son & Co., due at Messrs. Mastermans' at six months, on the 27th November next, shall be then paid out of money to be received from St. Phillip's Church, say amount 174l. 13s. 5d.—W. Clarke, W. Boothby"—was void, no consideration appearing for Boothby's promise. *Morley v. Boothby*, 3 Bing. 107; 10 Moore, 395.

The following letter, dated and signed by the defendant, and addressed to the plaintiff:—"I hereby agree to see you paid, within three months from date hereof, the amount of 5l., due to you on account of G. M., jun.," was not sufficient to bind the defendant, the consideration for the promise not being sufficiently expressed. *Clancy v. Pigott*, 4 N. & M. 496; 2 A. & E. 473; 1 H. & W. 20; *S. P., Jenkins v. Reynolds*, 6 Moore, 86; 3 B. & B. 14.

b. Past or Executory.

For Goods to be Supplied.—M. supplied a son with some beer, and on his refusing to supply more without a guarantee, the son gave the following guarantee, signed by the father:—"I hereby undertake to pay you for all the beer supplied by you to the Star Brewery, 131, East Street, Walworth, on the completion of the purchase, which will take place in a few days:"—Held, that the promise was *primâ facie* a promise to pay for goods to be supplied. *Mockett v. Ames*, 23 L. T. 729.

"I hereby guarantee Mr. J.'s account with you for wines and spirits to the amount of 100l.," is a guarantee for an existing account, and not for a future supply. *Allnutt v. Ashenden*, 6 Scott, N. R. 127; 5 M. & G. 392; 12 L. J., C. P. 124; 7 Jur. 113.

A wife being entitled to separate estate, without restraint upon anticipation, in order to obtain credit for her husband, a trader, gave the following guarantee to a wholesale dealer:—"In consideration of you having, at my request, agreed to supply and furnish goods to W. M. C., I do hereby guarantee to you 500l. This guarantee is to continue in force for the period of six years, and no longer:"—Held, that the guarantee only extended to the price of goods supplied after it was given, and not to debts owing to the guaranteed in respect of previous transactions. *Morrell v. Cowan*, 7 Ch. D. 151; 47 L. J., Ch. 73; 37 L. T. 586; 26 W. R. 90. Reversing 6 Ch. D. 166; 37 L. T. 122; 25 W. R. 808.

A guarantee was given as follows: "I. V. hereby engages to be responsible for liabilities incurred by M. and V. to the extent of 50l." At the time the guarantee was given 41l. was due from M. and V. to the plaintiff:—Held, first, that the guarantee contemplated future credit, but only to such an amount as with the existing liability made up 50l. *Chalmers v. Victors*, 18 L. T. 481; 16 W. R. 1046.

And the amount having been paid off by M. and V.:—Held, secondly, that the guarantee did not cover goods subsequently supplied. *Id.*

The plaintiffs (of whom D. had been in the habit of buying goods) having heard of a bill of sale given by D. to the defendants, declined to

let D. have certain goods which he had then bought of them without a telegram from the defendants that they would be answerable for them. They sent such telegram, and D. had the goods and in due time paid for them. By the post of the same day on which the telegram was despatched, the defendants sent to the plaintiffs a letter, in which, after referring to the telegram, and stating that they had done business with D. for five years, and had never known anything dishonest in his transactions, they wrote: "What you have heard was done to protect him from a dishonest tradesman, and will in no way, we hope, be to the injury of his creditors. Having every confidence in him he has but to call upon us for a cheque, and have it with pleasure for any account he may have with you. When to the contrary we will write to you."—Held, that the letter was a continuing guarantee for the amount of goods D. should buy of the plaintiffs until they should hear to the contrary. *Nottingham Hide, Skin, &c., Company v. Bottril*, 8 L. R. C. P. 694; 42 L. J., C. P. 256; 29 L. T. 134; 21 W. R. 739.

A guarantee for the payment of goods supplied to a third person, given on the 7th, will cover goods contracted for on the 6th, but not delivered till the 7th, and then supplied on the credit of the guarantee. *Simmons v. Keating*, 2 Stark, 426.

Ambiguous.—"In consideration of E. R. & Co. giving credit to D. J., I hereby engage to be responsible, and to pay any sum not exceeding 120*l.* due to E. R. & Co. by D. J.," is a good and binding guarantee, the words giving credit being equally applicable to future as to past credit. *Edwards v. Jerons*, 8 C. B. 436; 19 L. J., C. P. 50; 14 Jur. 131.

The defendant gave to the plaintiffs the following guarantee: "Gentlemen, As Mr. D. informs me you require some person as guarantee for goods supplied to him by you in his business, I have no objection to act as such for payment of your account."—Held, that the expression "for goods supplied" did not necessarily import a past consideration, and ought to be read "for goods to be supplied." *Hoad v. Grace*, 7 H. & N. 494; 31 L. J., Ex. 93; 8 Jur., N. S. 43; 5 L. T. 359; 10 W. R. 85.

A guarantee was as follows: "In consideration of the credit given by B. to E., I hereby agree to guarantee the payment of all bills of exchange drawn by B. and accepted by E. Also, I hereby agree to guarantee the payment of any balance that may be due from E. to B. This guarantee to include all bills of exchange now running as well as the balance of account at this day." It appeared that at the time of giving the guarantee there were bills running and an account due from E. to B., and future dealings between the parties were contemplated.—Held, that the guarantee extended as well to future as to past transactions. Per Pollock, C. B., and Martin, B., Bramwell, B., dissentiente. *Broom v. Batchelor*, 1 H. & N. 255; 25 L. J., Ex. 299.

Where the words of a guarantee were capable of expressing either a past or concurrent consideration.—Held, that the latter, which made the instrument valid, was to be adopted. *Steele v. Hoar*, 14 Q. B. 431; 19 L. J., Q. B. 89; 14 Jur. 147.

Construction of Several Documents.]—The

plaintiffs on the 24th November wrote to the defendant, "We are doing business with Messrs. B., and we require a guarantee of 200*l.*, and they refer us to you for one." The defendant replied on the 27th November, "I have no objection to become security for Messrs. B., and subjoin the following memorandum to that effect:—200*l.* I hereby engage to guarantee to (the plaintiffs) 200*l.* for iron received from them for Messrs. B., as annexed:—"Held, that the contract was to be collected from the three documents read together, and that the consideration for the promise was, that the plaintiffs would continue to supply iron to B. after the 27th November. *Colbourn v. Dawson*, 10 C. B. 765; 20 L. J., C. P. 154; 15 Jur., 680.

Mutual Obligation.—P. being indebted to the plaintiffs, the defendants gave them the following guarantee: "In consideration of your agreeing, at our request, from time to time to supply on credit to P. such goods as he may require, and you may think fit to supply, we do hereby guarantee to you the payment of such sum as he now owes and may at any time, from time to time, owe to you."—Held, that the guarantee did not contain any binding agreement on the part of the plaintiffs to supply goods to P., and that as they never did supply any goods to P. after the date of the guarantee, the defendants did not become liable to pay the existing debt of P. *Westhead v. Spruson*, 6 H. & N. 728; 30 L. J., Ex. 265; 7 Jur., N. S. 502; 4 L. T. 408; 9 W. R. 695.

Payment of Rent—Determination of Tenancy.]—M. being yearly tenant to the plaintiff on the terms of a written agreement, the defendant, in consideration of the plaintiff's continuing M. as such tenant, gave to the plaintiff a guarantee for "the rent of the Leese Farm in the occupation of M." The plaintiff afterwards gave M. notice to quit, but on the payment of arrears of rent withdrew it, before the expiration of the current year. The next year the rent became in arrear, and the plaintiff sued the defendant on his guarantee.—Held, that the old tenancy was determined by the notice to quit; that the guarantee applied only to the tenancy which existed at the time when it was given; and that the defendant was therefore not liable. *Tayleur v. Wildin*, 3 L. R., Ex. 303; 37 L. J., Ex. 173; 18 L. T. 655; 16 W. R. 1018.

Advances—Past or Future.]—A father gave his son a promissory note for 2,000*l.*, which was indorsed by the son, and discounted by a banking company who took from the father an agreement under seal that, on condition of their discounting the note, certain deeds of the father's deposited at the same time should remain as security for all money due or to become due from the son to the company on any account whatsoever. At the date of the agreement the son owed the company 3,000*l.* upon a running account, and the sum was subsequently increased to 5,000*l.* The father having died.—Held, that the bank was entitled to prove against the father's estate not only for the 2,000*l.*, the amount of the note, but also for all sums due from the son. *Burgess v. Ecc*, 13 L. R., Eq. 450; 41 L. J., Ch. 515; 26 L. T. 540; 20 W. R. 311.

A guarantee that, in consideration of advances made and to be made by C. and D., bankers, or

by any other persons of whom their firm might from time to time consist, in the way of loan, payments, discount, or otherwise, to F. H. and S. F., H. and G., jointly and severally, thereby guaranteed to C. and D. the repayment of the advances, and to indemnify them against any loss by reason of such advances; their liability not to exceed the sum of 1,000*l.*; the guarantee to be a continuing guarantee, and to be a security to C. and D. to the extent of 1,000*l.*, for the whole of any balances which might from time to time, or at any time, become due to C. and D. or to the persons for the time being constituting the firm of the banking-house, is a good and binding guarantee for both the past and future advances, such future advances having been made. *Chapman v. Sutton*, 3 D. & L. 646; 2 C. B. 634; 15 L. J., C. P. 166.

The defendant being agent to receive rents for A., undertook, upon A. giving him an authority to do so, to repay to the plaintiff out of the first money received on A.'s account, anything the plaintiff might be pleased to advance to A. A. gave the defendant this authority: "Please to pay (the plaintiff) 20*l.* by four instalments, namely 5*l.* each quarter, from my estate, commencing from the 29th of September, 1852, until September, 1853; and should any money be owing by me to her after that time, please to pay same way, as above."—Held, that the authority was not confined to the payment of the 20*l.*, but authorized the payment of further advances made by the plaintiff to A. *Horlor v. Carpenter*, 3 C. B. N. S. 172; 27 L. J., C. P. 1.

A creditor cannot avail himself of a security obtained under an agreement for a further advance, which he afterwards refuses. *Mayhew v. Crickett*, 2 Swans. 193.

The plaintiffs declared, that, in consideration that they would lend and advance 5,000*l.* to S. & Co., the defendant would be answerable for and repay them the sums so lent and advanced, and averred that they accordingly advanced the 5,000*l.*, by reason whereof the defendant became liable to pay. The defendant, at the request of the plaintiffs, on the 19th of May, 1815, wrote to them, stating that she would be answerable to the extent of 5,000*l.* for the use of the house of S. & Co. At the time this guarantee was given, S. & Co. were considerably indebted to the plaintiffs. On the 24th of the same month the guarantee was deposited with the plaintiffs as a security, with two bills amounting to 3,528*l.* 16*s.* 2*d.*, which having been in their hands as securities before, were delivered and redelivered as a security for a new note of 6,500*l.*, and no money passed on that day:—Held, that, as between the plaintiffs and the defendant, no money was advanced to S. and Co. subsequent to the guarantee, so as to give it a retrospective operation. *Glyn v. Hertel*, 2 Moore, 134.

In August, 1848, the defendant gave the following guarantee to O.: "I am aware that my uncles, J. and J. F. K., stand considerably indebted to you for professional business, and for cash advanced to them, and that it is not in their power to pay you at the present; and as in all probability they will become further indebted to you, though I by no means intend that this letter shall create or imply any obligation, on your part, to increase your claim against them, I am willing to bear you harmless against any loss arising out of the past or future transactions between you and my uncles, to a certain extent,

and, therefore, in consideration of your forbearing to press them for the immediate payment of the debt now due to you, I hereby engage to agree to guarantee you the payment of any sum they may be indebted to you upon the balance accounts between you, at any time during the next six years, to the extent of 1,000*l.*, whenever called upon by you to pay the same, and after twelve months' previous notice." At the date the guarantee, J. and J. F. K. were indebted to in 513*l.* Subsequently O. advanced large sums of money to J. and J. F. K., and dealings were on till January, 1849, when the debt due from them to O. amounted to 2,184*l.*:—Held, reversing the judgment of the Exchequer (2 H. & 399), that the guarantee was founded on a sufficient consideration, and that further advances having been made, and time given, it bound the defendant. *Oldershaw v. King*, 2 H. & W. 513 Jur., N. S. 1152; 27 L. J., Ex. 120.

The consideration for the promise to guarantee was the keeping the account open, and making further advances. Per curiam, dissenting. *Crompton, J. Ib.*

The consideration expressed being the forbearing to press for immediate payment, no other consideration could be implied. Per Crompton J. *Ib.*

—**Evidence.**—“Messrs. H., in consideration of your being in advance to L., in 10,000*l.* for purchase of cotton, I do hereby give you guarantee for that amount on their behalf B.”—Held, that the words of the guarantee not necessarily imply a past advance, and that the plaintiffs, on a trial, might have offered evidence to shew that future advances had been contemplated. *Haigh v. Brooks*, 10 A. & 309; 4 P. & D. 288.

—**Implication.**—A. guaranteed to a banking company “all current obligations in their hands to which B. may be a party, and all his future obligations and engagements that may come into their hands.”—Held, that the latter part of the guarantee, as to the future obligations, implied of itself a consideration, and did not require the specific statement of one of the body of the guarantee, according to the Statute of Frauds; and that the company might therefore, on the bankruptcy of A., prove for amount of their advances to B., subsequently, the date of the guarantee. *Littlejohn, Ex parte* 3 Mont. D. & D. 182; 7 Jur. 474.

—**Sufficiency.**—The following guarantee:—“We, the undersigned, hereby indemnify National Provincial Banking Company to the extent of 1,000*l.*, advanced or to be advanced to R. P. by the company;” R. P. at the time the guarantee was given, being indebted to bank in a sum exceeding 1,000*l.*, does not, on the face of it, or construed with reference to extrinsic circumstances, disclose a sufficient consideration. *Bell v. Welch*, 9 C. B. 154; 19 L. C. P. 184; 14 Jur. 432.

“As you are about to enter upon transaction in business with Messrs. C. (with whom you have already had dealings), in the course of which they may be from time to time largely indebted to you, in consideration of your doing so, I hereby agree to be responsible to you for, and guarantee to you, the payment of any sums of money which that firm, whether it may consist of the same

members as at present, or others, now is, or may at any time be, indebted to you, so that I am not called upon to pay more than 2,000l."—discloses a sufficient consideration, and covers both past and future debts. *Johnson v. Nicholls*, 1 C. B. 251; 14 L. J., C. P. 151; 9 Jur. 429; *S. P., Raikes v. Todd*, 1 P. & D. 138; 8 A. & E. 846; 1 W., W. & H. 619. *But see* 19 & 20 Vict. c. 97, s. 3.

On account of other Debts.]—Guarantee given by the defendant to the plaintiff as follows:—"In consideration of your having resigned the office of deacon of the Baptist church at C., I hereby agree to hold myself responsible to you for the payment of 150l. due to the Rev. J. E. by the Baptist church at C., and also the interest, payable every six months, for which you and P. M., deacons of the church, became responsible to the Rev. J. E., by an instrument dated September 25, 1840." That instrument was as follows:—"In consideration of your having resigned the pastoral office over the Baptist church at C., and the church having agreed at the earliest possible period to pay to you 700l., with interest half yearly, until the same be paid, we, the deacons, agree to hold ourselves responsible to you for the carrying out of the said resolution." The 700l. had been reduced to 150l., by payments between 1840 and 1845. In 1842 a resolution was entered in the church books, and signed by the plaintiff, inviting the defendant to become pastor, on condition that he agreed to be legally responsible to the plaintiff, the present deacon, and any future deacon, for the payment of 500l. due to J. E. by the church; and also agreed that the trustees of a fund, for the maintenance of the minister, should pay to the plaintiff or other deacon 100l. yearly, for the purpose of liquidating the above debt to J. E., and that the interest of the debt be paid half-yearly from the church funds. The defendant signed a memorandum in the church books, that he accepted the invitation on these terms. A declaration stated, that in consideration that the plaintiff, at the request of the defendant, would resign the office of deacon of the Baptist church at C., the defendant promised to hold himself responsible to the plaintiff for payment of 150l., due to J. E. by the Baptist church at C., and interest, being the residue of the 700l. remaining unpaid, for which the plaintiff and P. M. had become responsible to J. E.:—Held, that the effect of the guarantee was correctly stated in the declaration, and that the funds for the support of the minister were intended to be included for the payment of the debt due to J. E. *Sterle v. Hoe*, 14 Q. B. 431; 19 L. J., Q. B. 89; 14 Jur. 147.

c. Forbearance to Sue and Abandonment of Claims.

In what Cases.]—The plaintiff's agent wrote to the defendant: "I have this morning received the most peremptory instructions to settle this account. Be good enough to arrange something by to-morrow." The defendant in reply: "I undertake to pay 500l. on the account between my late brother, Mr. O. D. Hughes, and your client on or before this day three weeks." The plaintiff did not expressly agree to forbear suing, but did in fact forbear for three weeks:—Held, that the correspondence, together with the plaintiff's actual forbearance for three weeks to sue, constituted a good and binding promise to pay on the part of the de-

fendant. *Wynne v. Hughes*, 21 W. R. 628. See *Coles v. Pack*, 5 L. R., C. P. 65; 39 L. J., C. P. 63; 18 W. R. 292.

An agreement to forbear for a reasonable time, is a good consideration to support a promise to guarantee a debt due from a third person. *Oldershaw v. King*, 2 H. & W. 517; 27 L. J., Ex. 120; 3 Jur., N. S. 1152—Ex. Ch.

A testator appointed his son and three other persons his executors and trustees. The son disclaimed and renounced probate and afterwards purchased a portion of the testator's property. The other legatees raised a claim for losses incurred by the trustees, and the son's solicitor wrote on his behalf to the claimants agreeing to pay 300l. in satisfaction of the losses:—Held, that this agreement was not void for want of consideration. *Orrell v. Coppock*, 26 L. J., Ch. 269; 2 Jur., N. S. 1244.

Withdrawal of Petition.]—A guarantee was given in the following terms:—"In consideration of your withdrawing the petition you have presented for winding up the A. Company we agree to pay all the costs you have incurred in reference to the petition. We further agree to guarantee the payment to you within eighteen months, by the company or the liquidator thereof, of the principal of your debt of 722l." To a declaration on this guarantee, alleging as a breach the non-payment of the 722l., the defendants pleaded that after the alleged withdrawal of the petition, and before a reasonable time had elapsed, and within the eighteen months, the plaintiff presented another petition for winding up the company, which prevented the collection of the assets of the company. At the trial the jury found that the presentation of the second petition did not prevent the collection of assets:—Held, that the withdrawal of the first petition was a sufficient consideration for both promises of the guarantors; that the plea, as proved, afforded no defence; and that on the finding of the jury the plaintiff was entitled to recover. *Harris v. Venables*, 7 L. R., Ex. 235; 41 L. J., 180; 26 L. T. 437; 20 W. R. 974.

Where Fraudulent.]—In an action on a guarantee for a debt due from S. to the plaintiff, the promise alleged being that if the plaintiff would give S. a written acknowledgment that the plaintiff had no legal claim on S., the defendant would be answerable for the amount, with an averment that the plaintiff wrote and sent such acknowledgment to S. Plea, that S. was a trader within the bankrupt acts, and a prisoner in execution for debt, owing 300l. and upwards, and was desirous of petitioning the Court of Bankruptcy for an interim order of protection under 7 & 8 Vict. c. 96, s. 6, and in support of such petition of falsely representing himself to the court as owing less than 300l., and that the defendant, at the request of S., gave the guarantee, with the intent on the part of S. and the defendant that S. should be the better able falsely to make such representation, and that the plaintiff knew the corrupt purpose for which the guarantee was given, and with such knowledge accepted it, and assented to write the acknowledgment for the purpose of aiding S. in making the false representation:—Held, on proof of the facts pleaded, that the plaintiff's acknowledgment was not a release under seal, and that the defendant was entitled

to a verdict on the evidence. *Coles v. Strick*, 15 Q. B. 2.

Statement of Consideration.]—A declaration stated that L. made his promissory note payable to the plaintiff; that the note being in the plaintiff's hands overdue and unpaid, "in consideration that the plaintiff would forbear and give time to L. for payment of the note, to wit, for a reasonable time, the defendant promised to pay the note in case L. should make default." It then alleged that L. made default, and that the defendant did not pay the amount of the note. At the trial it appeared that the defendant having agreed to guarantee the payment of the note by L., indorsed on the back thereof as follows:—"I guarantee the payment of the within note by L., on the 2nd November next." On that day the note being due and dishonoured, the defendant signed the following memorandum, addressed to the plaintiff:—"Sir,—I request you will hold over the promissory note in your favour, of L., dated 31st July, 1844, for 200*l.*, at three months; and in consideration of your so doing, I undertake to continue in all respects my guarantee:—"—Held, that the guarantee was defective, and that there was no evidence to support the declaration. *Temple or Semple v. Pink*, 1 Ex. 74; 16 L. J., Ex. 237.

B. & C., members of a railway committee, being indebted to A. in a large sum which A. sought to recover by contributions from the committee, and A. having brought an action against B., and having threatened to sue C., D. promised that, in consideration that A. would cease to prosecute the action brought, and would forbear to sue C., he, D., would pay a certain smaller sum to A. In declaring upon this promise, it is not necessary to allege that D. was a member of the committee, or that A. had any well-founded claim against the committee, or that the actions brought and threatened related to the committee, or that the plaintiff was ready and willing to accept the smaller sum in satisfaction of the debt owing from B. and C. *Empson or Timpson v. Knowles*, 7 C. B. 651; 18 L. J., C. P. 222.

Abandoning Lien.]—A declaration stated that plaintiff was a shipbroker, and that he was employed by the owners of a ship to procure for them a charter of that ship upon the terms that he should be entitled to receive the freight, and thereout to satisfy himself his commission; and that he did accordingly procure a charter-party on certain terms; that the ship sailed, and performed her voyage and returned to England; that a change of ownership in some of the shares of the ship accrued before her return; that after her return the plaintiff was about to collect, and would have collected the freight, so as thereout to satisfy himself his commission; that the defendants were the brokers for the new owners, and it became desirable for them to obtain immediate possession of the ship, and they were, therefore, anxious that plaintiff should abandon his right of receiving the freight; that in consideration of the premises, and that the plaintiff would relinquish his right to collect the freight, the defendants promised to pay him his commission; that the plaintiff relinquished his right; but that the defendants would not pay him his commission:—Held, that this was an agreement by the defendants to pay in consideration of the

plaintiff abandoning his rights arising from several matters stated by way of inducement, the inducement, as stated, being material; and that the declaration was not supported by proof of an agreement, in consideration of the plaintiff not asserting any lien on the freight, without its appearing whether or not he was entitled to such lien. *Gull v. Lindsay*, 4 Ex. 45; 18 L. J., Ex. 355.

In an action on a guarantee, the declaration alleged that, in consideration that the plaintiff would give up their lien on certain goods of Y., and would take his acceptance for 140*l.*, the defendant guaranteed to the plaintiffs payment of the same, and the plaintiffs accordingly gave up to Y. the goods, and took the acceptances of Y. for 145*l.*:—Held, that the declaration disclosed no cause of action. *Pickles v. Thornton*, 33 L. T. 658—C. A. And see cases, ante, col. 109.

Composition of Debts.]—A declaration stated that A., being indebted to the plaintiffs in 7,093*l.* and being unable to pay the amount, requested them to accept a composition of 10*s.* in the pound on their debt, and to give time for payment, to which they agreed upon having the same guaranteed, and that thereupon the defendant addressed a guarantee to them, to the following effect: "At the request of A., and in consideration of your agreeing to take 10*s.* in the pound for your claim on them, amounting to 7,093*l.*, and giving them five years to pay of 3,546*l.*, being one-half of the debt, or at the rate of 10*s.* in the pound for the whole, with interest on 3,546*l.*, at the rate of 5*l.* per cent. per annum, payable half-yearly, the 3,546*l.* to be paid by the instalments and in the manner mentioned, or to be mentioned, in your agreement with A., I hereby guarantee to the extent of 500*l.* the payment by A. of 3,546*l.* with interest, as mentioned in the agreement; that the plaintiffs and A. subsequently entered into a written agreement, by which the plaintiff agreed to accept of A. the composition of 10*s.* in the pound, to be paid by stipulated instalments on specified days, extending over a space of five years, in consideration of having the payment of the instalments guaranteed by the persons named in the schedule, and in which the defendant's name appeared as guaranteeing to the extent of 500*l.* The agreement contained a proviso, rendering the agreement void, and enabling the plaintiff to recover the whole of the original debt, in case A. should make default in payment of any instalments on the stipulated days, or should commit any act of bankruptcy on which a fiat should issue. The declaration averred that one instalment became due, that default was made in payment thereof by A., that the plaintiffs applied to the defendant, but that he had not guaranteed the instalment, and that the same remained unpaid:—Held, on general demurrer, on the ground that, upon the true construction of the guarantee, the consideration of the defendant's promise was that there should be an agreement between the plaintiffs and A., and that the agreement entered into by them did not comply with the terms of the guarantee. *Clarke v. Greene*, 3 Ex. 619.

Release, at what Time.]—In an action on guarantee, the plaintiff, in support of an averment in the declaration, that he had executed a certain indenture, gave in evidence the following document, signed by the defendant: "In consideration of your having by indenture agreed to accept pay

ment of the debt owing to you by A. by the following instalments, that is to say, 10s. in the pound, I promise to guarantee the payment of the instalments." There was evidence that when A.'s creditors received the guarantee, he signed the deed at the same time:—Held, that, under the circumstance of the case, the true construction of the guarantee was, "that if at some future time the plaintiff shall have released the debt, the defendant will guarantee the same to him;" and, therefore, that it did not prove the averment in the declaration. *King v. Cole*, 2 Ex. 628; 17 L. J., Ex. 283.

d. Other Cases.

Indemnity to Sheriff's Officer.—A declaration alleged that the defendant issued a fi. fa. on a judgment against M., which the sheriff delivered to the plaintiff, his officer, to execute, and the plaintiff, at the defendant's request, seized goods, believing them to be M.'s, whereupon G. claimed them, and gave notice to the sheriff not to sell them; and in consideration of the premises, and that the plaintiff would pay no attention to the claim or notice, and would proceed to a sale, the defendant promised the plaintiff to indemnify him for so doing; that the plaintiff thereupon paid no attention, and sold the goods, and levied, and, at the defendant's request, delivered the balance to the defendant; that afterwards G., by reason of the premises, impleaded the plaintiff, together with the sheriff, in a county court, for seizing and selling, and recovered against the plaintiff and the sheriff the value of the goods, damages and costs, which the plaintiff being liable (as the defendant knew) to indemnify the sheriff, paid to G., but the defendant did not indemnify:—Held, a good declaration, for that consideration sufficiently appeared, and it was no objection that the plaintiff's disregard of the claim was not shewn with sufficient certainty to have been otherwise than an illegal act, or that the plaintiff, consistently with the allegations, might have sold in the mere performance of his duty, or that it was not sufficiently shewn that G. recovered solely by being entitled to the goods seized, and not by any irregularity in the plaintiff's acts, or how much damage accrued from the selling, and how much from the seizing, or that the action in the county court was against the sheriff together with the plaintiff. *Elliston v. Berryman*, 15 Q. B. 205.

Indemnity against Costs.—An agreement by the plaintiff, an attorney, the defendant, and B., set forth, that, in consideration of B. having agreed to pay to the defendant his claim against B., and certain costs, out of the proceeds to arise from the recovery by B., in an action of B. against J., the defendant undertook to pay the plaintiff all costs incurred by him in prosecuting the action of B. against J., the plaintiff thereby agreeing with the defendant to bring the same:—Held, that, in an action on this agreement, the consideration was rightly described to be, that the plaintiff, at the request of the defendant, would, with B.'s assent, prosecute the action of B. against J. *Dally v. Poolly*, 6 Q. B. 494.

Giving Security without Payment.—A plaintiff having given the defendant promissory notes, and a cognovit for 500l., as a composition for

certain claims, the defendant in consideration of the money so secured to be paid, engaged to indemnify him against certain liabilities:—Held, that the security, not the actual payment, was the consideration, and that the plaintiff might sue on the guarantee, though he had not paid the 500l. *Thin v. Brook*, 1 B. and Ad. 124.

Failure of Consideration.—Upon the eve of a sale by the sheriff, A. (a stranger) agreed to guarantee the judgment debts, upon the judgment creditor consenting to postpone the sale under the execution. It turned out that the consent of another party was necessary in order to prevent the sale, and in consequence the sale took place. A. gave notice that the consideration having failed, the guarantee was at an end:—Held, that A. was not liable on the guarantee. *Cooper v. Joel*, 27 Beav. 313; 1 De G., F. & J. 240.

8. AMOUNT OF LIABILITY.

Generally.—A guarantee is merely a contract to indemnify upon a contingency; and is in the nature of a claim for unliquidated damages. *Sampson v. Burton*, 4 Moore, 315; 2 B. & B. 89.

A surety bound himself jointly to a banking company in 500l., the condition of the bond being that if the obligors should from time to time pay all and every such sum or sums of money as should become due to the bank for money advanced to surety's co-obligor, and pay interest at 5l. per cent. per annum for such sum or sums of money as aforesaid, to be computed as is usual with the banking company in ordinary banking accounts with them; and also the lawful commission, charges and expenses incident to or occasioned by the transactions or matters between the bank and the co-obligor, and should indemnify and save harmless the banking company from all actions, suits and expenses, and all liability whatsoever by reason of the transactions and matters; then the bond was to be void. Provided that the principal moneys to be ultimately recovered on the bond were thereby limited not to exceed 250l., and that the obligors or any of them should not be liable to pay, by virtue thereof, any greater principal sum than 250l. But that the bond should be a continuing security to that amount, for the sums from time to time owing as aforesaid, exclusive of interest (to be computed as aforesaid), commission, costs, charges and expenses:—Held, that the surety was liable on this bond only for 250l. principal moneys advanced, and interest accrued upon that sum; but not for interest upon any further principal sum advanced by the bank. *Meek v. Wallis*, 27 L. T. 650.

Where a bond which on the face of it appears to be a simple money bond is given to secure a sum certain with interest, it must be construed, so far at least as regards the surety, as given to secure the debt then existing, and not to cover floating balances. *Walker v. Hardman*, 4 C. & F. 258; 11 Bligh, 299. And see *Poase v. Hurst*, 5 M. & R. 88; 10 B. & C. 122.

Prima facie, a continuing guarantee, limited in amount, to secure a floating balance, is, as between surety and creditor, a guarantee of so much only of the debt as does not exceed the sum named in the limitation, for it is to be presumed that the surety did not contempr

creditor's allowing the debtor to become indebted to him beyond that amount. No such presumption arises where the debt, in respect of which the bond is given, is an ascertained amount exceeding the sum named in the limitation. *Ellis v. Emmanuel*, 1 Ex. D. 157; 46 L. J., Ex. 25; 34 L. T. 553; 24 W. R. 332—C. A.

Upon a contract to guarantee a bill of exchange for a given sum, the guarantor would not be liable to that extent on a bill given for a larger sum. *Phillips v. Astling*, 2 Taunt. 206.

The defendant requested the plaintiff, by letter, to advance B. 2l. a week, and engaged "to pay him all moneys he might advance to B., in addition to the 24l. which he had already let him have."—Held, that the guarantee was to be read as if it had been "all such moneys," i.e., the 24l., and the amount of the subsequent weekly sums of 2l.; and that it did not extend to any other sums he might advance over and above the allowance of 2l., because this allowance was the subject-matter of the letter. *Smith v. Brandram*, 2 Scott, N. R. 539; 9 D. P. C. 441; 2 M. & G. 244; 5 Jur. 173.

Shares—Collateral Securities.]—The defendant and two others agreed to become sureties to the plaintiff for a debt of a fourth person, and all entered into a joint and several covenant for payment of 1,000l. and interest; one of the sureties gave on his own account an extra collateral security for the same debt, by assigning an annuity for 600l., which was not paid, but accounted for. The principal debtor also gave a bill of sale to the plaintiff, under which he took possession, and which he afterwards gave up to one of the sureties on receiving bills for 200l. from him:—Held, that the defendant, as one of the three sureties, was liable for one-third of the amount of the original debt and interest, notwithstanding the securities given and payments made by his co-sureties; the two other sureties having in effect paid their shares, the defendant was liable to the plaintiff for his share. *Margrett v. Gregory*, 6 L. T. 543; 10 W. R. 630.

Engagement at Lloyd's.]—Where a father, on his son's entering as an underwriter at Lloyd's, addressed to the managing body a letter whereby he held himself responsible for all his son's engagements in that capacity:—Held, that the guarantee extended to all the son's engagements as underwriter at Lloyd's, whether with members or outsiders. *Lloyd's v. Harper*, 16 Ch. D. 290; 50 L. J., Ch. 140; 43 L. T. 481; 29 W. R. 452—C. A.

The defendant guaranteed to the committee of Lloyd's the debts that S., who had applied to be admitted as a subscriber to Lloyd's, might contract as insurance broker, to enable him to act as such; S. took a partner H.: the defendant thereupon withdrew the guarantee, but on finding S. would cease to be a subscriber, wrote to say that the guarantee should continue in force on the same terms and conditions as therein mentioned; partnership firms are not admitted as subscribers of Lloyd's, but subscribers may have a substitute; H. was made a substitute for S.; their business of brokers at Lloyd's was transacted sometimes by S., sometimes by H. as his substitute, and was on behalf of the firm and in its name; debts accrued on these transactions:—Held, that the guarantee applied to such debts.

Leathley v. Spyer, 5 L. R., C. P. 595; 39 L. J. C. P. 299; 22 L. T. 821.

Guaranteeing Freight of Two Ships—Loss of one.]—The defendant chartered two vessels of 300 tons each for a voyage from Ibralia to London, with full cargoes of petroleum, at 84s. per ton. In consequence of their stores at Ibralia having been destroyed by fire, he was unable to furnish any oil; and the owners agreed to cancel the charterparties and to procure other cargoes, upon the defendant guaranteeing each vessel a sum of 900l. gross freight home. The homeward cargoes shipped under the substitute contract fell short of the guaranteed sum for each vessel by 343l. 6s. One of the vessels arrived in safety, the other was lost:—Held, that the contract was broken at the moment of the shipment of the homeward cargo, and consequently that the owners were entitled to recover the deficiency in respect of each vessel notwithstanding the loss of one. *Carr v. Walschian Petroleum Company*, 1 L. R., C. P. 636; 35 L. J., C. P. 314. Affirmed, 2 L. R., C. P. 468; 36 L. J., C. P. 236; 16 L. T. 460; 15 W. R. 87—Ex. Ch.

Guaranteeing Payment of Goods—At what Price.]—A surety agreed to guarantee the payment of goods supplied by the plaintiff to I under a contract with government. At the time the guarantee was given negotiations only were on foot, but soon after the government contract was made with B., and also the sub-contract between B. and the plaintiff. Each contract provided that the articles were to be supplied within given periods:—but, in point of fact, the articles were not supplied by the plaintiff to I or by B. to the government, until long after the fixed period. The government, however, by the option, and waived the delay, and paid the contract price. B., not having paid the plaintiff, the plaintiff sued the surety on the guarantee, and the surety sought to show that the price given by B. in the contract with the plaintiff was a high one, on account of the shortness of the time within which the goods were to be delivered, and that the market price at the time the goods were to be delivered was much lower, and he claimed to set off the difference between the two prices:—Held, that the surety could not set off the difference in price. *Oastell v. Pound*, 7 L. T. 852; 11 W. R. 518.

Held, also, that the goods were supplied under the original contract, and that the acceptance after the delay did not constitute a new contract and that the surety was liable. *Id.*

Upon Bankruptcy of Principal—Rateable Deduction.]—When prior to the commencement of an action against a surety, whose liability is limited to a portion only of the principal debt the plaintiff receives dividends from the estate of the principal debtor, under proceedings in liquidation, amounting to 9s. 2d. in the pound of his entire debts, he is not entitled to recover such action the whole amount of the surety's liability, but only the balance or difference after deducting the amount of a dividend of 9s. 2d. in the pound thereon. *Ellis v. Wilmer*, 10 L. R., Ex. 10; 44 L. J., Ex. 10; 31 L. T. 57; 23 W. R. 214.

When a surety has become party to a bond conditioned for payment of the debt and interest

with a proviso that he shall not be liable for more than a certain sum, and the creditor, under a liquidation of the affairs of the debtor, receives a dividend on the whole of the debt and interest then due, the right of the surety to have a proportion of those dividends applied in reduction of the claim against him depends upon whether the bond amounts to a guarantee of the whole debt, with a limitation of the sum which he is to be called upon to pay, or to a guarantee of a part only of the debt. In the former case he is liable for the whole unpaid balance to the extent of the sum limited in the proviso. In the latter case he is entitled to a deduction pro rata in respect of the dividends. *Ellis v. Emmanuel*, 1 Ex. D. 157; 46 L. J., Ex. 25; 34 L. T. 553; 24 W. R. 832—C. A.

Where a debt having been partly guaranteed, the debtor becomes a bankrupt, and the creditor proves for a larger amount than that covered by the guarantee, the dividends must be applied in ease of the guarantor, rateably to the whole debt proved. *Raikes v. Todd*, 1 P. & D. 138; 8 A. & E. 846; 1 W., W. & H. 619.

A bill having been accepted by a banking company, and indorsed to a holder for value, the company passed a resolution to wind up voluntarily, and the winding-up was ordered to be continued under supervision. After this date the holder received from the drawer a composition of 8s. 6d. in the pound on the amount of the bills. After this payment the holder lodged a claim with the liquidator for the whole amount of the bills:—Held, that he was entitled to be admitted to prove only for the balance, after deducting the part payment. *Oriental Commercial Bank, In re, Maxonoff, Ex parte*, 6 L. R., Eq. 582; 18 L. T. 450; 16 W. R. 784.

H. gave to B. a guarantee: "I hereby guarantee to you the payment of all goods you may supply to E. H., but so as my liability to you under this or any other guarantee shall not at any time exceed 250l." L. gave a similar guarantee. B. supplied goods to E. H. to the amount of 657l. E. H. then became bankrupt. B. proved for the whole sum, and then called on the guarantors, who paid him 250l. each. B. having afterwards received a dividend of 2s. 1d. in the pound on the 657l.:—Held, that each of the guarantors was entitled to a part of this dividend, bearing to the whole the same proportion as 250l. to 657l. *Hobson v. Bass*, 6 L. R., Ch. 792; 19 W. R. 992.

The obligee of a bond given by principal and surety, conditioned for the payment of money by instalments, who has proved under a commission of bankruptcy against the principal the whole debt, and received a dividend thereon of 2s. 7d. in the pound, may recover against the surety an instalment due, making a deduction of 2s. 7d. on the amount of such instalments; and the surety is not entitled to have the whole dividend applied in discharge of that instalment, but only rateably in part payment of each instalment as it becomes due. *Martin v. Brecknell*, 2 M. & S. 39; 2 Rose, 156; *S. P., London Assurance Company v. Buckle*, 4 Moore, 153.

"In consideration of your giving credit in the way of your trade to L. M., I guarantee to you the payment of any debt which he may contract with you from time to time as a running balance of account, to any amount not exceeding 400l." The plaintiff, on the faith of this guarantee, supplied L. M. with goods to the amount of 800l.;

and he afterwards, being in insolvent circumstances, assigned all his effects to trustees for the benefit of his creditors. The plaintiff claimed a debt of 625l., as the balance due to him against L. M.'s estate, and received a dividend of 8s. 9d. in the pound on the whole debt. In an action by the plaintiff against the defendant on his guarantee:—Held, that he was not entitled to deduct the whole sum received as a dividend from the gross amount of the debt, and to hold the defendant liable on his guarantee for the residue of the demand up to the extent of the guarantee; that the dividend received was to be applied rateably to the whole debt, as well the part covered by the guarantee as that which was not; and therefore, that a rateable deduction was to be made for the sum covered by the guarantee. *Bardwell v. Lydall*, 5 M. & P. 327; 7 Bing. 489.

The defendants and N. were jointly interested in a cargo of goods, of which the bills of lading were held by B. as security for the payment of the amount of two bills of exchange. At N.'s request the plaintiffs gave B. their guarantee for that amount, thus obtaining the bills of lading; after one bill was paid, and before the other was due, the defendants, N. being then insolvent, agreed with the plaintiffs that the goods should be sold, and that after the account of sales was made up, and the amount guaranteed by the plaintiffs, the defendants would bear and pay one-half of whatever loss might appear on the transaction. The plaintiffs paid the other bill; the cargo failed to realize the amount; they proved on N.'s estate for the whole amount of the difference, and received dividends on the whole amount. N. then claimed from the defendants half of the whole amount of the difference:—Held, that the defendants were not entitled to have credit for the dividends received, and were liable for half of the whole amount of the loss. *Liverpool Borough Bank v. Logan*, 5 H. & N. 464; 29 L. J., Ex. 249.

A., wishing to be allowed from time to time to overdraw his account with his bankers, the defendant gave them the following document: "On demand I promise to pay to Messrs. G. & Co. 300l., with interest on same, to secure an advance now or hereafter on a banking account with A." A. became insolvent, and paid, by agreement with his creditors, a composition of 16s. in the pound; the bankers, who had advanced much more than 300l., received the dividend on their whole advance, leaving a balance on the whole of more than 300l.:—Held, that the promise by the defendant was to repay an advance of 300l., and that he was therefore only liable for the balance of 300l. after deducting 16s. in the pound from that amount. *Gee v. Pack*, 33 L. J., Q. B. 49; 9 L. T. 290.

Where a limited guarantee has been given, and the limit has been exceeded by the party guaranteed, who afterwards receives from the estate of the principal debtor a dividend, the guarantor is entitled to the benefit of a proportional part of that dividend on the amount guaranteed, notwithstanding that the unpaid debt greatly exceeds the amount of such guarantee. *Thornton v. McKean*, 1 H. & M. 525; 32 L. J., Ch. 69; 11 W. R. 140.

Advances—Purpose of.—A defendant guaranteed the payment of gold with which the plaintiff should supply a goldsmith for the purposes

of his trade; the plaintiff discounted bills for the goldsmith, and gave him for them partly gold and partly money; the gold was applied to the goldsmith's trade, but the goldsmith did not indorse the bills:—Held, that the defendant was not liable under his guarantee for the gold so furnished. *Evans v. Whyte*, 5 Bing. 485; 3 M. & P. 130; M. & M. 468.

A. gave B. the following guarantee: "I have given C. an order to purchase cotton, and as it may be to my advantage to have his bills on me negotiated through your house, I have in such case to request that you will honour his drafts to the amount of those he may send you for sale on my account, and engage that his bills on me, so transmitted, shall be regularly accepted and paid:—"—Held, that under this guarantee B. was justified in honouring C.'s draft to the amount of a bill drawn by C. on A., and represented by C. to B. as being drawn on account of A., though such bill was in fact drawn by C. on his own account. *Ogden v. Aspinall*, 7 D. & R. 637.

Action against a surety upon a bond conditioned for the due payment by M. of all sums in which he should from time to time become indebted to the plaintiffs for goods supplied him by them in the course of their business. The plaintiffs having drawn a bill upon M. for coals supplied to him, discounted the bill, which was dishonoured. M. went to the plaintiffs, and telling them that he wanted 80*l.* to enable him to take up the bill, asked them to lend him that sum. The plaintiffs thereupon gave him a cheque for 80*l.*, with which, and his own money, he took up the bill:—Held, that this was not in substance a loan by the plaintiffs to the defendant of the 80*l.*, but an advance by them for the specific purpose of taking up the bill, which as between the plaintiffs and M., remained unpaid to that extent; and that consequently, as the plaintiffs might have recovered the 80*l.* from M. as for goods sold, the defendant was liable to pay that sum. *Darey v. Phelps*, 2 M. & G. 300; 2 Scott, N. R. 564.

— **Deed of Assignment in respect of—What included in.**—W. and S. by deed assigned to J. P. all moneys to which they might become entitled from a certain railway company upon trust to secure the due payment of the sum of 5,000*l.*, advanced by J. P., "and also of all other sums which might thereafter become due from W. and S. to the said J. P. whether in respect of principal, interest, discount, commissions, or otherwise howsoever." The 5,000*l.* mentioned in the deed was paid off, but J. P. was afterwards compelled to pay 5,000*l.* under a guarantee for W. and S. The appellants, as execution creditors, afterwards attached a sum of money due from the railway company to W. and S. J. P. had given notice of the assignment to the railway company:—Held, that the deed of assignment included not only advances made by J. P. to W. and S., but also money paid by him under his guarantee for them, and was not affected by subsequent letters offering additional security for the guarantee. *Dumbell v. Isle of Man Railway Company*, 42 L. T. 745—P. C.

— **By Bankers.**—The directors of a company being desirous to allot a sufficient number of their shares to procure the appointment of a settling day on the Stock Exchange, arranged

with the manager of a bank, to open an account in the name of S., a promoter of the company to be drawn on by him to an amount not exceeding 30,000*l.*, and for advances made on that account the company gave a guarantee under the common seal. Such an account was opened, and, as arranged with the manager, the money drawn thereon by S. was immediately paid in him to an account opened at the bank in company's name as and for the deposits payable by allottees of shares in the company. The allottees were real persons who had been induced by S. to apply for shares, but they were wholly incapable of paying for them; they had no intention of really becoming shareholders, and immediately handed their letters of allotment and blank transfers to S. The bank directors were ignorant of the object of this scheme and believed that the money was advanced to S. to be employed by him as the company's agent in their legitimate business. In furtherance of the plot, the manager gave a certificate in the name of the bank that 23,006*l.* had been paid in for the deposits on 11,503 shares in the company, but the application for a settlement was refused, and shortly afterwards it was ordered that the company should be wound up. Before the winding-up there had been paid on the company's account a total sum of 24,505*l.* 18*s.* 6*d.*, made up of S.'s payments and of 1,500*l.* which really was the company's money, and their liquidator sued the 24,505*l.* 18*s.* 6*d.* as money received for the use. The bank sought to set off 24,506*l.* 8*s.* due to them on S.'s account:—Held, that the bank was liable to the company for 1,500*l.* of the sum really paid in on their account. *British and American Telegraph Company v. All Bank*, 7 L. R., Ex. 119; 41 L. J., Ex. 67, L. T. 257; 20 W. R. 413.

— **Costs—Title to Lands.**—The defendant conveyed premises to the plaintiff, and covenanted for good title. An action was afterwards brought against the plaintiff by a party having a better title, and the plaintiff compromised it for 55*l.*:—Held, that the plaintiff, in an action for breach of covenant, might recover the whole sum paid and his costs as between attorney and client, though the compromise suit, though he had given notice of that suit to the defendant. For an action on a general guarantee, the effect of such want of notice to the indemnifying party is to let in proof on his part that the compromise was improvidently made; it lies on him to establish that fact, which was not done in the present case. *Smith v. Comp*, 3 B. & Ad. 407.

— **On Assignment of Leasehold.**—In an action by a lessee against the assignee of a lease for a breach of a contract by the assignee to demify the lessee against a failure to perform the covenants contained in a lease, he sought to recover the whole costs, as well as those paid by him on taxation as extra costs paid by him to his own attorney, incurred in unsuccessfully defending an action brought against him by the lessor for a breach of one of the covenants in the lease committed after the assignment:—Held, that the lessee was entitled to recover the extra costs as well as the taxed costs. *Howard Lovegrove*, 6 L. R., Ex. 43; 40 L. J., Ex. 1, 23 L. T. 396; 19 W. R. 188.

Expenses of proposed Railway Company.]—By an agreement whereby the plaintiff agreed to allow his name to be put on the list of the provisional committee of a railway company, and the defendants undertook to indemnify the plaintiff from all personal responsibility, and to hold him harmless against all costs, charges, and expenses that had been or might be incurred in and about the formation of the company, their meetings, advertisements, surveys, and other expenses of carrying out the company, applying for an act of parliament, or anything relating thereto:—Held, that this was an indemnity against lawful claims only, and therefore did not apply to the costs incurred in the defence of an action improperly brought against the plaintiff as a member of the provisional committee, and the costs of a chancery suit which arose out of the action. *Lewis v. Smith*, 9 C. B. 610; 19 L. J., C. P. 278.

The plaintiff and defendant being members of a committee of a proposed railway company, by an agreement under seal, which recited that debts and liabilities had been incurred, and that it was probable that further disputes would arise respecting the liability of the members and the committee of management; and that the plaintiff being desirous of being relieved from all such questions and disputes had proposed to contribute and pay a sum to the defendants towards the payment of their claims, upon their agreeing to indemnify him, and to guarantee him that the sums mentioned in the first schedule had been paid, the defendants guaranteed that the sums mentioned in the first schedule had been paid, and also that they would indemnify and save harmless the plaintiff from all claims expressly mentioned and referred to in the second schedule, and from all costs, damages and expenses which he might sustain or be put to by reason thereof, and at their own costs and charges defend him against all actions and suits which should be commenced or prosecuted against him for the recovery thereof, or any part or parts thereof. After the making of this agreement, an order was obtained in the Court of Chancery, under 11 & 12 Vict. c. 45, for winding up the affairs of the company. The plaintiff was adjudged to be a contributory, and a sum was directed to be collected, such sum being composed of one of the sums mentioned in the second schedule to the agreement, and the rest of it consisting of costs and expenses occasioned by and incidental to the proceedings under the winding-up. The plaintiff having been ordered to pay a proportion of the sum directed to be collected, and having paid the same, brought an action against the defendants under the agreement:—Held, that the agreement merely protected the plaintiff against the claims mentioned in the schedules, and against the costs and expenses to which the plaintiff might be put by reason of the enforcement of those claims; and consequently, that the plaintiff was not entitled to recover beyond the amount of the sum mentioned in the second schedule, and which was included in the amount directed to be collected, and that the costs and expenses which he had been compelled to pay were not of the character contemplated by the agreement, and could not be recovered by him from the defendants. *Tanner v. Woolmer*, 8 Ex. 482; 22 L. J., Ex. 259.

Writ—Notice of Liability.]—The plaintiff guaranteed A. that the defendant would, upon

demand, from time to time pay to A. what should be due. A demand was made upon the defendant by A., and upon non-payment a writ was issued against the plaintiff for the amount, the writ being the first notification to him of the amount being due and unpaid. He allowed judgment to go by default, and an execution was levied upon his goods:—Held, that he might recover against the defendant the costs of the writ at the suit of A., but not the costs of the subsequent proceedings. *Pierce v. Williams*, 23 L. J., Ex. 322.

Action undertaken at Request.]—In consideration of the plaintiff's having, at the instance of the defendant, consented to pay to the holder the amount of a dishonoured bill of exchange, on which the defendant was liable as indorser, and to bring an action on the bill in the plaintiff's own name against the acceptor, the defendant gave to the plaintiff the following guarantee: "I hereby agree to be answerable to you for all costs, damages, and expenses which you may sustain by reason of trying the action, and relating and incidental thereto." The plaintiff brought the action against H., who obtained the verdict. H.'s costs of suit were taxed and paid by the plaintiff. The bill of costs of the plaintiff's own attorney, in the same suit, having been delivered to, but not paid by the plaintiff, he sued the defendant on the guarantee:—Held, that he was entitled to recover, as damages, not only the costs which he had paid to H., but also those for which he was thus liable to his own attorney. *Spark v. Heslop*, 1 El. & El. 563; 28 L. J., Q. B. 197; 5 Jur., N. S. 730; 7 W. R. 312.

Guaranteeing Broker.]—An authority by a landlord to a broker to distrain goods for rent was as follows: "And for your so doing this shall be your sufficient warrant and authority and indemnification against all costs and charges in respect to any law expenses, action or actions, that may arise, and as well as any other and all charges or expenses which you may be at, or brought against you, on that account:—Held, to extend to the costs of defending an action of trover wrongfully brought by the tenant, who admitted the tenancy and the rent being due, against the broker for goods taken under the distress, in which action the tenant was nonsuited. *Ibbett v. De la Salle*, 6 H. & N. 233; 30 L. J., Ex. 44.

Sheriff.]—A sheriff, sued for a wrongful arrest, defended the action without communicating with the execution creditor, who was liable to indemnify him:—Held, in a subsequent action by the sheriff against the execution creditor, that, to entitle the sheriff to recover the costs of defending the former action, it should be submitted to the jury to say whether the course pursued in defending the former action was reasonable, under all the circumstances of the case. *Caldbeck v. Boon*, 7 Ir. R., C. L. 32.

Forbearing Execution—Lease of House.]—The plaintiff having recovered judgment against F., the defendant promised, that if the plaintiff would forbear to issue execution against F., she would, on or before a certain day, erect a house, and cause a lease of the same to be granted to the plaintiff; and the plaintiff promised that such lease, when granted, should be in satisfac-

tion of the judgment. In an action against the defendant for not erecting the house, and causing the lease to be granted :—Held, that the measure of damages was the value of the lease, and not the difference between the value of the judgment and the lease. *Strutt v. Furlar*, 16 M. & W. 249; 16 L. J., Ex. 84.

Interpleader Proceedings.]—In 1816, G. shipped goods on board a vessel chartered by him for Calcutta, and B. & Co. made advances to enable him to do so, under an arrangement that the goods should be transmitted to the agents at Calcutta of B. & Co., who were to dispose of the outward cargo there, and send the proceeds in goods or bills to B. & Co. in London, who were to reimburse themselves their charges, and hold the balance at the disposal of G. In November, 1817, G. being in difficulties, and indebted to the defendants in 850*l.*, they and G. applied to B. & Co. to pay off this debt by a further advance to G. on his consignment, and the defendants gave B. & Co. the following guarantee: "Messrs. B. & Co., You having expressed some doubts of the propriety of paying G.'s draft on you for 850*l.* in our favour, we hereby engage, if you will pay us the same, that we will reimburse you the amount on demand, with interest, in the event of your finding it necessary to call upon us to do so, either from the state of G.'s pending account with you, or from any other circumstances." B. & Co. thereupon accepted and paid a bill of 850*l.* drawn by G. on them in favour of the defendants. The vessel returned to England with a cargo in April, 1818, when C., the owner (G. having become bankrupt), gave notice to the East India Company (in whose docks she lay) not to deliver any part of the cargo without his authority. They thereupon sold the cargo, and paid the owner's demand for freight, and, in consequence of conflicting claims from G.'s assignees and from B. & Co., filed an interpleader bill in equity, and paid the balance of the proceeds into court. Proceedings at law and equity were continued between all the parties, under legal advice, up to 1837, when the result was, that B. & Co. were obliged to pay C.'s costs. In 1838, B. & Co. demanded of the defendants the 850*l.* due by the guarantee, with interest, and their share of the expenses incurred in the law proceedings, and, on their refusal to pay, brought an action against them on the guarantee :—Held, that the defendants could not be made liable, under the guarantee, for the expenses incurred by the plaintiffs in the law proceedings. *Colvin v. Buck*, 8 M. & W. 680.

Reducing Execution.]—An action having been commenced against a surety on a promissory note, he agreed, that, if the plaintiff would take proceedings against the principal, he (the surety) would pay the extra costs occasioned thereby; the plaintiff having done so, afterwards issued execution against the surety for the balance due on the note, and also the extra costs; the court ordered the execution to be reduced to the extent of the costs included in it. *Evans v. Pugh*, 2 D. P. C. 360.

Guaranteeing Application of Contract-moneys—Non-Receipt.]—The plaintiff, previously to delivering bricks to a government contractor, received from the defendants a guarantee in the following terms :—"Please to deliver to Mr. S.

for the completion of his contracts at D. and W. yards, 500,000 best bricks, to be delivered at the dockyards, at 32*s.* per thousand, and we, as his sureties, consent that the proper officer, Navy office, Somerset House, who shall or may have the payment of the contract when finished, shall and may stop the amount of such account for bricks delivered; and we agree to become guarantors for the payment of the same to you when the amount of the contract is paid." The bricks were delivered, and S. received, with the consent of the plaintiff, a part payment. S. having performed part only of his contract, and failed in the performance of it, other persons were employed by government to finish the contract without the assent of S. or the defendants and to these persons payment of the remainder of the contract price was paid; after which a balanced account was made out with S., in which he was debited for the sums paid to the parties who finished the contract, and with the sum paid for work partly performed, and received credit for the whole contract work done :—Held, that by the guarantee the defendants undertook only that the money should be paid to the plaintiff when paid in pursuance of the contract, and that the money paid to the parties who finished the contract was not money paid to him. *Heming v. Malin or Trnery*, 2 C., M. & R. 385; Gale, 206; 5 Tyr. 887; 1 Jur. 893.

Payment out of certain Fund.]—E. S., a widow being indebted to B. in 199*l.*, and being unable to comply with his demand for payment in full paid 40*l.* on account, and entered into a written agreement with him, whereby, after reciting his inability to pay the 159*l.*, B. covenanted that in consideration of her regularly paying the interest 7*l.* 10*s.*, every year during her life (which she thereby agreed to pay), he would forego all claim to the principal sum until after her death, and would not during her life bring any action to recover the same. The three daughters of E. S. also signed the following memorandum at the foot of the agreement: "We, the undersigned E. F., E. J. S., and L. J. S., daughters of above named E. S., hereby agree to pay the said sum of 159*l.* to the above-named J. B., his executors or administrators, out of the estate of the said E. S. at her decease." The only property of any kind or sort whatever, real or personal, which at the date of the agreement and thenceforth to the date of her decease, E. S. was possessed of or entitled to, was a life estate or interest in a house and premises called the Talbot Hotel, the reversion in fee of which property was vested in her daughters, and which hotel accordingly at her decease became their absolute property as tenants in common in fee. On the death of E. S., B. brought an action against the daughters on the above undertaking for the payment of the 159*l.* :—Held, that the plain and natural meaning of the words used in the memorandum was that, at E. S.'s death, the daughters would out of what she might leave behind her available for payment of her debts, pay B.'s debt, and that the words "the estate of the said E. S." did not name or apply to her life estate in the Talbot Hotel. *Brown v. Fletcher*, 35 L. T. 165.

In consideration of the plaintiff forbearing to prosecute a chancery suit against the defendant it was agreed between them that the defendant should, out of the first moneys he might receive from W., on whom the defendant had claim

hand to the plaintiff 500*l.*; and out of any further moneys he might receive from W. on account of the same contract, the defendant should pay the plaintiff 10*l.* per cent. upon the net amount which he from time to time might receive, until such percentage paid to the plaintiff should reach 1,300*l.*, and no longer; and that the defendant would not compromise with W., without providing for the plaintiff 1,300*l.*, or so much of it as then might remain due. Only one instalment was received from W.:—Held, that the plaintiff, under this agreement, was not entitled to any percentage beyond the 500*l.* due on the first instalment, though exceeding 500*l.* *Cochrane v. Green*, 9 C. B., N. S. 448; 30 L. J., C. P. 97; 7 Jur., N. S. 548; 9 W. R. 124.

Proceeds realized in Composition.—C. & Co., being insolvent, compounded with their creditors, by agreeing to pay them a composition of 7*s.* 6*d.* in the pound by three instalments, and execute a conveyance of their real and personal estate to the defendants, in trust to permit them, C. & Co., to carry on the business, subject to the control of the defendants, and to pay thereout to the creditors the three instalments, and in case of full payment, to reconvey and reassign the estate to C. & Co.; but upon default of such payment, then in trust to sell, and after deducting out of the proceeds interest, costs and amount of mortgages, to divide the remainder amongst themselves and other creditors. C. & Co. continued accordingly to carry on the business, and opened an account with a banking company, from whom they obtained large advances. The bank applied to, and obtained from the defendants the following guarantee:—"C. & Co., having assigned over all their real and personal estate to us, in trust for securing a composition of 7*s.* 6*d.* in the pound to their several creditors executing such deed, and it being necessary to open a banking account for the purpose of carrying on the trade, in order that the stock and goods on hand may be wrought up and converted into money, for the purpose of paying such dividends, and you having at our request consented to open a banking account for that purpose, and to make advances on such account, or on the credit of the names of C. & Co., or of any person or persons for the time being carrying on that concern; we do hereby promise and engage that any sum or sums of money to become due to you or to the banking company, in respect of such account, shall in the first instance be paid to you out of the net proceeds of the trust estate, so far as the same will extend to pay." Further advances were made by the bank to C. & Co. subsequent to this guarantee. The defendants subsequently sold the property of C. & Co. under the provisions of the composition deed, and the proceeds were insufficient to pay the creditors the composition of 7*s.* 6*d.* in the pound:—Held, that the meaning of the guarantee was, not that the defendants should be liable to the bank only out of the proceeds realized from the estate of C. & Co., after payment of the composition of 7*s.* 6*d.* to the creditors, but that they were liable, in the first instance, to repay out of the proceeds the whole amount of the advances made by the bank to C. & Co., as well before as after the guarantee. *Wilson v. Craven*, 8 M. & W. 584.

Receipt by Collectors.—In an action upon a bond, conditioned for the honest and faithful service of a banker's clerk, and for well and faith-

fully accounting for all moneys which should come to his hands (assigning for breaches, general misconduct, irregular and unbusinesslike conduct, and not faithfully accounting), an arbitrator, to whom the cause was referred, found specially, that, on a certain day, the clerk made an erroneous balance-sheet, failing to exhibit (as it ought to have done) a surplus of 100*l.*, but that it was not proved that that sum came to the hands of the clerk; and also, that, on a certain day, the clerk, having received from a customer 213*l.*, entered it in the books of the bank 113*l.*, thus exhibiting on that day's balance-sheet a false and an unaccounted-for surplus of 100*l.*:—Held, that these facts did not entitle the plaintiff to recover. *Jephson v. Howkins*, 2 Scott, N. R. 605; 2 M. & G. 366.

A., as surety, entered into a bond for the due and faithful performance by C. of his duty as clerk to a provincial bank. C. being sent by the manager of a bank, at the request of a customer, to his residence about eleven miles distant from the bank, for the purpose of receiving a large sum of money to be placed to his account, a considerable portion of it being in gold and silver, on his way back dropped the money from his pocket and lost it:—Held, that the money was received by C. in the course of his employment as clerk to the bank, that the surety was liable, notwithstanding the finding of the jury that it was not the custom for bankers in that part of the country to send for their customers' money in the manner adopted, and that the loss of the money was *prima facie* evidence of gross negligence on the part of C. *Melville v. Doidge*, 6 C. B. 450; 18 L. J., C. P. 7; 12 Jur. 922.

A bond was conditioned for the due payment by the chief clerk of a railway company of all moneys received by him on account of the company. He had allowed the other clerks to be in arrear, and made up the deficiency on one day by appropriating to it a portion of the moneys received on the following day, but had, in fact, paid over the sum equal to the amount received on each day, up to the time of his dismissal:—Held, a breach of the condition, and that the company was entitled to recover as damages the full amount of the deficiency. *London, Brighton and South Coast Railway Company v. Goodwin*, 6 Railw. Cas. 177; 3 Ex. 736; 18 L. J., Ex. 337.

Balance—Moneys Passing.—A. became surety for a treasurer of a poor-law union, and entered into a bond, which was conditioned for the duly paying over to the guardians upon his removal from office, of the balances, moneys, &c., which should be in his possession by virtue of the office. The treasurer was also a corn dealer, and as such had dealings in corn with the overseers of several townships, who were farmers, and whose duty it was to pay over to him the moneys which were required from their respective townships by the guardians. He was in the habit of receiving corn from them, debiting himself with the amount, and crediting them with the amount due from them for rates. His accounts were duly audited; and at the last audit, after his removal from office, it was found that a balance was due to the guardians:—Held, in an action against the surety, that, as between the treasurer and the overseers, money had in effect passed; and, therefore, that the surety was liable. *Belford Union (Guardians) v. Pattison*, 1 H. & N. 2.

523; 26 L. J., Ex. 115; 3 Jur., N. S. 116—Ex. Ch. Affirming 11 Ex. 623; 25 L. J., Ex. 91.

B. executed a bond, conditioned to be void, if G. should honestly, diligently, and faithfully perform and discharge the duties of his office as treasurer of a poor-law union. One of the duties was to pay out of any money for the time being in his hands, belonging to the guardians, all orders drawn upon him. G. was a country banker, issuing his own notes. On the 28th of December the guardians drew several orders for money, some of which having been presented at G.'s bank, 95l. were paid in notes of the bank on that day. On the 31st of December the officer of the union presented other orders, and received 200l. in notes of G.'s bank. On the same day, the guardians having to transmit money to London, their clerk presented to G. an order for 4l. 19s. 8d., and obtained from him a banker's draft on a banker in London, which was afterwards dishonoured. G. stopped payment at three o'clock on the 31st of December, and on the 1st of January was declared bankrupt. At the time of the presentment of the orders, G. had in his hands sufficient money of the guardians to pay them :—Held, that B. was not liable to make good either of the three several sums of money to the guardians. *Lichfield Union (Guardians) v. Green*, 1 H. & N. 884; 26 L. J., Ex. 140; 3 Jur., N. S. 247.

Appropriation.—M. was surety in a bond given by G., collector of taxes in Jamaica, for payment of the collections for 1842. G. at the date of the bond was in arrear for taxes collected by him in 1841. G. appointed S. his deputy, to collect the taxes for 1842, which he partly did, and G. collected the remainder. Shortly after the collection of the taxes, the receiver-general pressed G. for the payment of the arrears of 1841. G. went to S. and obtained from him 3,000l. to remit to the receiver-general, S. taking that amount out of a chest, in which were placed the moneys collected for 1842. G. converted that sum, and also 2,000l. which he had collected for taxes in 1842, into paper money, and transmitted 5,000l. to the receiver-general, who appropriated the whole amount in liquidation of the arrears for 1841. In an action by the crown against M. upon the bond :—Held, that the receiver-general had a right to appropriate the remittance by G. to the liquidation of the arrears of 1841, and that it was not necessary that G. should assent to that appropriation, and that M. was bound by the appropriation, and liable on the bond for the deficiency of the taxes for 1842. *Att.-Gen. of Jamaica v. Manderson*, 5 Moore, P. C. C. 239; 12 Jur. 313.

Taxes collected in one year under 23 Geo. 3, c. 99, must be duly paid by the collector to the account of that year, and the sureties are liable, though all the moneys collected in the year for which they are sureties should be in fact paid in, if any part of them should be appropriated by the collector, and received by the commissioners in satisfaction of the arrears of a former year. *Gwynne v. Burnell*, 7 C. & F. 572; West, 342; 1 Scott, N. R. 711; 6 Bing. N. C. 853.

Legal Collection.—Sureties to a bond given by a person appointed a collector of income-tax under 5 & 6 Vict. c. 35, and conditioned for the payment of all sums assessed and collected, or to be assessed and collected by him for a par-

ticular year as such collector, are not liable in respect of sums collected by him without legal authority. *Kepp v. Wiggett*, 10 C. B. 35; 2 L. J., C. P. 49; 14 Jur. 1137.

To an action on a bond given as a security for the due performance of the office of collector of rates, and conditioned for payment of all money received "by virtue and for the purposes of certain act of parliament, and relative to the collectorship of such rates," the defendant pleaded, that no rate was made, or in any way existed, which he could legally, or according to law, collect or get in, or could legally, or according to law, demand or obtain, by virtue of his office, and that he did not, during the continuance of his appointment, legally receive any money, by virtue or for the purposes of the act or relative to the collectorship of the rates :—Held, that the former part of the plea would have been held bad on special demurrer, as negative pregnant, for not shewing in what way the rate was illegal; but those objections not having been raised, the latter averment afforded a substantial answer to the action. *Webb James*, 9 D. P. C. 315; 7 M. & W. 279.

If in an action on a bond given by the sureties of a collector of taxes there are breaches assigned, that the collector did not pay over money received, and that he did not duly demand and enforce payment of the taxes, it is not necessary on the part of the plaintiff to prove exactly what money he received; for if it is proved that he was to collect a certain sum and that he paid over a smaller sum, and did not take proper steps to exonerate himself from the residue, the plaintiff will be entitled to recover. *Loveland v. Knight*, 4 M. & R. 597; 3 C. & 106.

9. COLLECTORS' BONDS.

Taxes—Formalities.—A bond with one surety only, taken by commissioners of taxes, under Geo. 3, c. 99, s. 13, is not therefore void. *Pepp v. Cooper*, 2 B. & A. 431.

A bond, whereby the obligor became bound collector of duties assessed under 43 Geo. 3, c. 1: might be put in force against one of the sureties though he was not apprised of the default of the principal collector in not paying over duties collected by him, nor called upon for an indemnity by the commissioners till after the dismissal from office of such collector. *Nares v. Rowles*, East, 510.

By 43 Geo. 3, c. 99, s. 13, the district collectors of assessed taxes are required to give security the commissioners in a sum "equal to the amount of the whole duty assessed and to be collected in each district;" and by 55 Geo. 3, c. 11 bonds given by collectors of assessed taxes as their sureties, for the due payment of moneys collected by them, are exempted from stamp duties :—Held, that the direction of 43 Geo. 3, c. 99, s. 13, was virtually complied with by a security given in such sums as was large enough to include, though it exceeded, the exact amount of duties to be collected for the district; and therefore that such bond was within the above exemption in the stamp act. *Collins v. Gwynne*, 2 & Scott, 640; 9 Bing. 544.

Held, also, that such bond was properly given "to the commissioners," and need not be "to his majesty, his heirs and successors." *Ib.*

The 43 Geo. 3, c. 99, s. 13, enacts, that the c

lectors shall give security to the commissioners for duly paying such moneys as shall come to their hands, and for duly demanding the sums assessed, and for duly enforcing the act against defaulters; and by 38 Geo. 3, c. 5, s. 21, the collectors are required to give security to the commissioners for paying to the receiver-general the sums collected by them. A surety was sued on a bond which contained those conditions, and also a condition for accounting and paying to the commissioners:—Held, that this latter condition might be rejected as surplusage, and did not avoid the bond. *S. C.*, 7 Bing. 423; 5 M. & P. 276.

— **Time.**—A bond made by a defendant's testator as surety for E., with a condition reciting that E. had been and still was collector of the land-tax, and all other taxes and duties imposed by several acts of parliament on the inhabitants of a parish, by means whereof he received from the inhabitants divers sums of money, and conditioned for the due payment by E., from time to time, and at all times thereafter, to the receiver-general of taxes, of all and every sum which he (E.) should from time to time collect and receive from the inhabitants of the parish, for or on account of any tax or taxes then imposed, or which should or might thereafter be imposed on them by any act of parliament, was confined to the current year for which E. was collector at the date of the bond, although it did not appear on the condition that he was only appointed for a year, it being shewn by plea that the office of collector was an annual office, and held as such by E. at the date of the bond, although by the replication it appeared that E. held the office not only for that year, but thence to the commencement of the action. *Hassell v. Long*, 2 M. & S. 363. And see *Curling v. Chalkden*, 3 M. & S. 502.

— **Enforcing Payment.**—To an action upon a bond given by a collector of assessed taxes and his sureties, pleas, shewing that the commissioners and receiver-general had not taken steps to enforce payment from the collector, as directed by the acts relating to the assessed taxes, are bad. *Wilks v. Heeley*, 1 C. & M. 249; 3 Tyr. 291.

A plea that the commissioners have not seized the lands of the collector, must shew that there were lands of the collector which might have been seized and sold to supply the deficiency. *Id.*

A bond given by a collector and his sureties to the commissioners of land and assessed taxes under 43 Geo. 3, c. 99, is broken, if the taxes collected in any one year are not duly paid up by the collector to the account of that year. *Gwynne v. Burnell*, 7 C. & F. 572; West, 342; 1 Scott, N. R. 711; 6 Bing. N. C. 853.

The seizure and sale of lands and goods of the collector, of the existence of which the commissioners had notice and knowledge, was under 43 Geo. 3, c. 99, s. 9, a condition precedent to their right to put the bond in suit against the surety. *Id.*

But the seizure and sale of lands and goods of the collector, of the existence of which the commissioners had no notice, was not a condition precedent to their right to put the bond in suit against the surety. *Id.*

Rates—Condition that Notice of Dishonesty

should be given.—The guarantors, by their agreement, contracted to guarantee the plaintiff against loss sustained from any act of fraud or dishonesty by a rate collector, or from any failure on his part to collect and pay into the Bank of Ireland the rates to be collected by him, and produce to the plaintiff, as collector-general, the receipt of the bank for such payment, or from any failure on his part to deliver to the plaintiff true accounts of the moneys collected, and lists of the persons in arrear, "provided that the plaintiff should, within ten days after the discovery by him of any fraud or dishonesty of the 'said persons employed,' and of any matter in respect of which any claim may be intended to be made, give notice in writing, at the office of the society, as far as the case will admit, of all the particulars thereof; and after any such discovery, the guarantee herein contained shall, as to loss by any act of fraud or dishonesty, subsequent thereto, be at an end:—Held, that the proviso required notice to be given of such fraud or dishonesty only as would form the foundation of a claim under the guarantee, and did not impose upon the plaintiff an obligation to give notice if he discovered that fraud or dishonesty had occurred on the part of the person employed, before the guarantee was entered into or the employment under himself commenced. *Byrne v. Muzio*, 8 L. R., Ir. 396.

— **Power of Suspension of Defaulting Party.**—Under the 12 & 13 Vict. c. 91, the power of dismissing rate collectors is vested in the lord lieutenant, but by regulations of the privy council, made under the act, the collector-general is empowered to suspend any collector who, in his opinion, has been guilty of neglect of duty:—Held, that the omission of the collector-general to suspend the collector, after knowledge of fraud and dishonesty on his part during his service and employment, was not a defence to an action on the guarantee; 1st, because the doctrine of *Phillips v. Fozall* (7 L. R., Q. B. 666) was inapplicable to a guarantee for the fidelity of an officer appointed and removable by the lord lieutenant; 2ndly, because the omission to exercise a power of suspension as distinguished from a power of dismissal did not terminate the liability of the sureties. *Id.*

— **Surety liable through Overseers' Negligence.**—The defendant, as surety, gave a bond to the guardians of the poor for the M. Union, conditioned for the due discharge by C. of his duties as collector of poor-rates for the parish of N. C. absconded, having embezzled part of the rates, and allowed others to be lost by not applying for them. The guardians sued the defendant for the loss. The defendant admitted his liability as to the sums embezzled, but disputed his liability as to the sums lost by C.'s negligence, on the ground that the loss would not have occurred if C. had been called upon to account as he ought to have been. It appeared that no negligence could be imputed to the guardians, but there appeared some ground to believe that if the overseers of the parish of N. had discharged their statutory duties with reasonable care the loss would not have occurred:—Held, that the plaintiffs were entitled to recover from the defendant the moneys lost through failure of C. to collect them, for that there had been no negligence on the part of the plaintiffs,

and they were not answerable for the negligence of the overseers. *Mansfield Union v. Wright*, 9 Q. B. D. 683—C. A. Affirming 46 J. P. 200.

— **Within what Time.**—The condition of a bond given to commissioners of sewers by a collector of rates was, that the collector should at all times render a faithful account to the commissioners for the time being of all such sums of money as had already been collected or received, or which thereafter should be collected or received by him, by virtue of any rates for and on account of such commissioners, and should pay to the commissioners for the time being all moneys already received, or which should thereafter be received by him:—Held, that the collector was bound to account for and pay to the commissioners for the time being, sums of money collected and received by him, by virtue of a rate made by commissioners acting under a commission, which expired before the execution of the bond. *Saunders v. Taylor*, 9 B. & C. 35.

Where a bond was conditioned that a collector of church and poor rates should produce a faithful account to the obligees or their successors for moneys which might be received by him, or come to his hands, pursuant to, and in execution of, his office of collector:—Held, that the obligor was not answerable for moneys received by him on account of any year subsequent to that in which the obligees were in office. *Leadley v. Evans*, 2 Bing. 32; 9 Moore, 102.

A., B. and C. entered into a bond as sureties for D. and E., the condition of which bond recited that D. was on such a day appointed collector of the church-rate of a parish, by virtue of which office he was empowered to collect and receive all such moneys as were rated and assessed on the inhabitants by virtue of the rate, and for which he was accountable to the wardens of the grand account, and bound the sureties for D.'s duly accounting for all moneys collected or received by him on account of the above rate, as also on all and every other rate or rates thereafter to be made and collected by him, D.:—Held, that the sureties were only answerable for D. in that single appointment, and not on his appointment in the ensuing year. *St. Saviour's, Southwark v. Bostock*, 2 N. R. 175.

A bond given to secure the faithful performance of the office of a collector of parochial rates (who was by act of parliament to be appointed by trustees for a year, and then to be capable of re-election), was conditioned, that, "from time to time, and at all times thereafter, during such time as he should continue in his office, whether by virtue of his said appointment, or of any re-appointment thereto, or of any such retainer or employment by or under the authority of the trustees, or their successors to be elected in the manner directed by the act, he should use his best endeavours to collect the moneys received by means of the rates, in the then or in any subsequent year," &c.:—Held, that the obligation of the bond was not confined to the year for which he was originally appointed, but extended also to all subsequent years in which he was continuously reappointed. *Augero v. Keen*, 1 M. & W. 390; 2 Gale, 8.

Action on a bond made by C. and his sureties, with a condition reciting the 27 Geo. 2, c. 38, and that C. (four years before the date of the bond) was appointed by the church-wardens and parishioners of D., in pursuance

of the statute, collector of the poor-rates to be levied and raised in the parish, and conditioned that C. should account as often as required, for all moneys so collected and received by him, by virtue of the act. Breach for not accounting for moneys collected and received since the bond: pleas, that C. accounted for all the moneys collected and received by him before the bond, and that the office of collector is an annual office, and that C. accounted for all the moneys collected and received by him within the current year of office in which the bond was made:—Held, that both pleas were ill, for, by the words of the statute, the appointment was prospective, to collect future rates, and not retrospective only, and the condition was in the words of the statute without any restraining words; and it was not pleaded that the office was an annual office at the time of making the bond, and if it had been, yet it appeared by the statute not to be an annual office, though concerning rates which were raised in the course of a year. *Curling v. Chalkden*, 3 M. & S. 502.

See also cases, *post*, col. 194.

Amount Recoverable under.—See AMOUNT OF LIABILITY, *supra*.

10. IMPLIED INDEMNITIES.

Delivery of Goods claimed by Third Parties.]

—The plaintiffs were in possession of certain trucks, which were claimed by the defendant, and also by the proprietors of a colliery. A correspondence took place between the plaintiffs and the defendant, in which the plaintiffs asked for an indemnity if they should deliver up the trucks to the defendant. The defendant, without giving any answer as to the indemnity, wrote requiring the plaintiffs to send the trucks back to him, which they thereupon did. The colliery proprietors then brought an action against the plaintiffs for conversion of the trucks; and their claim proving well founded, the plaintiffs were obliged to pay a sum of money, in settlement of the action, which they sought to recover from the defendant upon a contract of indemnity:—Held, that there was under the circumstances of the case, evidence of an implied promise to indemnify. *Dugdale v. Loring*, 10 L. R., C. P. 196; 44 L. J., C. P. 197; 32 L. T. 155; 23 W. R. 391.

The principle upon which in such cases a contract of indemnity is implied is not confined to cases of principal and agent, or employer and employed. *Ib.*

Expenses of Captain of Ship.]—A captain of a ship, in order to avoid expense, accepted the offer of a company to tranship some goods temporarily on board one of their vessels. The goods were afterwards removed to another vessel for the greater convenience of the company, but it was unfit to hold the goods, and they were lost. The captain, at the end of his voyage, declined to pay the value of the goods to the consignees, who held the bills of lading; he was then sued, and judgment was given against him. In an action to be reimbursed the damages, and the costs of the proceedings against the captain:—Held, that the company was bound to pay the value of the goods only, and not the costs of the action, as it ought not to have been defended. *Ronneberg v. Falkland Islands Company*, 11

C. B., N. S. 1; 34 L. J., C. P. 34; 10 Jur., N. S. 940; 10 L. T. 530; 12 W. R. 714.

Where a master of a ship which was damaged by perils of the sea (being exclusively the agent of the shipowner, in ordering repairs or borrowing money on bottomry bond for such repairs) hypothecated at a foreign port by a bottomry bond for necessary repairs, the ship, freight, and cargo, amongst which were the plaintiff's goods, and in consequence of the ship and freight realizing less than the sum borrowed, the plaintiff was obliged to contribute towards the difference, and also to pay his proportion of the costs of a suit instituted in the Court of Admiralty by the obligee of the bond:—Held, that the plaintiff might maintain an action against the owner of the ship on an implied promise to indemnify. *Benson v. Duncan*, 3 Ex. 644; 18 L. J., Ex. 169; 14 Jur. 218—Ex. Ch.

After Sale of Shares.—The plaintiff, being the holder of shares in a mine worked on the cost-book principle, sold them to the defendant, and delivered to him a transfer paper in the usual form, signed by the plaintiff, but with blank spaces for the name of the transferee. By taking this paper to the secretary of the mine, and filling up the blanks with his name, the defendant might have had himself registered as the owner of the shares. A call was made, which the plaintiff was compelled to pay, as he continued to be the registered owner of the shares, the defendant having taken no steps to have himself registered:—Held, that there was an implied contract on the part of the defendant to indemnify the plaintiff against calls made upon the shares while they remained the property of the defendant. *Walker v. Bartlett*, 18 C. B. 845; 25 L. J., C. P. 263; 2 Jur., N. S. 643—Ex. Ch.

Retirement of Director.—H. and W. were two of the directors of a banking company. It was agreed at a meeting of directors that H. should retire from being a director and a shareholder on the terms embodied in a minute, as follows:—"H.'s shares to be taken at par. Release and indemnity may be arranged by the solicitors of the parties. (Signed) F. K., chairman." H. retired, and his shares were cancelled. W. was not present at the meeting at which this minute was passed, but was aware of the transaction, and expressed no disapprobation, though he did not act to ratify it. It was subsequently determined, under the winding up of the company, that the cancellation of H.'s shares was invalid, and that he was a contributory:—Held, that W. was not under any liability to indemnify H. against the liabilities of the company arising after H.'s retirement. *Walker, Ex parte*, 2 Jur., N. S. 1216—L. J.

Distress by Superior Landlord.—There is no obligation upon the owner of land, arising from the mere circumstance of a stack of wheat being lawfully there, to indemnify the owner of the stack from the loss occasioned by a seizure and sale of the stack by the ecclesiastical commissioners, by virtue of 6 & 7 Will. 4, c. 71, for a tithe rent-charge upon such land. *Griffinhoofe v. Daubuz*, 5 El. & Bl. 746; 25 L. J., Q. B. 237; 2 Jur., N. S. 392—Ex. Ch.

To a breach of contract by a lessee, to indemnify his sub-lessee against the rent payable to

the superior landlord, it is no answer that at the time of the distress made by the superior landlord (the breach complained of) there was more rent due than that distrained for. *Briant v. Pilcher*, 16 C. B. 354; 1 Jur., N. S. 1020.

Against Payment of Rent.—A lessee of a farm for an unexpired term at a yearly rent, payable quarterly, gave up possession to the defendant, under an invalid assignment of the unexpired residue of the lease. He entered, occupied and paid the reserved rent quarterly to the lessor for the lessee. The lessor never accepted or objected to the defendant as his tenant. The defendant quitted on a quarter-day without giving the lessee any notice to quit:—Held, that a promise by the defendant to indemnify the lessee against the rent for any period after the defendant had ceased to occupy, could not be inferred as a matter of law. *Crouch v. Tregoning*, or *Tregonning*, 7 L. R., Ex. 88; 41 L. J., Ex. 97; 26 L. T. 286; 20 W. R. 536.

Bail.—A. entered into a recognizance of bail for B. on the removal by certiorari of an indictment for conspiracy. B. was convicted, and the recognizance was estreated for non-payment of the prosecutor's costs:—Held, that A. might maintain an action against B. as upon an implied indemnity. *Jones v. Orchard*, 16 C. B. 614; 24 L. J., M. C. 229; 1 Jur., N. S. 936.

Request to get Bills accepted against Bill of Lading—Forgery.—The defendant, a merchant at Newcastle, was a customer of the plaintiffs, bankers at Newcastle, whose London agent was the Union Bank of London. H., a merchant at Wolgast, in Prussia, wrote to the defendant that he was inclined to consign to him a cargo of wheat, and asking for how much, and at what date, the defendant would open for him a credit in London. The defendant wrote in reply: "You may draw against transmittal of bill of lading at 30s. to 32s. per quarter in advance for your best yellow wheat, on our account, at fourteen days, one, two, or three months' date, on the Union Bank of London." H. afterwards wrote to the defendant that he was about to consign to him 8,320 scheffels of wheat, shipped by the vessel Anna, Captain K., and that he annexed duplicate bill of lading. On the same day H. wrote to the Union Bank that he had drawn on them six bills of exchange for 400l. each, for account of the defendant. The Union Bank having no instructions, sent the letter to the plaintiffs. Messrs. B. and C. afterwards presented to the Union Bank, for acceptance, six bills of exchange for 400l. each, drawn and indorsed by H., together with a paper writing, purporting to be a bill of lading, indorsed by H. in blank. The plaintiffs having sent to the defendant the letter which H. addressed to the Union Bank, the defendant came to the plaintiffs' bank, and had some conversation with the manager, respecting the cargo of wheat supposed to have been shipped by H., when the defendant said, "it was a large amount, and that they must only accept against the bill of lading." The defendant then wrote to the plaintiffs, as follows: "We shall feel obliged by your requesting the Union Bank of London to accept the drafts of Mr. H. for 2,400l., against properly indorsed bill of lading of 8,320 scheffels of wheat, per Anna, F. K., master, on our account." The Union Bank, at the request

of the plaintiffs, accepted the drafts, and the plaintiffs debited the defendant with the amount. Before the draft became due it was discovered that the bill of lading was forged, and that no cargo was shipped on board the *Anna*. H. was afterwards convicted of uttering a forged bill of lading. The Union Bank having paid the bills, and debited the plaintiffs with the amount:—Held, that the plaintiffs were entitled to recover the amount from the defendant on an implied contract to indemnify them. *Woods v. Thiedemann*, 1 H. & C. 478; 10 W. R. 846.

Costs Payable—Consequences of Accident.]

—The plaintiffs were contractors for the construction and maintenance of a tramway belonging to a tramway company with the company, and in order to carry out their contract they entered into a contract with the defendants by which they undertook the construction and maintenance of the asphalt paving of the tramway. When H. was lawfully driving along the public highway on which the tramway was, he was, by reason of a hole in the asphalt paving of the tramway (due to the negligence of the defendants in carrying out their contract), thrown out of his cart and injured. He therefore commenced an action to recover compensation against the tramway company, who at once gave notice of the action to the plaintiffs, who passed on the notice to the defendants, and claimed to be indemnified by them. The defendants repudiated all responsibility or liability, and refused to have anything to do with the defence of the action. The action was eventually compromised by the plaintiffs, who paid to H. 110*l.* for damages and costs, and also incurred costs themselves in defending the action up to the compromise and in compromising, to the amount of 18*l.* 1*s.* 4*d.*:—Held, that the plaintiffs could not recover the costs paid to H., or the costs incurred in defending or compromising the action, although the costs were reasonably incurred, and though the plaintiffs did in fact benefit the defendants in so incurring them by reducing the claim of H. *Fisher v. Val de Travers Asphalt Paving Company*, 1 C. P. D. 511; 45 L. J., C. P. 479; 35 L. T. 366.

H. having contracted with the plaintiffs, who were carriers, for the carriage of two pictures from London to Paris, the plaintiffs contracted with a railway company for the carriage by them of the pictures over a part of the distance. The pictures were damaged on the journey by the negligence of the company. H. thereupon brought an action against the plaintiffs, who gave notice of it to the company, and requested them to defend it. They refused, and told the plaintiffs to take their own course. The plaintiffs defended the action brought against them by H. without success, and then brought an action against the company to recover not only the damages found by the jury to have been sustained by H., but also the costs of the unsuccessful defence. The company paid the damages into court, and disputed their liability as to the costs:—Held, that the costs were not recoverable, inasmuch as they could not be considered as the natural consequence of the default of the company, the contracts between H. and the plaintiffs, and between the plaintiffs and the company, having been separate and independent. *Bazendale v. London, Chatham and Dover*

Railway Company, 10 L. R., Ex. 35; 44 L. J., Ex. 20; 32 L. T. 330; 23 W. R. 167—Ex. Ch.

II. DISCHARGE OF SURETY.

1. ALTERATION OF OBLIGATION GENERALLY

Creditor depriving Surety of Rights.—If the principal creditor deprives the surety of any right he would have had against the original debtor, even though the surety is benefited thereby, the surety is discharged. *Polak v. Everett*, 1 Q. B. D. 669; 46 L. J., Q. B. 218; 3 L. T. 350; 24 W. R. 689—C. A. Affirming 4 L. J., Q. B. 369; 34 L. T. 128; 24 W. R. 365.

Although the surety is aware that an alteration is being made in the original contract, he is not bound to express his dissent to the transaction. *Ib.*

N. was indebted to the plaintiffs, and by deed agreed, first, to pay them 3,400*l.* on the 15th of February, 1874; secondly, within a certain time after the allotment of shares in a company to which he was about to assign his business, to transfer to them shares in it to the nominal value of 6,000*l.*, and redeem them at par within twelve months from the 1st of January, 1874; and fourthly, it was agreed between him and the plaintiffs that the book-debts due to him, to the nominal amount of 8,000*l.*, should be collected and one-half paid to the plaintiffs, to be applied towards redemption of the shares, and when he had received a sum equal to, or a multiple of, the amount of a share, they were to deliver to him shares at par equivalent to the amount so received. The defendant guaranteed the performance of this agreement by N. so far as concerned the redemption of the shares of the value 6,000*l.* Subsequently an arrangement was made between the plaintiffs and N., by which, for an equivalent in shares and cash, they released him their interest in the book-debts, that he might dispose of them to the company. The defendant having been sued on his guarantee for deficiency of 2,250*l.* in the amount of shares:—Held, that the new arrangement was such a variation of the rights of the defendant as surety as to discharge him. *Ib.*

In equity upon a contract of suretyship, if the person guaranteed does any act injurious to the surety, or inconsistent with his right, or if he omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the surety will be discharged. *Watts v. Shuttleworth*, 5 H. & N. 235. Affirmed, 7 H. N. 353; 7 Jur., N. S. 945; 5 L. T. 58; 10 W. R. 132—Ex. Ch.

It is not every alteration of his position by the act of the creditor that discharges the surety. To have this effect, the alteration must be such as interferes for a time with his remedies against the principal debtor. *Tucker v. Laing*, 2 Kay J. 745.

Where the creditor knew that the surety was negotiating a loan for the principal debtor, for the purpose of paying off therewith the debt which the surety was liable, and thus getting rid of such liability, and the creditor promised the debtor to give him further time, and this induced the surety to desist from his attempt to raise the money:—Held, that the surety's liability to the creditor was not discharged. *Ib.*

The neglect of the obligee to give notice to the surety that the principal has made default, d

not discharge such surety; but if the obligee (without the privity of the surety) enters into an engagement with the obligor, and deprives himself of the power of suing him, whereby the surety is prevented from coming into a court of equity for relief, he is then discharged, but not otherwise. *Orme v. Young*, Holt, 84.

Altering Purpose of Company.—In 1872 a company was formed to purchase and work a going concern, consisting of railway tyre and steam-roller works, and the vendor accepted part of the purchase-money in fully paid-up shares, called "vendor's shares." The vendor guaranteed to the shareholders a dividend for the first five years upon the called-up capital for the time being at the rate of ten per cent., and that if in any one of the five years the profits should not equal a dividend of ten per cent., he would pay the amount required to make the profits equal such dividend; and that, if he did not on demand pay such amount, the company might sell his "vendor's shares," and apply the proceeds in satisfaction of such amount. The business was carried on at a loss from the first, and in 1874 the directors, who had the widest powers of management, shut up the railway tyre department, which comprised four-fifths of the whole concern. In 1875 there were no profits at all, and the directors called upon the vendor under his guarantee to pay an amount sufficient to make up the dividend of ten per cent., and, on his refusal, commenced an action to enforce payment:—Held, that the guarantee was given upon the implied condition that the company should carry on the whole concern as it existed at the first, and that the company having broken the contract on its part, the vendor was discharged from his guarantee. *Brown & Co. v. Brown*, 35 L. T. 54.

Held, also, that the vendor was, under the circumstances, entitled to an injunction to restrain the company from selling his "vendor's shares." *Id.*

Nature of Tenancy.—In an action against a surety on his bond, whereby he guaranteed the performance of a covenant by his principal, the lessee of a farm and flock of sheep, to deliver up to the plaintiff at the end of the tenancy, with the farm, a like number and quality of sheep regularly heathed and pastured on the farm, it was proved that an alteration had been made in the terms of the letting by the surrender of a small part of the farm and a proportionate reduction of the rent. The jury found that the alteration had not made any material difference in the relation between the parties, so as to affect the capacity of the tenant to perform his covenant:—Held (Brett, L. J., dissentiente), that the surety was discharged. *Holme v. Brunskill*, 3 Q. B. D. 495; 47 L. J., Q. B. 610; 38 L. T. 838—C. A. Affirming 47 L. J., C. P. 81; 38 L. T. 103.

Any alteration in the form of the agreement between principals discharges the surety, unless it is self-evident that the alteration cannot prejudice the surety; the surety himself being the judge as to materiality. *Id.*

The surety is discharged where there has been a material alteration, or an alteration of some specific provision of the agreement, but not otherwise. *Id.*

In a contract by A. to let, and B. to take the

milking of cows at so much yearly rent payable quarterly, and by C. to pay the rent, C. is a mere surety; and in an action against him for the rent, A. must prove a literal performance of the contract on his part; as any variation made in such a contract by A. and B. without the consent of C. would discharge him, although his risk was not thereby increased. *Whitcher v. Hull*, 8 D. & R. 22; 5 B. & C. 269.

Taking additional Security.—Merely giving an additional security by a principal will not discharge a surety. *Overend, Gurney & Co. v. Oriental Financial Corporation*, 7 L. R., H. L. 348; 31 L. T. 322.

To an action for money lent, the defendant pleaded that the cause of action arose out of disbursements made for and on account of a vessel belonging to the defendant, and that the master made and sealed a bottomry bond, which was accepted and received by the plaintiff in satisfaction of the promises in the declaration. The plaintiff replied that he did not accept or receive the bond in satisfaction of the promises. At the trial it appeared that the bond was given by the master the day after the transaction as to the advances on the ship's account was closed, and by way of collateral security only:—Held, that the plaintiff's right to sue the owner in respect of the implied contract was not destroyed by the taking such additional security. *Weston v. Foster*, 3 Scott, 155; 2 Bing. N. C. 693; 2 Hodges, 59.

One of the co-sureties of a bond received from his principal a promissory note to the amount of that instrument:—Held, that it was a question for the jury to say *quo animo* the note was given, and whether it was given in pursuance of an arrangement that the surety should be thereby discharged, or merely by way of collateral security, in which latter case the surety would be liable for contribution on payment of the bond by his co-surety. *Done v. Whalley*, 9 Ex. 198.

Co-Sureties in Severalty—Release of one.—Where two or more sureties contract severally the creditor does not break the contract with one of them by releasing the other. The contract remaining entire, the surety in order to escape liability must shew an existing right to contribution from his co-surety which has been taken away or injuriously affected by his release:—Held, in an action upon a guarantee, that a plea to the effect that M. was the defendant's co-surety, and had been released in consideration of a new guarantee given to the plaintiff, constituted no defence: the plea nowhere averring or implying that the liability was joint, or that the defendant became surety on the faith of M.'s co-suretyship, or that any right of contribution had arisen against M. which had been taken away or injuriously affected, or that the defendant had suffered any damage or injury by the substitution described. *Ward v. National Bank of New Zealand*, 8 App. Cas. 755; 52 L. J., P. C. 65; 49 L. T. 315.

Release—Of Principal.—Action on a guarantee given the plaintiffs for goods to be supplied by them to G., to the extent of 400*l.* The guarantee provided, that the plaintiffs were to have full liberty to extend the period of credit to G., and to hold over or renew bills, notes, or other securities given by him, and to grant to G., and the

person liable on such bills, notes, or securities, any indulgence, and to compound with him or them, as the plaintiffs might think fit, without the same discharging or in any manner affecting the liability of the defendant, by virtue of the guarantee. The declaration averred the supply of goods exceeding the guarantee, which was unpaid by G., of which the defendant had notice, and was requested to pay that sum, but had not done so. Plea, that, after the debt was incurred by G., and before action, the plaintiffs became parties to a composition deed between G. and his creditors, whereby he assigned all his stock-in-trade for the benefit of his creditors; and that, in consideration thereof, the plaintiffs and the other creditors, parties thereto, granted a general release to G. of all debts and demands against him. The plea averred, that the guarantee was only made by the defendant as surety, and that the plaintiffs, by the deed, released G. without the privity of the defendant, and without notice:—Held, that, under the express terms of the guarantee, the surety was not discharged by the release of the principal debtor. *Couper v. Smith*, 4 M. & W. 519.

A defendant covenanted with the plaintiffs that, in consideration that they would give credit to one Taylor, he would be surety to the extent of 100*l.* for any sum which might from time to time be owing by Taylor. The deed provided that no indulgence, time, credit, or forbearance given or shewn to, or security taken from or composition with Taylor, should be any discharge of any liability under the deed, or should release the defendant from observing the provisions thereof. Taylor entered into a deed of composition with his creditors, which contained an unconditional release, which the plaintiffs executed:—Held, that the composition deed was no defence to the claim for 100*l.*, as by the terms of the guarantee the surety was not discharged by the release of the principal debtor. *Union Bank of Manchester v. Beech*, 34 L. J., Ex. 133; 12 L. T. 499; 13 W. R. 922.

Where a creditor having already a warrant of attorney from his debtor, takes a promissory note from him and a surety, and afterwards enters up judgment under his warrant of attorney, and takes the goods of the debtor in execution, and subsequently withdraws the execution without the knowledge of the surety, he discharges the surety. *Mayhew v. Cricket*, 1 Wils. C. C. 418; 2 Bing. 185.

Semble, that to reserve a creditor's rights against a surety there must be a distinct expression of intention to reserve it. *Overend, Gurney and Company v. Oriental Financial Corporation*, 7 L. R., H. L. 328; 31 L. T. 322. Affirming 7 L. R., Ch. 142; 41 L. J., Ch. 342; 25 L. T. 813; 20 W. R. 253.

— **Executor of Principal.**—Where a bond has been given for payment of money on a certain day by A., B., and C., jointly, and it does not appear on the face of the bond that B. and C. are only sureties, it is no defence in an action on the bond against B. and C., after A.'s death, to plead that A. was the principal, and that the plaintiff had released A.'s executor before bringing the action. *Ashbee v. Pidduck*, 1 M. & W. 564; 2 Gale, 116.

Secret Dealings with Principal.—Where a surety gave a guarantee to A. for a certain

amount of goods to be sold to B., and, by a secret agreement between A. and B., the latter consented to pay 10*s.* per ton beyond the market price of the goods, in satisfaction of an old standing debt due to the former:—Held, that this secret agreement was a fraud upon the guarantor, and discharged his liability. *Pidcock v. Bishop*, 5 D. & R. 505; 3 B. & C. 605.

W. and his wife deposited with a banking company the title-deeds of real estate, to which the wife was entitled under her father's will, to secure a running account not exceeding 2,000*l.* The father of W. gave the following guarantee to the bank: "I beg to say that the deeds lodged by my son are good for the amount of the arrangement with him, otherwise I will guarantee the same." The father subsequently paid a portion of the amount due on the security, and received back his guarantee:—Held, that the security was not thereby vacated, so as to affect the surety. *Wagh v. Wren*, 7 L. T. 612; 11 W. R. 244.

Taking and destroying Bill.—A bill given for the amount of a guarantee by the person guaranteed and taken by the plaintiff before the expiration of the time mentioned in the guarantee, but afterwards destroyed in the guarantor's presence, is no waiver of the guarantee. *Collins v. Owen*, 15 L. T. 327.

Irregular Payments.—A contractor undertook to perform certain works, and it was agreed that three-fourths of the work as finished should be paid for every two months, and the remaining one-fourth upon the completion of the whole work:—Held, that the sureties for the due performance of the contract were released from their liability, by reason of payments exceeding three-fourths of the work done having, without the consent of the sureties, been made to the contractor before the completion of the whole work. *Calvert v. London Dock Company*, 2 Keen, 638; 2 Jur. 62.

Mode of Advances Irregular.—A., as principal, and B., as surety, gave a joint and several promissory note for a sum of money to C., the consideration for which was expressed to be a draft at three months' date. No draft was given by C.; but, without the knowledge and assent of B., C. immediately, and without making any deduction by way of discount, advanced the money to A.:—Held, that this was a material variation from the engagement to which B. was party, and that B. was released from his liability. *Bonser v. Cox*, 6 Beav. 110; 13 L. J., Ch. 260; 8 Jur. 387.

To an action by payee against maker of a note, he pleaded that the note was made by him jointly and severally with and as surety for A. to secure the repayment of 20*l.*, advanced by a loan society to A.; that the loan was advanced by the society in the ordinary way of business; that, according to the rules of the society, it was to be repaid by weekly instalments; that discount to the amount of 2*s.* in the pound, and no more, was to be charged by the society to A.; and that the society wrongfully, and contrary to the rules, and without the surety's consent, deducted from the loan a larger sum of money than at the rate of 2*s.* in the pound, to wit, 12*s.*:—Held, that the surety was liable. *Brown v. Wilkinson*, 13 M. & W. 14; 13 L. J., Ex. 302.

Meaning of "Credit."—“If you give A. credit, we will be responsible that his payments shall be regularly made:”—Held, that the word “credit” meant a fair and reasonable credit, according to the manner in which A. and the persons guaranteed should deal, and did not confine the guarantee to dealings according to the strict customary credit of the trade. *Simpson v. Manley*, 2 C. & J. 13; 2 Tyr. 86; 1 Price, P. C. 130.

Fraudulent or unreasonable extension of credit, to the prejudice of the guarantors, would raise a question dehors the agreement. *Id.*

Method of Accounting.—The plaintiffs, bottle manufacturers, appointed M. their agent for the sale of bottles on commission, and received the following guarantee, signed by the defendant: “I hereby agree to guarantee my brother M.’s intrusions as your agent in Leith, to the extent of 500*l.*” The terms of sale between the plaintiffs and M., at the time of the guarantee, were, that the moneys received should be remitted from time to time, and an account of sales rendered at the end of each month, or when required, and an account current every three weeks. It was soon after agreed between the plaintiffs and M. that the account current should be rendered every six months; and subsequently, in pursuance of an agreement between them, M. from time to time gave his promissory notes to the plaintiffs, payable four months after date, for sums having no relation to the amount due from him, and the plaintiffs, as the notes became due, transmitted M. the difference between the money then in his hands and the amount of the notes. The defendant had no knowledge of, and never inquired as to the original and subsequent terms of dealing:—Held, that the alteration in the mode of accounting and paying did not discharge the surety. *Stewart v. McKean*, 10 Ex. 675; 3 C. L. R. 460; 24 L. J., Ex. 145.

Substituted Agreement.—A variance in the agreement to which a surety has subscribed, which variance has been made without the surety’s knowledge or consent, and which may prejudice him, or amount to the substitution of a new agreement for a former one, will discharge the surety, though the original agreement, notwithstanding such variance, may be that on which the liability is substantially incurred. *Bonar v. Macdonald*, 3 H. L. Cas. 226; 14 Jur. 1077.

A. became surety for B.’s conduct as a clerk in a bank. B. was subsequently appointed to a better situation in a branch of the same bank, and A. extended his suretyship to this new situation. B. afterwards, while remaining in the same situation, undertook, on having his salary raised, to become liable to one-fourth of the losses on discounts. No communication of this new arrangement was made to A.; B. allowed a customer considerably to overdraw his accounts, and thereby the bank lost a sum of money:—Held, that the surety could not be called on to make good this loss, though it fell within the terms of the original agreement, as the fresh arrangement was the substitution of a new agreement for the former one, and A. was thereby discharged. *Id.*

Amount of Advances.—To an action against a defendant on his bond, he set out the condition,

that J. had agreed to become tenant to the plaintiffs of a public-house; that it was stipulated that he should take from them the ale, wine, &c., to be consumed there; that he should become bound, with a surety, to pay for the same to the amount of 50*l.*, before he should have a fresh supply, as long as he should continue tenant of the plaintiffs; that when he should cease to be their tenant, the surety should be liable to the plaintiffs in such sum not exceeding 50*l.*, as J. might then owe the plaintiffs for ale, &c.; the condition then stated that, if J. should pay the plaintiffs for all ale received from them to an amount not exceeding 50*l.* before he should have a fresh supply, and when he should become indebted to them in that sum, and if he should pay them for all sums which he should owe them for ale, &c., not exceeding 50*l.*, when he should cease to be tenant, the obligation was to be void. The plaintiffs permitted J. to become indebted to them in a larger amount than 50*l.*:—Held, that the defendant was not discharged by reason of the plaintiffs having supplied J. with ale, &c., to an amount exceeding 50*l.* upon credit, but that, in any event, on default of the principal, the defendant was liable to the extent of 50*l.* *Seller v. Jones*, 16 M. & W. 112; 16 L. J., Ex. 20.

Notice of Excess.—A. executed a bond for 2,000*l.* to a banking company, the conditions whereof recited that C. kept an account with the company, and it was declared that if C. or A., or either of them, should, on demand, pay to the company all sums, not exceeding in the whole 1,000*l.*, which should from time to time be due to the company by C., with interest, the bond should be void. The company sued A. on the bond, alleging, that on 30th June, 1856, there was due from C., as the balance of his account, 996*l.* 12*s.* 11*d.*, which had not been paid by C. or A., though duly demanded, and a further sum for interest. Equitable plea, that the bond was executed by A. solely as surety for C., and so accepted by the company, and that by reason of various verbal and written communications between A. and the company before and at the time of execution, the liability of A. and the advances to C., which were to be secured, were limited to 950*l.*, and A. was to be informed if the account, with interest, should reach 1,000*l.* and not be reduced within a month, and he became surety on such terms only, but the company on each of several occasions made advances beyond 950*l.*, and on each of several occasions the account against C. exceeded 1,000*l.*, and was not reduced within a month, and A. was not informed; whereby he became absolutely released from liability and entitled to equitable relief. Previously to the execution of the bond, A. objected by letter to becoming liable for interest upon an advance of 1,000*l.*, and requested to know whether the 1,000*l.* was to include interest. In answer, the company informed him that the bond was for 1,000*l.* with interest, but that there was little chance of its exceeding that sum for any length of time, as the company, if it should be over the amount, including interest, at the half-yearly balance, would require it to be reduced to 1,000*l.* or would limit the amount to 950*l.*, which would leave a margin for interest. Afterwards the company executed a memorandum, to the effect that C.’s advance should be limited to 950*l.*, and A. should be informed if the account, with interest, should reach 1,000*l.*, and not be reduced

in a month. At this time the advance exceeded 950*l.*; A. then executed the bond. Afterwards the limit of 950*l.* was on many occasions exceeded; also on three occasions the amount of 1,000*l.*, interest included, was slightly exceeded, and not reduced within a month, and A. was not informed of it; also at one half-yearly balance the amount was 1,004*l.* 10*s.* 1*d.*, but was reduced by 12*l.* in two days after:—Held, that the effect of the agreement was, not that A. should be discharged from liability, upon the limit being exceeded, but that 950*l.* should be considered as substituted for 1,000*l.* in the condition. *Gordon v. Rae*, 8 El. & Bl. 1605; 27 L. J., Q. B. 185; 4 Jur., N. S. 530.

Necessity of retaining Securities.—A surety is entitled to the benefit of any security which the creditor has received for the debt, though he has received it after the contract of suretyship; and, therefore, where the creditor has so dealt afterwards with such security that on payment by the surety it cannot be given to him in the same condition as it was when the creditor first acquired it, the surety is discharged to the extent of such security. *Campbell v. Rothwell*, 47 L. J., Q. B. 114; 38 L. T. 33.

A., as B.'s surety, indorsed bills, drawn by B., to C. Subsequently B. gave C. a lien, in respect of such bills, upon goods of his in C.'s possession. B. having written to C. authorizing him to deliver up such goods to D., C. undertook to do so upon D.'s paying him a less sum than the amount of the bills:—Held, that A. was thereby discharged. *Id.*

A creditor who holds several securities for his debt, partly given by the principal debtor and partly by a surety, must retain all securities given by the principal debtor for the benefit of the surety, and if he neglects to do so, he discharges the surety. *Merchants Bank of London v. Maud*, 18 W. R. 312. See *S. C.*, on appeal, 19 W. R. 657.

A creditor holding a mortgage for a guaranteed debt is bound to hold it for the benefit of the surety, so as to enable him, on paying the debt, to take the security in its original condition, unimpaired. *Pledge v. Buas*, Johns. 663; 6 Jur., N. S. 695.

The rights of a surety, with respect to securities, extend to securities taken after the contract of suretyship. *Id.*

Right to Assign Debt and Securities.—The creditor is no doubt under the obligation of preserving the securities which he takes from the principal debtor, for the surety may entitle himself to the benefit of those securities, and if any of them be lost by the act or default of the creditor the surety may be wholly or partially discharged; but the creditor enters into no contract with the surety not to assign the debt or the securities. The law gives him the right to assign them, and if he does so assign them the obligation which attached upon the creditor attaches upon the assignee. The position of the assignee is in no respect altered. The assignee on the other hand acquires by the assignment all the rights of the assignor, and the surety can be in no better position against the assignee than he was against the assignor. *Wheatley v. Bastow*, 7 De G. M. & G. 279.—Per Turner, L.J.

Semble, that the surety has no right to receive notice of the assignment. *Id.*

Bill of Exchange.—The acceptor of a bill of exchange knows that by his acceptance he does an act which will make him liable to indemnify any indorser of it who may afterwards pay it. *Duncan Fox & Co. v. North and South Wales Bank*, 6 App. Cas. 11; 50 L. J., Ch. 355; 4 L. T. 706; 29 W. R. 763—H. L. (E.).

The indorser is a surety for the payment of the bill, and having paid it, is entitled to the benefit of any securities to cover it, deposited with the holder by the acceptor. He is so entitled whether at the time of his indorsement he knew, or did not know, of the deposit of those securities. The surety's right in this respect in no way depends upon contract, but is the result of the equity of indemnification derived from the contract of suretyship. *Id.*

Omission to value Security in Bankruptcy.—The defendant was surety for the repayment of a sum of money advanced by the plaintiff to the principal debtor. As a further security for the advance, the principal debtor deposited with the plaintiff a policy of life insurance. The principal debtor subsequently became bankrupt, the advance remaining unpaid, and the plaintiff proved against his estate for the full amount of the advance without valuing the policy of life insurance as a security, which was in consequence claimed by the trustee in bankruptcy as part of the bankrupt's estate. It was contended by the defendant in an action against him, as surety, that by not valuing the policy, and so depriving him of the benefit of it, the plaintiff had discharged him from all liability as surety:—Held, that the omission to value the policy was most a mere neglect or omission on the part of the plaintiff, and as such did not discharge the defendant from all liability as surety, but only to the extent of the value of the policy. *Rabow v. Juggins*, 5 Q. B. D. 138; 49 L. J., Q. B. 353; 28 W. R. 428. Affirmed, 5 Q. B. D. 42; 49 L. J., Q. B. 718; 42 L. T. 346; 29 W. R. 13; 44 J. P. 829—C. A.

On Paying off Mortgage Debt.—A., and C. executed to D. a mortgage of B.'s land (comprised in the petition for sale), and of C. lands, to secure 2,914*l.* 9*s.* 9*d.*, of which 90 was B.'s debt, and the remainder C.'s debt. The mortgage contained a proviso that, as between A., B. and C., A. was a surety only, and that A. and C. respectively were sureties only for the portion of the said sum; yet, with regard to them, they were to be considered as principal debtors so as not to be released by time being given any other or others of them, or by any act or omission of D., whereby, as sureties only, they would be released. B. subsequently executed to D. two other mortgages of the lands comprised in the petition. A. having paid D. the full amount of the debt secured by the first mortgage, claimed to stand in D.'s place for 90 being B.'s debt, and the moiety of 2,014*l.* 9*s.* 9*d.* being C.'s debt, for which both he and B. were joint sureties, and to be placed on the first schedule on foot of, and in the priority of, the first mortgage:—Held, first, that A.'s claim was valid, and that he was not estopped by a special proviso of the mortgage from relying on his equitable rights of surety. *Kirkwood*, 11 Ir. L. R., Ch. 108. And see *Forbes v. Jackson*, 19 Ch. D. 615; 51 L. J., Ch. 690; 30 W. R. 6. Held, secondly, that a surety joining in

mortgage is entitled on paying off the original mortgage debt to get the benefit of all the securities, held by the original mortgagee, without paying off subsequent mortgages. *Id.*

Held, thirdly, that the doctrine of tacking is applicable only in the case of an existing debt. *Id.*

Diverting Appropriated Funds.]—When a surety contracts with A. on behalf of a principal, the withdrawal, by arrangement between A. and the principal, of funds which the surety had a right to rely on as a security that the matters should be done which he, as surety, had contracted with A. should be done, is a prejudicial alteration of the surety's position, which discharges him from liability. *General Steam Navigation Company v. Holt*, 6 C. B., N. S. 550, 584; 6 Jur., N. S. 801; 8 W. R. 223—Ex. Ch.

D. having overdrawn his account at his bankers', and being desirous of further overdrawing it, for the convenience of carrying on his trade with ready money, induced his niece, who had lived under his care for several years, immediately after she attained her majority, and had come into possession of her property, to join as surety in a promissory note to the bankers to secure his balance. The bankers some time afterwards, without any communication with the surety, placed the amount of the note to the credit of D. :—Held, that, by this dealing with the note, the position of the surety was changed, and her liability discharged. *Archer v. Hudson*, 7 Beav. 551; 8 Jur. 761.

An obligation to a banker by a third party, to be responsible for a cash credit, to be given to one of the banker's customers, is not avoided by the fact, that immediately after the execution of the obligation the cash credit is employed to pay off an old debt due to the banker. *Hamilton v. Watson*, 12 C. & F. 109.

Discharge pro tanto.]—If, by the neglect of the creditor, the benefit of some of the securities for the debt is lost, the surety is pro tanto discharged. *Capel v. Butler*, 2 Sim. & Stu. 457.

Where, through negligence on the part of a creditor, a security, to the benefit of which a surety is entitled, is not properly perfected, the surety is discharged to the extent of the security lost. *Strange v. Fooks*, 4 Giff. 408; 9 Jur., N. S. 943; 8 L. T. 789.

Neglect to Enter up Warrant of Attorney.]—Where, upon taking a guarantee for repayment of advances to one of their customers, bankers also took from their principal debtor a warrant of attorney to cover the debt, and at the same time agreed with the guarantor that they would at any time, at his request, enter up judgment and levy execution on the warrant of attorney against the principal debtor; but by their neglect to file the warrant of attorney or a true copy thereof, in compliance with the requisitions of the Bankrupt Act (12 & 13 Vict. c. 106), s. 136, the warrant of attorney became void :—Held, that this neglect on the part of the bankers operated as a discharge to the surety in equity. *Watson v. Alcock*, 4 De G., M. & G. 242; 1 Eq. R. 231; 22 L. J., Ch. 858; 17 Jur. 568.

Giving up additional Security.]—But where a creditor, whose debt was secured by a bond of the principal debtor, and a surety took, after the

date of the transaction, further security from the principal debtor, and afterwards gave up that further security :—Held, that this did not discharge the surety. *Newton v. Chorlton*, 2 Drew. 333; 10 Hare, 646. See *Lake v. Brutton*, 8 De G., M. & G. 441; 25 L. J., Ch. 842; 2 Jur., N. S. 839.

Cause of Loss.]—As between principal and surety, if the primary security proves worthless, whether it was so originally, or whether it becomes so afterwards, the surety is not discharged, unless the loss or deficiency of the original and primary security was occasioned by the act of the creditor. *Hurdwick v. Wright*, 35 Beav. 133.

Release of one of several Sureties.]—Semble, that if a creditor releases by deed one of two sureties, who are jointly and severally liable, the other is also discharged. *Evans v. Bremridge*, 2 Kay & J. 174; 25 L. J., Ch. 102; 2 Jur., N. S. 134.

2. DEATH OF SURETY.

Generally.]—A guarantee the consideration for which is given once for all cannot be determined by the guarantor, and does not cease on his death. But as to whether a guarantee for future advances, which the party guaranteed is not bound to make, is not determinable by the guarantor, and whether it does not cease on notice of his death, quære. *Lloyd's v. Harper*, 16 Ch. D. 290; 50 L. J., Ch. 140; 43 L. T. 481; 29 W. R. 452—C. A.

In May, 1863, a father, on the occasion of the admission of his son as an underwriting member of Lloyd's, addressed to the managing committee of that body a letter, by which he held himself responsible for all his son's engagements in that capacity. Lloyd's was then a voluntary association, governed by certain bye-laws, under which a person once admitted a member could not be excluded from membership except in the event of his bankruptcy or insolvency. The association consisted of underwriting members, non-underwriting members, and subscribers. The practice of the underwriting members was to underwrite policies of marine insurance for the benefit of various owners of property, both members of the association and outsiders, but the policies with outsiders could only be effected through the agency of insurance brokers who were either members of or subscribers to the association. The association as such incurred no liability on the policies underwritten by its members. In 1871 the society was incorporated by act of parliament, all the rights of the committee on behalf of the members being vested by the act in the corporation. In 1876 the father died, and notice of his death was shortly afterwards given to Lloyd's. In 1878 the son became bankrupt, and thereupon ceased to be a member of Lloyd's :—Held, by the Court of Appeal, that the guarantee was not determined by the death of the father or by the notice of it, but that his estate was liable in respect of engagements contracted by the son after his death. *Id.*

A guarantee was determinable by six months' notice. The guarantor died, leaving as his executor the debtor on whose behalf the guarantee was given. The creditors to whom the guarantee was given continued to make ad-

vances to the debtor, knowing that there was no personal estate to answer the guarantee :—Held, that, under the circumstances, the creditors were not entitled to the benefit of the guarantee for their advances subsequent to the death. The death alone did not determine the guarantee. *Harris v. Fawcett*, 8 L. R., Ch. 866; 42 L. J., Ch. 502; 29 L. T. 84; 21 W. R. 742. Affirming 15 L. R., Eq. 311; 28 L. T. 182; 21 W. R. 504.

A continuing guarantee, in the absence of express provision, is revoked as to subsequent advances by notice of the death of the guarantor. *Coulthard v. Clementson*, 5 Q. B. D. 42; 49 L. J., Q. B. 204; 41 L. T. 798; 28 W. R. 355.

The death of the surety does not operate as a revocation of a continuing guarantee. *Bradbury v. Morgan*, 1 H. & C. 249; 31 L. J., Ex. 462; 8 Jur., N. S. 918; 7 L. T. 104; 10 W. R. 776.

A guarantee as follows: "I request you will give credit in the usual way of your business to L., and in consideration of your doing so, I hereby engage to guarantee the regular payment of the running balance of his account with you, until I give you notice to the contrary, to the extent of 100l."—is not a bare authority, but a contract, and therefore the executor of the guarantor is liable for goods supplied after his death. *Ib.*

Indemnity of Firm—Death of Partner.—By the conditions attached to a contract of indemnity against losses in trade, the guarantee became void on the death or retirement from trade of the person guaranteed :—Held, that this condition applied to the death or retirement of one of two partners guaranteed; and therefore, that a plea alleging such death of the partner was an answer to an action against the co-partner by the guarantors for the subscription or annual payment agreed to be paid by the assured. *Solvency Mutual Guarantee Company v. Freeman*, 7 H. & N. 17; 31 L. J., Ex. 197.

A partnership composed of three persons, A., B., and C., gave a joint and several bond to the bank to cover advances to be made to them by the bank on a cash credit; and in that bond two estates held by A. were specially named as part securities for these advances. On A.'s death :—Held, that by his death the partnership was dissolved and the security, so far as his estates were concerned, was no further continued. *Bank of Scotland v. Christie*, 8 Cl. & Fin. 214.

A bond was given by county bankers to a London firm conditioned to repay advances made by the latter to the former or any of them, associated or not with other persons. One of the partners in the county bank died, a considerable balance being then due to the London firm. In the month following the death of the deceased partner the London bankers received sums in payment more than sufficient to discharge the balance due, but also made advances of an equal amount :—Held, that the London bankers were entitled to apply the payments to the debt of the new firm and to recover on the bond against the representatives of the deceased partner. *Simson v. Ingham*, 2 B. & C. 65.

Of one of several Guarantors.—A firm of bankers took a continuing guarantee for advances to a customer in the form of a joint and several bond from two sureties. One of the sureties died, and after notice thereof the bank made further

advances to the customer :—Held, that the surviving surety was liable to the bank in respect of such advances. *Beckett v. Addyman*, 9 Q. B. L. 783; 51 L. J., Q. B. 597—C. A.

B. being hired as a clerk to A. & Co., but no for any definite period, C. and D. joined in bond to secure his duly accounting for his assets. C. died, and his executrix gave a written notice to A. & Co. that she would no longer remain surety; A. & Co. communicated this notice to B. and required and obtained from him the bond of another surety: D. died, and also the new surety, and four years and a half after the death of C., B. died, when deficiencies were found in his accounts, subsequent to the notice :—Held, that the executrix of C. had no equity to restrain A. & Co. from proceeding at law on the bond. *Gordon v. Calvert*, 4 Russ. 581; 1 Sim. 253. Ansee *S. C.*, 7 B. & C. 809; 1 M. & R. 497.

The condition of a bond, after reciting that A. B., and C. had filed a bill in equity against I. and E., was, that the obligee would pay all such costs as the Court of Chancery should award to the defendants on the hearing of the cause :—Held, that the death of E., before any costs were awarded, could not be pleaded in discharge of the bond. *Kipling v. Turner*, 5 B. & A. 261.

3. BANKRUPTCY OF PRINCIPAL.

Disclaimer by Trustee—Liability of Bankrupt's Surety.—The plaintiff being lessee of a farm for a term of years assigned the lease to P. taking the covenant of the defendant as surety for the due payment of the rent to the lessor for the residue of the term. During the continuance of the term P. became bankrupt, and his trustee having obtained the requisite leave of the court disclaimed all interest in the lease. Subsequently the lessor demanded from the plaintiff the half year's rent accruing after the bankruptcy. The plaintiff paid the rent and brought an action to recover the amount from the defendant under his covenant. Neither the plaintiff nor the defendant had entered upon or taken possession of the farm :—Held, that the plaintiff was entitled to recover. By *Manisty, J.*, on the ground that the disclaimer operated only as a surrender so far as was necessary to relieve the bankrupt, his estate, and the trustee from liability without otherwise affecting third parties, and that the plaintiff as lessee remained liable for the rent and had his remedy over against the defendant as the bankrupt's surety. By *Watkin Williams, J.* solely on the authority of *East and West India Docks Company v. Hill* (22 Ch. D. 14). *Hardin v. Preece*, 9 Q. B. D. 281; 51 L. J., Q. B. 515; 4 L. T. 100; 31 W. R. 42; 46 J. P. 646.

Sureties not Discharged by.—By an agreement between the Agra and Masterman's Bank a Calcutta tea company, and their London agent the bank granted a letter of credit, permitting the tea company to draw bills on the bank. The tea company undertook that the credit should provide for the outlay for the season's tea; that they would ship the whole produce of the season that they would draw upon the London agent for the value of the produce, and forward to the bank the bills, with bills of lading, policy of insurance, and invoice of tea shipped; and that they would pay any balance which might appear due on the credit on or before a certain date.

The London agents guaranteed to the bank that the tea company would perform its undertaking, "the terms of which we hereby confirm, holding ourselves responsible for the same." The tea company drew, in accordance with the letter of credit, several bills on the bank, which it accepted. Before any of them became due, the bank stopped payment, and was wound up, and its property transferred to the Agra bank. The bills were not paid at maturity, but were afterwards paid either by the Agra and Masterman's bank or by the Agra bank. The tea company never performed any part of their undertaking except the drawing the bills before mentioned, and became insolvent. The Agra bank, relying on the guarantee, claimed to be creditors, for the amount of the bills, against the estate of the London agents, who had executed a deed of insolvency. —Held, that the fact of the Agra and Masterman's bank stopping payment, and being wound up, did not excuse the tea company from fulfilling their contract; or release the guarantors from their liability; and that the claims of the Agra bank must be admitted for the amount of such damage as they had sustained by the default of the tea company to fulfil their contract. *Agra Bank, Ex parte, Barber, In re*, 9 L. R., Eq. 725; 39 L. J., Bk. 39.

A discharge of a debtor in liquidation, under the Bankruptcy Act, 1869, s. 125, is in all respects equivalent to and identical with a discharge in bankruptcy under s. 48, and therefore the unconditional discharge of a debtor in liquidation, obtained by means of a resolution of the statutory majority of creditors, under s. 125, does not release the debtor's sureties, although they did not assent to but protested against the resolution of discharge; and the right of the creditors to sue the sureties remains untouched and unaffected by such discharge. *Ellis v. Wilmot*, 10 L. R., Ex. 10; 44 L. J., Ex. 10; 31 L. T. 547; 23 W. R. 214.

The discharge of a debtor by the acceptance of a composition under the Bankruptcy Act, 1869, s. 126, is a discharge in bankruptcy by operation of law, and only releases the debtor himself, but does not release any person jointly bound with him. *Jacobs, Ex parte, Jacobs, In re*, 10 L. R., Ch. 211; 44 L. J., Bk. 34; 31 L. T. 745; 23 W. R. 251.

Therefore, when the acceptor of a bill of exchange filed a petition for liquidation of his affairs by arrangement, and the creditors duly passed resolutions accepting a composition from him, and the holder of the bill voted in favour of the composition:—Held, that this did not operate to release the drawer. *Id.*

A debtor and his sureties jointly and severally covenanted with a trustee for the creditors, to pay to him so much as would suffice to pay a composition of 7s. 6d. in the pound to all the creditors, by three instalments, 2s. 6d. each, at four, eight, and twelve months: and the deed contained a proviso that in case default should be made in payment of any or either of the instalments, or in case, before the composition should be fully paid to the trustee, the debtor should be adjudicated bankrupt, or make an attempt to make any assignment of his estate for the benefit of his creditors, or any arrangement with his creditors different to that arrangement, then and in every such case the deed and the release, and every other clause and provision

therein contained, should be thenceforth at an end and void. In an action against the sureties to recover the second instalment, the principal debtor having been adjudicated bankrupt on his own petition:—Held, that the bankruptcy did not render the deed void as against the sureties, but that the proviso made it voidable at the election of the creditors. *Hughes v. Palmer*, 19 C. B., N. S. 393; 34 L. J., C. P. 279; 11 Jur., N. S. 876; 12 L. T. 635; 13 W. R. 974.

Second Bankruptcy.]—A surety who guarantees the payment of an instalment under a composition resolution is not released by the debtor subsequently being adjudicated bankrupt at the suit of creditors who are not bound by the resolution. *Glegg v. Gilbey*, 2 Q. B. D. 209; 46 L. J., Q. B. 325; 35 L. T. 927; 25 W. R. 311—C. A.

The creditors of a debtor agreed by resolution to accept a composition payable by three instalments, the last instalment to be guaranteed by a surety. By a subsequent deed of insolvency, the debtor was to be allowed to carry on his business, but if he made default the inspectors might apply for an adjudication in bankruptcy, or compel him to assign his effects to them; and the deed provided "that in the event of his being adjudicated bankrupt or of a conveyance or assignment of his property and effects being made or required under the provisions of these presents" before payment, the surety should be released from his guarantee. The debtor was afterwards adjudicated bankrupt on the petition of creditors not bound by the resolution. A creditor sued on the guarantee:—Held, that the surety's position not being altered by the act of a party to the contract of guarantee, and the bankruptcy not having been brought about by the inspectors under the deed, the surety was not discharged from liability. *Id.*

Proof.]—If a creditor sues a surety on a guarantee, and the principal debtor becomes bankrupt, and the creditor proves the debt; and the surety gives notice to the creditor that, although he does not admit his liability as surety, he will, if the creditor signs the certificate, hold himself altogether discharged; and after issue joined in the action, but before the trial, the creditor signs the certificate, which, without such signature, the bankrupt could not obtain, and the certificate is allowed, and the creditor obtains judgment in the action, the surety is not discharged from his liability. *Browne v. Carr*, 2 Russ. 600; 5 M. & P. 497; 7 Bing. 508.

A defendant, after he had become bankrupt, was discharged out of custody, on a ca. sa., upon executing a warrant of attorney with two sureties, the sureties consenting that the plaintiff, in order to lessen their liability, should prove his debt under the commission. The plaintiff having proved his debt, but no dividend having been paid, the court refused, on summary application, to exonerate the sureties. *Duncan v. Sutton*, 1 Scott, 338; 1 Bing. N. C. 431.

Composition with Debtor releasing Sureties.]—To an action on a bond the defendant pleaded that it was the joint and several bond of himself and J., and was executed by him as surety only for J., and afterwards a composition deed was

made between J. of one part, and the plaintiff and another on behalf of all the creditors of J. of the other part, whereby J. conveyed to the parties of the second part all his estate to be administered for the benefit of his creditors in like manner as if J. had been adjudged bankrupt; and each of the creditors released J. from his debts "in like manner as if he had obtained a discharge in bankruptcy;" and that the plaintiff executed this deed without the consent of the defendant:—Held, by Kelly, C. B., and Bramwell, B.—Pigott, B., dissenting—a good plea. *Cragoe or Gragoe v. Jones*, 8 L. R., Ex. 81; 42 L. J., Ex. 68; 28 L. T. 36; 21 W. R. 408.

An agreement between a bond debtor and his creditor that the latter shall take all the debtor's property, and pay his other creditors 5s. in the pound, though not a discharge of the bond by way of accord and satisfaction, because not under seal, still operates in equity as a satisfaction of the debt; and it is not possible in equity, upon such a transaction, to reserve any rights against the surety, and any attempt to do so would be void, as being inconsistent with the agreement. *Webb v. Hewett*, 3 Kay & J. 438.

4. CHANGE OF SERVICE.

Terminable at Shorter Notice.—A bond was given by the obligor as surety that a servant would from time to time, and at all times during the service, satisfactorily account for and pay over to the master all moneys received by the servant for the master's use. One of the terms of the service was that it should be terminable by one month's notice on either side, but this was not known to the surety. After the commencement of the service the master and servant agreed, without the knowledge of the surety, that the service should be terminable at three months' notice:—Held, by Kelly, C. B., Pigott, B., and Pollock, B., dubitante Martin, B., that the surety was not discharged. But the servant having failed satisfactorily to account for or pay over moneys which he had received for the master's use, and the master, having with knowledge and without informing the surety thereof, retained the servant in his service:—Held, that the surety was discharged as to defaults committed by the servant after he was so retained. *Sanderson v. Aston*, 8 L. R., Ex. 73; 42 L. J., Ex. 64; 28 L. T. 35; 21 W. R. 293.

Where Separate Employments.—Where a principal is appointed to two distinct employments, and his sureties guarantee by one bond his good conduct in both, they are not discharged from liability as to one of the employments by the fact of his duties being altered and enlarged in the other. *Skillett v. Fletcher*, 1 L. R., C. P. 217; 35 L. J., C. P. 154; 12 Jur., N. S. 295; 1 H. & R. 197. Affirmed, 2 L. R., C. P. 469; 36 L. J., C. P. 206; 16 L. T. 426; 15 W. R. 876—Ex. Ch.

And where one enters into a bond as surety for the performance by another of two matters which are separate and distinct, a subsequent alteration of the principal's contract as to one of them, without the surety's consent, does not release the surety from his contract of suretyship as to the other. *Harrison v. Seymour*, 1 L. R.,

C. P. 518; 35 L. J., C. P. 264; 12 Jur., N. S. 924.

Change in Employers' Firm.—A bond was given to a mercantile firm, conditioned for the due accounting for and payment of all moneys received by B., their agent, on account of the firm. B. afterwards, with the knowledge and assent of the firm, takes A. into partnership, and the defendant enters into a similar bond, conditioned for the due accounting for and payment to the firm of all moneys received by A. on their account:—Held, first, that the defendant was not liable, within the meaning of the bond, for moneys received by A. & B. *London Assurance Corporation v. Bold*, 6 Q. B. 514; 14 L. J., Q. B. 50; 8 Jur. 1118.

Held, secondly, that letters written by the defendant, shewing his knowledge of the partnership between A. and B., could not be looked at for the purpose of so extending his liability. *Id.*

A surety, who is bound for a clerk in the employment of the obligors, is not discharged from the obligation of his bond, by the obligors having taken into the firm a new partner. *Barclay v. Lucas*, 1 T. R. 292, n.; 3 Dougl. 321.

Corporation.—A bond given to trustees to secure the faithful services of a clerk to an insurance company, which was no corporation, may be put in suit by the trustees for a breach of faithful service by the clerk, committed at any time during his continuance in the service of the actual existing body of persons carrying on the same business under the same name, notwithstanding any intermediate change of the original holders of the shares by death or transfer; the intention of the parties to the instrument being apparent to contract for such service to be performed to the company as a fluctuating body; and the intervention of the trustees removing all legal and technical difficulties to such a contract made with, or suit instituted by, the company themselves as a natural body. *Metcalf v. Bruin*, 12 East, 400; 2 Camp. 422.

Executors of Obligees.—A bond with condition that a clerk shall serve faithfully and account for all money to the obligee and his executors, does not make the obligor liable for money received by the clerk in the service of the executors of such obligee, who continue the business and retain him in the same employment. *Barker v. Parker*, 1 T. R. 287.

By Incorporation of Society.—A bond was given to A., B., and C., payable to them and their successors, as the governors of the Society of Musicians, conditioned to secure H.'s faithfully accounting with them and their successors, governors, &c., as their collector; afterwards the society was incorporated by letters-patent, at which time H. had duly accounted for all moneys collected by him; but after the incorporation received money for which he did not account:—Held, that the obligor of the bond was not liable for such default. *Dance v. Girdler*, 1 N. R. 34.

Reduction of Salary.—In 1841, R. was, by a resolution of a vestry, appointed permanent assistant overseer to a parish at an annual salary

of 16*l.*, and he performed the duties without giving security. In May, 1846, it was resolved by the vestry that he should continue his office upon giving security; and accordingly, in June, 1846, a bond was entered into by R. with two sureties, in pursuance of 59 Geo. 3, c. 12, subject to the condition that R. should from time to time, and at all times thereafter during the continuance of his appointment, faithfully account for the collection of the rates, and duly execute all the duties of the office; and a few days afterwards a warrant of the appointment of R. as assistant overseer was executed by the magistrates. R. continued to perform the duties of assistant overseer till 1851, but the duties having become lessened, in consequence of the appointment of a relieving officer in that year, a vestry (amongst whom was one of the sureties to the bond), with the consent of R., came to the resolution that R. should continue the office at a salary of 14*l.* per annum. After this R. continued to discharge the duties of the office for some months, and then resigned it, when he was found to be in debt to the parish:—Held, that the resolution of the vestry of 1851 did not amount to a revocation of the original appointment of R., but that he continued in the office at a reduced salary, and consequently that the sureties were not discharged from liability under the bond. *Franks v. Edwards*, 8 Ex. 214; 22 L. J., Ex. 42.

Increase of Salary.—In March, 1845, L. was elected assistant overseer of a parish, by the inhabitants in vestry assembled, at a yearly salary of 27*l.* In May following he entered into a bond with two sureties as a security for the faithful execution of the office under 59 Geo. 3, c. 12; the condition of the bond recited that statute, and that L. had been duly nominated and elected at the annual salary of 27*l.* In March, 1846, at a vestry duly held, a resolution was come to that the permanent overseer's salary (meaning L.'s) should be raised from 27*l.* to 35*l.* a year including all other extra charges. In June, 1846, a warrant of the appointment of L. was signed and sealed by two justices of the peace; this warrant recited that L. had been nominated and elected in March, 1846, at a yearly salary of 35*l.* Subsequently to June, 1846, L. had acted as assistant overseer, but had become defaulter to a considerable amount. In an action on the bond against the sureties:—Held, that there never had been an appointment by the justices upon the nomination and election of March, 1845, at an annual salary of 27*l.*, upon which the bond had been given, inasmuch as the appointment was made in pursuance of the resolution of March, 1846, at the increased salary of 35*l.*, and therefore that L. had never been duly appointed assistant overseer, and the sureties were not liable. *Holland v. Lea*, 6 Ex. 430; 2 C. L. R. 532; 23 L. J., Ex. 122.

Change in Mode of Payment.—A clerk was appointed at a salary of 100*l.* a year, and a bond was executed by the defendant, conditioned for the accounting by the clerk for all moneys received by him for the use of his employers. Subsequently his salary was commuted for a payment on commission:—Held, in an action on the bond, that the defendant was released by the change in the mode of payment. *North-Western*

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Railway Company v. Whinray, 10 Ex. 77; 2 C. L. R. 1207; 23 L. J., Ex. 201.

Yearly Re-Appointment.—A bond, reciting that A. was appointed assistant overseer of a parish, was conditioned for the performance of his duties thenceforth from time to time and at all times, so long as he should continue in such office. On the 25th June, 1840, a vestry meeting was held, at which A. was elected assistant overseer until the 25th March, 1841, at a salary of 8*sd.* in the pound on some sums collected, and 4*sd.* on others. Two justices by their warrant dated 9th July, 1840, reciting the vestry resolution, and that his salary had been fixed for the execution of his office until the 25th March then next, stated that in pursuance of 59 Geo. 3, c. 12, they appointed him assistant overseer. On the 25th March, 1841, he was again elected to the same office at a salary of 50*l.* per annum, and was re-appointed by the justices, and he continued to be so re-elected and re-appointed by the justices until March, 1846. On ceasing to hold office, he retained moneys in his hands:—Held, that the sureties were not liable on the bond. *Bamford v. Iles*, 3 Ex. 380; 18 L. J., M. C. 49.

Where parties had become sureties in a bond reciting that R. had been appointed to act as overseer for making and levying borough rates in that part of parish A. which lay within the borough, during the pleasure of the council, and the bond was conditioned for performance of the duties during such time as A. should act as such overseer:—Held, that the sureties were liable beyond the expiration of the year A. continued in office, for that there was no law limiting the duration of the office to a year, so as to control the express stipulations of the bond. *Birmingham (Mayor) v. Wright*, 16 Q. B. 63; 20 L. J., Q. B. 214; 15 Jur. 749.

Action on a bond. Plea set out the bond, which recited that J. had been appointed clerk to a company, and upon such appointment being made it was agreed that he and his sureties should enter into such bond for the due execution of his office; and the condition was that he should duly account "so long as he should continue to hold the office and employment." Averment, that the appointment of J. in the condition mentioned was an appointment for one year, and no longer. Replication, that J., with the assent of the sureties and the company, continued and remained in the office and employment after the expiration of the year in the plea mentioned:—Held, that the sureties were not liable after the expiration of the period for which J. was originally appointed; that the fact of the appointment being for one year might be shewn by plea; and that the continuance in office alleged in the replication must be taken to be by a re-appointment. *Kitson v. Julian*, 4 El. & Bl. 854; 24 L. J., Q. B. 202; 1 Jur., N. S. 754. See also *cases ante*, col. 171.

Variation of Annual to Perpetual Appointment.—Sureties by bond in 1842 covenanted with a corporation that M., who had been appointed treasurer to the corporation under 5 & 6 Will. 4, c. 76, s. 58, "should well and truly pay to the corporation, or to their successors, all such sums of money as M. should or might recover or receive, in virtue of his appointment as treasurer, during the whole time of his continuing in the office in consequence of the said election, or

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under any annual or other future election of the council to the office." At the time of his appointment the office was an annual one; but in 1843 was passed the 6 & 7 Vict. c. 89, which repealed 5 & 6 Will. 4, c. 76, s. 58, as inconvenient and unnecessary, and directed that the treasurer should "thenceforth hold his office during the pleasure of the council for the time being:"—Held, that there was not such a variation of tenure of the office as to discharge the sureties, and that the change from an annual to a perpetual appointment during pleasure was provided for by the words of the bond, "annual or other future election." *Oswald v. Berwick-upon-Tweed (Mayor) (in error)*, 5 H. L. Cas. 856; 25 L. J., Q. B. 383; 2 Jur., N. S. 743.

A bond executed before 6 & 7 Vict. c. 89, by the sureties of P., treasurer of a borough, was subject to a condition by which, after reciting that he had been elected treasurer under 5 & 6 Will. 4, c. 76, it was provided that the bond should be void, if he should account for moneys that might come to his hands as treasurer "(whether by virtue of his present or any subsequent appointment to the office) according to the directions and true intent and meaning of the statute, and in every other respect act in strict conformance with the same, and all other laws and regulations now or hereafter to be in force touching the office of treasurer, or the persons performing or liable to perform the duties thereof:"—Held, that the sureties were liable for misconduct of P. after the tenure of the office had been altered by 6 & 7 Vict. c. 89, from an annual office to an office held during pleasure. *Clifton Dartmouth Hardness (Mayor) v. Silly*, 7 El. & Bl. 97; 26 L. J., Q. B. 90; 3 Jur., N. S. 434.

The condition of a bond recited that A. had been appointed under 5 & 6 Will. 4, c. 76, treasurer to a borough, and declared that it had been agreed that the obligor should join with A. in the bond for the due performance of the office, and the condition was that if A. should duly perform the office according to the provisions of that statute, and of such statutes as might be thereafter passed relating to the office, the bond should be void. In a declaration by the obligee against the obligor, it was averred that, under the appointment in the condition mentioned, and divers subsequent annual appointments in every subsequent year, A. continued to be treasurer from the execution of the bond till 6 & 7 Vict. c. 89, when he, in accordance with that act, was appointed treasurer, and held office during the pleasure of the council till his death, and that the office at A.'s last appointment, and until his death, continued, in its nature, functions, and duties, to be the same office as mentioned in the condition. A breach was assigned, alleging a malversation by A., while he remained treasurer, not stated to have occurred within the year from his first appointment, but on a day which was subsequent to the appointment under 6 & 7 Vict. c. 89:—Held, bad, for that under 5 & 6 Will. 4, c. 76, s. 58, the appointment mentioned in the condition was for one year only; and the liability of the obligor could not extend to the holding under 6 & 7 Vict. c. 89, which makes the office to be an office held during the pleasure of the council. *Cambridge (Mayor) v. Dennis*, El., Bl. & El. 660; 5 Jur., N. S. 265.

Assistant Overseer appointed Overseer.]—A being duly appointed assistant overseer of the poor of a parish, entered into the usual bond with sureties; while he held that office he was appointed overseer of the same parish, and continued to discharge the duties of both those offices till he became a defaulter, when he resigned:—Held, that his acceptance of the office of overseer did not vacate that of assistant overseer without a resignation to and acceptance by the vestry; and that his sureties were liable for his defaultations committed both before and after he was so appointed. *Worth v. Newton*, 10 E. 247; 2 C. L. R. 1471; 23 L. J., Ex. 338.

Collector of Poor-Rates appointed Collector of Drainage Rates.]—A declaration was framed on a bond conditioned for the due performance by A. of his duties as collector of the poor-rate and of the sewers and general rates of a parish the bond to continue in force if A. held either office separately. Breach, that he received money in each capacity, and failed to pay over. Plea, that before breach two acts of parliament were passed increasing his duties as collector of sewers and general rates, and under which he was also appointed collector of main drainage rates, by the persons under whom he held his other appointments. These acts altered the proportion in which certain sewers rates were to be borne by different parishes, increased the proportion payable by the parish, and also imposed upon the sewers rates fresh charges of a small amount:—Held, that the appointment of A. to the new office of collector of main drainage rates did not avoid the bond. *Skillet v. Fletcher*, 2 L. R., C. P. 469; 36 L. J., C. P. 206; 16 L. 426; 15 W. R. 876—Ex. Ch.

Held, also, that the changes introduced by the acts did not amount to an alteration of the office to which he was originally appointed, and did not avoid the bond. *Id.*

Collector of Rates—Transfer of District.]—bond, reciting an order of the poor-law commissioners in 1836, by which the guardians of the union should appoint one or more fit and proper persons to be the collector or collectors of the poor-rates of such of the parishes as the guardians might deem to require a collector, and that every person appointed a collector should give security for the due discharge of the duties of the office, and that W. was duly appointed to be a collector under the order, was conditioned that he should, during his continuance in his office, and whether the district for which he was appointed was or was not changed, faithfully discharge the duties thereof, and obey the lawful directions of the guardians. In the first instance the guardians elected three persons to be collectors of the poor-rate in the union, to each of whom was assigned a portion of the parish. In 1848 the guardians divided the parish into four districts for collection of the poor-rates, and appointed an additional collector. After 13 & 14 Vict. c. 99, it was determined to appoint a fifth collector. At this time one of the four collectors resigned, and an advertisement was published that the guardians would appoint two persons to be collectors of the poor-rates of the parish, to one of whom would be assigned a collection of such rates from the owners of small tenements. W. applied, offering himself as a candidate: one of them; and he was elected for the post.

pose of collecting the rates from the owners of small tenements. The bond was then executed by W. and by A. as his surety. In 1855, one of the other collectors having resigned, W. applied to the guardians to transfer him to that district, which application was acceded to:—Held, that the appointment of W. was a general one, as collector of poor-rates for the parish, and that, there being only a change of the duties in 1855, the obligation of the surety was not discharged. *Portsea Island Union (Guardians) v. Whillier*, 2 EL. & EL. 755; 29 L. J., Q. B. 150; 6 Jur., N. S. 887; 2 L. T. 211; 8 W. R. 493.

Clerk to Railway—Amalgamation of Companies.—A bond was given by a party to the C. railway company, as a surety for the performance by G. of his duties as clerk. The condition was, that if G. should render to the C. company, or to the committee for managing the London terminus of the C. and B. and S. E. Railways, a true account of all the receipts and payments of him, as such clerk, and also should pay to the C. company, or to the committee, all such sums as he should receive on account of the company or committee, then the obligation to be void. The surety pleaded that the bond was made before the passing of an act to consolidate the B. and C. companies, and that the action was commenced afterwards, and that the C. company thereby became dissolved:—Held, that the plea was bad, and was no defence, inasmuch as the new company was the same as the two old ones, with additional powers, and that the amalgamation of the companies did not affect the responsibilities of the surety or G. *Brighton Railway Company v. Goodwin*, 6 Railw. Cas. 177; 3 Ex. 736; 18 L. J., Ex. 174.

C. as surety executed a bond, conditioned for the faithful service of a clerk to a railway company. Whilst the service continued that company and another railway company were dissolved and united into one company, by a statute which provided that all bonds made or entered into with, in favour of, or by the dissolved companies should "be and remain as good, valid and effectual, in favour of and against and with reference to the new company, and might be proceeded on and enforced in the same manner to all intents and purposes as if the last-mentioned company had been a party to and executed the same, or had been named or referred to therein, instead of the persons, company or parties actually named therein:—Held, that the surety was liable for breaches of the bond committed by the clerk after the union of the two companies. *Eastern Union Railway Company v. Cochrane*, 9 Ex. 197; 23 L. J., Ex. 61; 17 Jur. 1103.

Appointment—Whether ultra vires.—In January, 1851, A. as surety executed a bond to a railway company, which, after reciting that the company had agreed to appoint L. as their clerk or agent, for the purpose of selling coal, at a yearly salary of 100*l.*, was conditioned for the accounting by L. of all moneys received by him for the use of the company. L. performed the duties of clerk or agent at such salary until May, 1851, when it was agreed between L. and the company to substitute for such salary a commission of 6*d.* per ton on all coal for which he should obtain orders. From that time L. was paid for his services by commission, which amounted to a larger

sum than the fixed salary. In 1852 L. was indebted to the company for sums which he did not pay over, and the company having sued the defendant on the bond:—Held, that the bond was valid, although the company had no power to deal in coal. *North-Western Railway Company v. Whinray*, 10 Ex. 77; 2 C. L. R. 1207; 23 L. J., Ex. 261.

High Bailiff of County Court—Enlargement of Office.—A bond reciting that A. had been appointed high bailiff of a county court under 9 & 10 Vict. c. 95, and had appointed G. a bailiff of the court, was conditioned for the due execution by G. of all warrants, precepts, and writs issuing out of the court and directed to the high bailiff, and delivered to G.; and that his sureties would indemnify A. from all actions and losses which he might be liable to for executing or not executing any warrant or writ delivered to G., or for or by reason of the non-performance of his office and duties as such bailiff. The breach of duty assigned was a wrongful seizure of goods by G. as bailiff of the court, in a suit in which the court had jurisdiction under 9 & 10 Vict. c. 95, whereby A. had been subjected to an action, in which damages had been recovered against him. Plea, that the bond was made before 10 & 11 Vict. c. 102; 12 & 13 Vict. c. 61; and 13 & 14 Vict. c. 61; and that before issuing the warrant of execution the judge of the county court, under and by virtue of 12 & 13 Vict. c. 101, authorized G., as such bailiff, to act as broker or appraiser, for the purpose of selling or valuing goods taken in execution under 9 & 10 Vict. c. 95:—Held, that by these statutes the duties and liabilities of the office were essentially changed, and the risk of the sureties was increased; and therefore the obligation of the sureties was discharged; notwithstanding the breach of duty relied upon was a breach of the original duties of the office. *Pybus v. Gibb*, 6 EL. & BL. 902; 26 L. J., Q. B. 41; 3 Jur., N. S. 315.

Association of Partners with Agent.—A surety entered into a bond with an insurance company, and conditioned that L., his son, who had been appointed agent for the company, would well and truly pay to the actuary of the company all sums of money received by him as such agent. At the time he entered into the bond he received a letter, stating that he was only insuring his son's integrity. L., with the knowledge of the surety, was associated with F. in the agency; and shortly afterwards L. and F. entered into partnership as general merchants, and afterwards became insolvent; premiums having been received both by L. and F. as agents for the company, and such premiums not having been accounted for:—Held, in an action on the bond against the surety that the surrounding circumstances at the time he entered into the bond ought to be taken into consideration, and that his liability had been changed, and that he was consequently not liable on the bond. *Montefiore v. Lloyd*, 15 C. B., N. S. 203; 33 L. J., C. P. 49; 9 Jur., N. S. 1245; 9 L. T. 330; 12 W. R. 83.

5. CHANGE OF PARTNERSHIP.

Admission of Partner.—A surety bond for the faithful service of A. to a sole trader does

not extend to a subsequent partnership. *Wright v. Russell*, 2 W. Bl. 934; 3 Wils. 530.

If A. becomes bound to B. under condition that C. shall truly account to B. for all sums of money received by C. for B.'s use, and C. afterwards, with B.'s knowledge, takes D. as his partner; the guarantee does not extend to sums of money received by C. for B.'s use, after the formation of the partnership. *Belliers v. Ebsworth*, 3 Camp. 53.

A guarantee of moneys advanced by a firm, consisting of F. & Co., will not extend to a new firm, in which H. is introduced as a partner. *Spiers v. Houston*, 4 Bligh, N. S. 515.

Payments made by the principal after the alteration of the firm, and in transactions with him, are applicable to the extinction of the balance due to the old firm at the date of the alteration. *Id.*

Retirement of Partner.]—In and prior to 1866, W. & L., partners in trade, executed two joint and several bonds to the trustees of S.'s will to secure the repayment with interest of two sums of money advanced to them. In 1869, W. retired from the firm, and in pursuance of an agreement, assigned by deed all his share and interest in the firm to L., who covenanted to indemnify him against all the trade debts and liabilities. The trustees had notice of this deed. L. carried on the business with C. till 1871, when they filed a petition for liquidation by arrangement. The trustees proved under the liquidation for the balance of the principal and interest then due on the bonds, and attended and voted at all the meetings of the creditors, who agreed to accept a composition. The trustees were also parties to the composition deed by which they gave time to L. and C. for the payment of the balance due on the bonds. W. filed a bill praying for a declaration that, under the circumstances, he was absolutely released from all liability under the bonds:—Held, that the retirement of W. with a covenant of indemnity with the knowledge of the trustees, had altered his character of principal into that of surety; that the subsequent acts and conduct of the trustees had effected a complete novation of the bond debts; and, consequently, that W. was entitled to the relief which he sought. *Wilson v. Lloyd*, 16 L. R., Eq. 60; 42 L. J., Ch. 559; 28 L. T. 331; 21 W. R. 507.

Action on a bond against a surety. The condition recited that the University of Cambridge had appointed B., C. and J. their agents for the sale of books printed at their press in the university, and that the defendant had offered to enter into a bond with them as a surety; and it was conditioned that if B., C. and J., and the survivors and survivor of them, and such other person or persons as should or might at any time or times thereafter, in partnership with them, or any or either of them, act as agent or agents of the university, for the sale of books as aforesaid, did and should duly account to the university for all books delivered or sent to them, or any or either of them, for sale as aforesaid, and should pay all moneys which should become payable to the university in respect of such sale, then the obligation to be void:—Held, that by the retirement of J. from the partnership of B., C. and J., their surety was discharged from all further liability on this bond. *Cambridge University v. Baldwin*, 5 M. & W. 580.

A guarantee given to a firm consisting of three partners is determined by the retirement of one of them. *Dry v. Dary*, 2 P. & D. 249; 10 A. & E. 30; 3 Jur. 315.

Death of Partner.]—Where a bond by A., reciting that B. intended to open a banking account with C., D. and E. as his bankers, was conditioned for payment to them of all sums from time to time advanced to B. at the banking-house of C., D. and E.:—Held, that on C.'s death such obligation ceased, and did not cover future advances made after another partner was taken in; and that B., who was indebted to the house at C.'s death, having afterwards paid off the balance, which was applied at the time to the old debt incurred in C.'s lifetime, A. was wholly discharged from his obligation. *Strange v. Lee*, 3 East, 484.

Where C. became surety for such sums as should be advanced to meet bills drawn by A. and B. as partners, or either of them:—Held, that it did not extend to bills drawn by B. after the death of A. *Simpson v. Cooke*, 8 Moore, 558; 1 Bing. 452.

State of Accounts.]—A bond was given to the several persons constituting the firm of a banking-house, conditioned for the repayment of the balance of an account, and of such further sums as the bankers might advance to the obligor; one of the partners dies, and a new partner is taken into the firm; at that time a considerable balance is due from the obligor to the firm: advances are afterwards made by the bankers, and payments made to them on account by the obligor; the latter is credited by the new firm with the several payments, and charged with the original debt and subsequent advances, as constituting items in one entire account, and the balance due at the time of the partner's death is considerably reduced; and that reduced balance, by order of the obligor, is transferred by the bankers to the account of another customer, who, with his assent, is charged with the then debt of the obligor. The person so charged having become insolvent, the surviving partners of the original firm brought their action upon the bond:—Held, that as they had not originally treated it as a distinct account, but had blended it in the general account with other transactions, they were not at liberty so to treat it at a subsequent period; and, that having received in different payments a sum more than sufficient to discharge the debt due upon the bond at the time of the death of the deceased partner, the bond was to be considered as paid. *Bodenham v. Purchas*, 2 B. & A. 39. See *Hart v. Alexander*, 2 M. & W. 484.

Under a guarantee given to a banking-house, consisting of several partners, for the repayment of such bills, drawn upon them by one of their customers, as the bank might honour, and any advances they might make to the same customer within a certain time:—Held, that the guarantee ceased upon the death of one of the partners in the bank, before the expiration of the time to which the guarantee was expressed to extend. *Holland v. Teed*, 7 Hare, 60.

Held, further, that bills accepted before the death of the partner, and payable afterwards, were within the guarantee. That the amount guaranteed could not be increased by any act of the continuing firm and the customer, after the

death of the partner, although such amount might be diminished by such act. That, in the particular form of the guarantee, the amount guaranteed in respect of the bills honoured by the bank, was not to be reduced by the amount of a balance owing from the bank to the customer when the guarantee ceased, such balance having been afterwards paid in the course of business between the continuing firm and the customer. *Ib.*

A bond, conditioned to repay to five persons all sums advanced by them, or any of them, in their capacity of bankers, will not extend to sums advanced after the decease of one of the five by the four survivors, the four then acting as bankers. *Weston v. Barton*, 4 Taunt. 673.

Dissolution.—*R. and H.*, being in partnership, were in the habit, through the plaintiff's firm, of consigning goods to *B. and S.*, in China, for sale; the proceeds were remitted to the plaintiffs in London, against which they accepted bills drawn by *R. and H.*, and which they discounted. If the remittances did not put the plaintiffs in funds when the bills became due, the defendants were bound to make up the deficiency. By long practice, though there was no actual agreement, if the goods were not sold at the maturity of the bills, the plaintiffs accepted fresh bills, which the defendants negotiated, and handed the proceeds to the plaintiffs, who were thereby enabled to take up the first acceptances, and so to let defendants have the benefit of the advance for a further time without being under cash advance. In 1873 the partnership of *R. and H.* ceased by efflux of time, and it was agreed between them that *H.* should take over the whole stock of the old firm. The plaintiffs had notice of this. At the dissolution of the partnership there were acceptances of the plaintiffs running, and they, after the notice, renewed the bills, according to the old practice, by accepting fresh drafts of *H.* alone. When the goods were sold, the remittances were not sufficient to meet the plaintiffs' advances, and they brought an action against *R. and H.* to recover the balance. *R.* raised as a defence, that he had, by the agreement between him and *H.*, become only a surety for *H.*, instead of a principal joint debtor; and that the plaintiffs, by giving *H.* time after notice of this, had discharged *R.*—Held, that *R. and H.* could not change their position with regard to the plaintiffs without their assent, and so deprive them of the right they had to treat both *R. and H.* as principal debtors; that *R.* was therefore not discharged by the giving time to *H.* by means of the fresh acceptances. *Swire v. Redman*, 1 Q. B. D. 536; 35 L. T. 470; 24 W. R. 1069.

Continuing Business after Term.—*B.*, as principal, gave to his partner, *C.*, a bond, which was executed by *L.* as surety, indemnifying him from all loss from the partnership business, it being stipulated by the articles of partnership that the business should continue for five years; that in case either partner should retire, and the other be desirous of continuing the business, the continuing partner might take the retiring partner's share of the partnership assets at a valuation; and that if at the expiration of the partnership term either of the partners should be desirous of carrying on the business, and should neglect or refuse to purchase his partner's share in the assets at a valuation, then the assets should be realized, the debts paid out of the

proceeds, and the surplus divided between the partners according to their interests. At the expiration of the partnership term neither of the partners retired, but, without consulting *L.*, continued to carry it on for about twenty months longer, at the end of which time *C.* retired, leaving the whole partnership assets in the hands of *B.*, by whom the business was continued till *B.*'s bankruptcy, about three months afterwards. *B.* afterwards absconded, leaving the concern insolvent, and *C.* was compelled to liquidate the liabilities of the partnership:—Held, that inasmuch as by the articles the partnership ought to have been wound up at the expiration of the term limited by the articles, it was not competent to *C.* to agree to its continuance without the consent of *L.*, and yet to hold *L.* liable as surety upon the bond; and that *C.*, therefore, was not entitled to put the bond in force against *L.* *Small v. Currie*, 5 De G., Mac. & G. 141; 2 Eq. R. 639; 23 L. J., Ch. 746; 18 Jur. 731—*L. J.*

Breach after Death of Partner—Before other Change.—Action by *A.*, surviving obligee of a bond, against a surety. The condition of the bond recited that *A.*, *B.*, and *P.* had entered into co-partnership, and that it had been agreed that *P.* should be the acting partner, and that he and his surety should become bound to *A.* and *B.*, and it was conditioned for the performance by *P.* of the covenants on his part to be observed in a deed of co-partnership of the 1st of January, 1830, and made between *A.*, *B.*, and *P.*, and also for the delivery to *A.* and *B.* by *P.*, during such time as he should continue the acting partner in the trade of the co-partnership, of a true account of all moneys which should come to his hands. A plea averred performance by *P.* in the words of the condition, to *A.* and *B.* during the life of *B.*, and to *A.* since the decease of *B.* The partnership deed provided that the parties would, from the day of date of the deed, and up to the 1st July, 1841, be partners; that *P.* should be sole acting partner, and that he should, during the term of the co-partnership, discharge the duties of acting partner; that once every year the parties thereto would meet and settle accounts relative to the co-partnership; that if any of them, the parties thereto, their executors and administrators, should wish to withdraw from the co-partnership at the end of the seventh year of the co-partnership, he might do so on giving notice, and that the deed of co-partnership should determine as to the party giving such notice. The deed provided that any of the partners of the joint trade or business should be at liberty to transfer in his lifetime his share therein or any part to any one or more of his sons, and to dispose of his share by will to any person or persons whatsoever, and that the son or sons, or other person or persons to whom any such transfer or disposition should be made, or in case of the death of a partner without such transfer or disposition, that the executors or administrators of such partner so dying, should be deemed a partner or partners in the joint concern during the residue thereof. The replication assigned as a breach of the condition that *P.*, after the decease of *B.*, one of the partners, delivered false accounts. At the trial a breach was proved to have been committed as assigned after the death of *B.*, but before any other change in the firm had taken place:—

Held, that as the condition in the bond for P.'s accounting to A. and B. applied merely to the co-partnership by the three parties to the deed, the obligation of the surety had determined on the death of B. *Chapman v. Beckington*, 3 G. & D. 33; 3 Q. B. 703; 12 L. J., Q. B. 61; 7 Jur. 62.

—**Separate Securities of Deceased Partner.]**

—A partnership composed of three persons, A., B., and C., gave a joint and several bond to a bank, to cover advances to be made to them by the bank on a cash credit; and in that bond two estates held by A. were especially named as part securities for these advances. A. died:—Held, that, by his death, the partnership was dissolved, and the security, so far as his estates were concerned, was no further continued; no arrangement between the surviving partners, or between them and the bank, for the purpose of settling the general accounts, being capable of affecting the security. *Bank of Scotland v. Christie*, 8 C. & F. 214.

After the death of A. the bank continued as before its dealings with the partnership, constituted by B. and C.; and at a certain period payments made to the bank balanced the debt due to it at the time of A.'s death:—Held, that the separate liability of A.'s estates was thereby discharged. *Ib.*

Action, by whom.]—An action may be maintained upon a bond expressed to be payable to a mercantile firm, by the persons who actually constituted the firm when the bond was executed. *Moller v. Lambert*, 2 Camp. 548.

Construction.]—A company guaranteed a firm consisting of two partners in trade, against loss in respect of their gross annual returns. The guarantee was subject to the following condition:—"If a member of this company shall die, or if any member guaranteed with respect to his gross or particular trade debts shall cease to be such trader, his guarantee or contract shall become void upon such death, or (if such trader) on his retiring from such trade:—Held, that under this condition the guarantee became void upon the retirement of one of the two partners from the trade. *Solvency Mutual Guarantee Company v. Freeman*, 7 H. & N. 17; 31 L. J., Ex. 197; 7 Jur., N. S. 899.

C., by a guarantee reciting that M. had been a member of a late firm, and required to borrow money to meet the engagements of that firm, agreed to be surety to B. for all debts contracted, or that might be contracted, to and in favour of B., and generally for all the present and future liabilities of M. towards B. M. for some time traded alone, and afterwards traded with other parties, and contracted debts with B., which had no reference to the late firm, or to his sole trading:—Held, though the recital of the guarantee was special, it did not control the generality of the subsequent operative words. *Bank of British North America v. Cuvillier*, 4 L. T. 159—P. C.

A guarantee was addressed in the alternative "to Messrs. A. & Co., or the person or persons for the time being carrying on the business" of that firm:—Held, no variance, no change in the firm having in fact taken place. *Boyd v. Moyle*, 2 C. B. 644.

A declaration by A. against B. upon a guarantee stated, that in consideration of advances already made by A., and that A. would from time to time make advances to C., B. promised to repay A. the last-mentioned advances. The consideration on the face of the guarantee was "in consideration of advances made and to be made by A., or by any other persons of whom A.'s firm might from time to time consist:—Held, a variance. *Chapman v. Sutton*, 2 C. B. 634; 3 D. & L. 646; 15 L. J., C. P. 166.

A guarantee given in these terms, "In consideration of advances made and to be made by A. and B., or by any other persons of whom their firm may from time to time consist, in the way of loan, we jointly and severally hereby guarantee to A. and B. the repayment of the advances, and to indemnify them against any loss by reason of such advances, our liability not to exceed 1,000*l.*; this guarantee to be a continuing guarantee, and to be a security to A. and B. to the extent of 1,000*l.*, for the whole of any balance which may from time to time or at any time become due to A. and B., or to the persons for the time being constituting the firm," discloses a sufficient consideration for the promise, though there has been no change in the firm. *Ib.*

A guarantee for the future debt of a firm is not to be construed as a continuing one, so as to bind a party to it in the event of an alteration in the firm, unless the intention of the parties shall so appear either by express stipulation or by necessary implication from the nature of the firm, or otherwise. *Backhouse v. Hall*, 6 B. & S. 507; 34 L. J., Q. B. 141; 11 Jur., N. S. 562; 12 L. T. 375; 13 W. R. 654.

The following guarantee, given to a banking firm, "In consideration that you have, at our instance and request, consented to open an account with the firm of G. W. and W. J. Hall, shipbuilders, Monkwearmouth, we, and each of us, do hereby guarantee the payment to you of the moneys that at any time may become due, not exceeding 5,000*l.*, such payment by us not to be made at a shorter date than twelve months from this date," does not come within the proviso in the above enactment, as it does not appear, either by express stipulation or necessary implication, that the guarantee was to continue, notwithstanding a change in the persons constituting the firm. *Ib.*

The 19 & 20 Vict. c. 97, s. 4, is simply an affirmation of the law as it previously stood. *Ib.*

6. GIVING TIME.

Extent of Rule.]—If after a right of action accrues to a creditor against two or more persons, he is informed that one of them is a surety only, and, after that, he gives time to the principal debtor without the consent and knowledge of the surety, the rule as to the discharge of the surety applies. *Overend, Gurney & Company v. Oriental Financial Corporation*, 7 L. R., H. L. 348; 31 L. T. 322. Affirming 7 L. R., Ch. 142; 41 L. J., Ch. 332; 25 L. T. 813; 20 W. R. 253.

Merely giving an additional security by a principal will not discharge a surety, but if the giving of such security is really a consideration for giving time to the principal, it will do so. *Ib.*

It was not any defence at law, to an action

on a bond against a surety, that by a parol agreement time had been given to the principal. *Dacey v. Prendergrass*, 5 B. & A. 187; 2 Chit. 336; 6 Madd. 124.

What amounts to.]—Giving time to the principal, means, giving such time, without the consent or knowledge of the surety, as prevents the creditor from resorting to the principal on the day appointed, and thus puts the surety, who expects that this resort will be made in the first instance, in a worse situation than he was before. But an arrangement between the creditor and principal, of such a nature as may induce the creditor to give time, but does not, by its terms, bind him to do so, is not such "giving time" as renders the surety's situation worse than it was before. A mere voluntary abstaining to pursue to judgment is not giving time. *Bell v. Banks*, 3 Scott, N. R. 497; 3 M. & G. 258.

In an action by the payee against the maker of a note, the plaintiff proved a joint and several note made by the defendant and another person. The defendant then proved that he was a mere surety, having become a party to the note at the request of the other person who was indebted to the plaintiff, and that the note not having been paid when it became due, the plaintiff, in Hilary term, 1828, brought an action against the principal, which being about to be tried at the spring assizes, 1828, the plaintiff took a cognovit for the debt payable by three instalments, the first on the 28th of April, the others in May and June; but if the defendant failed in payment of any of these instalments, the plaintiff was to be at liberty immediately to enter up judgment and issue execution for the whole sum. The first instalment was not duly paid:—Held, that as the plaintiff, if he had proceeded in the action, could not have obtained judgment and issued execution before the 28th of April, the plaintiff did not, by taking the cognovit, give any time to the principal debtor. *Price v. Edmunds*, 10 B. & C. 578.

Course of Business—Renewing Bills.]—R. and H., being in partnership, were in the habit, through the plaintiff's firm, of consigning goods to B. and S., in China, for sale; the proceeds were remitted to the plaintiffs in London, against which they accepted bills drawn by R. and H., and which they discounted. If the remittances did not put the plaintiffs in funds when the bills became due, the defendants were bound to make up the deficiency. By long practice, though there was no actual agreement, if the goods were not sold at the maturity of the bills, the plaintiffs accepted fresh bills, which the defendants negotiated, and handed the proceeds to the plaintiffs, who were thereby enabled to take up the first acceptances, and so to let defendants have the benefit of the advance for a further time without being under cash advance. In 1873 the partnership of R. and H. ceased by efflux of time, and it was agreed between them that H. should take over the whole stock of the old firm. The plaintiffs had notice of this. At the dissolution of the partnership there were acceptances of the plaintiffs running, and they, after the notice, renewed the bills, according to the old practice, by accepting fresh drafts of H. alone. When the goods were sold, the remittances were not sufficient to meet the plaintiffs' advances, and they brought an action against R. and H. to recover

the balance. R. raised as a defence, that he had, by the agreement between him and H., become only a surety for H., instead of a principal joint debtor; and that the plaintiffs, by giving H. time after notice of this, had discharged R.:—Held, that R. and H. could not change their position with regard to the plaintiffs without their assent, and so deprive them of the right they had to treat both R. and H. as principal debtors; that R. was therefore not discharged by the giving time to H. by means of the fresh acceptances. *Swire v. Redman*, 1 Q. B. D. 536; 35 L. T. 470; 24 W. R. 1069.

Semble, even if the giving fresh acceptances would have otherwise discharged R., that, as it was only a continuance of the old practice to which R. was a party, it would not have discharged him. *Id.*

A. guaranteed the payment of any goods to be supplied by B. to C. between the 2nd of April, 1814, and the 2nd of April, 1815. Although no period of credit was specified, this could not be taken as a guarantee for an unlimited period, but to be restrained by the usual course of trade; and C. having accepted bills for the amount of the goods delivered, which B. permitted him to renew when payable, without any communication to A. on the subject of such renewal:—Held, that A. was discharged from his guarantee, by virtue of the rule that a creditor, giving further time to the principal debtor, without the consent of the surety, releases the surety; and that, although it was proved that the renewal was given only in consequence of C.'s inability to pay, and that no injury could accrue to A., the surety being himself the fit judge of what is or is not for his own benefit. *Samuel v. Howarth*, 3 Mer. 272.

The following guarantee was given in January, 1825, to certain bankers: "Please to open an account with and honour the cheques of B., on mill account, for whom I will be responsible." The account having been opened, the bankers made advances to B. from time to time till February, 1827, when they ceased; a large balance was then due to them from B., who, in October of that year, paid a sum into the bank on account of it; in February, 1828, the bankers took an acceptance from B., at three months, for the balance of his account, with interest, without the guarantor's knowledge; in several previous instances the bankers had taken similar acceptances from customers who had overdrawn their accounts; but though the guarantor had been consulted by them as their attorney on the dishonour of several of them, it was not shewn that he was aware of the practice of the bank in that particular:—Held, that the taking the acceptance from the principal debtor by the parties guaranteed, without the knowledge or assent of the surety, was a giving time to the principal, which altered the situation of the surety, and therefore discharged him from liability on the guarantee. *Howell v. Jones*, 4 Tyr. 548; 1 C. M. & R. 97.

A guarantee was given by the defendant, in consideration of the plaintiff's giving A. a current credit, to make good, upon the event of his failure, any deficiency, not exceeding a certain sum; a short time after the guarantee was given, a bill which had been previously given by A. to the plaintiff was dishonoured, and the plaintiff permitted him to renew it without giving any notice of the transaction to the defendant:—

Held, that this was not such a failure of the principal as to entitle the surety to a notice of the renewal of the bill. *Carr v. Brown*, 12 Moore, 62.

If a surety of a bill assents to its being renewed, he is not discharged. *Torrance v. Bank of British North America*, 5 L. R., P. C. 246; 29 L. T. 109; 21 W. R. 329.

A. at the request of B., and on his promises that he would share any loss or liability which he might thereby incur, accepted a bill at three months for the accommodation of C. At the maturity of the bill, C. being unable to meet it, it was agreed between the holders and A. and C. (without the knowledge of B.), that another bill should be drawn for the amount, in substitution of the former acceptance. A. having been obliged to pay the second bill, sued B. on his indemnity:—Held, that B.'s liability on his undertaking was not discharged by the renewal of the bill, the parties not standing in the position of creditor and principal and surety. *Way v. Hearn*, 11 C. B., N. S. 774; 32 L. J., C. P. 34.

— **Original Debt Paid off.**—In consideration of the plaintiff supplying C. with goods, the defendant agreed to be answerable up to 200*l.* for the price of goods supplied to C. at any time due to the plaintiff on an account current after two months' credit. Some time after, 332*l.* being due from C. to the plaintiff for goods supplied, C. executed a mortgage deed to the plaintiff as security for the then existing debt, and for any future debt for goods to be supplied. The deed contained a proviso that if C. paid the plaintiff the 332*l.* in six months from its date, and all sums due for future supplies in six months from their date, without prejudice to the plaintiff's right not to give credit in respect of future supplies, the mortgaged premises were to be reconveyed to C. There was also a covenant to pay the existing debt in six months, and future debts within six months from their accruing due, without prejudice to the plaintiff's refusing to give credit for future debts. The parties in fact dealt on a two months' credit only. In the course of dealing, C. paid off the 332*l.* A further debt exceeding 200*l.* having subsequently accrued, which C. could not pay, the plaintiff sued the defendant on the guarantee. He pleaded that he was discharged by time having been given by the plaintiff to C.:—Held, that by the mortgage deed the plaintiff did not give time to C., except in respect of the 332*l.* debt, and that, as that debt had long been discharged, the giving that time did not prejudice the surety as to other and future debts due from C. to the plaintiff; and that, as in fact only a two months' credit was given by the plaintiff to C., the guarantee remained in force, and that the defendant was liable, up to 200*l.*, on C.'s failure to pay the sum due in respect of goods supplied by the plaintiff to C. subsequently to the mortgage deed. *Bingham v. Corbitt*, 34 L. J., Q. B. 37; 12 W. R. 1030—Ex. Ch.

— **Agreement not to press for Repayment in consideration of Higher Rate of Interest.**—The plaintiffs lent 1,000*l.* to B., one of their customers, upon the security of a joint and several promissory note, payable on demand, made by B. and the defendant, a solicitor, and also upon the deposit of the deeds of a house of which B. was the owner, together with a memo-

randum signed by B. that the deeds were deposited as security for any general balance, not exceeding 1,000*l.*, which might then or thereafter be due to the plaintiffs from him. The memorandum contained an undertaking by B. to execute a legal mortgage of the house, but this undertaking was not carried out. Subsequently, in March, 1875, an arrangement was entered into without the knowledge of the defendant, between the plaintiffs and B., whereby it was agreed that the plaintiffs should not press for repayment of the loan, but that B. should pay instead a higher rate of interest than that on which the loan was originally made, and this higher rate was afterwards debited to B. in his current account. The loan and current account were always kept distinct, and for some months subsequent to this arrangement the plaintiffs always had a balance exceeding 1,400*l.* to the credit of B. The plaintiffs having pressed for the execution of a legal mortgage with the usual power of sale, the defendant's partner, on behalf of and in the name of his firm, prepared a legal mortgage to the plaintiffs, another solicitor acting for B. This mortgage, which was executed by B., secured the payment to the plaintiffs of any sum not exceeding 1,500*l.*, which might thereafter be due to the plaintiffs upon B.'s general account, with interest at 6 per cent., and also contained a covenant for payment three months after demand, and a power of sale in case of default. In an action brought upon the promissory note against the defendant, after default made by B.:—Held, that the defendant had signed and was liable upon the promissory note as principal, and that as there was no evidence to shew that the plaintiffs had agreed to accept the defendant merely as surety, he was not entitled to be treated as such. Held, also, that assuming the defendant was, and had been, accepted by the plaintiffs as surety for B., the transaction of March, 1875, did not amount to such a giving of time to B. as to discharge the defendant from his liability on the promissory note. *York City and County Banking Company v. Bainbridge*, 43 L. T. 732; 45 J. P. 158.

— **In consideration of Payment of Interest.**—A letter written by an agent of a bond creditor to the principal obligor, giving him eighteen months' further time to pay the debt, upon condition of his paying off at once the arrear of interest, and keeping down the interest to accrue in future, is a mere promise without consideration, and not binding; and therefore the obligor, who has joined in the bond as surety only, is not thereby discharged. *Tucker v. Laing*, 2 Kay & J. 745.

— **Extending Credit.**—The plaintiffs sued upon the following guarantee: "I hereby guarantee and engage to see you paid for any porter you may send Mr. A. J. of this town, until you receive notice to the contrary from me." According to the course of dealing between the plaintiffs and A. J., the latter was to have six months' credit, and then pay by a bill at two months:—Held, that an extension of the credit to nine months, and a bill at two months (without notice), discharged the surety. *Combe v. Woulfe*, 1 M. & Scott, 241; 8 Bing. 156.

Taking Note.—A promissory note was made

by A. and B., payable to C., to secure advances from C. to A.; after the note became due, it was agreed between C. and A., without the privity of B., that A. should execute a warrant of attorney to D., as trustee for C., to secure the amount of the note and a further advance made by C. to A.:—Held, that the acceptance of the new security by C., unaccompanied by any binding engagement on his part to give time to A., did not discharge B. *Bell v. Banks*, 3 M. & G. 258; 3 Scott, N. R. 497.

Where Series of Payments.]—When a surety guarantees a series of payments to be made at stated periods, if time is given to the principal debtor in respect of one payment by a binding agreement, the surety is discharged from liability in respect of that payment, but not in respect of future payments. *Croydon Commercial Gas and Coke Company v. Dickinson and Pollard*, 2 C. P. D. 46; 46 L. J., C. P. 157; 36 L. T. 135; 25 W. R. 157—C. A.

A principal (with sureties for the performance of the contract) contracted to take tar from a gas company, and to pay for each month's supply within the first fourteen days of the ensuing month, unless the company should by writing allow a longer time for payment. After the expiration of the first fourteen days of August the company took a promissory note from the principal for the amount due for July. Default was made by the principal in payment of the amounts due for July, for August, and for September:—Held, that, time having been thus given for the payment of the amount due for July, the sureties were discharged as to that amount. *Id.*

But not as to the amounts due for August and for September; the contract being separable, and the position of the sureties as to those amounts not being affected by the giving time for payment of the amount due for July. *Id.*

Where Binding Agreement.]—An obligee of a bond having placed himself in such a position with regard to the principal debtor, that he could not demand payment of the bond, until an agreement entered into with third parties had been carried into effect:—Held, that this was such a giving of time to the principal debtor as discharged a surety to the bond. *Cross v. Sprigg*, 2 Mac. & G. 113; 2 H. & T. 233; 19 L. J., Ch. 528; 14 Jur. 634.

The rule as to the liabilities of sureties in a bond is the same in Scotland as in England, viz., that they are not to be discharged from their obligation unless the contract between them and the obligees is varied by a positive contract between the obligees and the principal, without notice to the sureties. *Creighton v. Rankin*, 7 C. & F. 325.

If a bond creditor enters into a binding contract with the principal debtor to give him further time to pay, without the concurrence of his surety, the surety is discharged, because the creditor has put it out of his own power to enforce immediate payment, where the surety would have a right to require him to do so. *Bank of Ireland v. Beresford*, 6 Dow, 238. And see *Archer v. Hall*, 1 M. & P. 286; 4 Bing. 464.

The indorsees of bills of exchange as a security for a floating balance due on the accounts between them and the drawer, had notice that the acceptance was for the drawer; they afterwards entered into an agreement with the latter that

the existing debt should be liquidated by the drawer building for them ships, and should, in the meantime, be secured by a policy of insurance:—Held, first, that time was thus given to the principal debtor, and the surety was released in equity, if not at law also. *Davies v. Stainbank*, 6 De G., M. & G. 679.

Held, secondly, that a creditor who holds a floating guarantee for a surety, cannot, without the surety's consent, give time to the principal debtor as to a portion of the debt, without reserving the creditor's rights against the surety, and yet hold the surety liable for that portion. *Id.*

— Under Deed of Arrangement.]—By a deed of arrangement, it was proposed that P. should carry on his business under inspectorship for the benefit of all his creditors; that the plaintiffs, creditors of P., who held various securities for their debt, should be paid a certain sum in full, and a composition on the residue of their debt by instalments, they covenanting not to enforce claims against any parties to the bills in their hands who, as between themselves and P., were not then liable on the bills; but the rights of the plaintiffs against all parties to the bills in their hands (whether liable or not to P. as between him and such parties) were not to be prejudiced in the event of the proposals not being carried into effect. It was provided that the creditors (except as mentioned in the proposal) who should execute the deed, and who should hold any securities upon which any other persons should be liable, should not be prejudiced as to their rights and remedies against such persons; and that the deed should not extend to prevent the creditors, other than as provided for in the proposal, from enforcing or otherwise obtaining the full benefit of any mortgage, &c., upon any estate or effects, whether belonging to P. or any other person, or from suing any other persons who might be liable or accountable for the payment of all or any part of their debts either as drawers, indorsers or acceptors of any bills of exchange. Under this deed, which was in force for more than two years, time was given to P., the principal debtor; he then made default in paying the first instalment. In an action against the acceptor of one of the bills of exchange, of which the plaintiffs were holders at the time when the deed was executed, and which he had accepted for the accommodation of P., though the plaintiffs had no notice of that fact:—Held, that the effect of the deed was to discharge the defendant in equity, and therefore there was an equitable defence to the action. *Bailey v. Edwards*, 4 B. & S. 761; 34 L. J., Q. B. 41; 11 Jur., N. S. 134; *S. P.*, *Erwin v. Lancaster*, 12 L. T. 632; 13 W. R. 857.

Agreement with Stranger.]—A binding agreement for a good consideration, made by a creditor with a stranger, to give time to the principal debtor, does not operate as a discharge of the surety. *Fraser v. Jordan*, 8 El. & Bl. 303; 26 L. J., Q. B. 288; 3 Jur., N. S. 1054.

Before Recovery of Judgment against Principal.]—A surety is not discharged by the creditor taking from the debtor a cognovit in an action he had brought against the debtor, with a stay of execution until a day earlier than that on which judgment could have been obtained in the regular course. *Hulme v. Collins*, 2 Sim. 12.

A., principal, and B., surety, gave their promissory note to C. C. sued A., and took a cognovit, payable by instalments, the first instalment to be paid on the day before that on which C. might have signed final judgment in the action if no cognovit had been given, with power to issue execution for the whole debt in case of default. A. made default at the day:—Held, that B. was not discharged. *Price v. Edmunds*, 5 M. & R. 287; 10 B. & C. 578.

When Relationship begun — Pleading.] —

When two joint debtors entered into an arrangement between themselves by which, inter se, one of them became the principal and the other the surety, to the knowledge of the creditor, who afterwards, by taking a bill of exchange, gave time to him who had so become the principal:—Held, that the surety was discharged, and that these facts constituted a good answer, by way of equitable defence, to an action subsequently brought by the creditor against the surety, although the relation of principal and surety did not subsist at the time of the original contract. *Mainway v. Lewis*, 5 Ir. R., C. L. 229—Ex. Ch.

Held, also, that the equitable defence was not bad on demurrer, for want of an averment that the time was given to the quasi principal without the knowledge or assent of the quasi surety. *Id.*

7. CONCEALMENT AND FRAUD.

Non-communication of material Facts without Fraud.]—In consideration of the plaintiff accepting one H. as his tenant of certain lands, the defendant guaranteed the payment of the rent to become payable by H. as such tenant. In an action upon the guarantee, the defendant pleaded that, prior to the making of the guarantee, H. had been tenant to the plaintiff of the lands at a rent, and had been guilty of gross irregularity and delay in payment of such rent, and at the date of the guarantee was indebted to the plaintiff in a large sum for arrears of such rent, of which the defendant was ignorant; that the plaintiff did not, prior to the guarantee, communicate to the defendant these facts, but concealed from him the said material facts, which, if communicated to the defendant, would have prevented him from executing the said guarantee:—Held, upon demurrer, a bad plea. *Roper v. Cox*, 10 L. R., Ir. 200.

Uberrima fides, whether necessary.]—Where parties are contracting, either of them, unless he is under a duty to the other, may keep silence even as to facts which he believes would be operative on the mind of the other; if, however, one of them has made a statement which he believes to be true, but which in the course of the negotiation he discovers to be false, he is bound to correct his erroneous statement. *Davies v. London and Provincial Marine Insurance Company*, 8 Ch. D. 469; 47 L. J., Ch. 511; 38 L. T. 478; 26 W. R. 794.

In some cases, such as contracts between solicitor and client, there is a duty to make entire disclosure. In others, such as contracts of partnership, everything material must be disclosed. There is no such duty in the case of a contract of suretyship, but nevertheless very little said which ought not to have been said, and very little omitted which ought to have

been said, will suffice to avoid the contract. *Id.*

The officers of a company, believing that the retention of money by one of their agents amounted to felony, directed his arrest. Certain friends of his came to the officers of the company and proposed to deposit a sum of money by way of security for any deficiency. On the same day the company was advised that the acts of the agent did not amount to felony, and the directions for the arrest were withdrawn. Later in that day the friends of the agent had a second interview with the officers of the company, and agreed to deposit a sum of money as security for his defaults, no mention being made of the withdrawal of the directions for the arrest. The sum of money was afterwards deposited with trustees on an agreement for the security of the company:—Held, that the change of circumstances ought to have been stated to the intending sureties, and that the agreement must be rescinded and the money returned to the sureties. *Id.*

The rule which prevails in assurances upon ships and lives, that all material circumstances known to the assured must be disclosed, though there is no fraud in the concealment, does not extend to guarantees. *North British Assurance Company v. Lloyd*, 10 Ex. 523; 24 L. J., Ex. 14; 1 Jur., N. S. 45.

In the latter case the concealment, to vitiate the guarantee, must be fraudulent. *Id.*

A. obtained a loan of 10,000*l.* from an insurance company, on the deposit of railway shares, with a stipulation that, if the market value of the shares fell below a certain amount, A. should either furnish fresh shares or pay their value, so as to leave a given surplus. When the time for repayment of the loan arrived, the shares having fallen in value, the time was extended to a further period, on the deposit of additional shares, and the acceptance of A.'s brother (B.), to the amount of 2,000*l.* Before the loan became due, in pursuance of the terms of this second arrangement, B. applied to the company to be released from his acceptance upon procuring the guarantee of the defendant and three others for 500*l.* each. The company assented to this arrangement. A. then informed the defendant of the loan and of its terms, and told him, that unless he could procure security, his shares would be sold at a great loss; but the arrangement as to the withdrawal of B.'s acceptance was not communicated to the defendant, and he was wholly ignorant of it. The defendant executed a guarantee which did not refer to B.'s acceptance for 2,000*l.*, but recited the consideration for the guarantee to be the original loan, and of the company's agreeing not to require any further security in the event of the depreciation of the shares, as provided for by the original agreement. In an action on this guarantee by the company:—Held, that the non-communication of the private arrangement between the company and A. and his brother did not amount to constructive fraud, and afforded no defence to the action. *Id.*

At the request of the defendant, the plaintiff accepted a bill for 110*l.*, dated the 25th of October, 1859, and drawn by Read for the purpose of raising funds to relieve the latter from an execution, the defendant at the same time giving the plaintiff the following undertaking: "You having lent your name to Mr. Read on a bill for:

110*l.*, payable three months from this date, the proceeds to be applied to the discharge of the amount payable to the sheriff, I undertake to share with you any loss or liability you may incur in respect of such bill." Prior to this transaction, Read, finding himself in a state of great embarrassment, had applied to the defendant (who was his attorney) for advice; and, at the suggestion of the latter, an accountant was employed to prepare a statement of Read's affairs, to be laid before a meeting of his creditors. The plaintiff assisted the accountant in preparing this statement, and at his desire (in order, as he stated, that his imprudence might not come to the knowledge of his wife), the fact of Read being indebted to him to the extent of 2,000*l.* for money lent was kept out of the statement, and altogether suppressed:—Held, that, the contract being one of indemnity and not of suretyship, although the plaintiff knew that the defendant, when he agreed to be responsible for half the 110*l.*, was influenced by the impression that the balance-sheet contained a true statement of Read's affairs, he was entitled to recover from the defendant one-half of the loss entailed upon him by that transaction, the jury having negatived fraud. *Way v. Hearn*, 13 C. B., N. S. 292; 32 L. J., C. P. 34.

More non-communication of circumstances affecting the situation of the parties material for the surety to be acquainted with, and within the knowledge of the person obtaining a surety bond, is undue concealment, though not wilful or intentional, or with a view to any advantage to himself. *Railton v. Mathews*, 10 C. & F. 934.

It is settled that there must be something amounting to fraud to enable a surety to say, that he is to be released from his contract on account of misrepresentation or concealment. *Pledge v. Buss*, Johns. 663; 6 Jur., N. S. 695.

In an action on a banking guarantee, to take effect at once; a plea on equitable grounds, that it had been given on a misrepresentation by the plaintiff as to the state of the principal's banking account, and on an undertaking to return it if a partnership between the principal and the defendant did not take effect:—Held, that the latter part alone would not be any defence, and that to sustain the former part it must be shewn, not only that there was a misrepresentation, but that the defendant relied upon it, and gave the guarantee on the faith of it. *McKewan v. Thornton*, 2 F. & F. 594.

Necessity of Inquiry.—A surety is not, of necessity, entitled to receive, without inquiry from the party to whom he is about to bind himself, a full disclosure of all the circumstances of the dealings between the principal and that party. *Hamilton v. Watson*, 12 C. & F. 109.

If he requires to know any particular matter, of which the party about to receive the security is informed, he must make it the subject of a distinct inquiry. *Ib.*

Without saying that in every case a creditor is bound to inquire under what circumstances his debtor has obtained the concurrence of a surety, it may be safely stated, that if the dealings are such as fairly to lead a reasonable man to believe that fraud must have been used in order to obtain such concurrence, he is bound to make inquiry. In some cases wilful ignorance is not to be distinguished in its equitable consequences from

knowledge. *Owen v. Homan*, 4 H. L. Cas. 997; 1 Eq. R. 370; 17 Jur. 861.

Extent of Doctrine of Notice.—Notice to a creditor when his debt is contracted that the relation of principal and surety exists between his co-debtors is sufficient to affect him with the consequences of that relation without any further acceptance of it on his part. *Wythes v. Labouchere*, 3 De G. & J. 593; 5 Jur., N. S. 499.

But it is not a consequence of that relation that the creditor, without any inquiry on the part of the surety, should acquaint him with every circumstance affecting the credit of the debtor, or of any matter unconnected with the transaction in which he is about to engage which may render it hazardous, the principles applicable to insurances not applying to such a case. *Ib.*

A customer, being desirous of obtaining an advance from his bankers on the credit of a surety, employs solicitors for that purpose, who are also the ordinary solicitors of the bankers, but are not employed by them in the transaction in question. The solicitors, however, give information to the bankers as to the sufficiency of the surety, and debit them with the costs of preparing the instrument of suretyship:—Held, that they could not be regarded as having acted for the bankers from the beginning, so as to affect the bankers with notice of any concealment or misrepresentation on the part of the customer towards the surety. *Ib.*

Signature of Specification.—By a deed between a local board of the first part, certain contractors of the second part, and the defendant of the third part, the contractors covenanted to do work upon the basis of a specification; and the defendant covenanted to pay any losses that might be sustained from the non-performance of the work. The deed recited that the specification had been signed by five members of the local board, as was required by the local act. In point of fact the specification had never been signed, although it had been acted upon:—Held, that the mere fact of the specification not having been signed did not release the sureties from their liability. *Russell v. Trickett*, 13 L. T. 280.

Application of Moneys.—A. gave his promissory note as a security for a loan of 2,600*l.* by B. to C. Before the making of the note, it was agreed between B. and C. that part of the money lent should be applied to the payment of an old debt from C. to B. This agreement was concealed from A.:—Held, this was a fraud in law, and that A. was released from liability on the note. *Stone v. Compton*, 5 Bing. N. C. 142; 6 Scott, 846. See *Pidcock v. Bishop*, 5 D. & R. 505; 3 B. & C. 605.

As between principal and surety, if any material part of the transaction between the creditor and his debtor (in respect of which the surety enters into his engagement) is, with the knowledge and assent of the creditor, misrepresented to the surety (the misrepresentation being such, that but for the same the suretyship would not have been entered into, or being entered into, the extent of the surety's liability may thereby be increased), the security given by the surety is not available against him on the ground of fraud. *Ib.*

Exposing Vessel to Unusual Risk.—The defen-

dant agreed to sell two ships to a company, to be paid partly in bills of exchange accepted by the company; with liberty to the defendant to freight one of the vessels. The plaintiff agreed to indorse the bills by way of surety. Shortly afterwards the defendant, assuming to act as agent of the company, despatched one of the vessels to Constantinople, laden, on his own account, with munitions of war, for the Circassians, who were at war with Russia. This was not known either to the company or to the plaintiff:—Held, that the defendant having exposed the ships to extraordinary risk, it amounted to a release of the plaintiff from his liability. *Burke v. Rogerson*, 12 Jur., N. S. 635; 14 L. T. 780—L. J.

Postponement of Execution—Necessary Consents.—Upon the eve of a sale by a sheriff, a surety gave a written guarantee for payment of the judgment debts by instalments, in consideration of the judgment creditors consenting to postpone the sale under the execution. It turned out that the consent of another person was necessary in order to prevent the sale, and in consequence the sale took place. The surety gave notice that the consideration having failed, the guarantee was at an end. Representations were made on behalf of the judgment creditors when they took the guarantee, that they had power to stop the sale, and it would be stopped:—Held, that the surety was entitled to have the guarantee delivered up to be cancelled. *Cooper v. Joel*, 1 De G., F. & J. 240.

Previous Indebtedness.—P. had been employed by the plaintiffs in the sale of coals for them on commission, for which he at the end of each month gave them his acceptances, and by the terms of his agreement he was to hand over to them within six days all moneys he received from customers. P. having fallen into arrear to the extent of 1,272*l.*, the plaintiffs required him to find security to the amount of 300*l.*, and at his request the defendant consented to guarantee 100*l.* The agreement of guarantee recited the terms of dealing between the plaintiffs and P.; but the fact that P. was already indebted to the plaintiffs in the large sum above mentioned was concealed from the sureties. In an action against the defendant upon the agreement, he pleaded that he was induced to make it by the fraudulent concealment by the plaintiffs of a material fact:—Held, that the non-communication by the plaintiffs to the defendant of the fact that P. was at the time indebted to them, was evidence for the jury in support of the plea. *Lee v. Jones*, 14 C. B., N. S. 386. Affirmed, 17 C. B., N. S. 482; 34 L. J., C. P. 131; 11 Jur., N. S. 81; 13 W. R. 318—Ex. Ch.

Liability of Bank for Representations of Agent.—The plaintiff supplied oats to D., a customer of a bank, for the purpose of enabling D. to perform a contract with the government for the supply of oats, on the faith of a guarantee given by the manager of the bank that, on receipt of the money to be paid by the commissariat department to the bank for D. for the price of the oats supplied to the government by D., the bank would pay the plaintiff out of that money the sum due to him, subject only to the debt due to the bank from D. D. was, at the time, so largely indebted to the bank that it was practically impossible that there should be any

surplus to come to the plaintiff, after payment of the debt due to the bank; but the manager concealed this from the plaintiff. The bank having appropriated the whole of the money to the payment of their own debt:—Held, that on proof of these facts there was evidence to go to the jury of a false representation on the part of the manager of the bank; that the bank was answerable for such false representation; and that the false representation was properly described in the declaration as that of the bank. *Barwick v. English Joint Stock Bank*, 2 L. R., Ex. 259; 36 L. J., Ex. 147; 16 L. T. 461; 15 W. R. 877—Ex. Ch.

Servant's Honesty—Previous Acts.—In the case of a continuing guarantee for the honesty of a servant, if the master discovers that the servant has been guilty of acts of dishonesty in the course of the service to which the guarantee relates, and if, instead of dismissing the servant, as he may do at once and without notice, he chooses to continue him in his employ without the knowledge and consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service. *Phillips v. Foxhall*, 7 L. R., Q. B. 666; 41 L. J., Q. B. 293; 27 L. T. 231; 20 W. R. 900.

Declaration on a bond given to the plaintiff by the defendant which recited that by an agreement of even date the plaintiff had agreed to admit J. into his service as clerk and traveller (not further stating the terms of the agreement), and was conditioned for J.'s accounting for and paying over to the plaintiff all moneys which he might receive on the plaintiff's account; the breach alleged being that J. had received moneys for the plaintiff which he had not accounted for or paid over. Plea, that before the defaults sued for, J. had committed other defaults of the same kind; that the plaintiff had, with knowledge of those defaults, continued to employ J. in his service without notice to the defendant; and that the defaults sued for were committed during such continuance of the service:—Held, that the plea was good. *Sanderson v. Aston*, 8 L. R., Ex. 73; 42 L. J., Ex. 64; 28 L. T. 35; 21 W. R. 293.

When an action was brought by a county treasurer against the surety to the bond of a county cess collector, on account of a breach of the bond by non-payment into the proper bank of the cess which had been collected, the surety attempted to set up an equitable defence that the cess collector had been previously engaged in that office, and that during the time he fulfilled the duties of that office he had misconducted himself, which acts of misconduct were known to the plaintiff, who had given no notice to the surety on his becoming surety:—Held, that as no privity could exist between the surety to the bond, and the plaintiff in his official capacity of county treasurer, no equity could be set up against him. *Lawder v. Simpson*, 21 W. R. 439.

Precautions against Fraud.—A surety guaranteeing the honesty of a person employed is not entitled to be relieved from his obligation because the employer fails to use all the means in his power to guard against the consequences of dishonesty. *Black v. Ottoman Bank*, 8 Jur., N. S. 801; 6 L. T. 763; 10 W. R. 871.

To discharge a surety for the due performance of duties, there must be on the part of the obligee an act of connivance or gross negligence amounting to wilful shutting of the eyes to the fraud, or something approximating to it. *Dawson v. Lawes*, Kay, 280; 23 L. J., Ch. 434.

Effect of Power of Suspension of Defaulting Party.]—Under the 12 & 13 Vict. c. 91, the power of dismissing rate collectors is vested in the lord-lieutenant, but by regulations of the privy council, made under the act, the collector-general is empowered to suspend any collector who, in his opinion, has been guilty of neglect of duty:—Held, that the omission of the collector-general to suspend the collector, after knowledge of fraud and dishonesty on his part during his service and employment, was not a defence to an action on the guarantee; 1st, because the doctrine of *Phillips v. Foxhall* (7 L. R., Q. B. 666) was inapplicable to a guarantee for the fidelity of an officer appointed and removable by the lord-lieutenant; 2ndly, because the omission to exercise a power of suspension as distinguished from a power of dismissal did not terminate the liability of the sureties. *Byrne v. Muzio*, 8 L. R., Ir. 396.

8. LACHES AND NEGLIGENCE.

What amounts to.]—The mere passive inactivity of a person to whom a guarantee is given, his neglect to call the principal debtor to account in a reasonable time, and to enforce payment against him, does not discharge the surety; and the rule at law and in equity is the same, that there must be some positive act done by him to the prejudice of the surety, or such degree of negligence as to imply connivance, and amount to fraud. *Black v. Ottoman Bank*, 8 Jur., N. S. 801; 6 L. T. 620; 10 W. R. 871—P. C.

Mere negligence, even if gross, on the part of a creditor, unaccompanied by positive acts of concurrence in the defalcation of a debtor, will not discharge the surety, and is no ground of equitable defence. *Madden v. McMullen*, 13 Ir. C. L. R. 305; 4 L. T. 180.

Or mere forbearance or inactivity on the part of a creditor will not discharge a surety. *Strong v. Foster*, 17 C. B. 201; 25 L. J., C. P. 106.

If a party guaranteed does any act injurious to the surety, or inconsistent with his right, or omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the latter is discharged. *Watts v. Shuttleworth*, 5 H. & N. 235; 29 L. J., Ex. 229. Affirmed, 7 H. & N. 353; 7 Jur., N. S. 945; 5 L. T. 58; 9 W. R. 132—Ex. Ch.

Of Agents.]—A. obtained an advance of money from a loan society, upon the security of a joint and several promissory note of himself and the defendant (who, to the knowledge and on the requirement of the society, signed the same as surety), and of a bill of sale of A.'s furniture. Certain instalments of the note being in arrear, the lenders seized and sold the goods of A. under the bill of sale, and afterwards sued the defendant for the balance:—Held, that it was competent to the defendant to shew, by way of equitable defence, that but for the mismanagement of the lenders' agents, the goods of A.

would have realized sufficient to satisfy the whole debt. *Mutual Loan Fund Association v. Sudlow*, 5 C. B., N. S. 449; 28 L. J., C. P. 108; 5 Jur., N. S. 338.

Bond to Guardians for Collection of Rates—Surety Liable through Overseers' Negligence.]—The defendant, as surety, gave a bond to the guardians of the poor for the M. union, conditioned for the due discharge by C. of his duties as collector of poor-rates for the parish of N. C. absconded, having embezzled part of the rates, and allowed others to be lost by not applying for them. The guardians sued the defendant for the loss. The defendant admitted his liability as to the sums embezzled, but disputed his liability as to the sums lost by C.'s negligence, on the ground that the loss would not have occurred if C. had been called upon to account as he ought to have been. It appeared that no negligence could be imputed to the guardians, but there appeared some ground to believe that if the overseers of the parish of N. had discharged their statutory duties with reasonable care the loss would not have occurred:—Held, that the plaintiffs were entitled to recover from the defendant the moneys lost through failure of C. to collect them, for that there had been no negligence on the part of the plaintiffs, and they were not answerable for the negligence of the overseers. *Manafield Union v. Wright*, 9 Q. B. D. 683—C. A. Affirming 46 J. P. 200.

Non-discovery of Fraud.]—A. was bound jointly with B., the trustee of a bankrupt's estate in Scotland, to the extent of 1,000*l.* The condition of the bond was, that B. should faithfully discharge his office, account, &c. The creditors of the bankrupt, according to the practice in Scotland, chose three commissioners to act for them and superintend the proceedings of the trustee. B., by various contrivances, amounting to fraud against the estate, was found in arrear to the amount of 1,000*l.* Whereupon the bond being put in suit against A., he pleaded that the commissioners, by neglect and connivance, caused and permitted the default, or knowing it concealed it from him. Of this imputation there was no distinct proof:—Held, that even on that supposition A. was not discharged. *McTaggart v. Watson*, 10 Bligh, 618. *And see cases ante*, col. 216.

As to Accrual of Liability.]—A. having sent an order to B. for certain goods, C. undertook to guarantee payment to B., upon an undertaking of D. to indemnify C.: B. accordingly informed C. that the goods were preparing, and afterwards shipped them for A. without giving notice to C. that they were shipped; afterwards D. desired to recall his indemnity, upon which C. wrote to B. to know whether he had executed the order; to which no answer was given by B. for a considerable time, he having gone abroad in the interim: upon this C., supposing from the silence of B. that the order was not executed, gave up his indemnity to D.: C. still remained liable to B. on his guarantee. *Oxley v. Young*, 2 H. Bl. 613; 1 Esp. 424.

In Examining Accounts.]—The laches of obligees in a bond (conditioned for the principal obligor to account for and pay over from time

to time all such tolls as he should collect for the obligees), in not properly examining his accounts for eight or nine years, and not calling upon the principal for payment, so soon as they might have done, for sums in arrear, or unaccounted for, is not an estoppel in an action against the sureties. *Trent Navigation Company v. Harley*, 10 East, 34.

An insurance broker, bound with two sureties, became bankrupt, and was indebted to the obligees in a considerable sum for premiums, and they received a dividend of 6s. in the pound under the commission. The premiums were due three years before the bankruptcy, and the obligees did not call on the sureties until after the bankruptcy:—Held, that the sureties were not discharged by the laches of the obligees in suffering the credit of the broker to run on so long beyond the six months stipulated by the bond. *London Assurance Company v. Buckle*, 4 Moore, 153. And see *Hearn v. Cole*, 3 Dow, 459.

Delay in Suing.—The liability of a surety on a bond is not discharged by the delay of the creditor in suing for the debt, or by the circumstance of the principal debtor afterwards executing to the creditor another bond for a larger sum. *Eyre v. Everett*, 1 Russ. 381.

Extent of Delay—Notice.—The defendant guaranteed the payment of the price of certain timber sold by the plaintiff to the defendant's son. The plaintiff received part payment from the son, and afterwards made repeated applications for the residue. More than two years having elapsed from the day stipulated for payment, the son gave the plaintiff a bill of exchange, which was dishonoured, and shortly afterwards became bankrupt. The plaintiff did not give the defendant notice of the dishonour of the bill, nor did he inform him of the state of the account until after the bankruptcy:—Held, that the defendant was notwithstanding liable, and was not discharged by the time that had elapsed, nor by want of notice of the applications made to his son. *Goring v. Edmonds*, 6 Bing. 94; 3 M. & P. 259.

A. guarantees to B. the debt of C. upon condition "that no application shall be made to A. on B.'s part for the amount guaranteed, or any portion thereof, but on the failure of B.'s utmost efforts and legal proceedings to obtain the same from C." C. remains in England two years; then goes abroad insolvent, not having paid the debt to B. No proceedings are taken against him until four years after the guarantee given, when process is issued, and continued on the roll, C. remaining abroad until more than six years after the guarantee given: the guarantor is discharged by the laches of B. *Holl v. Hadley*, 4 N. & M. 505; 2 A. & E. 758.

If A. becomes bound to B. for the honesty of C., who embezzles money, B. may maintain an action on the guarantee, though three years have elapsed without notice having been given of the embezzlement by B. to A.; at least if A. was acquainted with the circumstances from any other quarter, and B. does not appear to have concealed it from him industriously. A. will not be discharged from his guarantee, though B. appears to have given credit to C. for the amount of the sum embezzled. *Peel v. Tatlock*, 1 B. & P. 419.

Not giving Notice.—Under a bond, conditioned that if M. should duly account for all moneys received by him in the plaintiff's service as a clerk; and also that if M. should embezzle the plaintiff's property, and should, within three days after proof thereof, repay the plaintiff the damage sustained by such misbehaviour or misdoing; or, in default thereof, if the defendant should, after notice given, make a full recompense to the plaintiff, the bond was to be void; the plaintiff, in order to render the defendant (the surety) liable for M.'s not accounting, must give the defendant notice thereof; as, by the construction of the condition, the notice must be given for M.'s not accounting, as well as for his embezzling. *Phillips v. Fordyce*, 2 Chit. 676.

Neglect to enforce Payment—Proceeds of Execution.—By a guarantee, the defendant engaged to pay to the plaintiff any debt due to him from the defendant's son, not exceeding 100l., provided that, before the defendant was called on in pursuance of the guarantee, the plaintiff should avail himself to the uttermost of any bona fide securities he held of the son; provided, also, that in case anything should prevent the defendant from receiving and retaining the proceeds of an execution he had levied on his son's property, the guarantee should be void:—Held, that the plaintiff's neglecting to adopt means to enforce payment of a bill by a party who was proved to be totally insolvent, and to have been three years and a half in gaol, where he continued, was not a breach of the condition upon which the guarantee was given. *Muskett v. Rogers*, 8 Scott 51; 5 Bing. N. C. 728.

Held, also, that the circumstance of a portion of the property seized, which turned out not to be the property of the defendant's son, being afterwards recovered by the owner, neither avoided the guarantee nor afforded ground for diminishing the amount of the defendant's liability thereon. *Id.*

Keeping Bill of Exchange Unreasonable Time.—Where the firm of A. & Co. gave a guarantee to B. & Co. that they would indorse any bill or bills which C. might give to B. & Co., in part payment of an order for certain goods then executing for him: B. & Co. to allow 5l. per cent. of the amount of the bills for the guarantee; and C. gave B. & Co. a bill at eighteen months, in part payment of the goods, which the latter kept for seventeen months and ten days, and then finding that C. was insolvent, applied, for the first time, to A. & Co. for their indorsement tendering the amount of commission:—Held, that B. & Co. were concluded by their lache and that A. & Co. were not liable on the guarantee. *Payne v. Ives*, 3 D. & R. 664.

Neglect to Present for Payment.—Where commission broker effected the sale of wool from the plaintiff to C. and P., to be paid for by bill at eight months, accepted by the latter; and the broker agreed to guarantee half the amount for an allowance of one per cent.; and the plaintiff confirmed the sale, and informed the broker that if he could not procure from C. and acceptances of approved houses (which he would prefer), that they would take his guarantee for one-half the amount on the terms proposed and the wool was delivered to the vendees wit

out the intervention of the broker, and the vendors took the acceptance of the former for the amount of the wool, made payable at a banker's; but, before the bill was at maturity, the vendees became insolvent, and the vendors resorted to the broker upon his guarantee:—Held, that he was liable, though the bill had not been presented for payment, and though there was no proof that it would not have been paid if presented. *Holbrow v. Wilkins*, 2 D. & R. 59; 1 B. & C. 10.

Where a debtor indorsed a bill of exchange of which he was the indorsee, over to his creditor by way of collateral security for his debt, and the creditor did not present it at maturity, nor give the debtor notice of its dishonour when presented:—Held, that the creditor could not recover in an action either on his original debt or upon the bill of exchange. *Peacock v. Purcell*, 14 C. B., N. S. 728; 32 L. J., C. P. 266; 10 Jur., N. S. 178; 8 L. T. 636; 11 W. R. 834.

In an action on a note, the defendant pleaded that he made the note jointly with E. for his accommodation, and as his surety only, to secure payment of a loan made by the plaintiff to E.; that at the time when the note was made, the plaintiff, having notice of the premises, agreed, in consideration of the defendant making such note as surety, that the plaintiff would call in and demand payment of the note from E. within three years; that this agreement should be indorsed in writing on the note at the time of making it, which, by mistake, was not done; that the plaintiff omitted to demand payment of the note from E. within three years, whereby he lost the means of obtaining payment from E., who had become insolvent:—Held, that the plea was good, on the ground that the condition, in consideration of which the defendant had become surety, had not been performed by the plaintiff. *Lawrence v. Walmesley*, 31 L. J., C. P. 143; 5 L. T. 798; 10 W. R. 344.

Sale of Goods at a Loss.—When money is borrowed on the security of a bill of sale of the borrower's goods, together with a note for the amount of the loan, signed by him and a third person, payable by instalments, the whole of the residue unpaid to become due upon default in payment of any instalment; and, default being made, the lender takes and sells the goods, and then sues the third person for the balance; it is a good equitable defence for him that he signed the note as surety merely, to the knowledge of the plaintiff, and that the goods would have sufficed, if properly sold, to satisfy the whole claim of the plaintiff, yet by his negligence and misconduct of the sale a loss was occasioned; and it is not material, for this purpose, that the fact of the suretyship does not appear on the face of the note. *Mutual Loan Fund Association v. Sudlow*, 5 C. B., N. S. 449; 28 L. J., C. P. 108; 5 Jur. N. S. 338.

Neglect to Insure.—H. agreed with W. to complete fittings for a warehouse for 3,450*l.*, to be paid by instalments during the progress of the work. The contract contained a stipulation, that W. shall and may insure the fittings from risk by fire at such time and for such amount as the architects may consider necessary, and deduct the costs of such insurance for the time during which the works are unfinished from the amount of the contract. By an agreement, reciting in

part the contract, the defendant agreed with W. to guarantee the due performance of the works by H. W. advanced 1,800*l.* to H. during the progress of the works; after which the fittings, to the value of 2,300*l.*, while still unfinished, were destroyed by accidental fire in the workshop of H. W. had not insured the fittings. H. became insolvent, and never repaid the 1,800*l.*, or any part of it. W. was compelled to pay a sum greater by 340*l.* than the original contract price to complete the work contracted for:—Held, that W. was bound to insure the fittings, and that his omission to do so, in equity, discharged the defendant's liability, not merely to the extent of the benefit he would have derived from the insurance if effected, but in toto. *Watts v. Shuttleworth*, 5 H. & N. 235. Affirmed, 7 H. & N. 353; 5 L. T. 58; 9 W. R. 132—Ex. Ch.

To File Warrant of Attorney.—By an agreement between bankers, a customer and a surety, the surety guaranteed the balance due or to become due from the customer, subject to a limit and to a proviso, empowering the surety at any time to determine by notice his liability as to subsequent dealings. The customer afterwards obtained a loan from the bank beyond the limit of the guarantee, on a warrant of attorney, and simultaneously a second agreement was entered into between the bankers, the customer and the surety, that the warrant of attorney should not prejudice or affect the former agreement, and that the bankers would at any time, when requested by the surety, enter up judgment and issue execution. The bankers omitted to file the warrant of attorney, and the customer became bankrupt:—Held, that the agreement to issue execution was not nudum pactum, and that by the omission to file the warrant of attorney the surety was discharged. *Watson v. Alloock*, 4 De G., M. & G. 242; 1 Eq. R. 231; 22 L. J., Ch. 858; 17 Jur. 568.

In Registering Bill of Sale.—By a deed, dated 25th of August, 1870, the goods of B. and P. were assigned to the plaintiffs as securities for money advanced to them by the plaintiffs. The defendant was a party to the deed, as surety for B. and P. In that capacity he covenanted for payment, on the 25th of August, 1871, and on other days, of a certain sum of money to the plaintiffs. The first instalment of interest became due from B. and P. upon the 25th of February, 1871. It was not paid, and to the knowledge of the plaintiffs B. and P. became embarrassed in their affairs. On the 5th of August they filed a petition in liquidation; a trustee was appointed, one being the solicitor in the liquidation, and the goods were sold by auction. The defendant knew nothing of the embarrassed state of B. and P. By the terms of the deed B. and P. were to remain in possession until default was made; but upon default being so made, the plaintiffs were also, by the terms of the deed, entitled to take possession of the goods, and after giving a month's notice to sell the goods. They did not avail themselves of this power:—Held, that, to the extent of the value of the goods assigned, the defendant was released from liability, by reason of the laches of the plaintiffs in not registering the deed under the Bills of Sale Act, and in not taking possession of the goods when default was made in the payment of interest, and when bankruptcy was, to

their knowledge, impending. *Wulff or Woulff v. Jay*, 7 L. R., Q. B. 756; 41 L. J., Q. B. 322; 27 L. T. 118; 20 W. R. 1030.

Creditor's Misfeasance.—Corn factors supplied flour on credit to a baker, on his executing to them, with a surety, a bond, the condition of which, after reciting that the baker had entered into a contract for the supply of bread to the army, was that the bond was to be void if the baker should deliver to the corn factors his bills on the government as he drew them, and if he and the surety should make good the amount to become due to the corn factors. The corn factors supplied flour, but not of the quality specified in the government contract, which was vacated on that account:—Held, that the corn factors could not as against the surety allege ignorance of the terms of the contract, and that the surety was discharged. *Blest v. Brown*, 4 De G., F. & J. 367.

9. ALTERATION OF INSTRUMENT.

Promissory Note.—A. being indebted to the plaintiff, it was arranged that B. and the defendant should join as her sureties in a promissory note for the amount payable to the plaintiff. The defendant, in ignorance of the arrangement that B. should sign the note, signed a joint and several note for the amount together with A. and as her surety. The note so signed was then handed to the plaintiff, who procured it to be signed by B., without the defendant's consent or knowledge:—Held, that, assuming the note to have been completely issued when it was signed by B., this was an alteration of the note and of the defendant's liability in a material point, and that the defendant was consequently discharged. *Gardner v. Walsh*, 5 El. & Bl. 83; 24 L. J., Q. B. 285; 1 Jur., N. S. 828.

Affixing Seal.—To an action on a guarantee, the defendant pleaded that, whilst the guarantee was in the hands of the plaintiff, it was, without the defendant's knowledge, by some person to him unknown, altered in a material particular, by affixing a seal by and near to his signature, as and for his seal, thereby causing the guarantee to purport to have been sealed by him, and to be his deed; by reason whereof the guarantee became void in law:—Held, that the plea was an answer to the action. *Davidson v. Cooper*, 13 M. & W. 343; 12 L. J., Ex. 467—Ex. Ch.

Inserting Unimportant Word.—A. agreed to do for B. & Co. all the wood-work on an iron ship which they were building for M. & Co., according to a certain tender, the whole to be completed for 3,800l. The contract or tender contained the following clause: "Any important work not mentioned in this tender that may be required to be done by the owners, to be paid for by them, in addition to the amount herein specified." The work was undertaken by A. for B. & Co., upon the faith of a guarantee as follows: "In consideration of your contract with B. & Co. for the wood-work of an iron ship now building by them for M. & Co., we hereby guarantee the payment to you according to the contract." The word "important" in the contract was inserted by A., with the consent of B. & Co., after the guarantee was signed by C.:—Held, that the

contract bound B. & Co. for extra work done, they being the persons referred to therein as the owners, and that the insertion of the word "important" had no material effect upon the liability of C. under the guarantee. *Andrews v. Lawrence*, 19 C. B., N. S. 768—Ex. Ch.

In whose Custody.—Several directors of a banking company, amongst whom was the defendant, signed a document, whereby they severally undertook to pay a sum of money to the bank, the intention, however, being that they should only be bound each for a proportion. The defendant and some others paid their proportion, and the secretary then struck out their names without the knowledge of the defendant, he being under the impression that the legal effect of the document was what had been intended. An action was brought against the defendant on this document to recover the whole amount secured:—Held, that the document was in the custody of the bank as distinguished from the individual directors, and that the above material alteration, therefore, discharged the defendant. *Bank of Hindostan, China, and Japan v. Smith*, 36 L. J., C. P. 241; 16 L. T. 518.

10. PAYMENT.

Subsequently Avoided.—A surety is not discharged by the fact of the creditor having innocently received payment from the principal debtor, if such payment has been subsequently avoided as a fraudulent preference under the bankruptcy laws by the assignees of the debtor, and they have recovered from the creditor the sum paid. *Petty v. Cooke*, 6 L. R., Q. B. 790; 40 L. J., Q. B. 281; 25 L. T. 90; 19 W. R. 1112.

S., and the defendant as his surety, made and delivered to the plaintiff a joint promissory note, for the payment of money due from S. to the plaintiff. S. paid to the plaintiff the amount of the note, and the plaintiff in good faith received such amount, but at the time of making the payment, S. was in insolvent circumstances, and made the payment in contemplation of bankruptcy, of which the plaintiff was ignorant. After the time of payment, S. made an assignment to trustees for the benefit of his creditors. The trustees elected to treat the payment by S. to the plaintiff as a fraudulent preference, and the plaintiff paid the amount to them:—Held, that the plaintiff had a right to maintain an action against the defendant, and that the latter was not discharged from liability in respect of the note. *Id.*

Time of.—Where an obligee of a bond receives the whole principal after it is payable, he cannot recover interest in an action on the bond, as solvet post diem is a good plea. *Dixon v. Parkes*, 1 Esp. 110; *S. P.*, sed quære, *Hellier v. Franklin*, 1 Stark. 291.

To whom.—A payment by the obligor of a bond to the obligee, to whom the obligor is also otherwise indebted, cannot, without some circumstances to shew that it was intended to be made in discharge of the bond, be so applied in favour of a surety of the obligor, in an action upon the bond, under the plea of payment. *Plomer v. Long*, 1 Stark. 153.

Payment of a bond debt to one of two trustees

is a good discharge as to both. *Husband v. Davis*, 10 C. B. 645; 20 L. J., C. P. 118.

Appropriation of Payments by Party guaranteed.]—A. & Co., bankers, advanced 2,000*l.* to B., a customer, by placing it to the credit of his general current account, and took as security a series of ten promissory notes, maturing at the rate of one per week during a period of ten weeks. C., as surety for B., gave a written undertaking that, if the notes were not paid, he would secure the debt by a mortgage upon property of his own. Moneys were paid into B.'s account more than sufficient to meet the bills if they had been so applied, but as the account was at the same time largely drawn upon, it was at the dates of the maturing of the bills constantly overdrawn :—Held, that A. & Co. having received moneys which they might have applied to the satisfaction of the notes, were bound so to have applied them to the relief of the surety, before applying them to the liquidation of the current account, and that the surety was consequently discharged. *Kinnaird v. Webster*, 10 Ch. D. 139; 48 L. J., Ch. 348; 39 L. T. 494; 27 W.R. 212.

Certain of the directors of a company guaranteed personally to the company's bankers the drafts of the agent of the company to the extent of 1,000*l.*, and 1,000*l.* further, undertaking to provide the bankers with funds to meet the acceptances before maturity. The company kept a current account with the bankers, and the drafts of its agent were from time to time honoured and debited to this current account. One of the guarantors died and his estate was under the administration of the court. The company's current account had been constantly overdrawn; at the date of the testator's death it was overdrawn to the amount of 1,605*l.* 18*s.* 6*d.*; and the company was now in liquidation :—Held, that the guarantees given were a continuing security not satisfied by the earlier credits in the current account, and that, therefore, the bankers were entitled to prove against the testator's estate for the sum of 1,605*l.* 18*s.* 6*d.* and interest at four per cent. from the date of the testator's death. *Booth, In re, Browning v. Baldwin*, 40 L. T. 248; 27 W. R. 644.

Action on a bond, dated 10th January, 1837, conditioned for the repayment of principal and interest on the 6th April following, and given as a security by the defendants to the plaintiffs on the advance of 1,000*l.* by the plaintiffs to W., one of the defendants, who had then lately opened an account with a bank of which the plaintiffs were trustees. Several sums of money had been paid in by W. to the credit side of his account previously to and since the execution of the bond :—Held, there being evidence to lead to such a conclusion, that the bond was given as a continuing security, and was not discharged by the sums paid in by W. *Henniker v. Wigg*, 4 Q. B. 792; D. & M. 160; 7 Jur. 1058.

Satisfaction.]—The plaintiffs, in an action against the co-obligor of the defendant on the joint and several indemnity bond of both of them, accepted from the former 215*l.*, the damages being at that time unliquidated, and gave a receipt for that sum, stating it to be in discharge of the damages and costs in that action :—Held, that this receipt did not shew

that the plaintiffs had accepted the 215*l.* in satisfaction of the entire claim to indemnity under the bond; and therefore that they were entitled to recover a further sum against the defendant. *Field v. Robins*, 2 N. & P. 226; 8 A. & E. 90; 1 W., W. & H. 145; 2 Jur. 855.

A. gave B. a bond to secure an annuity, and before any payment became due A. lent B. a sum of money, on which it was agreed that B. should retain the payments of the annuity, as they became due, till that sum was discharged; the agreement to retain held a good plea to an action on the bond, such agreement and retainer being equivalent to a plea of *solvit ad diem*. *Sturdy v. Arnaud*, 3 T. R. 599.

A., as surety, became bound to the guardians of a poor-law union, by a bond conditioned, that the treasurer of the union should discharge the duties of his office "by receiving all moneys tendered to be paid to guardians, by paying, out of the moneys in his hands of the guardians, all orders on him drawn on their behalf," and that he should pay over to the guardians all balances, moneys, &c., due to the union. The treasurer, who was a corn factor, had extensive dealings in corn, and opened accounts in trade with the overseers of the townships who were farmers. No money was received from these townships, but it was the practice of the treasurer to debit the overseers in his trade account with the amount of the poor-rate ordered by the guardians to be paid, and then to debit himself with the amount as paid to him as treasurer. His accounts were audited half-yearly, and the credits on the corn were allowed by the auditor as payments in money. At the last audit the auditors found that the sum of 239*l.* 1*s.* 10*d.* was due from him to the guardians :—Held, that the surety was liable, inasmuch as between the treasurer and the overseers money had in fact passed. *Pattison v. Belford Union*, 1 H. & N. 523; 26 L. J., Ex. 115; 3 Jur., N. S. 116—Ex. Ch.

A. guaranteed the payment to B. of two bills of exchange accepted by C. C. afterwards handed over the amount of the bills to B. A fiat having issued against C., his assignees recovered the money from B. as having been paid by way of fraudulent preference. In an action by B. against A. upon the guarantee, A. pleaded that C. had paid, and B. had received, the money in satisfaction :—Held, that this payment did not amount to a satisfaction. *Pritchard v. Hitchcock*, 6 M. & G. 851; 6 Scott, N. R. 851; 12 L. J., C. P. 322.

Conduct.]—A treasurer of a poor-law board entered with sureties into a bond, with a condition that he should honestly, diligently, and faithfully perform the duties of his office, one of which was to pay orders for money which should be drawn upon him by the guardians. He was a banker, issuing his own notes. On a Friday he paid orders drawn upon him by the guardians, partly in cash and partly in his own notes; and again on Monday forenoon paid similar orders in a similar way, and also gave in exchange for their order, in favour of persons from London, a common banker's draft upon London, which was afterwards dishonoured. The bank stopped payment on Monday afternoon :—Held, that the sureties were discharged, because as to the notes given on Friday, the guardians having kept them during Saturday, conclusively elected to treat

the orders as paid; as to all the notes, the guardians, who were entitled to receive cash, thought fit to receive the notes; and as to the banker's draft upon London, the guardians received it for their own convenience. *Lichfield Union (Guardians) v. Green*, 1 H. & N. 884; 26 L. J., Ex. 140; 3 Jur., N. S. 247.

Pleading.—Action on a bond for the penal sum of 12,000*l.* The declaration set forth the condition which was for the payment of 6,000*l.* with interest, and assigned as a breach the non-payment of the 6,000*l.* (omitting interest). Plea, that the defendant paid the 6,000*l.* with interest according to the form and effect of the condition, is bad. *Bishton v. Evans*, 2 C., M. & R. 12; 3 D. P. C. 735; 1 Gale, 76; 5 Tyr. 639.

Payment, by whom.—Action on a bond. Plea, payment. 200*l.* having been lent by the plaintiff to the defendant on his bond, through M., the defendant's attorney, and who acted for him generally as his agent in his pecuniary affairs, and repayment being afterwards demanded, M. obtained from his banker (the real plaintiff) an advance of 400*l.* for himself, depositing the bond and another bond as a security for repayment, stating in a letter to the plaintiff that he had laid down the money to prevent her any further inconvenience. The defendant was not aware of the application for, or of the repayment of the 200*l.*—Held, that this was not a payment by the defendant. *Lucas v. Wilkinson*, 1 H. & N. 420; 26 L. J., Ex. 13.

11. RESERVATION OF RIGHTS AGAINST SURETY.

Rule.—It is a general rule that a creditor may give time to the principal debtor without discharging his right against the surety, provided he expressly reserves such right. Circumstances may, however, prevent that rule from having effect. *Owen v. Homan*, 4 H. L. Cas. 997; 1 Eq. R. 370; 17 Jur. 861.

Covenant not to Sue.—By a deed under the Bankruptcy Act, 1861, the principal debtor assigned all his property to trustees to sell, with power to them to advance moneys necessary for converting the prepared earth, part of the property assigned, into bricks, and for selling the same, and ultimately to pay thereout rateably, so far as it would extend, the debts of the several creditors. It was also declared that the creditors did, "subject to the proviso, acquit, release, and for ever discharge" the debtor; and then followed a proviso that any creditor who had any security for his demand, or to the payment whereof any person was liable as surety for the debtor, might execute the deed without prejudice to such security or to the claim against any surety.—Held, that the deed operated only as a covenant not to sue, and not as a release extinguishing the debts, and that, therefore, the creditors' rights against any surety of the debtor were legally reserved. *Bateson v. Gosling*, 7 L. R., C. P. 9; 41 L. J., C. P. 53; 25 L. T. 570; 20 W. R. 98.

A. and B. entered into a joint and several bond, conditioned for payment of moneys due by B. to a bank. After the making of the bond, the bank, without the privity or consent of B., executed a deed, whereby the bank released B. from all actions, &c., with a proviso that nothing therein contained was to extend to prevent the bank

from suing any other person than B., who might be liable to make good to the bank any money due from B., or as being jointly or severally bound with B. in any bond, &c., as if the deed had not been executed, it being understood and agreed, that as regards any such suits, the deed should not operate or be pleaded in bar or as a release.—Held, first, that this deed operated only as a covenant not to sue B., and not as a release. *Price v. Barker*, 4 El. & Bl. 760; 24 L. J., Q. B. 130; 1 Jur., N. S. 775.

Held, secondly, that A. was not discharged by the execution of the deed without his consent; the effect of a covenant not to sue the principal debtor qualified by a reserve of the remedies against a surety being to allow the surety to retain all his remedies over against the principal and the covenant not to sue operating only so far as the rights of the surety may not be affected *Id.*

Express Reservation.—A surety by deed guaranteed the payment of a banking current account, and agreed that no composition with the principal debtor should discharge his liability. The principal debtor entered into a deed of composition with his creditors, which contained an absolute release of his debts.—Held, that the surety was not discharged by the release of the principal debtor. *Union Bank of Manchester v. Beech*, 3 H. & C. 672; 34 L. J., Ex. 133; 1 L. T. 499; 13 W. R. 922.

A transaction which would otherwise operate as a release of a surety, such as giving time to the principal debtor, will not have that effect either at law or in equity, if the remedy against the surety is expressly reserved. *Boaler Mayor*, 10 C. B., N. S. 76; 34 L. J., C. P. 230; 12 L. T. 457; 13 W. R. 775.

It is a rule of law that a creditor may suspend his right for ever against the principal debtor and yet preserve his rights against the surety. When a debtor executed a deed which contained a release from his creditors, followed by a proviso reserving any rights his creditors might have against any other persons in respect of any debt due by the debtor, either alone or jointly with any other persons.—Held, that a surety was released. *Green v. Wynn*, 7 L. R., Eq. 28; 41 L. J., Ch. 76; 19 L. T. 553; 17 W. R. 1. Affirmed, 4 L. R., Ch. 204; 38 L. J., Ch. 220; 17 W. R. 385.

If A., the creditor of B., by bills, for which and D. are sureties, by a deed to which B. and C. are parties, discharges B. and C., reserving remedies against D.; such reservation is not defeated by a stipulation that the bills shall be delivered up; it appearing that such stipulation was intended to be so modified as to give to the benefit of such reservation. *Maltby v. Cstairs*, 1 M. & R. 549; 7 B. & C. 735.

A release to one of two sureties who had entered into a joint and several covenant to pay annuity, in default of payment by the grantor, was accompanied by a proviso that the release should not prejudice the right of the grantor to enforce payment against the grantor, and the other surety, or either of them.—Held, that the proviso restrained the operation of the release and that the liability of the co-surety was affected by the release. *Thompson v. Lac*, C. B. 540; 16 L. J., C. P. 75.

To an action by payee against maker of a promissory note. Plea, that the note was made

him and G., and that the plaintiff afterwards, by deed-poll, released G., whereby the defendant was released. The deed, by which it appeared that the creditors of G. agreed to accept a composition, contained a clause that it should not extend to invalidate notes upon which other parties might be jointly liable with G., or prejudice the claim of any creditor against a surety of G.:—Held, that the deed did not release the defendant. *North v. Wakefield*, 13 Q. B. 536; 18 L. J., Q. B. 214; 13 Jur. 731.

A. gave a promissory note payable to B. (for which A. had received no consideration) as a security for goods to be sold to B. on credit; and B. indorsed the note over to the creditors. B. afterwards executed a deed of composition with the creditors, by which he undertook to pay his debt to them by instalments, that they should not be prevented by that arrangement from suing on any securities which they held, and that on default in paying the instalments the deed should be void:—Held, that the delay granted to B. by this agreement did not discharge A. *Nichols v. Norris*, 3 B. & Ad. 41.

Seem, that to reserve a creditor's right against a surety there must be a distinct expression of intention to reserve it. *Oeverend, Gurney & Co. v. Oriental Financial Corporation*, 7 L. R., H. L. 348; 31 L. T. 322. Affirming 7 L. R., Ch. 142; 41 L. J., Ch. 332; 25 L. T. 813; 20 W. R. 253.

Knowledge of Arrangement with Principal.]—A declaration alleged that the defendant, by articles of agreement under seal, which recited that R. M'G. had opened an account with the plaintiffs (a banking company), agreed to guarantee and be accountable for the payment of all sums of money which were or thereafter should become due to the plaintiffs from R. M'G., by reason of any money advanced or owing, or thereafter to be advanced or owing on the banking account, from R. M'G., stating that such guarantee was limited to 500*l.*, and was to be a continuing guarantee; and providing that in case of bankruptcy or insolvency, not only the 500*l.* should be paid to the plaintiffs by the defendant, but that they should be at liberty to apply the whole of the dividends receivable on their whole debt in discharge of the part not guaranteed; that 599*l.* 13*s.* 4*d.* became due upon the advance of moneys by the plaintiffs to R. M'G., yet that R. M'G. did not pay the same, and thereby the defendant became liable to pay 500*l.*, the amount of his guarantee. To this the defendant pleaded, that no part of the 599*l.* 13*s.* 4*d.* was due or owing from R. M'G. to the plaintiffs on the banking account. Another plea was, that, after the accruing of the debt of R. M'G. to the plaintiffs, he was indebted to them in 1,100*l.*, of which the 599*l.* 13*s.* 4*d.* was part, and was also indebted to other persons, and was in insolvent circumstances, and unable to pay the plaintiffs and his other creditors their debts in full, and that thereupon he agreed with the plaintiffs and his other creditors to pay, and the plaintiffs and the other creditors mutually agreed with each other and with R. M'G. to accept from him a composition of 10*s.* 6*d.* in the pound, as a composition in discharge of the respective debts; and the plea then stated the payment by R. M'G. of the composition to the plaintiffs. Replication, that the plaintiffs entered into the composition with the knowledge of the defendant, and upon the agreement that

it should not discharge the defendant from his liability upon the guarantee; which was denied by the rejoinder. At the trial, the facts stated in the replication were found by the jury, and the judge told them that under those circumstances they ought also to find the second issue for the plaintiffs, which they accordingly did:—Held, on a rule to arrest the judgment, that the replication to the fourth plea was good, inasmuch as it did not appear that the reservation of the plaintiffs' rights against the defendant was unknown to the other creditors. *Davidson v. M'Gregor*, 8 M. & W. 755.

Where upon giving time to a principal debtor there is a reservation of rights against a surety the surety is not discharged, and the question whether or not the surety is informed of the arrangement is wholly immaterial. *Webb v. Hewitt*, 3 K. & J. 438.

Intention to Abandon.]—A deed of assignment contained a clause providing that it should not affect any surety nor any security which any of the creditors might have, but if such security should be enforceable against the debtor or his estate, then the creditor (unless he should consent to abandon his security) should be entitled to receive dividends upon so much only of his secured debts as might remain after such security should have been realized, after credit should have been given for the full value thereof; and a creditor, holding a policy of assurance at that time valueless, proved for the full amount of his debt and receive a dividend thereon:—Held, that there was no evidence of the creditor's intention to abandon his security. *Parker v. Anglessea (Marquis)*, 25 L. T. 482; 20 W. R. 162.

Surety suing released Principal.]—The plaintiff, a shareholder in a banking company, became surety for advances to be made by the company to the defendant. The defendant afterwards executed a composition deed, to which the plaintiff and the company were parties, whereby he assigned his property to trustees for the benefit of his creditors; and this deed contained a stipulation for a reserve of remedies against sureties for the defendant. The plaintiff having been compelled to pay the debt to the company:—Held, that he was entitled to recover back the amount from the defendant. *Kearsley v. Cole*, 16 M. & W. 128; 16 L. J., Ex. 115.

Action by the indorsee against the acceptor of a bill of exchange. Plea: A composition deed registered under the Bankruptcy Act, 1861; the deed contained no reservation of rights against sureties. Replication: That the bill was accepted for value and indorsed to the plaintiff for value, and that if he had assented to the deed he would have discharged the drawers. Rejoinder: That before the registration of the deed the drawers consented to the plaintiff executing and becoming bound by the deed. The issue upon the rejoinder having been found for the defendant:—Held, that as by reason of such consent the plaintiff might have come in for the composition and have held the drawers liable for the balance, he was in the same position as if the right to have recourse to the drawers had been reserved to him in the deed, and therefore he was bound by it. *Poole v. Willats*, 4 L. R., Q. B. 630; 38 L. J., Q. B. 255; 20 L. T. 1006; 17 W. R. 1009; 9 B. & S. 957.

In an action by the drawer against the ac

ceptor of a bill, he pleaded a composition deed executed by him before the bill was due. The deed contained a clause reserving the rights of creditors against sureties. In the declaration the bill was stated to be payable to the plaintiff, without showing that it was a negotiable instrument. The replication alleged that the bill was payable not to the plaintiff only, but to the plaintiff or order; that he had indorsed the bill; that the holders of the bill at the time of the making and registration of the deed presented the bill for payment, and it was dishonoured by the defendant. The plaintiff never assented to the deed, and was compelled to pay the amount of the bill to the holders, upon which he became the holder. The replication concluded, that "the plaintiff, except as in the replication mentioned, was not a creditor of the defendant in respect of his claim on the bill:—"—Held, that there was no departure from the declaration, but that the replication was bad because the plaintiff was a creditor and was barred by the deed. *Hooper v. Marshall*, 21 L. T. 639.

12. OTHER CASES.

Felony of Third Parties.—Bond of a clerk to commissioners of public works, conditioned from time to time when so required, to account in writing for all moneys; and also make good answer for and pay the moneys due on the balance of such accounts to the commissioners. In an action on the bond, a replication, that although he had accounted, and a large sum was due on balance of such account, yet he did not make good answer for or pay the balance. Rejoinder, that he paid part of the balance and made good answer for the residue thus, that he was necessarily travelling on the public way in discharge of his duty, with such residue on his person, when the same was violently and feloniously stolen and taken from him:—Held, that the acts of strangers to the bond could not discharge the obligor. *Hornaby v. Slack*, 1 Ir. C. L. R. 126.

Landlords Distraint.—Landlords advanced money to their tenant on a joint note of himself and a surety; they afterwards took a security for this and another sum advanced at the same time, by an assignment of furniture of the tenant by way of mortgage:—Held, that, by taking the furniture under a distress for rent in arrear, they discharged the surety. *Pearl v. Deacon*, 1 De G. & J. 461; 26 L. J., Ch. 761; 3 Jur., N. S. 1187.

Surety becoming Principal.—Judgment having been obtained against a surety, he entered into a new arrangement with the creditor (irrespective of the principal debtor), by which execution was not to issue while he kept up certain policies for securing the debt:—Held, that he became principal, and not surety, by the new arrangement, and that no subsequent dealing between the creditor and the principal debtor would annul it. *Reade v. Lowndes*, 23 Beav. 361; 26 L. J., Ch. 793; 3 Jur., N. S. 877.

Renewal of Liability.—Where a creditor, having already a warrant of attorney from his debtor, takes a promissory note from him and a surety, and afterwards enters up judgment under his warrant of attorney, and takes the goods of

the principal debtor in execution, and subsequently withdraws the execution without the knowledge of the surety, he discharges the surety. But if the surety, after knowing that the execution is withdrawn, makes a new promise, his liability is restored, and he cannot object to the promise as being without consideration. *Mayhew v. Crickets*, 1 Wil. C. C. 418; 2 Bing. 185.

A debtor and his surety persuaded the creditor to accept from the debtor a transfer of a mortgage which the debtor knew to be imaginary, but which the surety, relying on the debtor's statement, believed to be a good security. Afterwards, the creditor, at the request of the surety who suggested to him that he was secured by the mortgage, released the surety. Some friends of the surety, on the faith of this release, lent him money to enable him to compound with his other creditors, which the creditor, at the time of giving the release, knew that they had refused to do unless the release was given:—Held that the creditor was entitled to be restored to his rights against the surety. *Scholefield v. Templer*, Johns. 155; 28 L. J., Ch. 452; 5 Jur. N. S. 619. Affirmed on appeal, 4 De G. & J. 429.

Terms on which Relief granted.—Where surety had pleaded to an action on the guarantee and then filed a bill in equity for an injunction and had put the bankers to unnecessary costs:—Held, that he could only be relieved in equity on paying the costs at law subsequently to the declaration. *Watson v. Allcock*, 4 De G., M. G. 242; 1 Eq. R. 231; 22 L. J., Ch. 858; 1 Jur. 568.

III. RIGHTS OF SURETY.

1. CONTRIBUTION.

a. Nature of Liability.

Under what Instruments.—There is a right of contribution between co-sureties, whether separate instruments or by the same instrument. *Mayhew v. Crickets*, 2 Bing. 185; 1 Wils. C. 418; *S. P.*, *Craythorne v. Swinburne*, 14 V. 160.

But where sureties are bound by different instruments for equal portions of a debt due from the same principal, and the suretyship of each a separate and distinct transaction, there is no right of contribution between them. *Coope Twynam*, 1 Turn. & Russ. 426.

A bond was executed by a principal and two sureties, with a stipulation that the sureties should not be discharged by any new arrangement between the creditor and the principal. One of the sureties compounded with his creditors, and by the terms of the bond the money secured became immediately payable. After the plaintiff signed a separate undertaking to come liable for the whole amount; and upon the principal becoming insolvent, the creditor sued the plaintiff and obtained payment of the amount due. The plaintiff filed his bill against the solvent surety in the first bond for contribution:—Held, that he was entitled to contribution from him. *Whiting v. Burke*, 6 L. R., Ch. Affirming 10 L. R., Eq. 539.

The doctrine of contribution amongst sureties is not founded in contract, but is the result of general equity on the ground of equality;

burden and benefit. Therefore, where three sureties are bound by different instruments, but for the same principal and the same engagement, they shall contribute. *Deering v. Winchelsea (Earl)*, 1 Cox, 318; 2 B. & P. 270.

Where different Shares.]—Where several parties are sureties for the payment of one sum of money, though by distinct instruments, and one pays more than an equal share of that sum, he may have contribution from his co-sureties; but if it is arranged by contract, which it may be, that each surety shall be answerable only for a given portion of one sum of money, in such case there is no right of contribution amongst the co-sureties. *Pendlebury v. Walker*, 4 Y. & C. 424.

—Arrangement for Settlement.]—A., B., C., and D., at request of E., who was in pecuniary difficulties, had joined with E. as sureties in various promissory notes and bills of exchange, but in no instance had they all four joined. A. was liable to a larger amount than B., C., and D. The creditors of E. pressed for payment, and A., B., C., and D. employed W., a solicitor, to enter into arrangements with the creditors on their behalf, and the following agreement was drawn up by W. and signed by A., B., C., and D.:—"We, the undersigned, being jointly liable as guarantors upon certain bills of exchange given in favour of E., authorize W. to act for us as our joint and several solicitor in all matters concerning those bills, and we further authorize W. to take such proceedings as he may think fit to recover the amount of such bills from E. In carrying out the terms W. will negotiate to settle the above upon the best terms he can. As, however, between the parties themselves, the following is the basis of the arrangement inter se: Upon the amount being ascertained for which the liabilities can be discharged, the parties to this arrangement undertake to provide the same in the proportion of one-fourth each, and all sums recovered from E. are to be brought into account and repaid to such parties in proportion to their existing liabilities, or to the amounts respectively found by them." In a suit by A. for contribution:—Held, that upon the true construction of this agreement, the parties did not intend to alter their existing liabilities and to take the entire liability upon themselves in equal shares, but only to advance the requisite money in the first instance in equal shares; and that, consequently, their ultimate rights and liabilities were not thereby varied. *Arcedekne v. Howard*, 45 L. J., Ch. 622—H. L.

Between Wrongdoers.]—The principle that no rights of indemnity and of contribution exist as between wrongdoers is confined to cases where the transaction is actually illegal or void, or where the fraud is so great that on moral grounds the court will not entertain a suit for the relief of the malefactors. The principle is further limited to cases where the fraudulent or illegal transaction is itself the basis of the claim, and does not apply where the transaction, though leading to that which is the basis of the claim, is separable from it. *Power v. Hoey*, 19 W. R. 916.

Promise not within Statute of Frauds.]—A

promise by one co-surety to indemnify another is not within the 4th section of the Statute of Frauds, and therefore need not be in writing. *Thomas v. Cook*, 3 M. & R. 444; 8 B. & C. 728.

Where A., at the request of B., entered into a bond with him and C. to indemnify D. against certain debts due from C., and D. and B. promised to save A. harmless from all loss by reason of the bond:—Held, that this promise was binding, although not in writing, and that A. might recover from B. the whole of the moneys which he was compelled to pay by virtue of the bond. *Id.*

Liability accrues after Payment of more than Share.]—A surety is not entitled to call upon his co-surety for contribution until he has paid more than his proportion of the debt due to the principal creditor, even though the co-surety has not been required by the creditor to pay anything, provided that the co-surety has not been released by the creditor. *Davis v. Humphreys (infra)* followed. *Craythorne v. Swinburne* (14 Ves. 160) discussed. *Snowdon, Ex parte, Snowdon, In re*, 17 Ch. D. 44; 50 L. J., Ch. 540; 44 L. T. 830; 29 W. R. 654—C. A.

A surety is not entitled to sue his co-sureties for contribution until he has paid on account of the principal debt a sum greater than he would be obliged to pay when the entire liability should be fairly apportioned among them. *Davis v. Humphreys*, 6 M. & W. 153; 4 Jur. 250.

Joint Surety at Instance of Plaintiff.]—Where the defendant at the instance of the plaintiff became a joint surety for a third person, and the plaintiff was forced to pay all the money:—Held, that he could not call on the defendant for contribution of a moiety; aliter, if he had become a joint surety of his own motion. *Turner v. Davies*, 2 Esp. 478.

Payment without Demand.]—Where one of two persons, who, as sureties for a third, signed together with the principal a joint and several promissory note, on the note becoming due paid the amount, although no demand had been made or action brought against him by the holder:—Held, that such payment could not be considered voluntary, and that he might sue his co-surety for contribution. *Pitt v. Pursford*, 8 M. & W. 538; 5 Jur. 611.

Nature of Payment.]—A surety has no right to sue his co-surety for contribution, unless the sum paid by him, and in respect of which he sues, is his own money. *Gopel v. Swindon*, 1 D. & L. 888; 13 L. J., Q. B. 113; 8 Jur. 340.

Giving Time to Surety.]—Although time given to the principal will, under certain circumstances, exonerate a surety, yet time given to a surety without the privity of his co-surety, will not, upon his paying the debt, affect his right to contribution against such co-surety. *Dunn v. Slee*, 1 Moore, 2; Holt, 399.

A surety in an indemnity bond may maintain an action against his co-surety, although he has given a subsequent security to the obligees, under which he paid the sum conditioned in the bond, without the knowledge or consent of such co-surety. *Id.*

Taking Security from Principal.]—In a

by a co-surety against his companion for contribution on a bond, it appeared that at the time of executing the bond the plaintiff had, unknown to the defendant, taken a promissory note from the principal for the amount:—Held, that the jury was rightly directed to say, whether the plaintiff and defendant were co-sureties for the principal; and that, if the defendant meant to contend that the giving the promissory note was in consequence of an arrangement that the surety was to look solely to the principal for repayment, he should have asked the judge to put that question to the jury. *Dove v. Whalley*, 2 Ex. 198; 17 L. J., Ex. 225; 12 Jur. 338.

Discharge of Principal—Mistake.—To an action by the plaintiff to recover contribution from the defendant, his co-surety, he pleaded that without his privity or consent the plaintiff had agreed to discharge the principal. Replication, on equitable grounds, that the agreement, by which it was alleged the principal was discharged, was worded by mistake so as to include the claim sued for, contrary to the intention of the parties, and that the plaintiff did not otherwise discharge the principal, and that the true agreement was in all respects performed:—Held, a good replication. *Vorley v. Barrett*, 1 C. B., N. S. 225; 26 L. J., C. P. 1.

Between Drawer and Indorser of Accommodation Bills.—A., being in want of money, applied to the plaintiff and the defendant to put their names to a bill for his benefit, which they agreed to do; A. drawing the bill, the plaintiff accepting and the defendant indorsing; A. at the same time giving the plaintiff and the defendant a memorandum, stating that the bill was accepted and indorsed for his accommodation, and that he would pay the bill when it became due; he, however, not being able to do so, again applied to the plaintiff and the defendant to put their names to a second bill, in order to meet the first, which they did, the position of the names being changed, A. accepting, the plaintiff drawing, and the defendant indorsing, as before. The plaintiff having eventually to pay the amount of the bill, brought an action against the defendant for contribution as a co-surety:—Held, that the defendant was a co-surety, and therefore bound to pay his quota. *Reynolds v. Wheeler*, 10 C. B., N. S. 561; 30 L. J., C. P. 350; 7 Jur., N. S. 1290; 4 L. T. 472.

b. Amount.

Rateable Proportion.—It seems that one of several co-sureties in a bond may recover against any one of the others his aliquot proportion of the money paid by him under the bond, regard being had to the number of sureties. *Cowell v. Edwards*, 2 B. & P. 268.

Even though the insolvency of the principal and of the other sureties is not proved. *Ib.*

If A., B., and C. become bound as sureties for D. in three separate bonds, and any one of them is compelled to pay the whole debt of the principal, the two others are compellable to contribute in proportion to the penalties of their respective bonds. *Deering v. Winchelsea (Earl)*, 2 B. & P. 270; 1 Cox, 318.

A surety may recover contribution, according to the number of sureties, without reference to the number of principals, from his co-sureties in

an action for money paid. *Kemp v. Finden*, 12 M. & W. 421; 13 L. J., Ex. 137; 8 Jur. 65; *S. P.*, *Pitt v. Purssord*, 8 M. & W. 538.

Security obtained by one Co-Surety who has paid off Debt.—C. being indebted to D., four of his friends joined him in signing and giving four promissory notes to secure the payment to D. of the sum of 13,000*l.* and interest. D. effected three policies on the life of C. for, in the aggregate, 10,000*l.* In 1867, Lord H., of E., one of the co-sureties, having been sued by D. on the notes, paid, with the assistance of his father, the Earl of E., the 13,000*l.* and interest by a mortgage of estates which were settled upon the earl for life with remainder to Lord H. of E.; and the earl having paid the premiums and kept the policies on foot, in September, 1871, shortly after the death of C. obtained an assignment from D. of the policies and received the 10,000*l.* from the insurance office. A., another of the four sureties, died. His estate, which was stated to be insolvent, was being administered by the court, and Lord H. of E. brought in a claim against it for contribution in respect of the sum paid to D. on the notes:—Held, that, under all the circumstances of the case, Lord H. of E. and his father, the earl, must be treated as one person, and that the claim for contribution would be allowed, but only after Lord H. of E. had brought into account, as a set-off, the moneys which were received on the three policies assigned to the earl, credit being first given for the premiums and other moneys which had been paid in reference to the transaction. *Arcedeckne, In re*, *Atkins v. Arcedeckne*, 24 Ch. D. 709; 53 L. J., Ch. 102; 48 L. T. 725.

One Surety Insolvent.—One of the sureties of an annuity was obliged to pay the arrears of an annuity, a second was insolvent, and an action was brought against the third for contribution:—Held, that at common law he was liable only to one-third, and not one-half. *Broune v. Lee*, 6 B. & C. 689; 9 D. & R. 700.

Five directors of a company gave their joint and several bond to a bank to secure repayment with interest of a loan made by the bank to the company. By an agreement between five persons interested in the company of the first part, and the five directors of the second part, after reciting the bond, it was agreed that, in pursuance of an agreement made upon the treaty for the loan by the bank, the liability of the several persons parties thereto of the second part, under the bond, should be borne and discharged by the ten several persons parties thereto in equal shares and proportions, and that each of the several persons parties thereto would indemnify the other nine against all actions, &c., in respect of the loan by the bank or in respect of the bond. The company was ordered to be wound up, and the bank recovered judgment against the obligees of bond for the whole amount of principal and interest due thereunder. One of the guarantors had become insolvent. On a bill by two of the guarantors, who had under the judgment paid more than their proportion of the sum secured by the bond, against the other eight guarantors to enforce a rateable contribution from them in respect of the principal, interest and costs recovered under the bond:—Held, that all the solvent guarantors were liable to contribute rateably in respect of the whole amount

recovered under the bond, and that the extra liability arising from the insolvency of one of the guarantors was not to fall upon the defendants to the action at law. *Dallas v. Walls*, 29 L. T. 599.

Costs.—A. and B. were sureties for C., a collector of taxes, who became a defaulter. The obligees sued A. and recovered:—Held, that in an action for contribution, brought by A. against B., A. could only recover half the amount of the verdict against him, and that he could not recover from B. either the half of the taxed costs of the obligees, or the half of his own costs of defending the action brought by the obligees. *Knight v. Hughes*, 3 C. & P. 467; M. & M. 247.

Held, also, that if A., after the verdict in the action against him on the bond, obtained a sum of money from C., he must take that in reduction of the amount of the verdict, and could not apply it either to pay his own costs or the taxed costs of the obligees. *Id.*

A. deposited with the defendant, as a security for goods, a bill accepted by the plaintiff, for which the plaintiff had received no value. A. afterwards paid for the goods, and asked for the restoration of the bill; but the defendant indorsed it for value to G., who sued the plaintiff and recovered:—Held, that the plaintiff might recover from the defendant the amount of the bill as money paid to the use of the defendant, but not the costs of the action by G. against the plaintiff. *Bleaden v. Charles*, 7 Bing. 246; 5 M. & P. 14.

Where the plaintiff and the defendant executed as sureties a warrant of attorney, given as a collateral security for a sum of money advanced on mortgage to the principals, and on default being made by the principals, judgment was entered up on the warrant of attorney, and execution issued against the plaintiff:—Held, that he was entitled to recover from the defendant, as his co-surety, a moiety of the costs of such execution. *Kemp v. Finden*, *infra*.

Interest.—When one of several sureties has paid the principal debt, and some of the co-sureties are insolvent, he is entitled as against the solvent sureties to be repaid their numerical shares of what he has paid with interest from the time of payment, although the instrument does not contain any express indemnity so as to carry interest as on a specialty. *Hitchman v. Stewart*, 3 Drew. 271; 24 L. J., Ch. 690; 1 Jur., N. S. 839.

A surety, who is indemnified against all loss by his principal, and who is compelled to pay the debt of his principal, is entitled to interest upon the amount so paid, though interest was not expressly mentioned in the contract between them, and though there was not any demand of interest, and though the claim in respect thereof was not made until many years after payment. *Petre v. Duncombe*, 2 L., M. & P. 107; 20 L. J., Q. B. 242; 15 Jur. 86.

Use of Recognizance.—When one of two sureties has paid the full amount of a receiver's recognizance, he is entitled to use the recognizance for the purpose of recovering, out of the estate of his co-surety, not only one-half of the sum so paid by him, but also interest thereon from the date of payment. *Swan, In re*, 4 Ir. R., Eq. 208—C. A.

Sureties in a recognizance contribute in proportion to the amounts for which they were respectively originally bound. *MacDouglas, In re*, 10 Ir. R., Eq. 269—C. A.

c. Proceedings.

Action.—A surety may recover contribution from his co-surety in an action for money paid. *Kemp v. Finden*, 12 M. & W. 421; 13 L. J., Ex. 137; 8 Jur. 65.

A. mortgaged an estate to B., in which C. joined as a surety; and A. and C. gave a joint bond for the payment of the sum advanced by B. A. afterwards, by indenture, to which C. was no party, sold the estate to D., who engaged to pay B. the sum advanced by him to A., and covenanted to indemnify A. and C. from the payment thereof. D. being afterwards called on for payment by B., C. advanced to D. the sum due to B. in discharge of the mortgage:—Held, that C. was not entitled to recover from D. in an action for money paid. *Crafts v. Tritton*, 2 Moore, 411.

Where a surety, bound with his principal for the payment of money by instalments, takes a bond as a security, he cannot recover on the implied promise. *Toussaint v. Martinant*, 2 T. R. 100.

Evidence of Payment.—In an action against a co-surety in a bond for contribution, any declaration of the obligee upon what account he received the money paid him in account by the principal obligor is not evidence unless made at the time of payment. *Dunn v. See*, 1 Moore, 2; Holt, 399.

2. RECOUPMENT.

In what Cases.—A. guaranteed to B. & Co. the payment of all goods supplied by them to H. until they received notice from C. of the discontinuance of the guarantee, "but so as A.'s liability under the guarantee should not at any time exceed 250*l.*" H. afterwards became bankrupt, and owed B. & Co. for goods 657*l.*, upon which sum they received a dividend in the bankruptcy. A. paid the 250*l.* under his guarantee:—Held, that A. was entitled to receive from B. & Co. a proportionate part of the dividend. *Hobson v. Bass*, 6 L. R., Ch. 792; 19 W. R. 992.

Four directors of a company, by way of security for any balance which might be due from the company to a bank, gave the manager of a branch of the bank their promissory note for 2,000*l.*, and the manager indorsed the note to the bank. The company was wound up. The bank proved in the winding-up for 3,659*l.* as due by the company to the bank, and was declared entitled to a dividend of 1,051*l.* on that sum. The bank afterwards brought an action against one of the makers of the note, who paid the bank 2,067*l.* for debt and interest due on the note:—Held, that the giving the note was in pursuance of an ordinary contract of suretyship, and that the surety who had paid the 2,067*l.* was entitled to receive from the bank a share of the dividend, bearing the same proportion to the whole dividend as the sum paid by him bore to the sum proved for by the bank. *Gray v. Seckham*, 7 L. R., Ch. 680; 42 L. J., Ch. 127; 27 L. T. 290; 20 W. R. 920.

A person who becomes surety for a limited

amount of a debt has, on paying the amount for which he is liable, all the rights of a creditor in respect of that amount, and is entitled to share in the security held by the creditor for the whole debt. *Goodwin v. Gray*, 22 W. R. 312.

A bank held the guarantee of B. for their debtor's account, whereby it was provided that "the guarantee should extend to the repayment of all moneys which should at any time be due from the debtor to the bank, and should be a continuing guarantee to the extent of 800*l.* . . ." and "that the guarantee should not be considered as wholly or partially satisfied by the payment or liquidation at any time or times thereafter of any sums for the time being due, but should extend to and be a security for every and all future sum or sums of money at any time due to the bank thereon notwithstanding any such payment or liquidation;" and "that all dividends, compositions, and payments should be taken or applied as payments in gross, and that the guarantee should apply to secure any ultimate balance due to the bank." The debtor having filed a petition for liquidation, B. paid 800*l.*, the amount of his guarantee, to the bank. Upon a question whether the bank, or B., was entitled to prove for the 800*l.*:—Held, that B. having by the guarantee contracted himself out of his original right, in favour of the bank, the latter was entitled to prove for the whole amount of their debt, including the 800*l.* paid by B. *Midland Banking Company, Ex parte, Sellers, In re*, 38 L. T. 395.

The deed of a surety does not extinguish the simple contract debt of the principal. *White v. Cuyler*, 6 T. R. 176; 1 Esp. 200.

A surety may in equity compel his principal to relieve him of his liability by payment of the debt. *Antrobus v. Davidson*, 3 Mer. 578.

Amount.]—A surety who compounds a debt for which his principal and himself have become jointly liable, and takes an assignment of that debt to a trustee for himself, can only claim against his principal the amount which he has actually paid. *Reed v. Morris*, 2 Mylne & C. 361; 1 Jur. 233.

The plaintiff and defendant being joint makers of a promissory note, the defendant as principal, and the plaintiff as his surety, the defendant covenanted with the plaintiff to pay the amount to the payee of the note on a given day, but made default:—Held, in an action on this covenant, that the plaintiff was entitled, though he had not paid the note, to recover the full amount of it by way of damages. *Loosemore v. Radford*, 9 M. & W. 657; 1 D., N. S. 881.

Mistake.]—The plaintiff was co-surety with K. in a bond given by B. to the guardians of a union, conditioned for the due accounting to them of moneys received by him as treasurer. At the time the bond was entered into B. was a member of a banking firm, into which the moneys of the union were afterwards paid and drawn out by the guardians by cheques in their name. The firm became bankrupt, and B. having ceased to be the treasurer, the guardians demanded of the plaintiff, as such surety, the balance due from B., the late treasurer. The plaintiff, in ignorance of the facts, paid the money:—Held, that the sureties were not liable on the bond, and that the plaintiff having paid the money in ignorance of the facts, was entitled to recover

it back. *Mills v. Alderbury Union (Guardians)*, 3 Ex. 590; 18 L. J., Ex. 252.

Retainer by Executor.]—A surety having paid the debt of his principal is entitled to rank as a simple contract creditor for the amount, and, if made executor, to retain it out of the assets of the principal against all other creditors of equal degree. *Boyd v. Brooks*, 34 L. J., Ch. 605; 12 L. T. 38; 13 W. R. 419.

3. SECURITIES.

Title to.]—A surety is entitled to the benefit of any security which the creditor has received for the debt, though he has received it after the contract of suretyship. *Campbell v. Rothwell*, 47 L. J., Q. B. 114; 38 L. T. 33.

Marshalling—In what Cases.]—A. having effected policies upon his own life with an assurance office, mortgaged them to the office as a security for successive loans. In one of these mortgages B. became surety for repayment of the amount borrowed. A. subsequently became bankrupt, and B. was compelled as surety to pay part of the debt. Upon A.'s death:—Held, as against his assignee in bankruptcy, that B. was entitled to marshal the securities so as to obtain repayment out of the balance of the several policy-moneys of the amount which he had been compelled as surety to pay. *Heyman v. Dubois*, 13 L. R., Eq. 158; 41 L. J., Ch. 224; 25 L. T. 558.

When given by Principal to one Co-Surety.]

—A surety who has obtained from the principal debtor a counter-security for the liability which he has undertaken, is bound to bring into hotchpot, for the benefit of his co-sureties, whatever he receives from that source, even though he consented to be a surety only upon the terms of having the security, and the co-sureties were, when they entered into the contract of suretyship, ignorant of his agreement for security. *Steel v. Dixon*, 17 Ch. D. 825; 50 L. J., Ch. 591; 45 L. T. 142; 29 W. R. 735.

Transfer of the Securities on Payment off of Mortgage on Premises.]

—In December, 1854, S. assigned certain premises and a policy of assurance to secure the repayment of a sum of 200*l.* advanced to him by W., and interest. The proviso for redemption was that, on payment of the money, W. would reassign the premises and policy unto S., his executors, administrators or assigns, or as he or they should direct. F., by the same indenture, as surety, covenanted for himself only, with W., that while the 200*l.* or any part should remain owing he would pay the interest and premiums, and he also assigned a policy on his own life, and covenanted to pay the premiums. W. at four different periods between May 1856, and May, 1866, advanced moneys amounting to 530*l.* to S. on the security of the same premises. S. made default in the payment of interest W. died in 1878, and his executors made a demand upon F. for all arrears, which he paid, and he also paid the premiums on the policy of S.:—Held, that F. was entitled to have a transfer of all the securities on paying what was due upon the mortgage of December, 1854. *Forbes v. Jackson*, 19 Ch. D. 615; 51 L. J., Ch. 690; 31

W. R. 652. And see *Kirkwood, In re*, 1 Ir. R., Ch. 108.

Indorsing Acceptance.]—The indorser of a bill of exchange is a surety for the payment to the holder, and, having paid it, is entitled to the benefit of any securities to cover it deposited with the holder by the acceptor. He is so entitled whether at the time of his indorsement he knew, or did not know, of the deposit of those securities. The surety's right in this respect in no way depends on contract, but is the result of the equity of indemnification attendant on the suretyship. *Duncan, Fox & Company v. North and South Wales Bank*, 6 App. Cas. 1; 50 L. J., Ch. 355; 43 L. T. 706; 29 W. R. 763—H. L. (E.).

S. C. R., one of the partners of R. & Sons, in December, 1874, deposited with the N. & S. W. Bank the title-deeds of two of his own freehold properties, and signed a memorandum acknowledging them to be deposited as securities for what the N. & S. W. Bank might advance to the firm in the way of discounts. In November, 1875, D. & Co. sold to R. & Sons a cargo of corn to be paid for in cash. Cash was paid only for part. R. & Sons offered a bill of exchange for the rest, which was declined. D. & Co. were customers of the N. & S. W. Bank. R. & Sons said if D. & Co. would inquire of those bankers they would find it would be all right with their bills. The bank manager refused to discount the bill without the indorsement of D. & Co., but said that he believed D. & Co. would incur no more than a nominal liability by putting their names on the bill. D. & Co. thereupon consented to take the bill, indorsed it in the ordinary way, and it was discounted by the bank and carried to their credit. In January, 1876, R. & Sons stopped payment. The bill became due in February, and was dishonoured. D. & Co., who then became acquainted with the fact that securities had been deposited with the bankers to cover advances on R. & Sons' bills, brought an action against the N. & S. W. Bank to have the benefit, so far as they would go, of the securities deposited in December, 1874, claiming to be sureties to the bankers for what was due upon the bill:—Held, that D. & Co. were sureties on the bill, and that as such they were entitled to the benefit of these securities. *Ib.*

Vendor's Lien—Delivery Order.]—On the 3rd of March goods belonging to C., lying at the St. Katharine Dock, in the custody of the Docks Company, were bought by D., as broker for buyers and sellers, for B. & Co., without disclosing the names of his principals, and D. indorsed to them the delivery order he had obtained from the sellers, on the representation of B. & Co. that the goods were wanted for immediate shipment. They, however, pledged their interest in the goods to the plaintiffs, and indorsed the order to them. On the prompt-day, the 18th of March, the plaintiffs' clerk lodged the order at the London office of the Docks Company, with this memorandum, "Hold within to our order, and have warrants made out as soon as possible." He was told that the warrants would be ready with the goods on the 20th of March. Three hours later a messenger from the office reached the warrant office at the Dock House with a notice that the order had been lodged. Meanwhile B. & Co. had stopped payment, and

D. being so informed, and having no notice of the plaintiffs' title, on the same day paid C. for the goods, and through a clerk who reached the Dock House before the messenger had arrived, obtained at the warrant office a warrant for the goods in the name of C., who indorsed the same to D., and gave him a second delivery order. The first delivery order was returned to the plaintiffs by the Docks Company, who refused to act upon it. In an action by the plaintiffs, claiming as against the Docks Company, C., and D., to be entitled to the goods:—Held, that D. was the surety, and B. & Co. the principal debtors; that, in the circumstances of the case, the unpaid vendor's lien had passed to D.; that the title to the goods was in D. *Imperial Bank v. London and St. Katharine Docks Company*, 5 Ch. D. 195; 46 L. J., Ch. 335; 36 L. T. 233.

And see cases ante, col. 156.

Under 19 & 20 Vict. c. 97.]—This act applies to a contract entered into before the passing of the act, provided a breach of it has taken place, and payment has been made by the surety after the passing of the act. *Cochran, In re*, 5 L. R., Eq. 209; 37 L. J., Ch. 293; 17 L. T. 487; 16 W. R. 324.

The court has no power under this provision to enforce by order the remedy there given. *Phillips v. Dickson*, 8 C. B., N. S. 391; 29 L. J., C. P. 223.

A surety is not entitled to have an assignment of the principal security, unless he pays the debt in full. *Ewart v. Latta*, 4 Macq. H. L. C. 983.

Where two properties are mortgaged by A. to B. for distinct sums, and C. is surety for the one only, the right of B. to retain all the securities until repaid both debts overrides the right of C. to have the benefit of the securities for that debt for which he is surety. *Farebrother v. Wodehouse*, 23 Beav. 18; 26 L. J., Ch. 81; 2 Jur., N. S. 1178.

A co-debtor who has paid the entire debt in respect of which judgment has been recovered against himself and the other co-debtors, is entitled to an assignment of such judgment, and it is no defence to an action by him against the judgment creditor for refusing to assign it, to plead that such judgment had become satisfied by payment by such co-debtor after he had been taken in execution on the judgment. *Batchellor v. Lawrence*, 9 C. B., N. S. 543; 30 L. J., C. P. 39; 6 Jur., N. S. 1306; 3 L. T. 508.

A surety is entitled to the benefit of all securities taken by the creditor, whether he has notice of them or not. *Pearl v. Deacon*, 24 Beav. 186; 3 Jur., N. S. 879; *S. P., Strange v. Fooks*, 4 Giff. 408.

Discharge of Surety by Loss of Securities.]—See ante, col. 183.

IV. ACTION AGAINST SURETY.

1. GENERALLY.

Who may Sue.]—Where a father, on his son's entering as an underwriter at Lloyd's, gave the committee of that body a letter by which he held himself responsible for all his son's engagements in that capacity; in an action on the guarantee by the committee:—Held, that the committee of Lloyd's, and the corporation of Lloyd's, as their successors, were trustees of the

benefit of the guarantee for all the persons, whether members or outsiders, with whom the son had contracted engagements as an underwriting member, and that the corporation could maintain an action to enforce the guarantee against the father's estate for the benefit of all those persons; on the ground, as to the outsiders, that the brokers, through whom the son's engagements with them were contracted, were trustees for their principals of the right which they themselves had to call on their own agents, Lloyd's, to enforce the guarantee for their benefit. *Lloyd's v. Harper*, 16 Ch. D. 290; 50 L. J., Ch. 140; 43 L. T. 481; 29 W. R. 452—C. A.

Right of Set-off.—In an action by the payee of a joint and several note against one who, to the knowledge of the payee, joined in it as a surety only, it is competent to the surety, by way of equitable defence, to plead a plea of set-off due from the payee to the principal, arising out of the same transaction out of which the liability of the surety arose. *Becherre v. Lewis*, 7 L. R., C. P. 372; 41 L. J., C. P. 161; 26 L. T. 848; 20 W. R. 726.

The plaintiff signed and delivered to the defendant the following document: "In consideration of your having, at my request, agreed to become a director of the Surrey Gas Association, and to be and act as director, I hereby undertake and agree to guarantee, indemnify and save you harmless from and against all losses, costs, charges, damages and expenses which you may bear, incur, sustain or to be put to by reason thereof, or on account of actions as director, and I further agree to accept a transfer of twenty-four of your shares in the association when requested by you, such transfer to be at my own expense, costs and charges, and I undertake to pay all calls for and in respect of such shares." The plaintiff having afterwards sued the defendant for a debt:—Held, that the defendant might set off the expenses incurred by him as a director as money paid for the plaintiff's use. *Hutchinson v. Sydney*, 10 Ex. 438; 3 C. L. R. 174; 24 L. J., Ex. 25.

A declaration that in consideration the plaintiff would accept, for the defendant's accommodation, a bill of exchange, and would deliver it to him in order that he might negotiate it for his own use, the defendant promised to indemnify and save harmless the plaintiff from any loss or damage by reason thereof and that the plaintiff accepted the bill, yet the defendant did not indemnify and save harmless the plaintiff from loss or damage by reason thereof, and the plaintiff, as acceptor, was obliged to and did pay the holder the amount of the bill, with interest, and the costs of an action brought on the bill, and the plaintiff also incurred costs and expenses in defending and settling the action. Plea to the plaintiff's claim, in respect of the amount of the bill and interest, a set-off. Another plea to the costs of the action, and the costs and expenses incurred in defending and settling the action, that the whole of these were incurred at the defendant's request, concluding with a set-off:—Held, that the first plea was good, as the defendant might sever so much of the plaintiff's claim as was liquidated, and plead a set-off to that; and that the second plea was bad, as pleaded to costs incurred, but not paid. *Cramp-ton v. Walker*, 3 El. & El. 321; 30 L. J., Q. B. 19; 7 Jur., N. S. 43; 9 W. R. 98.

A guarantee, being a mere contract of indemnity, cannot form the subject of a set-off. *Morley v. Inglis*, 5 Scott, 314; 4 Bing. N. C. 58; 6 D. P. C. 202; 3 Hodges, 270.

Joint Debt of Defendants—Debt due from Plaintiff to Co-surety.—Action on a covenant to pay all liabilities which the plaintiff might incur under a deed of assignment made between the plaintiff and other parties. The defendant pleaded that the covenant was the joint and several covenant of himself and one Wilson, and that before action the plaintiff was indebted to Wilson in an amount exceeding the plaintiff's claim against the defendant; and that Wilson had assigned the plaintiff's debt to himself and the defendant in equal shares as tenants in common. As to one half of the plaintiff's claim the defendant claimed to set off one half of the debt so assigned, and as to the other half, the defendant said that he was entitled to be exonerated by his co-surety Wilson, and to call upon him to contribute in equal shares to the payment of the plaintiff's claim, and was entitled to set off the share remaining vested in Wilson against this part of the plaintiff's claim:—Held, that the defence was no answer to the plaintiff's claim. *Bowyear v. Pawson*, 6 Q. B. D. 540; 50 L. J., Q. B. 495; 29 W. R. 664.

Surety of Company.—A surety for a debt of a company paid the debt after the date of an order for winding up the company under the Joint Stock Companies Acts, 1856 and 1857. Among the securities for the debt in the hands of the creditor was a promissory note of the company:—Held, that the surety was entitled to set off against a debt due from him to the company an equal amount of the money due from the company on the note. *Moseley Green Coal and Coke Company, In re, Barrett's case*, 4 De G., J. & S. 756.

2. PLEADINGS.

Claims.—If B., by a guarantee, undertakes to A. to answer for the payment of goods to be sent by him to C., A. cannot maintain indebitatus assumpsit against B., for the price of the goods sent to C. accordingly, but must declare specially on the guarantee. *Mines v. Sculthorpe*, 2 Camp. 215.

A. drew a bill nominally for a specific purpose, which he was authorized to do, and got it discounted with some bankers who held a guarantee from B. for that particular bill; A. applied the money to other purposes, and B. was obliged to pay the banker under his guarantee. Semble, that A. subjected himself to a special action on the case. *Jones v. Fleming*, 7 B. & C. 217.

It is not necessary in a declaration against a person, on his undertaking to be answerable for or to pay the debt of another, to state an agreement, a note, or a memorandum, or the terms of any such, or the parties thereto, or that it was in writing or signed by the defendant. *Lilly v. Hewitt*, 11 Price, 494.

It is not necessary to aver a request made to the party himself, in the first instance, to pay the debt before the guarantor is resorted to; at least an averment, that he had neglected and refused to repay the money, is sufficient for the purpose of maintaining the action against the guarantor. *Id.*

A declaration stated that S. was in the custody of the warden of the Fleet, in execution at the suit of the plaintiff, upon a judgment, and that in consideration that the plaintiff would cause him to be discharged, and would take his warrant of attorney for the debt and costs, the defendant undertook that S. should be forthcoming to satisfy the amount of the judgment to be entered up on the warrant of attorney, on the 18th July, 1840, at the office of Mr. A., and also, that one day's previous notice of meeting S. should be given to Mr. A. Averment, that the plaintiff did discharge S. out of custody, and took a warrant of attorney for the debt and costs. Breach, that S. was not forthcoming to satisfy the amount of the judgment so to be entered up as aforesaid, at the day and place agreed on, nor was one day's notice given to Mr. A.:—Held, sufficient, on motion in arrest of judgment, without an averment that judgment was actually entered up on the warrant of attorney. *Page v. Jarvis*, 8 M. & W. 136; 5 Jur. 412.

A declaration upon an undertaking to indemnify and save harmless the plaintiff from all actions which might be brought by C. for or in respect of rent then due or to become due for premises, stating that C. brought an action against the plaintiff for rent "claimed to be due" for the occupation of the premises for a certain time then elapsed; that the plaintiff was forced and obliged to pay the same, and that the defendant had failed to indemnify him—is bad, for not shewing that the rent in respect of which C. brought his action was due at the time of the defendant's promise, or became due afterwards. *Leachbery v. Evans*, 3 M. & G. 210; 3 Scott, N. R. 176.

— **Construction.**—A declaration on a guarantee omitted in the description of the contract the following clause: "This guarantee is only to extend to secure moneys becoming due in respect of dealing up to, and inclusive of, the day of receipt, by" (plaintiff), "of a written notice from me" (the guaranteeing party), "to discontinue this guarantee:":—Held, no variance. *Jones v. Clarke*, 3 Q. B. 194.

A declaration stated that the defendant promised that in the event of A.M. making default in payment of 15*l.* 3*s.*, the defendant would, on such default being made, immediately pay the plaintiff that sum; whereas the terms of the guarantee, as proved, were as follows: "In the event of A.M. making default, I will, immediately on such default being made, and a letter being sent to me at 62, Gower-street, Bedford-square, giving me notice of such default, pay," &c.:—Held, as the declaration alleged an absolute, while the terms of the guarantee conveyed only a qualified conditional promise to pay on a letter being sent as a condition precedent, that there was a variance between the guarantee declared on and the guarantee proved. *Higgins v. Dixon*, 2 D. & L. 124; 14 L. J., Q. B. 329; 10 Jur. 376.

A breach assigned in a declaration, upon a guarantee that the plaintiff would sell and deliver goods to A., the defendant guaranteed the payment in case A. did not pay for them, was, that the defendant had not guaranteed the payment or paid. The defendant pleaded that he had guaranteed the payment:—Held, that the words in the breach were not to be understood as used disjunctively, and that proof that the de-

fendant had executed the instrument of guarantee did not entitle him to a verdict on that issue. *Boyd v. Moyle*, 2 C. B. 644.

In an action on the following guarantee: "Whereas W. C. is indebted to you in a sum of money, and may have occasion to make further purchases from you; as an inducement to you to sell him such goods, and continue your dealing with him, I hereby agree and undertake to guarantee you in 100*l.*, payable to you in default on the part of W. C. for two months." The declaration stated the promise to be, to guarantee the plaintiffs in 100*l.* "payable on default of W. C. on two months' notice thereof to the defendant:":—Held, a variance. *Allan v. Kenning*, 2 M. & Scott, 768; 9 Bing. 618.

A declaration on a guarantee stated the consideration of the instrument to be, that the plaintiff would give credit to a third person "in manner then and there agreed upon between them:": by the correspondence produced in evidence to support such guarantee, the terms on which the credit was stated to be given were "to be agreed upon:":—Held, that the substance of the consideration was properly set out, and consequently that there was no variance. *Irving v. Mackenzie*, 1 B. & B. 523.

In an action on a guarantee, the declaration stated that the defendants undertook to indemnify A. for holding goods in his warehouse on their behalf, and delivering the same up to them when requested so to do: on the production of the instrument, it appeared that the defendants only guaranteed him for holding the goods in his warehouse on their behalf:—Held, that this was no variance, as it must be implied that he was to deliver them up to the defendants. *Sampson v. Burton*, 4 Moore, 515; 2 B. & B. 89.

A declaration on a guarantee stated that P. kept an account with a banking company, and was indebted to them in 800*l.* for money advanced by them to him, and that it was proposed that they should advance to P. more money; and thereupon an agreement was entered into between the company and the defendants, and signed by them, as follows: "We, the undersigned, hereby indemnify (the company) to the extent of 1,000*l.*, advanced or to be advanced to P., but this indemnity to cease when P. shall have paid 1,000*l.* to the credit of his account." The evidence was, that at the time the guarantee was given, the sum of 1,400*l.* was due from P. to the company for money already advanced:—Held, that the guarantee, construed with reference to the facts existing at the time it was given, did not disclose a good consideration, and that if the preliminary averments in the declaration were to be taken as a statement of part of the consideration, they were put in issue by non assumpsit, and were not proved. *Bell v. Welch*, 9 C. B. 154; 19 L. J., C. P. 184; 14 Jur. 432.

— **Recovery on Common Counts.**—Where, on the trial of an action upon a guarantee, for the payment of work done for a third person, the plaintiff at first shaped his case upon the guarantee, but afterwards resorted to the common counts, and made out the defendant's liability as a principal, and recovered a verdict on those counts:—Held, that the verdict could not be disturbed. *Edge v. Frost*, 4 D. & R. 243.

A defendant undertook to see the plaintiff paid for certain goods supplied by him to A., at the defendant's request. After the goods had been

supplied, and A. had made default in payment, the defendant acknowledged his liability under the guarantee, and promised to pay the plaintiff the price of the goods. Neither the guarantee nor the subsequent promise was in writing:—Held, that the plaintiff was entitled to recover on an account stated. *Wilson v. Marshall*, 15 Ir. C. L. R. 467.

Defences—Summary Judgment.]—A surety whose principal has not admitted the debt claimed by the plaintiff, and who has received no particulars of demand, will be allowed to defend an action on a specially-indorsed writ without paying money into court or giving security. *Lloyd's Banking Company v. Ogle*, 1 Ex. D. 262; 45 L. J., Ex. 606; 34 L. T. 584; 24 W. R. 678.

—New Agreement.]—In an action on a contract of guarantee, it is a good bar, that before breach a new contract has been made to pay absolutely. *Taylor v. Hillary*, 1 C., M. & E. 741; 3 D. P. C. 461; 1 Gale, 22; 5 Tyr. 373.

A declaration stated that the plaintiff engaged C. as collecting clerk, and required security previously to employing him, and, in consideration that the plaintiff would employ C., the defendant gave his guarantee. Plea, that before the defendant made the promise, and before the plaintiff required the security, the plaintiff and C. had agreed together that the plaintiff should employ C., which agreement was in force at the time of the defendant's promise:—Held, that this was a denial that C. was employed at the request of the defendant, and, therefore, that the plea traversed the consideration alleged, and amounted to the general issue. *Lyall v. Higgins*, 3 G. & D. 585; 4 Q. B. 528; 12 L. J., Q. B. 241; 7 Jur. 644.

—Statute of Frauds.]—A declaration stated, that the defendant guaranteed the payment of goods furnished by the plaintiff to H., at the defendant's request. Plea, that, before breach of that undertaking, it was agreed that the plaintiff should supply goods to H., and that they should be paid for at the end of three months by a joint bill at four months, to be accepted by the defendant, which agreement the plaintiff, before breach of the former declared on, accepted in full discharge of such former agreement, and released the defendant from performing it:—Held, that the second agreement did not require to be in writing, pursuant to 29 Car. 2, c. 3, s. 4, being an agreement by which the defendant became absolutely bound as an original debtor; and not being an accord and satisfaction, but a substituted contract, afforded a good defence to the action without alleging performance. *Taylor v. Hillary*, *supra*.

The objection that there is no note in writing of a promise to pay the debt of another within 29 Car. 2, c. 3, s. 4, need not be pleaded specially. *Eastwood v. Kenyon*, 11 A. & E. 438; 3 P. & D. 276; 4 Jur. 1081.

In an action on a guarantee, the defendant may shew, under the general issue, that the consideration alleged in the declaration is not the actual consideration to be inferred from the instrument. *Raikes v. Todd*, 1 P. & D. 138; 8 A. & E. 846; 1 W., W. & H. 619.

To an action upon a guarantee, a plea that the promise declared on was a special promise for

the debt of another, and that no agreement in respect thereof, nor any memorandum or note thereof in writing, was signed by the defendant, was bad on special demurrer, as amounting to an argumentative denial of the contract or promise alleged. *Reade v. Lambe*, 6 Ex. 130; 2 L., M. & P. 67; 20 L. J., Ex. 161.

Replication.—Where a defendant pleads that the contract declared upon was a guarantee for the debt of another, and that no memorandum thereof, stating the consideration, was or is in writing signed by the defendant, or any person authorized by him; the plaintiff may reply, that a memorandum of agreement in writing, stating the consideration, was signed by the defendant, without setting out such memorandum in the replication. *Wakeham v. Sutton*, 2 A. & E. 78; 4 N. & M. 114; S. P., *Lysaght v. Walker*, 5 Bligh, N. S. 1.

The defendant and P. agreed for the sale by P. to the defendant of the "put or call" of some foreign railway shares, at a certain price per share, at any time before or on the 18th February, 1844. Before that day the defendant agreed to resell the option to the plaintiff, and to guarantee the performance of the agreement by P. On the 16th February the plaintiff required the delivery of the shares pursuant to the terms of the agreement, but it was at the same time verbally agreed between him and the defendant and P., that they should be delivered by P. to the plaintiff, not on the 18th February, but on the 2nd March, at Paris. To an action on this agreement the defendant pleaded, that, on the 18th February, it was agreed between the plaintiff and P., without the knowledge or consent of the defendant, that the shares should not be delivered according to the notice given by the defendant to P. (i.e. for the 18th February), but that the contract should be carried over, and the delivery of the shares postponed until the 1st March; and so that P. made default with the leave and licence of the plaintiff. The replication denied that it was so agreed:—Held, that this put in issue not only the fact of the agreement, but also the fact that it was made without the knowledge or consent of the plaintiff. *Hargreaves v. Parsons*, 13 M. & W. 561; 14 L. J., Ex. 250.

3. EVIDENCE.

Judgment against Principal not binding on Surety apart from Agreement.]—In the absence of special agreement a judgment, or an award against a principal debtor, is not binding on the surety, and is not evidence against him in an action against him by the creditor, but the surety is entitled to have the liability proved as against him in the same way as against the principal debtor. *Young, Ex parte, Kitchen In re*, 17 Ch. D. 668; 50 L. J., Ch. 824; 41 L. T. 90—C. A.

A judgment in an action inter partes is only binding on the parties to the action and those claiming under them, except in a case where there is an express contract by C. to indemnify B. against an action brought against him by A. In such a case judgment in the action by A. against B. will be conclusive in an action by B. against C. upon the contract of indemnity because that is the real meaning of such contract. *Parker v. Lewis*, 8 L. R., Ch. 1035

43 L. J., Ch. 281; 29 L. T. 199; 21 W. R. 923, 928.

Accounts of Principal.]—An account delivered by a principal charging himself is evidence against his surety. *Lysaght v. Walker*, 5 Bligh, N. S. 1.

Limitation of Liability.]—To an action on a guarantee the defendant pleaded, that the guarantee was given by him on terms which limited his liability thereunder; and the plaintiff traversed this plea:—Held, that, in this state of the record, the plaintiff was not at liberty to object to the admissibility of evidence to prove what those terms were, on the ground that they were not shewn to have been reduced into writing. *Galley v. Taylor*, 2 C. & K. 551.

Nature of Service.]—A declaration stated the consideration to be, that A. "would then engage" C. as traveller, and averred that "A. did then engage C.;" it was proved that A. had previously employed him in that capacity on one occasion:—Held, that this proof was sufficient. *Norton v. Powell*, 4 M. & G. 42.

Delivery of Goods.]—On a guarantee to pay for goods sold and delivered to a third person, what such person has said respecting the goods sold to him is not evidence to charge the person giving the guarantee; the delivery of them must be proved. *Evans v. Battie*, 5 Esp. 26. And see *Bacon v. Chesney*, 1 Stark. 192.

Evidence that, according to the custom of trade, the plaintiffs delivered coals to N. K. daily, and that at the end of every month he gave a bill payable in two months, is not sufficient to charge the defendant upon a guarantee for the payment of coals to be delivered to N. K. at a credit of two months from the delivery. *Hull v. Hudley*, 5 Bing. 54; 2 M. & P. 136.

If in an action on a guarantee for payment for goods to be supplied to A. the plaintiff avers that goods were supplied to A., and the defendant pleads non assumption, this admits the supply of the goods to A., and no proof is required in support of the averment, and the plaintiff need not give any evidence that the goods were supplied, except with the view of shewing the amount of damages. *Taylor v. Hillary*, 7 C. & P. 30.

Notice.]—A declaration stated that, in consideration that R. J. in his lifetime (of whom the plaintiff was administratrix) would execute a bond to W. J., in the penal sum of 600*l.*, the defendant undertook that he would save harmless and indemnify R. J., his executors and administrators, from any loss or damage, by reason of his executing the bond: the declaration then averred the execution of the bond by R. J., his death, and the grant of administration to the plaintiff; and that she, as administratrix, became liable to pay and satisfy the bond to W. J., of which the defendant had notice; but that he did not indemnify the plaintiff, as such administratrix, from loss or damage by reason of the execution of the bond; by means whereof she, as administratrix, was called upon, and forced, and obliged to pay, and did pay to W. J., 310*l.*, secured by the bond, and a further sum for the costs of an action against her. Plea, that the plaintiff, as administratrix, was not called upon, or forced, or obliged to pay, nor did she pay to

W. J., the moneys in the declaration mentioned, nor was she damaged as therein mentioned. The bond, when produced on the trial, appeared to be subject to a condition for repayment of the sum secured, with interest, "at or before the expiration of six months' notice to be given to pay the same," and there was no proof of such notice having been given. The defendant had notice of the action being commenced against the plaintiff on the bond (which was stayed by a judge's order on payment of debt and costs), and did not come in to defend it:—Held, that this was sufficient to entitle the plaintiff to recover on the above issue. *Jones v. Williams*, 7 M. & W. 493; 9 D. P. C. 252.

If in an action on a bond against a surety, non-payment by the principal, after a notice in writing required by the condition, is averred in the declaration, and the defendant suffers judgment by default, it is not necessary to give evidence of the notice, because the allegations of the declaration are not put in issue. *Barwise v. Russell*, 3 C. & P. 608.

Negligence of Party Guaranteed.]—The condition of a bond recited a deed of dissolution of partnership between the plaintiff and T., in which was recited an agreement, that, subject to the adjustment of the partnership accounts as therein mentioned, the stock-in-trade and partnership effects should belong absolutely to T., and all debts due from the partnership should be paid by T.; and that T., and the defendant as his surety, should indemnify the plaintiff by their joint and several bond against the partnership debts; and the condition was, that T. and the defendant or one of them, should indemnify the plaintiff against the payment of the partnership debts, and all costs, and all actions to be brought in respect thereof. To a declaration on this bond, which set out the condition, and a breach of it in non-payment of a debt due from the partnership to M., who in consequence sued the plaintiff and T. for it, the defendant pleaded, that if the plaintiff was damaged, it was through his own default:—Held, that under this plea the defendant could not give in evidence the deed of dissolution, to shew that it contained certain stipulations as to the adjustment of the accounts, which the plaintiff had not performed, not having paid over to T. a balance alleged to be due to the latter on such adjustment. *White v. Ansdell*, 1 M. & W. 348.

— **Reduction of Damages.]**—Held, also, that the defendant could not shew, in reduction of damages, that the costs of T.'s defence to the action brought by M. were much less than the costs incurred by the plaintiff. *Ib.*

PRINTER.

Contracts with Compositors.]—An agreement between master printers and journeymen, fixing the amount and mode of calculating the work done and the price to be paid for it, contained the following rule: Standing advertisements or stereo blocks, if forming a complete page, or when collected together making one or more complete pages, in a wrapper or an advertising

sheet of a magazine or a review, not to be chargeable; the compositor to charge only for his time in making them up. The remainder of the matter in such wrapper or advertising sheet, including standing advertisements or stereo blocks not forming a complete page, to be charged for by the compositor, and cast up according to the 8th and 20th articles of the scale as they may respectively apply:—Held, that when there were complete pages containing one of several standing advertisements, the compositor was to charge only for time, but that he was entitled to charge according to the scale whenever a page was composed in part of standing materials and in part of new matter. *Hill v. Levey*, 3 H. & N. 702; 28 L. J., Ex. 80; 4 Jur., N. S. 589—Ex. Ch.

Hiring.—An overseer in a printing-office is an artificer within the exemption in the 55 Geo. 3, c. 184, and a contract of hiring does not require to be stamped. *Bishop v. Letts*, 1 F. & F. 401.

Lien.—A printer employed to print certain numbers, but not all consecutive numbers of an entire work, has a lien upon the copies not delivered for his general balance due for printing the whole of those numbers. *Blake v. Nicholson*, 3 M. & S. 167. See *Ford v. Baynton*, 1 D. P. C. 357.

But a stereotype printer has no lien on stereotype plates not manufactured by himself, but put into his hands to print from them. *Bleaden v. Hancock*, M. & M. 465; 4 C. & P. 152.

If a party claims a lien on plates for his bill for printing from them, in order to establish it, he must shew a course of dealing, so general and uniform, that persons must be supposed to form their contracts on the tacit understanding that there is such a usage. *Ib.*

Contract with Author—Immoral Contract.—An author, by a verbal agreement, employed a printer to print a work, and placed the manuscript in his hands, with an intimation that it would be accompanied by a dedication. The work was printed by him, and the dedication having been sent, a proof of it was struck off at his premises by his servants. Before the copies of the dedication were worked off, his attention was for the first time directed to its contents, and, finding them libellous, he refused to print the dedication:—Held, first, that he might recover against the author for printing the work without the dedication. *Clay v. Yates*, 1 H. & N. 73; 25 L. J., Ex. 237; 2 Jur., N. S. 908.

Held, secondly, that the action for this purpose was rightly brought for work, labour and materials; and that this was not a contract for the sale of goods within the Statute of Frauds (29 Car. 2, c. 3), s. 17. *Ib.*

A printer cannot recover for printing an immoral work, and it is no answer that the parties are in pari delicto. *Poplett v. Stockdale*, 2 C. & P. 198; R. & M. 337.

Entire Contract—Damage by Fire.—Where a printer has been employed to print a work, of which the impression is to be a certain number of copies, if a fire breaks out and consumes the premises before the whole number has been worked off, the printer cannot recover anything, although a part has actually been delivered. *Adlard v. Booth*, 7 C. & P. 108.

Custom as to Insurance.—A printer undertook to insure for a publisher the paper sent to him for printing a work. He afterwards effected an insurance in his own name, and on a loss by fire recovered the amount of his insurance, but which was considerably short of his own loss:—Held, that it could not be set off as money received on account of the publisher for the printing. *Gillett v. Mawman*, 1 Taunt. 137.

By the custom of trade, a printer is not entitled to recover for printing a work until the whole is completed and delivered. *Ib.*

There is no general custom of trade by which printers are bound to insure for the booksellers the paper of the works which they print. *Mawman v. Gillett*, 2 Taunt. 325.

Right of Crown.—The crown has not a prerogative or a power to grant the printing of almanacs to the Company of Stationers, exclusive of any other. *Stationers' Company v. Carman*, 2 W. Bl. 1004.

The king's printers were authorized to print statutes and abridgments at common law, exclusively of all others who had not prior grants. *Basket v. Cambridge University*, 2 Burr. 661; 1 W. Bl. 105; 2 Ld. Ken. 397.

Liability for Infringement of Copyright.—See COPYRIGHT.

Liability for Libel.—See DEFAMATION.

PRINTS & ENGRAVINGS (COPYRIGHT IN).

See COPYRIGHT.

PRISON AND PRISONER.

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III. PRISONERS.

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I. PRISON.

Lands purchased for Prison Purposes vesting in Prison Commissioners.—In 1867 the justices of the county of M. bought land covered with houses subject to leases for long terms, several years of which remained unexpired. The land and the houses were conveyed to the clerk of the peace for the county, "upon trust for the jus-

tices of the county of M., for the purposes of the Prisons Act, 1865, and upon or for no other trust, intent, or purpose whatsoever." The land and houses were never used as part of the prison. An action having been brought to try whether the reversion in the land and houses was in the prison commissioners or the justices, the defendant proposed to adduce as evidence the minutes of the proceedings of the justices in order to shew that the land had been bought for the purpose of rendering the prison more commodious or safe:—Held, that the reversion in the land and the houses standing thereon had passed to the prison commissioners by virtue of the Prisons Act, 1877. *Prison Commissioners v. Middlesex (Clerk of the Peace)*, 9 Q. B. D. 506; 51 L. J., Q. B. 433; 46 L. T. 864; 30 W. R. 881; 46 J. P. 740—C. A.

Per Jessel, M. R.: That the conveyance having been executed, the minutes of the proceedings of the justices were inadmissible as evidence shewing the purpose for which the land and houses had been bought. *Id.*

Order made by Justices for Enlargement of—Necessary Notice.—By 28 & 29 Vict. c. 126, s. 24, the necessity for the alteration or enlargement of an existing prison shall be proved by the presentment of two or more visiting justices, and the consideration of such a presentment shall not be entertained unless not less than three weeks' notice has been given in some newspaper circulating in the district of the prison authority, of their intention to take the same into consideration at a time and place to be stated in the notice. Due notice having been given that the presentment of justices as to certain gaols would be taken into consideration at the April quarter sessions for a county, the presentment was taken into consideration at those sessions, and it was resolved that the matter should be referred to a select committee, to inquire into it, and report to the October sessions. At the October sessions the report was taken into consideration without any fresh notice having been given, and an order was made in conformity with the report:—Held, that the power of adjournment was inherent in the sessions, and that it was competent to the court to adjourn the matter from the April to the October sessions; that they had in effect done so, though not formally; that a fresh notice for the October sessions was not necessary; and that the order was therefore valid. *Reg. v. Westmoreland (Justices)*, 3 L. R., Q. B. 457; 37 L. J., M. C. 115; 18 L. T. 326; 16 W. R. 753; 9 B. & S. 288.

Newgate.—The corporation of London was not authorized by 4 Geo. 4, c. 64, to make any orders for the regulation of Newgate, which prevented justices of the peace for the county of Middlesex from committing persons charged with misdemeanor to that gaol. *Reg. v. Cope*, 6 A. & E. 226; 1 N. & P. 515; 7 O. & P. 720.

The clerk of the sessions of gaol delivery of Newgate is not entitled to any fee in respect of convicts sentenced to imprisonment with hard labour. *Reg. v. Baker*, 2 N. & P. 375; 7 A. & E. 502.

— **For Criminal Offenders only.**—By 52 Geo. 3, c. ccix., Newgate is made a prison for the reception of criminal offenders only; therefore

a person committed by civil process cannot be detained there. *Masters, Ex parte*, 33 L. J., Q. B. 146; 9 L. T. 733.

By 12 & 13 Vict. c. 14, s. 2, in default of distress whereon to levy a poor or highway rate with costs, two justices are empowered to issue their warrant of commitment against the person in default to the common gaol or house of correction for any time not exceeding three calendar months, unless the sums therein mentioned be sooner paid. Defaulters in payment of rates, the payment of which might be enforced under this statute, were committed to Whitecross-street prison and Newgate:—Held, that the warrants of commitment were civil and not criminal process, and therefore the commitment to Whitecross-street prison was right, and the commitment to Newgate was wrong. *Reg. v. Whitecross-street Prison (Governor)*, 6 B. & S. 371; 10 Cox, C. C. 134; 34 L. J., M. C. 193.

— **So also House of Correction in Coldbath-fields.**—The governor of the House of Correction in Coldbath-fields is justified in refusing to receive a person committed for default in payment of rates, under 20 & 21 Vict. c. cxviii. s. 14, relating to Islington. *Reg. v. Coldbath-fields (Governor)*, 6 B. & S. 352; 10 Cox, C. C. 125; 34 L. J., M. C. 137.

Reformatory—Absconding from.—Where a lad was found guilty of absconding from a reformatory school, and sentenced to be imprisoned for that offence under 17 & 18 Vict. c. 86, s. 4:—Held, that the justices had no authority to add to such sentence of imprisonment an order that after the expiration thereof he should be again detained within the reformatory school. *Robson v. Anderson*, 5 L. T. 789.

— **Rating.**—A reformatory, established under 17 & 18 Vict. c. 86, is not rateable to the relief of the poor. *Shepherd v. Bradford (Churchwardens)*, 16 C. B., N. S. 369; 33 L. J., M. C. 182; 10 Jur., N. S. 799; 10 L. T. 421; 12 W. R. 867.

II. KEEPERS.

Liability of.—The keeper of a prison who receives and detains one apprehended and charged in his custody under a warrant, runs the risk of the warrant having been executed against the proper person; and though acting bonâ fide, and without the means of ascertaining the identity of the individual named in the warrant, he is liable to an action for false imprisonment, if by the mistake of the officer to whom it was directed, it was executed against another. *Aaron v. Alexander*, 3 Camp. 35. And see *Taylor v. White*, 4 Esp. 80.

— **For Trespass.**—Trespass will lie against the governor of a prison for causing a prisoner to be removed by force, or threats of force, from one division of the prison to another, in which he ought not by law to be confined, although he acts in obedience to a rule issued by the secretary of state, if such rule is not in accordance with the statutes as to the classification of the prisoners. *Cobbett v. Grey*, 4 Ex. 729; 19 L. J., Ex. 107.

The secretary of state is also liable to an action if he improperly directs the gaoler so to

remove all persons of a certain class, and a gaoler does remove a person coming within that class. *Id.*

M. was committed for a contempt of court in not answering to a bill in chancery. She was taken to gaol under a warrant addressed to the gaoler, which shewed on the face of it the cause of her committal. The plaintiff in the suit did not bring her to the bar of the court within thirty days; but the gaoler did not discharge her:—Held, that the duty was cast in express terms on the gaoler by 11 Geo. 4 & 1 Will. 4, c. 36, s. 15, to discharge the person in his custody under such circumstances, and as the warrant gave him notice, he was bound to discharge her after the lapse of thirty days, without an order from the sheriff or the Court of Chancery; and that an action of trespass would lie against him for detaining her. *Moore v. Rose*, 4 L. R., Q. B. 486; 38 L. J., Q. B. 236; 17 W. R. 729.

Superannuation of Officers—Compensation—Liability of County to Pay.—At the time of passing the Prisons Act, 1877, C. was the governor of a prison, which, pursuant to that statute, was transferred to the Secretary of State for the Home Department. The justices of M. had been the local authority having the control of the prison. C. retired from his appointment soon after the coming into force of that act, and the Commissioners of the Treasury awarded to C. an annuity of 582*l.* 13*s.* 4*d.*, and apportioned it as follows: 429*l.* 6*s.* 8*d.* to be borne by the justices of M., and 133*l.* 6*s.* 8*d.* to be borne by grants provided by parliament. At the time of his retirement C. was less than sixty years of age, and he had not become incapable from sickness, age, or infirmity, or injury, of executing his office in person, and he retired for the purpose of facilitating improvements in the management of the prison. The justices having declined to pay the sum of 429*l.* 6*s.* 8*d.*:—Held, that the commissioners had jurisdiction to apportion the annuity granted to C. in the manner above mentioned, and that a mandamus would lie to compel the justices of M. to pay the amount apportioned upon them. *Reg. v. Middlesex (Justices)*, 11 Q. B. D. 656; 52 L. J., Q. B. 552; 49 L. T. 614—C. A. Affirming 48 L. T. 480; 47 J. P. 454.

III. PRISONERS.

1. EXPENSES CAUSED BY.

Reformatory—Expense of providing requisite Clothing for Prisoner.—By the Prisons Act, 1877, the "prison authority," constituted under the Prisons Act, 1865, s. 5, is relieved from the obligation of defraying the expense of clothing requisite for the admission of a youthful offender to a reformatory school under the Reformatory Schools Act, 1867, ss. 14, 23; for expenses of that description fall within the definition of "maintenance of a prisoner" contained in the Prisons Act, 1877, s. 57, and must be defrayed out of moneys provided by parliament, under s. 4. *Prison Commissioners v. Liverpool (Corporation)*, 5 Q. B. D. 332; 49 L. J., Q. B. 431; 42 L. T. 838; 29 W. R. 6; 44 J. P. 616—C. A.

Maintenance of, when Removed to Asylum—Upon what Funds Chargeable.—Where a pauper prisoner without a settlement becomes

insane during confinement in a prison to which the Prison Act, 1877 (40 & 41 Vict. c. 21) applies, the expenses of inquiring into his insanity and of removing him to a county lunatic asylum, and of his maintenance in such asylum during the currency of his sentence are, by ss. 4 & 57 of that act, to be defrayed out of moneys provided by parliament; and the effect of those sections is to repeal the provisions of 3 & 4 Vict. c. 54, s. 2, which made the county liable. *Mews v. Reg.*, 8 App. Cas. 339; 52 L. J., M. C. 57; 48 L. T. 1; 31 W. R. 385; 47 J. P. 310; 15 Cox, C. C. 185—H. L. (E.).

Liability of Boroughs for Maintenance.—By 5 & 6 Vict. c. 98, s. 18, a borough with a separate court of sessions, sending its prisoners to the county gaol without any special contract, shall pay the expenses incurred in the conveyance, transport, maintenance, safe custody and care of every such prisoner, according to the time he shall remain in custody there, at the average daily cost of each prisoner according to the whole number of prisoners confined in the prison, including in such expenses all expenses of "repairs, alterations, additions, and improvements in or to the prison":—Held, that any such borough is bound to contribute, in the proportion above mentioned, not only towards the cost of the necessary and ordinary repairs of the county gaol, but towards the cost of enlarging it, according to 28 & 29 Vict. c. 126. *Reg. v. Wigan (Mayor)*, 5 L. R., Q. B. 267; 39 L. J., M. C. 68; 21 L. T. 715; 18 W. R. 455.

Conveying Prisoner to Prison, Expenses of.—A metropolitan police magistrate, having summarily convicted an offender and adjudged her to be imprisoned, made out a warrant for her commitment; in obedience to which warrant the plaintiff, a police constable, duly conveyed her to prison. By reason of such conveyance the plaintiff incurred certain expenses which the prisoner had no means to defray. The magistrate subsequently made an order under 27 Geo. 2, c. 3, directed to the defendant, ordering him to pay to the plaintiff the amount of such expenses. The defendant refused to comply with the order, on the ground that the liability to pay the expenses of conveying prisoners to prison had been transferred from the county to the secretary of state by s. 4 of the Prisons Act, 1877, which provides, that "After the commencement of the act all expenses incurred in respect of the maintenance of prisons to which the act applies and of the prisoners therein shall be defrayed out of moneys provided by parliament." A similar question arose with regard to the expenses of conveying from the police court to the prison a man committed to take his trial for felony:—Held, that the expenses of conveying prisoners to prison were by s. 4 transferred to the secretary of state, and that the word "therein" in that section pointed to the class of prisoners to whose maintenance the act was intended to apply, not to the period of time from which the liability for such maintenance was to commence. *Mullins v. Surrey (Treasurer)*, 7 App. Cas. 1; 51 L. J., Q. B. 145; 45 L. T. 625; 30 W. R. 157; 46 J. P. 276; 15 Cox, C. C. 9—H. L. (E.).

2. PROCEEDINGS AGAINST.

Process.—Where a defendant is in a county

gaol, in the custody of the sheriff, on a criminal charge, a writ of *capias* may be lodged with the sheriff, who is then bound to detain the defendant. An order of the court to detain is not necessary. *Grainger v. Moore*, 5 D. P. C. 456.

A governor of a prison, in compliance with an order of the visiting justices, refused to allow the process of the court to be served upon a prisoner undergoing a criminal sentence. The court granted a rule nisi for an attachment against the governor, on the condition that the rule was not to be served or acted upon, unless he persisted in refusing to allow service. *Danson v. Le Capelain*, 7 Ex. 667; 21 L. J., Ex. 219.

A writ of *capias* under 1 & 2 Vict. c. 110, s. 3, is not a step in the action, but is altogether collateral to it. *Ireland v. Berry*, D. & M. 505; 5 Q. B. 531; 13 L. J., Q. B. 140.

Where a detainer for debt was lodged against a person in custody on a criminal charge, who was afterwards convicted and sentenced to a year's imprisonment:—Held, that the creditor was not bound to declare during that period. *Altruffe v. Lunn*, 9 B. & C. 395.

A prisoner, who conducts in person an action in which he is the plaintiff, is not entitled to a *habeas corpus* to bring him to chambers, to oppose a summons for leave to plead several matters, unless the judge, in his discretion, thinks that there is an urgent necessity for his presence. *Ford v. Graham*, 1 L. M. & P. 604; 10 C. B. 369.

Application for Discharge.—A prisoner has a right to apply *de die in diem* for his discharge, and is not prejudiced by a former application having been unsuccessfully made. *Hallett v. Cresswell*, 1 B. C. Rep. 1; 3 D. & L. 561; 15 L. J., Q. B. 129.

Charging in Execution.—Where a defendant is in custody on a criminal charge, it is not necessary for the plaintiff to charge him in execution, in a civil suit, by *habeas corpus ad satisfaciendum*, within two terms after the commitment to prison. *Gibbs v. King*, 2 D. & L. 806; 1 C. B. 1; 14 L. J., C. P. 85; 9 Jur. 113.

Where a defendant was brought up in custody of a gaoler for the purpose of being charged in execution, and it appeared that a commissioner of bankrupts had on the preceding day granted an interim order for his protection, the court refused to allow him to be charged in execution. *Sloman v. Williams*, 4 D. & L. 49.

It is no ground of objection to the defendant's being charged in execution, that the plaintiff had, on a former occasion, repudiated the action. *Recell v. Wetherell*, 3 C. B. 605.

It is no cause to shew against a motion to charge a defendant in execution, who has been brought up on a *habeas corpus ad satisfaciendum*, that the warrant of attorney on which the judgment has been signed was given without consideration, and the judgment signed in breach of good faith. *Cooke v. Wright*, 5 D. & L. 274.

A defendant was arrested upon process, which was set aside by the court as having been improperly issued:—Held, that the illegality of the original arrest could not be shewn as cause against his being charged in execution at the suit of another plaintiff, by whom he had been detained, but that his discharge from such detainer

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could only be obtained on a substantive motion. *Stanford, In re*, 1 D., N. S. 183; 4 Scott, N. R. 23; 3 M. & G. 409.

A prisoner in custody, under process of contempt of the Court of Common Pleas, is liable to be charged in execution upon a judgment in that court in the ordinary way. *Wade v. Wood*, 1 C. B. 462.

Supersedeas.—A defendant arrested upon an order, under 1 & 2 Vict. c. 110, s. 3, is supersedeable, unless the plaintiff proceeds to execution within two terms inclusive after judgment. *Walter or Walker v. De Richmond or Richmond*, 6 Q. B. 544; 2 D. & L. 507; 14 L. J., Q. B. 22.

A prisoner once supersedeable is always so. *Hallett v. Cresswell*, 1 B. C. Rep. 1; 3 D. & L. 561; 15 L. J., Q. B. 129; 10 Jur. 266.

But this only holds so long as he remains in the same custody and under the same process. *Rose v. Christfield*, 1 T. R. 591.

Where the nature of the charge is altered, it has been repeatedly determined to be otherwise. *London Assurance Company v. Perkins*, 1 T. R. 591, n.

As against a prisoner, a final judgment is complete at the time of signing, without carrying in the roll. *Colbron v. Hall*, 5 D. P. C. 535.

If after judgment the defendant is superseded for want of being charged in execution, and then an action of debt is brought on that judgment, and judgment recovered thereon, the defendant may be taken in execution on such second judgment. *Ismay v. Deroin*, 2 W. Bl. 982.

A defendant who has once become supersedeable for want of being charged in execution cannot afterwards be charged in execution on the same judgment. *Hewitt v. Melton*, 1 C. & M. 579; 3 Tyr. 503; S. C., nom. *Melton v. Hewitt*, 2 D. P. C. 71.

Right to See Witness who is also a Prisoner.]

—A. was to be tried for felony at the assizes for the county of W., and B., a material witness for A., was committed to the W. city prison for further examination on a charge of felony:—Held, that before the trial of A. the governor of the W. city prison ought to allow A.'s attorney to see B. in his presence. *Rea v. Simmonds*, 7 C. & P. 176.

PRIVILEGED COMMUNICATIONS.

See DEFAMATION—EVIDENCE.

PRIVY COUNCIL.

- I. APPEALS FROM COLONIES.—*See* COLONY.
- II. IN ECCLESIASTICAL MATTERS.—*See* ECCLESIASTICAL LAW.
- III. IN MARITIME MATTERS.—*See* SHIPPING.
- IV. IN MATTERS RELATING TO PATENTS.—*See* PATENT.

PRIZE OF WAR.

See WAR.

PROBATE.

- I. OF WILLS.—*See* WILL.
- II. DUTY.—*See* REVENUE.

PROCLAMATIONS.

The object of a royal proclamation is only to make known the existing law; it can neither make nor unmake the law. *Chevassé, Ex parte*, 4 De G., J. & S. 655; 34 L. J., Bk. 17; 11 Jur., N. S. 406; 12 L. T. 249; 13 W. R. 627.

PROFIT À PRENDRE.

See COMMON—CUSTOM AND PRESCRIPTION—EASEMENT—FISH AND FISHERY.

PROHIBITION.

- I. WHEN THE WRIT LIES.
 - 1. Generally.
 - 2. To and by what Courts, 262.
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 - I. WHEN THE WRIT LIES.
 - 1. GENERALLY.

Generally.—To entitle a party to a prohibition to restrain commissioners acting under a local act from proceeding to enforce a penalty for an offence against the act, he must distinctly

shew that they are acting without jurisdiction. It is not enough to shew that it is doubtful, upon the act, whether the jurisdiction extends to the place where the alleged offence was committed. *Birch, In re*, 15 C. B. 743.

Object of.]—Prohibition is the common law proceeding by which any of the superior temporal courts at Westminster (not the Queen's Bench only) are enabled to restrain, amongst others, the Courts Ecclesiastical from acting in excess of their jurisdiction, but it does not enable the temporal court to act as a Court of Appeal from the Court Ecclesiastical so as to correct any irregularity or even injustice which may have been done by the Ecclesiastical Court, if done in the exercise of their jurisdiction. *Maconochie v. Penzance (Lord)*, 6 App. Cas. 443; 50 L. J., Q. B. 611; 44 L. T. 479; 29 W. R. 633; 45 J. P. 584—H. L. (E.).

Part within and Part without Jurisdiction.]

—Where part of a decision of the court sought to be prohibited is within its jurisdiction and part not, a prohibition is awarded against doing what is in excess of jurisdiction, and a consultation as to the rest. *Ib.*

Where the subject of a suit in an inferior court is within its jurisdiction, though in the proceedings a matter is stated which is out of its jurisdiction, yet unless it is going on to try such matter, a prohibition will not lie. *Dutens v. Robson*, 1 H. Bl. 100.

It is no objection to a rule for a prohibition before verdict that a part of the cause of action arose within the jurisdiction of the inferior court. *Wallace v. Allan*, 10 L. R., C. P. 607; 44 L. J., C. P. 351; 32 L. T. 830; 23 W. R. 703.

Where the inferior court has only jurisdiction over part of the matter, and not of the rest, the Queen's Bench has a discretion after judgment delivered. *Curslake v. Mapledoram*, 2 T. R. 473.

Where Jurisdiction may be Exceeded.]

—The court will not grant prohibition to a tribunal like the Local Government Board on the ground that in an appeal to them they will perhaps take into consideration upon that appeal matters which do not properly arise before them. *Reg. v. Local Government Board*, 9 Q. B. D. 600; 51 L. J. M. C. 121; 46 J. P. 820. Affirmed, 10 Q. B. 1309; 52 L. J., M. C. 4; 48 L. T. 173; 31 W. R. 172; 47 J. P. 228—C. A.

Excess of Jurisdiction.]

—Under 9 & 10 Vic. c. 38, empowering the Commissioners of Woods and Forests to form a royal park in Battersea fields, a jury was impannelled before the sheriff of Surrey to ascertain what recompense should be made to a claimant for the value of lands required for the purposes of the act, and found verdict for 750*l.*, which the sheriff gave judgment for, and ordered to be paid to the claimant. Thereupon the claimant applied for a prohibition to prohibit the sheriff and the commissioners from entering and recording the verdict as judgment, and further acting upon or making available the same, on the ground of an excess of jurisdiction and misdirection by the sheriff: Held, that the verdict and judgment were valid and conclusive in themselves, and that neither the recording of them, nor the proceeding whi

the commissioners were empowered to take, were acts in respect of which the prohibition could be granted. *Chabot v. Morpeth (Lord)*, 15 Q. B. 446; 19 L. J., Q. B. 377.

Where an inferior court proceeds in a cause properly within its jurisdiction, no prohibition can be awarded till the pleadings raise some issue which the court is incompetent to try. *London (Mayor) v. Chr.*, 2 L. R., H. L. 239; 36 L. J., Ex. 225; 16 W. R. 44.

But where the foundation for the jurisdiction is itself defective, a prohibition may be applied for at once. *Id.*

A county court judge, on the 25th of November, 1872, made an order for the commitment of a debtor for forty days for non-payment of debt and costs under a judgment. The debtor was arrested thereunder on the 30th of December, and discharged by a judge of a superior court on the 6th of January, 1873, on the ground of privilege. The gaoler claiming to retain the warrant for his own protection, and the judge of the county court refusing to issue a second or duplicate warrant, a fresh judgment summons was taken out, under which a second order of commitment for forty days for the non-payment of the same debt and the additional costs was issued on the 7th of March, 1873:—Held, that the issuing of the second order of commitment pending the first was an excess of jurisdiction, and a prohibition was granted. *Horsnail v. Bruce*, 8 L. R., C. P. 378; 42 L. J., C. P. 140; 28 L. T. 705; 21 W. R. 597.

My view of the power of prohibition at the present day is that the court should not be chary of exercising it, and that wherever the legislature entrusts to any body of persons other than to the superior courts the power of imposing an obligation upon individuals, the courts ought to exercise as widely as they can the power of controlling those bodies of persons, if those persons admittedly attempt to exercise powers beyond the powers given to them by act of parliament. *Reg. v. Local Government Board*, 10 Q. B. D. 321; 52 L. J., M. C. 10; 48 L. T. 181.—Per Brett, L. J.

—**Point need not have been taken in Court below.**—Where an inferior court has no jurisdiction to entertain a cause, it is not necessary, to entitle a party to a prohibition, that the objection to the want of jurisdiction should have been made in the inferior court, and overruled. *Haber v. Portugal (Queen)*, 17 Q. B. 171; 20 L. J., Q. B. 488; 16 Jur. 164.

Must be Material.—A prohibition will not be granted where it is not material. *Butterworth v. Walker*, 3 Burr. 1689.

For Non-reception of Evidence.—Where justices had convicted a party of unlawfully taking fish in a private fishery, the court refused to issue a prohibition against their proceeding to enforce it, on the ground that the defendant claimed a right of fishing before the justices; and they refused to require the informant to produce his title deeds. *Higgins, Ex parte*, 10 Jur. 838.

What constitutes a Judicial Proceeding.—The governing body of a university may lawfully issue a decree that every tradesman, with whom a person in statu pupillari within the university contracts a debt exceeding 5l., shall make

the same known to the tutor of such person's college, on pain of being discommuned if he omits doing so; and, in case of disobedience, they may enforce such decree by ordering that no person in statu pupillari shall deal with the tradesman for a given period. If the vice-chancellor, attended, on summons, by the heads of colleges, makes an order to discommune, in pursuance of such decree, this is not a judicial proceeding which the superior courts can restrain by prohibition. *Death, Ex parte*, 18 Q. B. 647; 21 L. J., Q. B. 337; 17 Jur., 112.

After Sentence.—After sentence, prohibition will not go, unless want of jurisdiction below appears upon the face of the proceedings. *Buggin v. Bennet*, 4 Burr. 2035.

Where a matter is properly triable at common law, prohibition lies before sentence, but if a party submit to trial, it is afterwards too late. *Full v. Hutchins*, Cowp. 424, 432. And see *Stainbank v. Bradshaw*, 10 East, 349, n.

When the want of jurisdiction of an inferior court appears on the face of the process, the court will grant a prohibition after sentence. *Roberts v. Humby*, 3 M. & W. 120; M. & H. 331; 6 D. P. C. 82.

After Appeal.—Semble, that a prohibition can be moved for after an appeal. *Harrington (Earl) v. Ramsay*, 8 Ex. 879; 22 L. J., Ex. 326.

After Judgment.—A prohibition will not be granted after judgment, unless it is perfectly clear that there has been an excess of jurisdiction. *Ricardo v. Maidenhead Local Board*, 2 H. & N. 257; 27 L. J., M. C. 73.

Against Judgment.—Prohibition will not be granted against a judgment, merely because of a defect. *Ennaght v. Penzance (Lord)*, 7 App. Cas. 240; 51 L. J., Q. B. 506; 46 L. T. 779; 30 W. R. 753; 46 J. P. 644—H. L. (E.).

Not Verified by Affidavit.—Prohibition denied where the matter of suggestion was dehors the proceedings, and not verified by affidavit. *Caton v. Burton*, Cowp. 330; S. P., *Paxton v. Knight*, 1 Burr. 307, 314; 2 Ld. Ken. 14.

2. TO AND BY WHAT COURTS.

To Courts of Appeal.—A prohibition will be granted to a court of appeal, where it appears that they have no jurisdiction over the subject-matter, even after they have remitted the suit to the court below, and awarded costs against the appellant, and though the party applying for a prohibition appealed to that court. *Darby v. Cozens*, 1 T. R. 552.

Semble, that the courts of common law have power to issue a writ of prohibition to the judicial committee of the privy council, if it exceeds its jurisdiction; but it cannot issue for that which is a subject of appeal. *Smyth, Ex parte*, 2 C., M. & R. 748; 1 Gale, 274; S. P. and S. C., 3 A. & E. 719.

To Criminal Courts.—A prohibition lies to a court of criminal no less than to one of civil jurisdiction. *Reg. v. Herford*, 3 El. & El. 115; 29 L. J., Q. B. 249; 6 Jur., N. S. 750.

To Mayor's Court of London—When Granted
K 2

or Refused.—The court, at the instance of a stranger, made a rule absolute for a prohibition to the Mayor's Court, after verdict for the plaintiff, notwithstanding that the claim was below 50*l.*, and consequently there could be no plea to the jurisdiction. *Quartly v. Timmins*, 9 L. R., C. P. 416; 22 W. R. 488.

In order to allow the Mayor's Court of London to entertain a suit, the cause of action must have arisen within its jurisdiction, even although the amount in dispute is less than 50*l.*, and the defendant carries on business in the city of London:—Held, that an attorney is sufficiently a stranger to the suit in the Mayor's Court to entitle him to apply for a prohibition, although the defendant himself can only raise an objection to the jurisdiction by plea under 20 and 21 Vict. c. clvii., s. 15. *Willis v. Harris*, 43 L. J., C. P. 208.

When a party not residing within the jurisdiction of the Mayor's Court is made a defendant by process therein, a prohibition will be granted with costs upon the court being informed of such process by the attorney of the defendant. *Robinson v. Emanuel*, 9 L. R., C. P. 414; 43 L. J., C. P. 244; 30 L. T. 500.

A defendant in a suit in the Mayor's Court cannot move for a writ of prohibition to stay the proceedings in a foreign attachment. *Baker v. Clark*, 8 L. R., C. P. 121.

A defendant can himself apply in the superior court to prohibit the Mayor's Court from proceeding further in an action when the court is proceeding without jurisdiction. *Bridge v. Branch*, 1 C. P. D. 633; 34 L. T. 905.

A defendant in an action in the Mayor's Court may obtain a writ of prohibition, notwithstanding the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 15, which enacts that "no defendant shall be permitted to object to the jurisdiction of the court in or by any proceeding whatsoever except by plea;" the real effect of that section being only to limit the mode of objecting within the Mayor's Court to the jurisdiction. *Jacobs v. Brett*, 20 L. R., Eq. 1; 44 L. J., Ch. 377; 32 L. T. 522; 23 W. R. 556.

Whether a writ of prohibition is applied for by either of the parties to the suit in an inferior court, or by a stranger to such suit, the only discretion which the superior court has to refuse such writ is if in doubt in fact or law whether the inferior court is exceeding its jurisdiction or is acting without jurisdiction. *Worthington v. Jeffries*, 10 L. R., C. P. 379; 44 L. J., C. P. 209; 32 L. T. 606; 23 W. R. 750.

But when a writ of prohibition has been issued to restrain proceedings in the Mayor's Court on the application of a stranger to the suit, it cannot be sustained unless he can shew that the court has exceeded its jurisdiction both with reference to the facts and the law, and then it is a matter of discretion with the superior court whether or not to set it aside. *Chambers v. Green*, 20 L. R., Eq. 552; 44 L. J., Ch. 600.

The same facts which would allow a stranger to obtain a prohibition to the Mayor's Court will not entitle the defendant to plead to the jurisdiction of that court. *Evans v. Nicholson* (No. 1), 32 L. T. 664.

By the Mayor's Court Act, s. 12, no plea to the jurisdiction shall be allowed in cases where the plaintiff claims not more than 50*l.*, and where the cause of action arises either wholly or in part

within the city: and by s. 15, no defendant may object to the jurisdiction except by plea. The plaintiff's cause of action arose in part within the city, and the defendant pleaded to the jurisdiction:—Held, that, although a prohibition might be granted, the defendant was not entitled to plead to the jurisdiction. *Ib.*

A prohibition will not be granted to restrain the Mayor's Court from proceeding where no plea to the jurisdiction is allowed under s. 12 of the Mayor's Court Procedure Act, 1857. *Hawes v. Parvley*, 1 C. P. D. 418; 46 L. J., C. P. 18.

By s. 15 of the Mayor's Court of London Procedure Act, 1857, no defendant shall be permitted to object to the jurisdiction of the court in or by any proceeding whatsoever, except by plea. The court therefore refused to grant a prohibition, although the cause of action in respect of which proceedings were taken in the Mayor's Court, did not arise within the jurisdiction of that court. *Manning v. Farquharson*, 29 L. J., Q. B. 22; 6 Jur., N. S. 1300.

The court will not grant a prohibition to the Mayor's Court to restrain proceedings on an attachment of goods and chattels, merely on the ground that the attachment had the effect of preventing the due registration by the garnishee (the purser and secretary of a mine) of the transfer of shares sold to the applicant by the debtor. *Fredinnick v. Oliver*, 29 L. J., Ex. 466.

A superior court is not bound to grant prohibition to the Mayor's Court, to prevent that court from proceeding in an action from want of jurisdiction, unless it is clear that the cause of action sued on arose outside the jurisdiction. *Taylor v. Nicholls*, 1 C. P. D. 242; 45 L. J., C. P. 455; 24 W. R. 673.

Therefore where a plaintiff who carried on business in the city, brought an action to recover the price of goods sold to the defendant (who resided and carried on business outside the city) and delivered to him outside the city, and the defendant by a letter addressed to and received by the plaintiff's solicitor in the city, but posted out of the city, had admitted the debt, the court refused to grant prohibition, holding that it was not clear that the action was not brought on accounts stated, and consequently that the Mayor's Court might have jurisdiction. *Ib.*

Semble, that the Court of Chancery has jurisdiction to issue a prohibition to the Mayor's Court. *Jacobs v. Friedburg*, 21 W. R. 353.

To Courts-Martial.—A prohibition cannot be issued to a court-martial after sentence pronounced by the court and ratified by the sovereign, and execution by dismissal from the army in pursuance of such sentence. *Poe, In re*, 5 B. & Ad. 681; 2 N. & M. 636.

To Admiralty Court.—The Court of Admiralty, although it possesses by statute in certain cases some of the powers of a superior court, is an inferior court, to which prohibition will lie. *James v. London and South-Western Railway Company*, 7 L. R., Ex. 187; 41 L. J., Ex. 82; 26 L. T. 187; 20 W. R. 238. Affirmed, 7 L. R., Ex. 287; 27 L. T. 382—Ex. Ch. But see the *Judicature Act*.

A prohibition will not be granted to the Court of Admiralty on the ground that it is proceeding without jurisdiction in a matter involving international law, unless the facts and the rules of law governing them are clearly beyond its powers:

for that court is peculiarly adapted to the decision of questions arising upon international and maritime law. *Charkieh, In re*, 8 L. R., Q. B. 197; 42 L. J., Q. B. 75; 28 L. T. 190; 21 W. R. 437.

The ship *Charkieh* ran down the ship *Batavier* in the Thames. The *Charkieh* was arrested under a warrant of the Court of Admiralty, issued in a cause of damage instituted in that court on behalf of the owners of the *Batavier*. A rule nisi was granted for a prohibition on the ground that the *Charkieh* was the property of the Khedive of Egypt. In shewing cause against the rule, affidavits were used alleging that the *Charkieh* was, at the time of the collision, in reality used for carrying cargo and passengers. The court declined to issue the prohibition: the question whether or not the *Charkieh* was the property of a sovereign potentate, so as by the law of nations to be exempt from liability, being one which might properly be decided in the Court of Admiralty. *Ib.*

A judge of a county court having admiralty jurisdiction assumed to exercise such jurisdiction in a case of collision on the Thames between two barges propelled by oars only:—Held, that the admiralty jurisdiction of the county court in cases of collision was not more extensive than that of the Court of Admiralty, and as that court had no jurisdiction over such a collision, that the county court had no such admiralty jurisdiction, and that a writ of prohibition should issue to the judge. *Eccard v. Kendall*, 5 L. R., C. P. 428.

To Ecclesiastical Courts.—When the common law courts are not sitting, the Court of Chancery will upon an ex parte application grant a prohibition to restrain an Ecclesiastical Court from trying a question of prescription. The order in such a case is made absolute in the first instance. *Bateman, Ex parte*, 9 L. R., Eq. 660; 39 L. J., Ch. 383; 22 L. T. 60; 18 W. R. 425.

A representation under the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), against a clergyman, was sent to the Bishop of Rochester; and was by him duly transmitted to the Archbishop of Canterbury. The archbishop, thereupon, by his requisition, required the judge to hear the matters of the representation, "at any place in London or Westminster, or within the diocese of Rochester, as you may think fit." The judge heard the case in the public library at Lambeth Palace, which though in the province of Canterbury, is neither in London nor in Westminster, nor in the diocese of Rochester, and gave judgment against the clergyman, who did not appear, although he had notice of the proceedings. A monition issued against him, and, on his non-compliance therewith, he was pronounced guilty of contempt and imprisoned. On his applying for a prohibition to the Arches Court on the ground that the judge had no jurisdiction:—Held, that a prohibition must issue, for that the judge had no power to hear the case at any place outside the limits defined by the requisition, and that by hearing the case at Lambeth he had exceeded his authority, and the whole proceedings were on that account void and coram non iudice. *Hudson v. Tooth*, 3 Q. B. D. 46; 47 L. J., Q. B. 18; 37 L. T. 462; 26 W. R. 95.

A prohibition will not be granted to restrain a petition in the Ecclesiastical Court where it is within the jurisdiction of the court to grant some of the privileges prayed for, especially where the

applicant has no special interest in the proceedings. *Reg. v. Twiss*, 4 L. R., Q. B. 407; 38 L. J., Q. B. 223; 20 L. T. 522; 17 W. R. 765; 10 B. & S. 298.

See also cases under ECCLESIASTICAL LAW.

To Salford Hundred Court of Record.—By the Salford Hundred Court of Record Act, 1868 (31 & 32 Vict. c. cxxx.), no defendant shall be permitted to object to the jurisdiction of the court otherwise than by special plea, and if the want of jurisdiction be not so pleaded the court shall have jurisdiction for all purposes:—Held, that the section did not oust the jurisdiction of the superior courts to restrain by prohibition, and that a defendant who was sued in the Salford court, for a matter over which that court had no jurisdiction, might himself apply to a superior court for a writ of prohibition. *Oram v. Brearey*, 2 Ex. D. 346; 46 L. J., Ex. 481; 36 L. T. 476; 25 W. R. 695.

To Local Government Board.—Whether a prohibition will lie at all in the case of a tribunal constituted as the Local Government Board is, quære. *Reg. v. Local Government Board*, 9 Q. B. D. 600; 51 L. J., M. C. 121; 46 J. P. 820. Affirmed, 10 Q. B. D. 309; 52 L. J., M. C. 4; 48 L. T. 173; 31 W. R. 72; 47 J. P. 228—C. A.

To Justices.—The 20 & 21 Vict. c. 43, s. 2, provides that, after the hearing and determination by justices of any information or complaint which they have power to determine in a summary way, either party may apply to the justices to state a case for the opinion of one of the superior courts of common law; and by s. 6, the decision of the superior court on such special case shall be "final and conclusive on all parties." To a declaration in prohibition, the defendant pleaded that the plaintiff had already taken the opinion of the Queen's Bench on a special case stated by justices, on his application, raising a question as to their jurisdiction; and that that court had decided against him, affirming the jurisdiction of the justices:—Held, that as the finality of the decision of the Queen's Bench depended on the fact of the justices having jurisdiction to determine the complaint in a summary way, and as the Court of Chancery was of opinion that they had no such jurisdiction, the demurrer should be allowed. *Devonshire (Duke) v. Foott*, 5 Ir. R., Eq. 314.

To County Courts.—*See* COUNTY COURT.

By the Court of Chancery.—Although the Court of Chancery may have jurisdiction to grant a writ of prohibition, yet the proper course is, during term time, to apply to a court of common law. *Foster, In re*, 3 Jur., N. S. 1238. *See also Jacobs v. Friedburg, supra.*

II. PRACTICE, PLEADINGS AND COSTS.

Application for Writ.—A prohibition may be moved for by a defendant himself, where the court is satisfied that an inferior court is proceeding without jurisdiction. *Bridge v. Branch*, 1 C. P. D. 633; 34 L. T. 905.

Where an inferior court exceeds its jurisdiction, the court is bound to interfere by prohibition upon the application of a stranger, as well

as of the defendant himself. *Haber v. Portugal (Queen)*, 17 Q. B. 171; 20 L. J., Q. B. 488; 16 Jur. 164.

The court is bound to grant a prohibition where a court has no jurisdiction, upon the application of a stranger, as well as of a party to the proceedings. *Ib.*

The granting of a prohibition on the application of a stranger is discretionary. *Reg. v. Toiss*, 4 L. R., Q. B. 407; 38 L. J., Q. B. 228; 20 L. T. 522; 17 W. R. 765; 10 B. & S. 298.

When a superior court is clearly of opinion, both with reference to the facts and the law, that an inferior court is exceeding its jurisdiction, it is bound to grant a writ of prohibition, whether the applicant is the defendant or a stranger. *Worthington v. Jeffries*, 10 L. R., C. P. 379; 44 L. J., C. P. 209; 32 L. T. 606; 23 W. R. 750.

In such a case neither the smallness of the claim in the suit nor delay on the part of the applicant is a reason for refusing the writ. *Ib.*

The plaintiff in the inferior court has in no case an absolute right to have the plaintiff in prohibition put to declare in prohibition. *Ib.*

When it is clear on the facts and the law that an inferior court is exceeding its jurisdiction, the granting a prohibition is in the discretion of the superior court, where the applicant for the prohibition is a stranger. *Chambers v. Green*, 20 L. R., Eq. 552; 44 L. J., Ch. 600.

— **Mayor's Court.**—*See cases ante*, col. 262.

Decision as to Jurisdiction Reviewable on Rule.—The decision of a court on facts going to its jurisdiction is reviewable on a rule for a writ of prohibition. *Liverpool United Gas Light Company v. Ecerton (Overseers)*, 6 L. R., C. P. 414; 40 L. J., M. C. 104; 23 L. T. 813; 19 W. R. 412.

Abandonment of Part of Claim.—When a plaintiff's claim, in an action in the Mayor's Court, London, is composed of several items, some whereof relate to business done within, and others to business done without, the City of London, a superior court, upon an application for a prohibition, has a discretion to allow the plaintiff finally to abandon the causes of action accruing out of the city, and to proceed in the Mayor's Court for those accruing within the city. *Ellis v. Fleming*, 1 C. P. D. 237, 45 L. J., C. P. 512.

When Injunction granted instead of Prohibition.—Where the legislature has pointed out a special tribunal for determining a question, as a general rule no other court ought to restrain the proceedings before it; but where the question has come before another court in an independent proceeding in which it is necessary to decide the whole matter between the parties, the court may in such case restrain the proceedings elsewhere by injunction in order to save expense. *Stanward v. St. Giles, Camberwell*, 20 Ch. D. 190; 51 L. J., Ch. 629; 46 L. T. 243; 30 W. R. 693—C. A.

A dispute having arisen between the defendants, who were a local authority, and the plaintiff about a drain which the plaintiff had interfered with, the defendants gave notice to the plaintiff that they would enter on his land and reinstate the drain; but they afterwards

abandoned their intention, and instead took proceedings against him before the magistrate. The plaintiff then brought an action against the defendants, claiming an injunction to restrain them from trespassing on his land, and from proceeding against him before the magistrate. In the statement of claim the plaintiff did not in terms allege that the defendants threatened and intended to trespass on the land:—Held, that as no intention to commit a trespass was proved or alleged, the plaintiff had not made out his case for an injunction against the trespass; and that being so, the court had no jurisdiction to restrain the proceedings before the magistrate. *Ib.*

The jurisdiction to grant prohibition is now conferred by the Judicature Acts upon every judge of the High Court; but, inasmuch as one of the main objects of the acts (Judicature Act, 1873, s. 24, sub-s. 7) is to enable the court to decide, if possible, in one proceeding, all the questions in dispute in the same matter and between the same parties, and (Judicature Act, 1873, s. 25, sub-s. 8) to grant an injunction in all cases in which it shall appear to the court "just and convenient" so to do, the court may, in any case in which it has power to grant prohibition, grant an injunction to restrain the proceedings in the inferior court. *Hedley v. Bates*, 13 Ch. D. 498; 49 L. J., Ch. 170; 42 L. T. 41; 28 W. R. 365.

Prohibition or Appeal—County Court.—In an action of ejectment properly brought in the county court, the summons must be delivered to the bailiff forty clear days at least before the return day under Ord. VIII. r. 7 of the County Court Rules, 1875, and the judge of the county court has no power to waive this condition even where, though the bailiff has not received the summons forty days, he has yet served it on the defendant thirty-five days before the return day as required by the latter part of the same rule. If under such circumstances the judge proceeds to hear the case, the defendant not consenting, the High Court, on appeal by the defendant, will set aside the judgment. *Semble*, such a case is not matter of prohibition. *Barker v. Palmer*, 8 Q. B. D. 9; 51 L. J., Q. B. 110; 45 L. T. 480; 30 W. R. 59.

— **Divorce Court.**—A petitioner filed a petition, in the court for Divorce, for dissolution of the marriage between him and his wife, celebrated in the East Indies, according to the rites of the Church of England, on the ground of her adultery with the co-respondent, and claiming damages against him; to which the respondent and co-respondent entered an absolute appearance, but afterwards applied to be allowed to appear under protest, on the ground that the court had no jurisdiction, by reason of the petitioner and respondent never having been domiciled within its jurisdiction; which application was refused. On the trial of the issues the jury found that the adultery was proved, and assessed the damages to be paid by the co-respondent at 5,000*l.*; and thereupon the judge ordinary pronounced a decree nisi for the dissolution of the marriage, and ordered him to pay all the costs of and incident to the petition. Upon application by the co-respondent for a prohibition to the judge ordinary:—Held, that the co-respondent was only aggrieved by the order for payment of the costs, which, if wrong, was ground for appeal,

and therefore a prohibition ought not to issue. *Berridge, In re*, 4 B. & S. 187; 32 L. J., Q. B. 312; 10 Jur., N. S. 254.

Bar by Delay and Acquiescence.—Where an action is brought in an inferior court, and the defendant appears at the trial and makes no objection to the jurisdiction of the court whilst the case is proceeding, but suffers the court to act without protest or objection as if it had jurisdiction, down to actual payment of damages and costs, it is too late to apply for a prohibition, even though the party had no opportunity of applying earlier to the superior court, unless the want of jurisdiction appears upon the face of the proceedings. *Yates v. Palmer*, 6 D. & L. 283.

Material delay will be a bar to the writ. *Denton, In re*, 1 H. & C. 654; 32 L. J., Ex. 89; 9 Jur., N. S. 337.

Affidavit, form of.—It is no objection to an affidavit for a rule nisi in prohibition that it is stated to be "In the matter of an action commenced" in the inferior court. *Wallace v. Allan*, 10 L. R., C. P. 607; 44 L. J., C. P. 351; 32 L. T. 830; 23 W. R. 703.

Affidavits in support of an application for a prohibition must be entitled simply in the court, and not in any cause. *Evans, Ex parte*, 2 D., N. S. 410; 12 L. J., Q. B. 68; 7 Jur. 281.

But when it was objected to affidavits in answer to a rule nisi that they were entitled "In the Queen's Bench, between M. A. B., plaintiff, and W. P., defendant, in prohibition," and not in the Queen's Bench only, the court allowed them to be read. *Breedon v. Capp*, 9 Jur. 781.

When a rule nisi for a prohibition has been discharged, the court will not allow the motion to be renewed, upon affidavits stating matter not before presented to the court, but existing at the time of the original application. *Bodenham v. Ricketts*, 6 N. & M. 537.

Declaring in.—Where a prohibition is applied for, the court will always, on the demand of the party against whom the application is made, put the party applying to declare. *Renington v. Dolby*, 9 Q. B. 176; 14 L. J., Q. B. 5. See *Thompson v. Ingham*, 14 Q. B. 710; 19 L. J., Q. B. 189; *Stephenson v. Raines*, 2 El. & Bl. 744; *Mossop v. North-Western Railway Company*, 16 C. B. 580.

After sentence in the Ecclesiastical Court in a matter, where the question turned upon the construction of an act of parliament, upon a doubt raised whether that court had not misconstrued the act, the court directed the plaintiff to declare for the more solemn adjudication of the question. *Gare v. Gapper*, 3 East, 472; *S. P.*, *White v. Steel*, 31 L. J., C. P. 265; 5 L. T. 449.

But the court will not put the party to declare, if it is clearly of opinion against granting the prohibition, because the same application may be made to the other courts. *Lindo v. Rodney*, 2 Dougl. 613, n.

Pleas.—A defendant may plead several pleas. *Hall v. Maule*, 5 N. & M. 455; 4 A. & E. 283.

Restitution.—The court will not award restitution in prohibition when the subject-matter of a suit is no longer within the control of the inferior court. *Denton, In re*, 1 H. & C. 654; 32 L. J., Ex. 89; 9 Jur., N. S. 337.

Costs.—Where a rule is made absolute for issuing a prohibition, the costs of the rule cannot be granted to the successful party under 1 Will. 4, c. 21, s. 1; that statute only applying to cases where there have been pleadings in prohibition. *Re v. Kealing*, 1 D. P. C. 440.

The 1 Will. 4, c. 21, does not enable the court, where a party has declared in prohibition and succeeded, to grant him his costs incurred in the Ecclesiastical Court. *Tessimond v. Yardley*, 5 B. & Ad. 458.

Where it was made a term on enlarging a rule for a prohibition, that the party applying should declare, and he did declare, and the defendant, instead of pleading, obtained a judge's order staying the proceedings upon payment of costs incurred since the rule to declare. Upon motion to set aside that order:—Held, that the plaintiff in prohibition was not entitled to any further costs. *Pewtress v. Harvey*, 1 B. & Ad. 154.

Before 1 Will. 4, c. 21, no costs could be awarded against executors, against whom judgment was obtained on demurrer, upon a question whether they were entitled to a general or limited probate. *Scammel v. Wilkinson*, 3 East, 202.

The rule, that where a new trial is granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeeds on the second, applies to issues in prohibition. *Craven v. Sanderson*, 7 A. & E. 897, n.

A party in whose favour judgment is given in prohibition is entitled to the costs of the application for the writ, without obtaining a rule for such costs. *Tucker, Ex parte*, 4 M. & G. 1079.

The costs incurred by a plaintiff in prohibition, in his defence to the suit in the inferior court, are not recoverable as damages. *White v. Steele*, 13 C. B., N. S. 231; 32 L. J., C. P. 1; 9 Jur., N. S. 648.

The 1 Will. 4, c. 21, s. 1, does not entitle an applicant for a prohibition to his costs where the rule is made absolute in the first instance without pleadings, as in such case there is no judgment within the meaning of the section. *Ecerton (Overseers), Ex parte*, 6 L. R., C. P. 245; 40 L. J., C. P. 201; 24 L. T. 361; 19 W. R. 927.

The court, in making a rule absolute for a prohibition without pleadings, may grant the costs. *Wallace v. Allan*, 10 L. R., C. P. 607; 44 L. J., C. P. 351; 32 L. T. 830; 23 W. R. 703.

In pursuance of the intimation given by the court in *Robinson v. Emanuel* (9 L. R., C. P. 414; 43 L. J., C. P. 244; 30 L. T. 50), that the court would, in future, in virtue of its general jurisdiction over its officers, order the costs of a rule for a prohibition to be paid by the plaintiff's attorney in every case in which the action had been improperly brought in the Lord Mayor's Court in respect of a cause of action not arising within the jurisdiction of that court, the costs were, on the 12th July, 1874, ordered to be paid by the respective attorneys for the plaintiffs in several cases. *Mem.*, 9 L. R., C. P. 751, n.

The order for costs of a prohibition will not be made against the plaintiff's solicitor personally, unless the rule has been moved for in that form, and the solicitor has had an opportunity of shewing cause. *Rogers v. London, Chatham and Dover Railway Company*, 26 W. R. 192.

PROMISSORY NOTE.*See* BILL OF EXCHANGE.**PROMOTER.***See* COMPANY.**PROOF OF DEBT.***See* BANKRUPTCY—COMPANY.**PROPERTY TAX.***See* REVENUE.**PROSPECTUS.***See* COMPANY.**PROTECTION ORDER.***See* HUSBAND AND WIFE.**PROTEST.**I. PARTY TO MAKE.—*See* NOTARY.II. FOR NON-PAYMENT OF BILLS.—*See* BILL OF EXCHANGE.**PROXY.**

Appointment—Right of.—The 7 & 8 Vict. c. 21, s. 6, did not abrogate the right of appointing a general proxy, with a 30s. stamp, under 55 Geo. 3, c. 184. *Trinity House of Hull v. Beadle*, 13 Q. B. 175; 18 L. J., Q. B. 78; 13 Jur. 557.

— **Validity of.**—The liquidator of a company in voluntary liquidation, in his affidavit of

proof in bankruptcy of a debt due to the company, described himself as the liquidator of the company, and at the foot of the affidavit there was a proxy in this form: "I appoint T. and D. jointly and severally my proxy," which was signed by the liquidator in his own name, without adding any description or stating that he acted in the name and on behalf of the company:—Held, that the proxy was good. *Taylor, Ex parte, Pooley, In re*, 36 L. T. 679; 25 W. R. 641—C. A.

By the 65th of the articles of association of a steamship company, it was provided that votes might be given personally or by proxy. Article 66 provided that the instrument appointing a proxy should be in writing under the hand of the appointor, and should be attested by one or more witness or witnesses, and that no person should be appointed a proxy who was not a member of the company. Article 68 gave a form of proxy containing an attestation clause. By a special resolution article 68 was repealed, and a new form given without an attestation clause, but the resolution did not purport to repeal article 66:—Held, that as the special resolution did not purport to affect article 66, the provision requiring the signature to be attested remained in force, and that it was not merely directory, but that attestation was essential to the validity of a proxy, and that unattested proxies must be rejected. *Harben v. Phillips* (No. 1), 23 Ch. D. 14; 48 L. T. 334; 31 W. R. 173—C. A.

— **Revocation.**—A proxy made by a canon to act for him in his absence, in all corporate business, is not revoked by the canon making the proxy having, in an intermediate period, appeared and acted for himself. *Eyre v. Lovell*, 3 Dougl. 67.

— **Stamp.**—A note in writing, signed by proprietors under a local act, authorizing others to act for them in the nomination and appointment of a special commissioner, requires to be stamped. *Reg. v. Kelk*, 12 A. & E. 559; 4 P. & D. 185.

PUBLIC COMPANY.*See* COMPANY.**PUBLIC DOCUMENT.***See* EVIDENCE.**PUBLIC HEALTH.***See* HEALTH.

PUBLIC-HOUSE.

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PUBLIC OFFICER.**I. APPOINTMENT.**

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I. APPOINTMENT.**1. NATURE AND VALIDITY OF.**

Power of Appointor.]—An appointment to an office for the life of the appointee is not invalid, upon the sole ground that the person making the appointment only holds his own office for life. *Rosslyn (Earl) v. Aytoun*, 11 C. & F. 742.

Duration.]—The office of paymaster of exchequer bills was an office during pleasure only, and not during good behaviour or for life, under 48 Geo. 3, c. 1. *Smyth v. Latham*, 9 Bing. 692; 3 M. & Scott, 261; 1 C. & M. 547; 3 Tyr. 509.

The office of weighmaster in a market town in Ireland is a freehold office. The appointment to it ought to be for life. *McMahon v. Lennard*, 6 H. L. Cas. 970.

A corporation having power by statute to appoint a weighmaster, and also at their discretion to remove him, the office is not a freehold office, and an appointment duly made by the corporation of a weighmaster during their pleasure is valid. *Delea v. Cork (Mayor)*, 5 Ir. R., C. L. 37; 19 W. R. 411.

The office of surgeon of the district prison of

St. Catherine in the island of Jamaica (created by the acts of the local legislature) is an office held during pleasure only, and not during good behaviour. *Hill v. Reg.*, 8 Moore, P. C. C. 138.

R. was in 1878 elected to the office of remembrancer of the City of London by the Court of Common Council, and was subsequently sworn in before the Court of Aldermen. Before the plaintiff took the oath, the Lord Mayor made a declaration that his election was subject to the standing order relative to officers being annually elected, and the election was entered upon the city records as having been made upon those terms. In 1881 the Court of Common Council passed a resolution that R. be not re-elected remembrancer, and the office be declared vacant. R. brought this action for a declaration that he was still remembrancer, and an injunction against the corporation appointing anyone in his place, on the ground that the office had by usage acquired the nature of freehold, and that the Court of Common Council had no power by resolution or by the form of election to alter the tenure of the office. It appeared that a remembrancer was first appointed eo nomine in 1570 by act of Common Council. Remembrancers were from that time regularly appointed to hold their office, sometimes during good behaviour, sometimes during the pleasure of the Court of Aldermen. In 1816 a resolution was passed by the Court of Common Council that every person who might be elected to any office in the gift of that court should be elected for a year only. The subsequent appointments were expressed upon the records to have been made subject to this standing order. Some form of annual re-election was gone through at the beginning of every year in the case of the remembrancership and some of the other offices included in the standing order:—Held, that, if the office were for life, the election for a less period would be void altogether, and not merely as to the limitation, but that the form of appointment having varied, there was no continual usage sufficient to establish that the office was of any particular tenure; that, if there was, it was as strong in favour of the tenure being during the will of the corporation as during good behaviour, and the resolution of the Common Council that the office was vacant was a sufficient determination of their will. *Roberts v. London (Mayor)*, 46 L. T. 623; 30 W. R. 637. Affirmed, 49 L. T. 455; 31 W. R. 529—C. A.

Clerk to Board of Guardians.]—Under 6 & 7 Will. 4, c. 86, s. 7; the clerk to the board of guardians of a union created under 4 & 5 Will. 4, c. 76, has no right to be superintendent registrar except in the case of the first appointment after 6 & 7 Will. 4, c. 86, coming into operation; and on any subsequent vacancy the power of appointment is in the board of guardians. *Reg. v. Acaison*, 2 B. & S. 795; 31 L. J., Q. B. 227; 6 L. T. 535; 10 W. R. 691.

A., who was clerk to the board of guardians of a union, created under 4 & 5 Will. 4, c. 76, and was also superintendent registrar appointed by the registrar-general, under 7 Will. 4 & 1 Vict. c. 22, died on 4th January, 1861. On the 17th January, the defendant was appointed superintendent registrar by the board of guardians. On the 14th February, the relator was appointed clerk to the board of guardians. Upon information in the nature of quo warranto:—Held, that the

defendant was duly appointed superintendent registrar. *Ib.*

Tithe Valuer—Interest.—By a private statute, tithes and dues were commuted for a specific corn rent, to be raised by assessment upon the landowners, and the court of quarter sessions, once in every ten years, upon application to be made to them by the landowners to appoint a person to make a new valuation of the land within the township, and again to apportion the annual sums which the owner or owners shall or ought to be charged with, was required by order of the court to nominate and appoint one or more fit and proper person or persons, not interested in the tithes or dues, and not being the steward or agent of any person so interested, to make a new valuation and assessment. In an action upon a distress for a sum for which the plaintiff had been assessed in pursuance of such a valuation, it was contended that the land was not liable, because the appointed tithe valuer, who was a shareholder in a railway passing through the township, was interested in the tithes and dues, that the sessions had consequently no jurisdiction to appoint him, and that therefore his acts were null and void:—Held, assuming him to be interested within the meaning of the statute, and that the order appointing him might have been brought up by certiorari and quashed, that as the sessions had jurisdiction to inquire and determine whether he was interested, and the appointment had not been set aside, he was de facto in the office of tithe valuer, and that consequently his acts done whilst so in office were not null and void, and could not be challenged. *Lancaster and Carlisle Railway Company v. Heaton*, 8 El. & Bl. 952; 27 L. J., Q. B. 196; 4 Jur., N. S. 707.

Assessors of Land Tax.—The 38 Geo. 3, c. 5, s. 8, requires the assessors of land tax to be inhabitants of the parish, township or place, residing within the parish for which they are to act:—Held, that the acts of a person duly appointed as assessor were valid, although he was not qualified by being an inhabitant. *Waterloo Bridge Company v. Cull*, 1 El. & Bl. 213; 28 L. J., Q. B. 70; 5 Jur., N. S. 464.

Interested Person.—An office, of which the salary is to be fixed, and the accounts audited by certain justices, cannot be held by one of such justices. *Reg. v. Patteson*, 1 N. & M. 612; 4 B. & Ad. 9.

Survivorship.—When a settlor, instead of leaving the tenant for life protector of the settlement, appoints two persons to be protector under 3 & 4 Will. 4, c. 74, s. 32, and one dies, the office survives. *Bell v. Holtby*, 15 L. R., Eq. 178; 42 L. J., Ch. 266; 28 L. T. 9; 21 W. R. 321.

Where one of two, appointed under 9 & 10 Vict. c. 95, s. 25, to execute jointly the office of clerk to a county court, dies, the survivor continues to hold the office, though he cannot act till a successor to the deceased person is appointed. *Reg. v. Wake*, 8 El. & Bl. 384; 27 L. J., Q. B. 11; 4 Jur., N. S. 68.

Of Deputy.—See post, col. 277.

2. STAMP DUTY UPON.

When Necessary.—The appointment in writing of a treasurer to the guardians of the poor of Birmingham, under a local act, at a yearly salary, requires a stamp. *Reg. v. Welch*, 2 C. & K. 296; 1 Den. C. C. 199.

But if such appointment is not receivable for want of a stamp, a recital in a bond executed by him is sufficient evidence of his appointment, and his duties may be shewn from the clauses of the local act of parliament under which he is appointed. *Ib.*

Two persons, who had been appointed common-keepers in a manor, appointed their deputy, by the following writing signed by them: "We, the undersigned, having been appointed common-keepers, hereby nominate and appoint you our deputy for the lower common, and authorize you to act for us in that behalf in all things pertaining to the rights and privileges of the lord and the tenants of the manor, with the same powers and in the same manner as it would be our duty to act." It then went on to state what were the rights of common, and in what manner the duties of common-keeper should be exercised:—Held, that this document did not require to be stamped, as being a "grant or appointment of or to an office or employment," within 55 Geo. 3, c. 184. *Roberts v. Elliott*, 11 M. & W. 527.

3. PROOF OF.

The fact, that a party did a particular act (as signing a land-tax assessment) in an official capacity, may be proved, not only by shewing that he exercised the office before or at the period in question, but also by evidence (limited to a reasonable time) of his having exercised it afterwards. *Doe d. Hopley v. Young*, 8 Q. B. 63; 15 L. J., Q. B. 9; 9 Jur. 941; *S. P., Doe d. Bowley v. Baines*, 8 Q. B. 1037.

Proof that a person has acted as a public officer on one occasion, before the occasion in question, is evidence that he is such officer. *Reg. v. Murphy*, 8 C. & P. 297.

In proceedings against a party in a voluntary office, not cast on him by law, it is necessary to aver not only an appointment, but an acceptance by the person appointed. *Serra v. Wright*, 6 Taunt. 45; 1 Marsh. 441.

It is not necessary, in an action by the weigh-master for disturbance in his office, to shew a formal appointment to it by deed. His having acted in the office for several years is sufficient. *M'Mahon v. Lennard*, 6 H. L. Cas. 970.

4. REFUSAL OF.

When Indictable.—An indictment that the defendant was appointed overseer of the poor of a parish, "and that he afterwards refused to take the office of overseer of the parish to which he was so appointed," is good. *Reg. v. Burder*, 4 T. R. 788; Nolan, 111.

In an indictment against a person for refusing to serve the office of overseer of the poor of a parish:—Held, that he was a substantial householder within 43 Eliz. c. 2, and liable to serve such office, although he occupied a house and paid the rent and taxes in the parish, by means of a clerk only, but slept in another parish. *Reg. v. Poynder*, 2 D. & R. 258; 1 B. & C. 178.

Absence.—The voluntary absence of a chief officer of a corporation, upon the charter day of election of his successor, is not indictable under 11 Geo. 1, c. 4, s. 6, unless his presence as such chief officer was necessary, by the constitution of the corporation, to constitute a legal corporate assembly for such purpose. *Rez v. Corry*, 5 East, 372; 1 Smith, 538.

Compelling Service.—Payment of a fine imposed by the bye-laws of a corporation, for refusing to accept a corporate office, does not exempt the party elected from serving the office, and he may be compelled to do so by mandamus. *Rez v. Bower*, 2 D. & R. 842; 1 B. & C. 585.

5. ASSIGNMENT OF.

Validity of.—The office of warden of a forest was granted by James the First to Lord Oxford, his heirs and assigns, and was subsequently assigned by the holder upon various occasions; and, lastly, to A., without any objection on the part of the crown:—Held, that the office passed under the assignment to A., and that he was entitled to claim compensation upon the forest being disafforested. *Wellensley v. Mornington*, 23 L. J., Ch. 49.

The office of wood-ward, or forester of the crown, is an office of trust, incapable of assignment without a licence from the crown, founded on the return to a writ of *ad quod damnum*. *Att.-Gen. v. Matthias*, 4 Kay & J. 579; 27 L. J., Ch. 761; 4 Jur., N. S. 628.

Deputy—Appointment of.—Ordinarily if it is an office requiring skill or discretion a person cannot appoint a deputy—he cannot transfer but is bound to do it himself. But where the office is merely ministerial, such as that of digging a grave or of pulling a bell, it is clear that a deputy may be appointed therein; in the case of the sexton falling ill the public might be inconvenienced if dead bodies could not be buried. *St. Margaret's, Rochester (Burial Board) v. Thompson*, 6 L. R., C. P. 445; 40 L. J., C. P. 213; 24 L. T. 673; 19 W. R. 892. And see *Campbell v. Hewlitt*, *infra*.

An under-sheriff could not appoint a deputy under 3 & 4 Will. 4, c. 42. *Jones v. Williams*, 2 D., N. S. 938; 12 L. J., Q. B. 295; 7 Jur. 581.

Rights of Deputy.—An action will not lie by a deputy against his principal for an increase of salary, without an express agreement, where the latter has been appointed to a new office. *Bell v. Drummond*, Peake, 45.

By a royal charter, establishing the Palace Court, it was granted that there should for ever be an office of the prothonotary of the court, and officer called the prothonotary, to make out and enrol processes, pleadings and judgments, and to keep the rolls and records; and the king granted the office to B., to have and execute the same by himself, or by his sufficient deputy, during his natural life. On a vacancy, the marshal of the household was to appoint the new prothonotary, who should be admitted, and might have and exercise the office during his natural life by himself or by his sufficient deputy or deputies. The prothonotary revoked by deed the appointment of his deputy, and appointed another by deed.

The judge of the court, deeming this person insufficiently qualified, rejected him, and himself appointed the party previously dismissed, who had not ceased to act and to receive the fees payable to the prothonotary. He had received these fees while in office under the prothonotary's appointment, and the practice had been that he retained part and paid over the rest, in stated portions, to the knight marshal, the steward and the prothonotary:—Held, that the offices of prothonotary and deputy prothonotary were not distinct, and that, in the absence of special contract, the deputy acted and received fees on behalf of the prothonotary. *Campbell v. Hewlitt*, 16 Q. B. 258.

Held, secondly, that the retention of fees by the deputy on his account must be ascribed, not to any independent right, but to agreement between him and the prothonotary. *Id.*

Held, thirdly, that the prothonotary's revocation of the appointment determined the agreement and the deputy's right to retain any part of the fees; though if he unavoidably continued to perform duties on behalf of the prothonotary, he might have a cross claim for remuneration. *Id.*

Held, fourthly, that the judge of the court might refuse an insufficient deputy nominated by the prothonotary, but could not, of his own authority, appoint another deputy. *Id.*

6. DETERMINATION OF.

a. By Removal or Suspension.

Right to—By whom Removable.—It is the prerogative of the crown, by letters patent, to suspend a public officer, though the office is granted for life. *Slingby's case*, 3 Swans. 178.

The Supreme Court of Calcutta has power by the Charter of Justice to remove or suspend officers of that court, on account of misconduct, and this power of removal is not limited to acts done by such officer in his judicial character, but includes transactions distinct from those of his office. *Grant, In re*, 7 Moore, P. C. C. 141.

An officer of the court, being a shareholder and director of a bank at Calcutta, was a party to deceptive statements, contained in the half-yearly reports of the concern, as to the state of the affairs of the bank, and also availed himself, in his character of director, to obtain credit to a considerable amount upon his personal security only, which, by the condition of the deed of co-partnership of the bank, amounted to a breach of trust. No charge or imputation, with respect to his judicial functions, was brought against him:—Held, that there were sufficient grounds for calling upon the court to protect the administration of justice by suspending such officer for so misconducting himself. *Id.*

The office of commissioner of crown lands in New South Wales, created by the act of the legislature of that colony, is not a patent office, though made under the great seal of the colony within the meaning of the 22 Geo. 3, c. 75, but is an office held *durante bene placito*; and there is no right of appeal to the Queen in Council, under that statute, from an order of amotion from such office by the governor-general and executive council. *Robertson, Ex parte*, 11 Moore, P. C. C. 288.

The 22 Geo. 3, c. 75, applies only to offices held by patent, for life, or for a certain term. *Id.*

Mode of.]—Though a corporation may have by statute a power to remove one of its officers holding a freehold office, the Court of Queen's Bench will see that that power is exercised in a lawful manner, and will interfere if it should not be so. But if exercised in a lawful manner the court will refuse to interfere on the mere ground that the power has not been wisely or discreetly put in force in the particular case. *Osgood v. Nelson*, 5 L. R., H. L. 636; 41 L. J., Q. B. 329.

In the case of removal from office of an officer of the corporation, upon an accusation of inability or neglect of duty, if there has been such evidence given as in an ordinary trial would justify the judge in leaving it to a jury to say, as a matter of fact, whether the accusation was made out, the court will not interfere with the decision arrived at by the corporation. *Ib.*

A corporate body having the power to dismiss one of its officers holding a freehold office on complaint against him, referred to a committee of its own body the task of examining into the complaint, and receiving evidence upon it and reporting thereon. The committee performed this duty. The report and evidence were duly furnished to the inculpated officer, who was then called on for his defence. He was afforded the opportunity of being heard, and counsel was heard for him, but the corporate body itself did not rehear the evidence. He was ordered to be dismissed from his office:—Held, that this was not a case of delegation of lawful authority, but was a due exercise of that authority by the corporate body itself. *Ib.*

Notice of.]—A person validly elected to an office and admitted to it, cannot be removed from it without notice. *Reg. v. Saddlers' Company*, 10 H. L. Cas. 404.

The Poor Law Commissioners have a discretionary power of removing a relieving officer of a union whom they deem unfit for his office, without giving him notice of their intention to remove him, or hearing what he has to say in his defence. *Teather v. Poor Law Commissioners*, 19 L. J., M. C. 70.

Effect of Suspension.]—Suspension does not create a vacancy in an office, it is only an impediment to the officer enjoying any benefit from it; but all acts required to be done by such officer must still be done by him to give them validity. *Phillips v. Bury*, 2 T. R. 351.

When an officer is suspended by the crown, he is entitled to receive his salary, but not to exercise the functions of the office. *Slingby's case*, 3 Swans. 178.

b. By Other Means.

Appointment of Another.]—Where justices of the peace having power to appoint a surgeon, appointed another in the place of one holding the office:—Held, that the office of surgeon of the district prison being a public office, held at pleasure, and not an ancient office, the choice of another to fill such office, by the justices, in exercise of the powers vested in them by the local acts was a determination of the first appointment. *Hill v. Reg.*, 8 Moore, P. C. C. 138.

The subsequent appointment of a new paymaster in the place of a former one is a virtual revocation of the appointment of such former

paymaster, even though the instrument under which the new appointment is made contains no express clause of revocation of the old one, and though it allege, contrary to the fact, that the former paymaster had resigned. *Smyth v. Latham*, 9 Bing. 692; 3 M. and Scott 251; 1 C. & M. 547; 3 Tyr. 509.

Acceptance of Incompatible Office.]—A public officer cannot vacate his office by accepting an incompatible office, unless the first office is one which he might have determined by his own act, or which he might have surrendered to the party appointing to the second office, or from which he might have been removed by, or with the concurrence of, such party. *Rex v. Patterson*, 1 N. & M. 612; 4 B. & Ad. 9.

The acceptance by the holder of one office of another incompatible office does not vacate the former, unless it is such as he could determine by his own act simply, or unless that authority concurred in the appointment which could accept the surrender of or remove from the old one. *Worth v. Newton*, 10 Ex. 247; 23 L. J., Ex. 338.

II. RIGHTS OF OFFICERS.

1. SALARY, PENSIONS, &c.

a. Generally.

Agreements for.]—The marshal of the city of Dublin is by virtue of his office registrar of the pawnbrokers of Ireland, and as marshal and registrar is entitled to receive considerable fees; and the defendant, in consideration of his being appointed to the office of marshal by the corporation of Dublin, entered into an agreement with them to accept, by way of fixed salary, a sum less than the fees, and to pay over the fees to the city treasurer:—Held, that the agreement was illegal, as being against public policy. *Dublin (Mayor) v. Hayes*, 10 Ir. R., C. L. 226.

An agreement between a municipal corporation and the clerk of the peace of the borough, on his appointment, that he shall accept a fixed salary in lieu of his fees, and that any surplus of fees above the salary shall be paid into the borough fund, is void, on two grounds of public policy: first, because a person accepting an office of trust can make no bargain in respect of that office; and, secondly, because the law presumes that all the fees are required for the purpose of enabling him to uphold the dignity and perform properly the duties of his office. *Liverpool Corporation v. Wright*, 1 Johns. 359; 28 L. J., Ch. 868; 5 Jur., N. S. 1156.

Exclusion from Office—Return of Salary.]—The defendant, who had been illegally elected for the office of surgeon of a county infirmary in Ireland, entered into office, and though cautioned, kept out the plaintiff, who had been legally elected:—Held, first, that the plaintiff was entitled to recover damages from the defendant for so excluding him from the office. *Lawlor v. Alton*, 8 Ir. R., C. L. 160.

Held, secondly, that the plaintiff, as he had not actually discharged the duties of the office, though he had offered and was ready to do so, was not entitled to recover, as money had and

received, the salary which the defendant had received under the grand jury presentment *Ib.*

Claim to Fees—Evidence.—The immemorial existence of fees of an office may be presumed from uninterrupted modern usage, unless there is some evidence given to the contrary. *Shepherd v. Payne*, 16 C. B., N. S. 132; 33 L. J., C. P. 158; 10 Jur., N. S. 540; 10 L. T. 193; 12 W. R. 581—Ex. Ch.

The modern usurpation of an excess does not affect the title to the original fees. *Ib.*

The clerk of the papers of the Queen's prison, appointed under 5 & 6 Vict. c. 22, by the secretary of state, at a fixed salary, holds in effect the same office as the clerk of the papers of the Queen's Bench prison, appointed under the 27 Geo. 2, c. 17, by the marshal of the Marshalsea, and that office was one belonging to the Queen's Bench, and consequently within the 11 Geo. 4 and 1 Will. 4, c. 58, and 1 & 2 Will. 4, c. 35:—Held, therefore, that the clerk of the papers of the Queen's prison was entitled to insist on payment to him of the fees sanctioned by the commissioners under the 1 & 2 Will. 4, c. 35, in order that he may account for them to the treasury. *Markwell v. Dyson*, 14 Q. B. 820; 19 L. J., Q. B. 193; 14 Jur. 809.

Revocation of Resolution Granting Pensions.—Trustees were created by statute a body corporate for the management of the navigation of a river, with a common seal and a perpetual succession. The statute empowered them to levy tolls, and enacted that it should be lawful for them to allow to any officer or servant an annuity or allowance. Their clerk, removable at their will and pleasure, for forty years, having in 1865 resigned, owing to ill-health, the trustees duly passed a resolution (not sealed) that his resignation "be accepted, and that a retiring pension of 300*l.* per annum, free of income tax, be granted to him during the remainder of his life." The pension was duly paid quarterly for some years, until the defendants, who had meanwhile been substituted by statute for the trustees, with all their powers, and subject to all their liabilities, duly passed a resolution to reduce the pension to 150*l.* per annum, to be paid during their pleasure, and made the first quarterly payment on the reduced scale. The clerk having brought an action to recover the difference:—Held, that the resolution of 1865 was revocable, and that he could not recover. *Marchant v. Lee Conservancy Board*, 9 L. R., Ex. 60; 43 L. J., Ex. 44; 30 L. T. 367—Ex. Ch.

Pensions under the Superannuation Act, 1859.—Under the provisions of the Superannuation Act, 1859, the question whether or not a pension shall be granted to a public servant is to be decided by the Commissioners of the Treasury; and until they have decided to grant a pension no public servant can maintain an action in respect thereof. *Edmunds v. Att.-Gen.*, 47 L. J., Ch. 345; 38 L. T. 213; 26 W. R. 550.

The Superannuation Act, 1859, s. 2, after prescribing a scale of superannuation allowances for civil servants according to length of service, provides that, if any question shall arise as to the claim of any civil servant for superannuation under this clause, "it shall be referred to the Commissioners of the Treasury, whose decision shall be final." Where, therefore, a civil servant

makes a claim for superannuation allowance to the Commissioners of the Treasury, and their lordships decide upon the amount of the allowance to be made, such decision is final, and cannot afterwards be made the subject of litigation in any civil tribunal. *Cooper v. Reg.*, 14 Ch. D. 311; 49 L. J., Ch. 490; 42 L. T. 617; 28 W. R. 611.

Pensions—How Granted—Attachment.—A superannuation allowance, granted by a resolution of the board of directors of the East India Company to a retired clerk under the authority of 53 Geo. 3, c. 155, s. 93, is only a gratuity; and the grant, to be binding on the company, must be by deed. For both these reasons, the allowance is not a debt which can be attached on behalf of a judgment creditor of the grantee under 17 & 18 Vict. c. 125. *Jones v. East India Company*, 17 C. B. 351; 25 L. J., C. P. 154; 2 Jur., N. S. 189.

On Bankruptcy.—The effect of ss. 15 and 17 of the Bankruptcy Act, 1869, is to vest in the trustee in a bankruptcy all the "property" of the bankrupt of whatever nature, including the matters dealt with by s. 23 and ss. 87 to 95, but subject to the exceptions and qualifications introduced by those sections. The pension of a retired judge of a crown colony, granted by the secretary of state for the colonies, and voted annually by the legislature of the colony, is, in case of the bankruptcy of the judge, "property" which vests in the trustee in the bankruptcy, but it is "income" of the bankrupt within s. 90 of the Bankruptcy Act, 1869, and is subject to the power thereby given to the court to determine how much of it shall be set aside for the benefit of the bankrupt's creditors. *Huggins, Ex parte, Huggins, In re*, 21 Ch. D. 85; 51 L. J., Ch. 935; 47 L. T. 559; 30 W. R. 878—C. A.

Sequestration.—The Court of Probate in enforcing payment of alimony and costs, will authorize sequestration to receive portions of a civil service pension. *Sansom v. Sansom*, 4 P. D. 69; 48 L. J., P. 25; 39 L. T. 642; 27 W. R. 692.

Ord. XLVII. enables a writ of sequestration to be issued against the estate of a judgment debtor who has disobeyed an order made under s. 5 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), directing him to pay an instalment of the debt by a given day. A creditor, before 1876, recovered a judgment against a county court judge in receipt of a salary. In February, 1876, the creditor, under s. 5 of the Debtors Act, 1869, obtained an order that the judge should pay the debt by instalments at stated times. In December, 1877, he resigned his judgeship, and a pension was granted him under 15 & 16 Vict. c. 52, s. 15. Having made default in payment of the sum he was directed to pay by the order of February, 1876, the creditor issued a writ of sequestration, and afterwards, in April, 1878, obtained an order of the Common Pleas Division restraining the debtor from receiving 200*l.*, part of his pension, and ordering that the sequestrator should receive that amount out of the pension. The debtor appealed against this order:—Held, that the writ of sequestration was properly issued; that the pension could be made available for payment of his debts, and that the order of the Common

Pleas Division was rightly made. *Wilcock v. Terrell*, 3 Ex. D. 323; 39 L. T. 84—C. A.

— **For Payment of Costs.**—On a motion the court gave leave in its discretion, under the Rules of Court of April, 1880, to issue a sequestration for the payment of costs. *Snow v. Bolton*, 17 Ch. D. 433; 50 L. J., Ch. 743; 44 L. T. 571; 29 W. R. 583.

b. Assignment of.

Validity.—A. executed a deed in Scotland according to the form there, assigning his property to trustees, for the benefit of creditors. The operative part of the deed was in these words:—"All and sundry superiorities, lands and heritages, debts heritable and movable, and whole goods, gear, sums of money, and effects; and in general my whole means and estate, heritable and movable, of whatever nature or denomination, or wherever situate, presently belonging to me:"—Held, that these words did not pass the profits of a public office at that time filled by the grantor. *Hill v. Paul*, 8 C. & F. 295.

An assignment by a retired military officer of his pension for valuable consideration is void under 47 Geo. 3, sess. 2, c. 25. *Lloyd v. Cheetham*, 3 Giff. 171; 30 L. J., Ch. 640; 4 L. T. 576; 9 W. R. 924.

But the statute does not apply to the assignment of a pension granted by the East India Company. *Heald v. Hay*, 3 Giff. 467; 31 L. J., Ch. 311; *S. P.*, *Carew v. Cooper*, 4 Giff. 619; 33 L. J., Ch. 289.

A compensation granted to a public civil officer on the reduction of offices in his department under 4 & 5 Will. 4, c. 24, is not assignable by him. *Wells v. Foster*, 8 M. & W. 149; 5 Jur. 464.

— **As an Act of Bankruptcy.**—A debtor executed a deed of assignment of all his property, except a pension from the East India Company, to a creditor to secure a past debt:—Held, that as this pension could not pass to his trustee in bankruptcy, it formed no substantial exception from the assignment, and the assignment was therefore an act of bankruptcy. *Hawker, Ex parte, Keely, In re*, 7 L. R., Ch. 214; 41 L. J., Bk. 34; 26 L. T. 54; 20 W. R. 322.

By Mortgage.—Property, including a pension payable by the secretary of state for India, was mortgaged to the plaintiff, and subsequently to one of the defendants. Upon a bill for foreclosure the common decree was made, and it was also ordered that, in the event of the foreclosure becoming absolute, the mortgagor should execute a power of attorney enabling the mortgagee to receive the pension. *James v. Ellis*, 24 L. T. 12; 19 W. R. 319.

Claim for Arrears of—Set-off.—In an action brought by a retired clergyman against his successor in the incumbency for arrears of the pension allowed under the Incumbents' Resignation Act, 1871, the defendant claimed to set off against such arrears, and also to recover, by way of counter-claim, a judgment debt due to him from the retired clergyman:—Held, that the pension was inalienable, and therefore the de-

fendant's claim could not be set off, and the plaintiff was entitled to a separate and independent judgment for the arrears due. *Gathercole v. Smith* (No. 2), 7 Q. B. D. 626; 50 L. J., Q. B. 681; 45 L. T. 106; 29 W. R. 577; 45 J. P., 812—C. A.

By the 10th section of the Incumbents' Resignation Act, 1871, the pension allowed to a retiring clerk is made a charge upon the revenues of the benefice, "and shall be recoverable as a debt at law or in equity from the incumbent of the said benefice by the retired clerk, his executors, administrators and assigns . . . but shall not be transferable at law or in equity." In an action by a retired clerk against the incumbent of the benefice for payment of the arrears of the pension that had been allowed him under the act:—Held, that the incumbent could not set off against such arrears a judgment debt previously due to him from the retired clerk. *Gathercole v. Smith* (No. 1), 17 Ch. D. 1; 50 L. J., Ch. 671; 44 L. T. 439; 29 W. R. 434—C. A.

c. Right to have Accounts Audited.

E. held an office under the crown for thirty-one years, during which time a large amount of public money passed through his hands. On an application for a mandamus directing the treasury board to transmit his accounts during that time to the comptroller-general for audit:—Held, that a servant of the crown, as accountable for money passing through his hands, although liable to the right of the crown to call for an audit of his accounts, had no reciprocal right to compel such audit. *Edmunds, Ex parte*, 25 L. T. 705; 20 W. R. 205.

2. COMPENSATION FOR LOSS OF OFFICE.

a. Jurisdiction.

Lords of the Treasury.—The lords of the treasury have no jurisdiction to determine the right of a borough officer to compensation, whether he has been removed for alleged misconduct or otherwise. They have jurisdiction as to nothing but the amount of compensation. *Reg. v. Sandwich (Mayor)*, 2 G. & D. 28; 2 Q. B. 895; 6 Jur. 684; *S. P.*, *Reg. v. Harwich (Mayor)*, 2 Q. B. 909; 2 G. & D. 109; 6 Jur. 821.

By the usage of a borough, the office of clerk to the justices was appurtenant to the office of common clerk. After the 5 & 6 Will. 4, c. 76, a separate commission of the peace was granted to the borough; and the person who had been common clerk, which office was then abolished, was in lieu thereof appointed town-clerk and clerk of the peace, but not, as formerly, clerk to the justices also; such office being by s. 103 incompatible with that of clerk of the peace:—Held, that the lords of the treasury had jurisdiction to make an order on the town council to compensate him for the loss of such office. *Rex v. Bridgewater (Mayor)*, 1 N. & P. 466; 6 A. & E. 339.

Where the lords of the treasury awarded compensation to an officer in a borough, on his being removed from office by the town council, if the office was not a borough office, or the removal was not made under 5 & 6 Will. 4, c. 76, the lords of the treasury had no jurisdiction. *Reg. v. Poole (Mayor)*, 3 N. & P. 119; 7 A. & E. 730.

The lords of the treasury had no jurisdiction to decide whether an officer of a borough had been properly removed from office on the ground of misconduct. *Reg. v. Warwick (Corporation)*, 3 P. & D. 429; 10 A. & E. 386.

If a corporation refuses compensation to a removed officer, on the ground that they had removed him for cause sufficient, the lords of the treasury have no jurisdiction to try the question of the sufficiency; and though, after entertaining that question, and determining it in favour of the claimant, they also adjudicate upon the proper amount of compensation, the court will not enforce by mandamus the payment of such compensation, nor try, upon the return to a mandamus, the sufficiency of the cause, the claimant being bound in the first instance to proceed against the corporation by mandamus, to compel them to restore him, or give him compensation for removal. *Reg. v. Newbury (Mayor)*, 1 Q. B. 751; 1 G. & D. 388; 6 Jur. 365.

Town Council.—The town council has jurisdiction to determine the whole claim to compensation of a borough officer who has been removed from office; and may pronounce not only on the amount to which he is entitled, but whether his office or the tenure of it, was such as to entitle him to anything. *Reg. v. Sandwich (Mayor)*, 2 G. & D. 28; 2 Q. B. 895; 6 Jur. 684.

b. Persons Entitled.

Officer de facto.—The council of a borough removed a town clerk, who had been elected to hold during good behaviour, but had not made the declaration prescribed by 9 Geo. 4, c. 17, s. 2:—Held, that, as having been an officer de facto, he was entitled to compensation. *Reg. v. Cambridge (Mayor)*, 12 A. & E. 702; 4 P. & D. 294.

Solicitors.—An attorney cannot, under 5 & 6 Will. 4, c. 76, s. 66, or 5 & 6 Vict. c. 111, s. 2, claim compensation for fees and emoluments which he derived from being employed by the justices of a division to prosecute offenders committed by them for trial, where the prosecutor did not employ another attorney. *Reg. v. Manchester (Mayor)*, 5 Q. B. 402; 8 Jur. 421.

Certain trustees having the management of the relief of the poor of a metropolitan parish, appointed a solicitor for the arrangement of legal matters, with an annual salary. After the passing of the Metropolitan Poor Act, 1867 (30 Vict. c. 6), the poor law board refused to allow the board of guardians elected under that act to continue him in the appointment which he had received from the trustees:—Held, that he was entitled to an award of compensation from the poor law board, under s. 76. *Reg. v. Local Government Board*, 9 L. R., Q. B. 148; 43 L. J., Q. B. 49; 29 L. T. 769; 22 W. R. 315.

The four attorneys of the sheriff's court of York having a monopoly of the office of attorney in that court, were not, on other attorneys being admitted to practise in the court, by the operation of 5 & 6 Will. 4, c. 76, entitled to compensation; because, although their office was an office of profit within 5 & 6 Will. 4, c. 76, s. 66, there had been no abolition of it, or removal from it. *Reg. v. York (Mayor)*, 2 G. & D. 580; 3 Q. B. 550; 6 Jur. 1082.

Clerk to Stipendiary.—Before and at the time

of granting a charter of incorporation and a separate court of quarter sessions to the borough of Manchester, there was a division of the county of Lancaster, called "the division of Manchester," consisting of forty-three townships, and the business of the division was done at the New Bailey, in Salford; and M. acted as clerk to the justices who attended there. Some of the justices of the division met at Worsley, and others at Heaton Norris, both being townships within the division, and did petty sessions business there; and such justices employed different clerks on such occasions. By virtue of 53 Geo. 3, c. 78, a stipendiary magistrate was appointed for a district, including Salford and other townships in the division of Manchester, who appointed M. as his clerk:—Held, first, that M. was not clerk to the justices for the Manchester division of the county of Lancaster, but only to such of them as attended at Salford; and, secondly, that the clerk to the stipendiary magistrate was not an officer of the borough, county or division of the county within 5 & 6 Vict. c. 111, s. 2; and, therefore, that M. was not, on either ground, entitled to compensation. *Reg. v. Manchester (Borough)*, 9 Q. B. 458; 16 L. J., Q. B. 27; 11 Jur. 222.

Coroners.—The 7 & 8 Vict. c. 92, s. 4, empowers the Queen, with the advice of her privy council, to order that any county shall be divided into so many districts, as shall seem expedient, for the purposes of the act; and by s. 6, whenever any county has been customarily divided into districts, for the purpose of holding inquests, during seven years before the passing of the act, and it shall seem expedient that the same division of the county be made under this act, each of such districts shall be assigned to the coroner usually acting in and for the same district before the passing of this act; but if it shall appear expedient that a different division of such county be made, and any coroner shall present a petition praying for compensation for the loss of his emoluments arising out of such change, the lords of the treasury are to assess the amount of compensation to be paid out of the county rate:—Held, that the coroner was entitled to compensation only where a county had been customarily divided into districts for seven years before the passing of the act, and where a different division was ordered under the act. *Reg. v. Lechmere*, 16 Q. B. 284; 20 L. J., Q. B. 169; 15 Jur. 558.

Chamberlains.—In 1794, a corporation appointed A. assistant-chamberlain of the city, for a year, at a yearly salary. In 1804 the salary of A. was raised. In 1810 B. was appointed assistant-chamberlain by the chamberlain, and he continued to hold this office till the passing of the 5 & 6 Will. 4, c. 76. In 1827 the corporation had again raised the salary. On the passing of the 5 & 6 Will. 4, c. 76, the office of B. was abolished, and a claim having been made by him for compensation, the lords of the treasury awarded, that his office was not the subject of compensation, and the court confirmed the decision. *Harvey, Ex parte*, 3 N. & P. 159; 7 A. & E. 739.

Clerk of the Peace.—After the 5 & 6 Vict. c. 111, a corporate borough was created by charter, not containing a non-intromittant clause. Its

area was a part of a county. A grant of a court of quarter sessions was made, and the council appointed a clerk of the peace for the borough:—Held, that the clerk of the peace of the county was not entitled to compensation under the 5 & 6 Will. 4, c. 76, s. 66, he not having been removed nor his office abolished, although the profits were diminished. *Reg. v. Brighton Council*, 7 El. & Bl. 249; 26 L. J., Q. B. 153; 3 Jur., N. S. 585.

Evidence of Resignation.—It is no evidence of voluntary resignation, by a corporate officer, of the offices held by him, so as to exclude him from compensation, that he omitted to declare his wish to be re-elected, and allowed another person, without opposition, to be elected in his place. *Att.-Gen. v. Poole (Corporation)*, 8 Beav. 75; 14 L. J., Ch. 101; 9 Jur. 318.

Where no formal resignation or surrender of the offices held by a corporate officer was made by him, and another person was, without opposition by him, appointed in his place:—Held, that such corporate officer was removed from his offices within the meaning of the act. *Ib.*

Agreement not under Seal.—An agreement by a corporation with one of their officers, for an increase of the salary of an office retained by him, as a compensation for the loss of an office of which he was deprived, though upon an executed consideration, is not binding, if the contract is not under the common seal of the corporation. *Reg. v. Stamford (Mayor)*, 6 Q. B. 433; 8 Jur. 909.

c. Assessment of.

Emoluments of Office.—The Metropolitan Bridges Act, 1877, provided that compensation should be paid to certain officers, including clerks, but not including solicitors, of the private companies or corporations whose bridges were taken over by the Metropolitan Board of Works under the act, upon a scale to be calculated on the basis of the emoluments actually received by them in the two years previous to the passing of the act. The Deptford Creek Bridge was taken over by the board, and thereby the plaintiff, who had been clerk to the Deptford Creek Bridge Company, lost his office. He had received a salary as clerk, and also payments for legal business done by him as solicitor for the company, and commission on the rents of the company's property which he received. The Deptford Creek Bridge Company had by their act power to appoint a solicitor and receiver as well as a clerk; they had never appointed such officers, and the legal business of the company had always been done and the rents received by the clerk, who had always been a solicitor:—Held, that, by the practice of the company, these duties had been attached to the office of clerk, and that the plaintiff was entitled to compensation in respect of the payments received for discharging them as part of the emoluments of his office; but as to the payments for legal business done by him, only in respect of his proportion as partner in the firm of solicitors of the net profits after deducting all office expenses necessarily incurred in earning the money. *Drew v. Metropolitan Board of Works*, 50 L. T. 138—C. A.

Incidental Business.—A town clerk had trans-

acted the legal business of the corporation as charity trustees. He and his predecessors in office had usually transacted such business as incidental to their office. On the passing of 5 & 6 Will. 4, c. 76, he was removed from the office of town clerk, and subsequently the new charity trustees also removed him from their employment. The town council having awarded him compensation for the loss of his office of town clerk, but having refused compensation for the loss of his employment by the trustees, he appealed to the lords of the treasury, who awarded him compensation for such employment also:—Held, that they had jurisdiction to award such compensation, because the transaction of the charity business formed part of the incidental profits of the office of town clerk, and they therefore had entertained a question of amount only, and not a question whether the loss of any distinct office was a proper subject of compensation. *Reg. v. Norwich (Mayor)*, 2 G. & D. 605; 3 Q. B. 285.

Calculation from Bygone Time.—A treasury order for compensation to an officer of a corporation dismissed after the passing of 5 & 6 Will. 4, c. 76, is not necessarily bad because it directs the compensation to be calculated from a bygone time. But such order is bad, and a nullity, if on the face of it, or by comparison with the treasury minute directing the order to issue, it appears that the compensation is partly given for a period during which the party still held the office. *Reg. v. Lichfield (Mayor)*, 16 Q. B. 781; 20 L. J., Q. B. 383; 15 Jur. 812—Ex. Ch.

Annual or Life Office.—The steward of a borough demanded compensation as for an office held for life. The town council allowed compensation as for an annual office only. The lords of the treasury, after hearing the parties, awarded compensation on the former principle. On motion for a mandamus to the corporation to execute a compensation-bond, there appeared evidence, on the one hand, that the office was not legally holden for life; and, on the other, that it had usually been so holden, and that the appointment was accepted on that understanding:—Held, that the lords of the treasury were not bound to consider only the legal tenure, but might, referring to the circumstances of the case, award compensation as for an office held for life. *Reg. v. Norwich (Mayor)*, 8 A. & E. 633.

When Nominal.—On the 21st August, 1835, the town clerk of Lyme Regis died, and, on the 31st of the same month, Lec was appointed his successor. On the 8th September, 1835, the 5 & 6 Will. 4, c. 76, passed:—Held, that he was entitled to nominal compensation only for the loss of his office as town clerk, since he must have known, when he was appointed, that his appointment would soon cease. *Lec, Ex parte*, 2 N. & P. 63; 7 A. & E. 139.

Effect of Award.—Where a town council, in obedience to a mandamus, assessed compensation for the loss of certain offices of profit, and the lords of the treasury, on appeal, assessed a larger amount of compensation:—Held, that the assessment under the mandamus estopped the town council from denying the right to compen-

sation. *Sandwich (Mayor) (in error) v. Reg.*, 10 Q. B. 563; 16 L. J., Q. B. 432.

III. LIABILITY OF OFFICERS.

1. CIVIL PROCEEDINGS.

a. Contracts.

The principal secretary of state for war is not personally liable in an action for breach of a contract entered into by him on behalf of the war department. *O'Grady v. Cardwell*, 21 W. R. 340.

b. Acts in Execution of Duty.

Grant of Booty "in Trust" to Distribute amongst Persons entitled.]—Her Majesty by royal warrant "granted" booty of war to the secretary of state for India in council "in trust" to distribute amongst the persons found entitled to share it by the decree of the judge of the Court of Admiralty, to whom the matter had been referred by the sovereign for that purpose, with a direction that doubts should be finally determined by the secretary of state unless her Majesty should otherwise order. An action having been brought against the secretary of state for India in council by K., on behalf of himself and all the other parties entitled, alleging that a portion only of the fund had been distributed, and claiming an account and the distribution of the residue:—Held, that the warrant did not operate as a transfer of property or create a trust; and that the defendant, being merely the agent of the sovereign to distribute the fund, was not liable to account to any of the parties found entitled. *Kinloch v. Secretary of State for India in Council*, 15 Ch. D. 1; 49 L. J., Ch. 571; 42 L. T. 667; 28 W. R. 619.—C. A. Affirmed, 7 App. Cas. 619; 51 L. J., Ch. 885; 47 L. T. 133; 30 W. R. 845—H. L. (E.).

Obedience to Orders.]—The plaintiff, having obtained judgment against F. in an action of assault and false imprisonment, sued out a ca. sa., whereon F. was taken and committed to the Queen's Prison, of which the defendant was the keeper. F. afterwards petitioned the Court of Bankruptcy for his discharge, under 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, and, having obtained from the commissioner an order for his discharge, was, in obedience thereto, discharged by the defendant accordingly. The plaintiff having brought an action against the defendant for an escape:—Held, that, whether this was or was not a debt from which the commissioner had power to discharge the prisoner, the defendant was protected, being bound to obey the order of the commissioner, who was acting judicially, in a matter over which he had jurisdiction. *Thomas v. Hudson*, 14 M. & W. 353; 2 D. & L. 873; 14 L. J., Ex. 283; 9 Jur. 627.

Seizure of Ship by Naval Officer.]—By the Kidnapping Act, 1872, s. 3, vessels carrying native labourers of the South Sea Islands, not being part of the crew, must have a licence; by s. 6, vessels carrying native labourers without a licence are subject to the provisions of s. 16; by s. 9, to detain or confine a native for the purpose of removing him from one place to another is declared to be felony; by s. 16, any vessel sus-

pected upon reasonable grounds of committing an offence against the 9th section may be detained; by s. 20, no damages shall be payable and no officer shall be responsible for the detention or seizure of a vessel in pursuance of the act. Before the passing of the Kidnapping Act, 1872, the plaintiff's vessel sailed on a voyage to the South Sea Islands for the purpose of fishing; her master hired native labourers, and after the fishing was over the vessel was engaged in carrying the natives home when she was seized by a man-of-war, of which the defendant was commander. At the time of the seizure the defendant bona fide believed that there was reasonable ground for suspecting that an offence had been committed against the act:—Held, no action would lie against the defendant. *Burns v. Nowell*, 5 Q. B. D. 444; 49 L. J., Q. B. 468; 43 L. T. 342; 29 W. R. 39; 44 J. P. 828—C. A.

See also sub tit. ACTION.

Colonial Governors.]—Trespass for seizing and detaining at Kingston in Jamaica a schooner of which the plaintiff was charterer, and which had, as alleged, put into the port of Kingston in distress and for repairs. Plea, in substance, of privilege and to the jurisdiction, that the defendant was captain-general and governor-in-chief of the island of Jamaica, that the acts complained of were done by him as governor of the island and in the exercise of his reasonable discretion as such, and as acts of state. The plea did not aver even generally that the seizure of the plaintiff's ship was an act which the defendant was empowered to do as governor, nor even that it was an act of state:—Held, that the judgment respondent ouster was right and must be affirmed. *Musgrave v. Pulido*, 5 App. Cas. 102; 49 L. J., P. C. 20; 41 L. T. 629; 28 W. R. 373—P. C.

— Liability for Mistake when acting within Limits.]—Quære, how far a governor when acting within the limits of his authority, but mistakenly, is protected. *Id.*

— Jurisdiction.]—The governor of a colony (in ordinary cases) cannot be regarded as a viceroy; nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission and limited to the powers thereby expressly or impliedly entrusted to him. It is within the province of municipal courts to determine whether any act of power done by a governor is within the limits of his authority, and, therefore, an act of state. *Id.*

Suit against Officer in Official Capacity.]—In a suit against her Majesty's deputy commissary general for Natal, and as such representing her Majesty's commissariat department, to recover certain moneys as the price or hire of certain waggons and oxen, for the carriage of certain goods, for damages for illegal acts of defendant or his employés, and for general damage:—Held, on exceptions by the defendant to the jurisdiction of the court and to the declaration, that the defendant could not be sued, either personally or in his official capacity, upon a contract entered into by him on behalf of the commissariat department; and that there was no cause of action against him. The government revenue cannot be reached by a suit against a public officer in his official capacity. *Quære*,

whether the court would have had jurisdiction if a petition of right had been presented and the crown had ordered that right should be done. *Palmer v. Hutchinson*, 6 App. Cas. 619; 50 L. J., P. C. 62; 45 L. T. 180—P. C.

Wrongful Act—Excessive Fees.—If exorbitant fees were taken by a custom-house officer from the master of a vessel, upon his taking out a cocquet and bond pursuant to 13 & 14 Car. 2, c. 11, s. 7; though the statute imposed the duty on the master personally, the owners might recover the excess as money had and received. *Stevenson v. Mortimer*, Cowp. 805.

Duty thrown on Body.—Where a duty is thrown on a body consisting of several persons each is individually liable for a breach of duty, as well for acts of commission as of omission. *Re v. Holland*, 5 T. R. 607.

c. Costs.

The Court of Appeal has no jurisdiction to give costs against the registrar of trade marks, when the latter is unsuccessful. *Rotherham's Trade Mark, In re*, 14 Ch. D. 585; 49 L. J., Ch. 511; 43 L. T. 1—C. A.

Where a court of inquiry ordered a master's certificate to be suspended on the invitation of the Board of Trade, and the only ground on which the decision could be supported was that serious damage to a ship had been caused by the wrongful act or default of the master, within the meaning of s. 242 of the Merchant Shipping Act, 1854, sub-s. 2, and on appeal it appeared to the Court of Appeal that there was no evidence that the damage had been caused by the wrongful act or default of the master, the Court of Appeal reversed the decision, and ordered the Board of Trade to pay the costs of the appeal. *The Arizona*, 5 P. D. 123; 49 L. J., P. 54; 42 L. T. 505; 28 W. R. 704—C. A.

2. CRIMINAL PROCEEDINGS.

Indictable Offences—What are.—It is a high misprision in an officer to alter an enrolment without the sanction of the Court of Chancery. *Garriok v. Williams*, 3 Taunt. 540.

A public officer is indictable for misbehaviour in his office. *Re v. Bembridge*, 3 Dougl. 327.

One who was appointed collector of certain duties by the proper constituted authorities, and who considered himself, and was considered by the commissioners to be such collector, but whose appointment turned out to have been informally made, cannot be indicted at common law for the receipt of duties, by colour and pretence of being collector of such duties, though the money was fraudulently collected and misapplied by him, because he was in fact appointed collector, and in that character received the money. *Re v. Dobson*, 7 East, 218.

A collector of post-horse duty demanded of A. a sum of money, alleging that A. had let out horses for hire without payment of the duty. A. denied that he had done so, and gave the collector a promissory note for 5*l.*, the amount of which, after it became due, was paid by A. to the collector, who handed it over to his principal, the farmer of the post-horse duties:—Held, that this was extortion in the collector, and that his having paid the money over to his

principal made no difference. *Re v. Higgins*, 4 C. & P. 247.

An indictment does not lie against a turnpike-keeper to try the question of exemption from toll, unless the ground of exemption was specified at the time the toll was taken. *Re v. Hamlyn*, 4 Camp. 379.

Evidence.—On the trial of an indictment for a fraud against an agent of government, under the control of the treasury, a letter of instructions addressed to him by the lords of the treasury may be read without proving the commission by which they were appointed. *Re v. Jones*, 2 Camp. 131.

Jurisdiction.—The 42 Geo. 3, c. 85, giving jurisdiction for trying and punishing in this country, persons holding public offices or employments, for offences committed abroad, does not extend to felonies. *Re v. Shawe*, 5 M. & S. 403.

Validity of Indictments.—In an indictment against a public officer for breach of duty, it is sufficient to state generally that he is such officer, without shewing his appointment. *Re v. Holland*, 5 T. R. 607.

In an indictment against an officer for disobedience of orders, it is not necessary to aver that the orders have not been revoked, or that they are in force. *Id.*

Where a public officer is charged with a breach of duty, which duty arises from certain acts within the limits of his government, it is not necessary to aver, in an indictment against him, that he had notice of those acts; he is presumed from his situation to know them. *Id.*

A charge in an indictment against an officer, of a breach of orders in not prosecuting a war, "with all possible vigour and decision," is too uncertain, even though the charge is made in the very words of the order given to him. *Id.*

By 33 Geo. 3, c. 52, s. 62, the demanding or receiving any sum of money or other valuable thing as a gift or present, or under colour thereof, whether for the use of the party receiving the same, or for, or pretended to be for, the use of the company, or of any other person whatsoever, by any British subject holding any office in the East Indies, shall be extortion and a misdemeanour, and shall be proceeded against and punishable as such. An information under this section charged the defendant with receiving from R., in the East Indies, a sum of money, to wit, 8,000 rupees, being of the value of 800*l.* of lawful money of Great Britain, as a gift or present. The jury found him guilty, and that the sum of money was 8,000 rupees; and that the sum of 8,000 rupees, at the time of the receipt, was of the value of 766*l.* 13*s.* 4*d.* money of Great Britain, being at the rate of of 1*s.* 11*d.* for each rupee:—Held, first, that the meaning of the statute was to prevent a person holding office in the East Indies from receiving any gift absolutely, whatever the reason for the gift might be; and that, if the meaning of the statute was to prohibit gifts being received only where they were received extorsively or under colour of office, the indictment would be good by virtue of 7 Geo. 4, c. 64, which applied as well to indictments preferred for offences abroad as for offences in England. *Douglas v. Reg. (in error)*, 13 Q. B. 74; 17 L. J., M. C. 176; 12 Jur. 974—Ex. Ch.

Held, secondly, that it was not necessary to state for whose use the money was received. *Ib.*

Held, thirdly, that it was not necessary to state whose the money was. *Ib.*

The 49 Geo. 3, c. 126, s. 3, makes it a misdemeanor in any person who shall by any way or means contract or agree to receive, or have any money, fee or profit, for any office or employment specified in that act, or for any appointment thereto:—Held, that a count in an indictment alleging the offence to be that the defendants did unlawfully and corruptly contract and agree with D. N. to procure the appointment to a certain office and employment, was bad for not stating the offence within that section. *Samo or Day v. Reg.*, 2 Cox, C. C. 178.—*Ex. Ch.*

PUBLIC WORSHIP.

See ECCLESIASTICAL LAW.

QUARANTINE.

See SHIPPING.

QUARE IMPEDIT.

See ECCLESIASTICAL LAW.

QUARTER SESSIONS.

See JUSTICE OF THE PEACE.

QUEEN ANNE'S BOUNTY.

See ECCLESIASTICAL LAW.

QUO WARRANTO INFORMATION.

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I. GENERAL PRINCIPLES.

Discretion.—It is discretionary in the court to grant or withhold a quo warranto information, even where a good objection to the title is shewn. *Rex v. Parry*, 6 A. & E. 810.

It is in the discretion of the court to grant a quo warranto information or not. *Rex v. Trevenen*, 2 B. & A. 479. *S. P.*, *Reg. v. Cousins*, 42 L. J., Q. B. 124; 28 L. T. 116.

To Try Collateral Matter.—The court will not grant it against an officer of a corporation established by charter, pursuant to 7 Will. 4 & 1 Vict. c. 78, s. 49, if it appears that the object in prosecuting the information is to try the legality of the charter. *Reg. v. Taylor*, 11 A. & E. 949; 3 P. & D. 652.

Where a quo warranto was moved for on the ground of a disputed mode of election, which alone was in controversy at the time of the defendant's election, and which ground was afterwards answered on shewing cause, the court would not, in its discretion, make the rule absolute to try another incidental and secondary question, as to whether there was a sufficient interval of time allowed between the nomination and election of the defendant; no person's right having been set aside by means of such acceleration of the election, if it was accelerated. *Rex v. Osbourne*, 4 East, 327.

Friendly Proceeding.—It is no objection, that it is a friendly proceeding, in order that the party may disclaim. *Rex v. Marshall*, 2 Chit. 370.

No Civil Right in Controversy.—Where a corporation was dissolved, and no corporate body existed in fact at the time, the court refused to grant it against an individual for an impertinent claim to be returning officer at an election of members to serve in parliament, by virtue of

his having been elected an alderman while the corporation existed in fact; there being no civil right in controversy, but it being rather the ground of a proceeding in *panam* by the attorney-general. *Rex v. Saunders*, 3 East, 119.

Doubtful Question.—It will be granted where the right depends upon a matter of doubtful law, in order to its being finally determined. *Rex v. Carter*, Cowp. 58; Lofft, 516.

The court will not decide on the validity of the election of a corporate officer, if the question is new or doubtful, on a rule for a quo warranto. *Rex v. Godwin*, 1 Dougl. 397.

Where Result of Election unaffected.—A rule for a quo warranto, in respect of an annual office of guardians of the poor, the election to which was on the 14th of May, on the ground that the mode of election adopted was not a proper one, was not applied for till the 13th of January following, and it was then not shewn that any ratepayer had been prevented from voting, or that the result of the election was affected by the mode adopted. In the exercise of its discretion the court discharged the rule. *Reg. v. Cousins*, 42 L. J., Q. B. 124; 28 L. T. 116.

The court will not allow a quo warranto to be filed to try the title to an office merely because there has been an irregularity in the election, in the absence of bad faith, and where the result of the election has not been affected. *Reg. v. Ward*, 8 L. R., Q. B. 210; 42 L. J., Q. B. 126; 28 L. T. 118; 21 W. R. 632.

At the election of a local board of health, the chairman being about to go out of office, another person was appointed under 11 & 12 Vict. c. 63, s. 21, to act as returning officer in case of the chairman being nominated for re-election. Nomination papers were sent in due course to the chairman, and amongst them one nominating him as a candidate. He nevertheless continued to receive the nomination papers, and when all had been delivered prepared the voting papers, inserting therein the names of the persons nominated as required by s. 24. He did not further act as returning officer; and was returned as re-elected. There was nothing to shew that the names were inserted in the voting papers otherwise than in their proper order, or that the result of the election had been in any way affected by the voting papers having been prepared by the chairman instead of by the person appointed to act as returning officer:—Held, that, assuming the chairman's conduct to have been an irregularity, the court in its discretion ought not to allow an information to be filed against his election, no mischief having been done. *Ib.*

Office Held during Pleasure.—On an application for a quo warranto against the clerk to a school board, on the ground that he was improperly elected according to 33 & 34 Vict. c. 75, s. 35, the court refused a rule, considering that the majority of the board might, without assistance, remedy the impropriety itself, the office being held during the pleasure of the board. *Bradley v. Sylvester*, 25 L. T. 459.

A clerk to justices of a borough, appointed under 5 & 6 Will. 4, c. 76, s. 102, holds only during the pleasure of the justices, and therefore a quo warranto will not lie for his office. *Reg. v. Fox*, 8 El. & Bl. 399; 27 L. J., Q. B. 151; 4 Jur., N. S. 410.

When Granting useless.—The court refused to grant a rule for a quo warranto information applied for by the former occupant of an office, on the ground that his dismissal from office had been illegal, when they were satisfied that if reinstated he might legally, and would be, dismissed again immediately. *Richards, Ex parte*, 3 Q. B. D. 368; 47 L. J., Q. B. 498; 38 L. T. 684; 26 W. R. 695.

Office Determined.—A party who had been appointed to, and was discharging, the office of town clerk of a borough when the Municipal Corporations Act, 5 & 6 Will. 4, c. 76, passed, was afterwards removed by the town council, and claimed compensation under s. 66. A motion was then made, at the instance of the corporation, for a quo warranto against him for exercising the office, on the alleged grounds that he was not a burgess at the time, was not sworn in, and did not make the declaration required by 9 Geo. 4, c. 17:—Held, that it ought not to be granted for trying the title to an office which was determined. *Harris, In re*, 6 A. & E. 475.

A quo warranto was issued for holding an annual office, after its close, to try a civil right. *Rex v. New Radnor*, 2 Ld. Ken. 498.

Election to Offices.—To entitle a party to a quo warranto, on the ground that the person filling the office has not been elected by a majority of the class entitled to vote, the relator must shew who the class is that is entitled to vote, and that another person had a majority of such votes. *Rex v. Mashiter*, 1 N. & P. 314; 6 A. & E. 153; W., W. & D. 173.

The charter of the Saddlers' Company provides, in case of vacancy in the office of assistants, that it shall be lawful for the wardens and assistants at their pleasure to elect one other of the commonalty, and that the wardens and assistants in all things appertaining to the good rule and government of the company should be subject and obedient to the lord mayor and court of aldermen of London. An applicant for a quo warranto relied upon an alleged usage and practice of the company to elect by seniority. The court refused to make the rule absolute, as the evidence would not warrant a jury in finding the existence of a bye-law to that effect. *Reg. v. Fisher*, 4 B. & S. 575, n.

Held, also, that the mayor and court of aldermen could not control the court in the exercise of its jurisdiction over the corporate rights of the company. *Ib.*

Resignation of Office.—A quo warranto was granted against a person for exercising an office in a corporation after he had resigned by writing, but without deed. *Rex v. Payne*, 2 Chit. 367.

The court will make the rule absolute, although the party has, since the rule obtained, resigned his office, and his resignation has been accepted. *Rex v. Warlow*, 2 M. & S. 75.

When a person wrongfully elected to a corporate office and admitted into it resigns, and his resignation is accepted, another candidate who claims to have been duly elected and to be admitted into the office, is entitled to a quo warranto. *Reg. v. Blizzard*, 2 L. R., Q. B. 55; 36 L. J., Q. B. 18; 15 L. T. 242; 15 W. R. 105; 7 B. & S. 922.

User of Franchise.—There must be a user as

well as a claim of a franchise, in order to found an application for a quo warranto: stating that the defendant, who was elected to an office, had tendered himself to be sworn in, is not sufficient. *Reg. v. Whitwell*, 5 T. R. 85.

But a swearing in, though defective in law, yet being such whereby the party claimed at the time to be a free burgess of a corporation, is a sufficient user of the office to warrant a quo warranto against him, and not like a mere claim of the office. *Reg. v. Tate*, 4 East, 337.

The affidavit of a relator, that he "has been informed and believes" that the defendant exercises the office which he is charged with usurping, is sufficient. *Reg. v. Slythe*, 9 D. & R. 226; 6 B. & C. 240.

A mere statement in an affidavit for a quo warranto against a town councillor, that he has accepted the office, is insufficient, under 5 & 6 Will. 4, c. 76. The acts constituting acceptance should be also stated. *Reg. v. Slatter*, 3 P. & D. 263; 11 A. & E. 505; 4 Jur. 316.

A statement that he has acted in the office, is sufficient. *Reg. v. Quayle*, 11 A. & E. 508; 5 Jur. 368.

The court will not institute a scrutiny and determine upon affidavits which of two candidates has been elected town councillor. *Id.*

Where sufficient appears by the affidavits to draw the merits of an election to a corporate office into question, the court will grant a quo warranto, though the fact of the defendant's usurpation no otherwise appeared than by the deponents' swearing to their information and belief that the defendant was admitted a freeman, and sworn and enrolled accordingly, the defendant not denying the fact when called upon by a rule to shew cause. *Reg. v. Harwood*, 2 East, 177.

A quo warranto for usurping the office of free burgess, does not lie against the mere claim of one who, though elected, never was admitted. *Reg. v. Ponsonby*, 1 Ves. jun. 1; 2 Bro. P. C. 311; 1 Ld. Ken. 1.

Where it appeared that the defendant had presided at a vestry meeting convened for the purpose of electing a member of a burial board, under 15 & 16 Vict. c. 85, s. 12; that he and others were proposed and seconded; that he declared himself elected; that the clerk wrote to the clerk of the burial board informing him of his election; and that at the next vestry meeting, when he again presided, the minutes of the previous meeting, one of which was a memorandum of his election, were unanimously confirmed. The defendant stated that he had declined to attend any of the meetings of the board, and he had not at any time acted or claimed the right to act as a member of the board:—Held, that this was not a sufficient user of the office to found an application for a quo warranto. *Reg. v. Jones*, 28 L. T. 270.

II. AGAINST WHOM AND FOR WHAT OFFICES.

1. GENERALLY.

A quo warranto will lie for usurping any office, whether created by charter of the crown alone, or by the crown with the consent of parliament, provided the office is of a public nature, and a substantive office, and not merely the function or employment of a deputy or a servant, held at

the will or pleasure of others. *Darley v. Reg. (in error)*, 12 C. & F. 520.

The office of treasurer of the public money of the county of the city of Dublin, is an office for which an information in the nature of a quo warranto will lie. *Id.*

A quo warranto will not lie for usurping an office which is not of a public nature, although such office may have been created by a charter of the crown. *Smyth, Ex. parte*, 8 L. T. 458; 11 W. R. 754.

A quo warranto will not lie to try a question concerning the validity of an election to a fellowship of a college which was disputed by the master. *Reg. v. Gregory*, 4 T. R. 240, n.

Where a franchise has been exercised from very remote times under circumstances which make it reasonable to suppose, that it emanated from a grant by the crown, and there has, at no period, been any considerable opposition to it, the court will not allow a quo warranto, to try its validity, merely on the ground that it cannot be distinctly traced to a legal origin, especially if the franchise has been partially recognized in any ancient statute. *Reg. v. Archdall*, 3 N. & P. 696; 8 A. & E. 281.

A quo warranto granted in order to try whether a residence in a borough previously to an election, which required residence, was bona fide or not. *Reg. v. Richmond (Duke)*, 6 T. R. 560.

The court refused a rule for a quo warranto against the town clerk of a borough, which was moved for in order to contest his right to compensation as a displaced officer under 5 & 6 Will. 4, c. 76, s. 66. *Reg. v. Harris*, 1 N. & P. 576; W., W. & D. 237; 6 A. & E. 475.

It will lie for holding a court of record within a charter borough, and presiding therein in the absence of the bailiffs, the defendant not being one of them. *Reg. v. Williams*, 1 Burr. 402; 2 Ld. Ken. 68.

So, for holding a court-leet after long disuser, without shewing a title by the original grant. *Darrell v. Bridge*, 1 W. Bl. 46.

So, for the office of bailiff of a court-leet. *Reg. v. Bingham*, 2 East, 308.

A quo warranto will not lie for encouraging the exercise of a franchise. *Reg. v. Marsden*, 1 W. Bl. 579; 3 Burr. 1812.

It was granted for exercising the office of a justice of the peace. *Reg. v. —*, 2 Chit. 368.

So, against ten, for exercising the office of commissioners for paving the town of Taunton under an act of 9 Geo. 3, who had been improperly elected to fill up vacancies in the original number. *Reg. v. Badcock*, 6 East, 359.

It will lie to repeal the grant of a franchise by scire facias, where the owner has neglected his duty. *Peter v. Kendall*, 6 B. & C. 703.

A quo warranto will not lie for the office of master of a hospital and free grammar school, established by a royal charter. *Reg. v. Mousley*, 8 Q. B. 946; 16 L. J., Q. B. 89; 11 Jur. 56.

It lies for the office of recorder. *Reg. v. Colchester (Mayor)*, 2 T. R. 259.

A coroner in a borough having acted under an irregular appointment, and been recognized in his office by the council for several years:—Held, that the office was full, and that a quo warranto lay to oust a subsequently-appointed coroner. *Reg. v. Grimshaw*, 10 Q. B. 747; 16 L. J., M. C. 385.

A party removed from the office of clerk of a county court by the judge of the court, with the

approval of the lord chancellor, under 9 & 10 Vict. c. 95, s. 24, for alleged inability, is entitled to try the validity of such removal by quo warranto. *Reg. v. Owen*, 15 Q. B. 476; 19 L. J., Q. B. 490; 14 Jur. 953.

It does not lie against the clerk of the commissioners of land tax; but if he is improperly elected under 43 Geo. 3, c. 99, a mandamus will lie to the commissioners to admit the person who had the majority of legal votes. *Re v. Thatcher*, 1 D. & R. 426.

The office of governor and director of the poor of an incorporated district is not such an office as that for which a quo warranto will lie for an usurpation of it. *Re v. Ramadan*, 5 N. & M. 325; 3 A. & E. 456.

A quo warranto will not lie against a county treasurer to shew by what authority he holds the office if he has been de facto elected by the justices in quarter sessions. *Re v. Herefordshire (Justices)*, 1 Chit. 700.

For an office of great trust and pre-eminence within the borough, touching the election, and return of burgesses to serve in parliament, it will not lie. *Re v. McKay*, 6 D. & R. 432; 4 B. & C. 351.

It lies against the bailiff of a borough by prescription, sending members to parliament, though not a corporate officer. *Re v. Highmore*, 1 D. & R. 438; 5 B. & A. 771.

And against a portreeve of a borough and manor, who, as portreeve, is the returning officer of the borough. *Re v. Mein*, 3 T. R. 596.

A chairman of a local board of health was the returning officer at elections of members of the board, and should have personally conducted the election; and where an election was conducted, during the absence of the chairman, by the clerk and secretary of the board, a quo warranto was granted against the members elected. *Reg. v. Backhouse*, 13 W. R. 846. See *Reg. v. Backhouse*, 7 B. & S. 911.

The 15 Car. 2, c. 17, creating the corporation of the Bedford Level, directs that they shall appoint a registrar and other officers at their pleasure, the duty of which registrar is to register titles to land within the Level; and he takes an oath of office:—Held, that a quo warranto does not lie against such an officer; he being a mere servant of the corporation, and his office not affecting any franchise or other authority holden under the crown. *Re v. Bedford Level Corporation*, 6 East, 356; 2 Smith, 535.

A local act created a corporation, consisting of sworn commissioners, with summary power of seizure of goods, and imprisonment of the person, and of preventing and removing obstructions and nuisances in the streets; powers for paving, cleansing, and lighting; powers of appointing and paying officers, of determining the number of watchmen, of regulating them, and dismissing, paying, or pensioning them; of possessing property in materials required under the act, of instituting prosecutions, of imposing rates, of appointing and removing treasurers, to whom penalties, imposed by the act, were to be paid for the purposes of the act; and of hearing appeals by parties complaining of things done under the act:—Held, that a quo warranto would lie against persons claiming to be commissioners. *Re v. Beadle*, 3 Ad. & E. 467.

But it does not lie for the office of trustees under a public local act, elected as vacancies occur, by occupiers in the parish, and taking an

oath of office, with power to appoint salaried treasurers, collectors, &c., of moneys raised under the act, accountable to themselves; to pass by-laws with penalties; to impose rates in case of certain other functionaries not so doing; to supply omissions in the rates, and to relieve parties aggrieved or incompetent to pay; to appoint salaried watchmen; to purchase, hold, and manage property for the purposes of the act; to contract for the supply of the poor, remove nuisances, and apprehend for certain specified nuisances; to maintain the highways, and prevent encroachments thereon; to superintend the lighting, paving, watching, and cleansing of the streets; to remove dangerous buildings, on complaint upon oath (which they were to administer), and to sue in the name of their clerk, or one of themselves. *Re v. Hanley*, 3 A. & E. 463, n.

2. PAROCHIAL OFFICES.

A quo warranto does not lie for exercising the office of guardian of the poor for a union, under 4 & 5 Will. 4, c. 76. *Aston Union, In re*, 6 A. & E. 784; W., W. & D. 329; S. C., nom. *Re v. Carpenter*, 1 N. & P. 773. But see contra, *Reg. v. Hampton*, 12 Jur., N. S. 583; 13 L. T. 431; 15 W. R. 43; 6 B. & S. 923.

The office of clerk to the board of guardians of a union appointed under 4 & 5 Will. 4, c. 76, s. 46 (Poor Law Act), is an office created by statute, and of a public nature, in respect of which a quo warranto will lie. *Reg. v. St. Martin-in-the-Fields (Guardians)*, 17 Q. B. 149; 20 L. J., Q. B. 423; 15 Jur. 800; S. P., *Hill v. Reg.*, 8 Moore, P. C. C. 139.

It does not lie against overseers. *Re v. Danberry*, 1 Bott's P. L. 324.

It lies for the office of constable. *Reg. v. Booth*, 12 Q. B. 884; 18 L. J., M. C. 25; 13 Jur. 6.

But it does not for the office of churchwarden. *Re v. Shepherd*, 4 T. R. 381; S. P., *Barlow, In re*, 30 L. J., Q. B. 271; 5 L. T. 289.

The court will not grant a quo warranto to inquire into the election of an assistant overseer. *Reg. v. Simpson*, 19 W. R. 73.

3. CORPORATE AND MUNICIPAL OFFICES.

No quo warranto can be granted against a corporation acting as such, but only against individual members. *Re v. Carmarthen (Corporation)*, 1 W. Bl. 187; 2 Burr. 869.

The persons declared to be elected as town councillors by the mayor or ward aldermen, at a municipal election, and who had accepted office and made the proper declaration, can only be removed from office by a quo warranto information. *Re v. Winchester (Mayor)*, 2 N. & P. 274; 7 A. & E. 215.

A quo warranto does not lie against a freeman of a borough who does not appear to possess any corporate property, and who has been struck off the roll of electors for members of parliament by the revising barrister. *Reg. v. Pepper*, 3 N. & P. 154; 7 A. & E. 745.

Where a person had an inchoate right to be a free burgess of a borough:—Held, that his title could not be impeached, because he was sworn in before officers who were so de facto, but not de jure. *Re v. Slythe*, 6 B. & C. 240; 9 D. & R. 226.

It is an inflexible rule of law, that where a person has been de facto elected to a corporate office, and has accepted and acted in the office, the validity of the election and the title to the office can only be tried by proceeding on a quo warranto information. *Reg. v. Chester (Mayor)*, 5 El. & Bl. 531; 25 L. J., Q. B. 61; 2 Jur., N. S. 114.

The court will not grant a quo warranto against a burgess for being illegally upon the burgess roll, unless it is shewn that he has de facto exercised the office. *Reg. v. Armstrong*, 25 L. J., Q. B. 238; 2 Jur., N. S. 211.

A person's name was on the burgess list unobjectioned to at the revision in October, 1867, and he was elected town councillor on the 1st November following. His father received parochial relief in December, 1866:—Held, that the court would inquire by quo warranto into his title to be on the burgess list. *Reg. v. Ireland*, 3 L. R., Q. B. 130; 37 L. J., Q. B. 73; 17 L. T. 466; 16 W. R. 358; 9 B. & S. 19.

4. INCOMPATIBLE OFFICES.

A quo warranto lies against a person who had held the incompatible office of capital burgess and town-clerk, before and since 32 Geo. 3, c. 58, without interruption. *Reg. v. Bond*, 6 D. & R. 333.

So, where there is a continuing incompatibility, though the party held the offices of capital burgess and town-clerk for more than six years. *Reg. v. Lawrence*, 2 Chit. 371.

On a motion for a quo warranto against a corporator, on the ground of the acceptance of an incompatible office, the relator must shew a legal appointment to the second office. *Reg. v. Day*, 4 M. & R. 541; 9 B. & C. 702.

III. WHETHER REMEDY BY QUO WARRANTO OR MANDAMUS.

The court will not grant a rule in the alternative for a quo warranto or a mandamus. *Reg. v. Leeds (Mayor)*, 11 A. & E. 512.

A mandamus to admit a recorder refused, because there was a recorder de facto, and the party had a remedy by quo warranto, though both of them claimed the office under the same election. *Reg. v. Colchester (Mayor)*, 2 T. R. 259.

If a party has been ousted from an office by the election of another person to that office (the election not being merely colourable), his remedy is not by mandamus, but by a quo warranto. *Reg. v. Oxford (Mayor)*, 1 N. & P. 474; 6 A. & E. 349.

A party having a majority of votes for the office of councillor of a borough, and having been declared elected according to the form prescribed by 5 & 6 Will. 4, c. 76, s. 35, and having also been admitted, the office is full in fact, and the remedy to try whether it is full of right is by quo warranto. *Reg. v. Derby (Councillors)*, 2 N. & P. 589; 7 A. & E. 419; W., W. & D. 671.

Where a councillor's name has been expunged from the burgess roll, a quo warranto is the proper mode to try his title to the office, and not a mandamus to the mayor to hold a fresh election. *Reg. v. Ricketts*, 3 N. & P. 151.

On shewing cause against a mandamus com-

manding commissioners to administer the oath of office as commissioners to a person, who, it was alleged, had been elected by a majority of votes under a statute, in opposition to another person whom the commissioners had sworn in as having a majority of legal votes:—Held, that a mandamus would lie, on the ground that it was an office for which a quo warranto would not lie, and therefore there was no other remedy. *Reg. v. Keyningham Level Commissioners*, 11 Jur. 58, n.

See also MANDAMUS.

IV. ON WHOSE APPLICATION.

Generally.]—A quo warranto against persons for claiming to act as a corporation must be filed by and in the name of the attorney-general. *Reg. v. Ogden*, 10 B. & C. 230.

It cannot be filed at the instance of an individual against persons for usurping a franchise of a private nature, not connected with public government. *Id.*

The court will judge from all the circumstances who are the real prosecutors. *Reg. v. Cudlipp*, 6 T. R. 503.

And will not permit a corporator to file an information against another, for a defect of title which equally applies to his own, or to the title of those under whom he claims. *Id.*

For the circumstance of the relator's standing in the same situation with the defendant, or its appearing that the corporation must necessarily be dissolved by impeaching the defendant's title, and those who claim under him, will govern the discretion of the court in refusing such an application. *Reg. v. Bond*, 2 T. R. 767.

Even though the relator has enjoyed his office many years uninterruptedly. *Reg. v. Couell*, 6 D. & R. 336.

Any burgess is a competent relator against a party exercising the office of town-clerk, though the right of electing to that office is in a select body. *Reg. v. Davies*, 1 M. & R. 538.

A burgess is a good relator, although the effect of the information would be to dissolve the corporation. *Reg. v. Parry*, 2 N. & P. 414; 6 A. & E. 810.

On motion for a quo warranto against a town councillor, founded on a defect in the burgess roll, it is not a valid objection to the relator that he is not a burgess; his interest is sufficient, if he is subject to the government of the councillors as an inhabitant. If the motion is made on the affidavit of three persons, two of whom are not qualified to be relators, the information may, nevertheless, be granted if the third party is unobjectionable as a relator, though his affidavit alone does not shew sufficient ground for the information. *Id.*

An inhabitant of a borough may be a relator on an application against a town councillor, though he is not a burgess. *Reg. v. Quayle*, 11 A. & E. 508; 5 Jur. 386.

The court will grant leave to a private relator to exhibit an information against individual members of a corporation, although the affidavits on which the rule is moved disclose matter tending to dissolve the corporation. *Reg. v. White*, 1 N. & P. 84; 5 A. & E. 613; 2 H. & W. 403.

Where the relator was an inhabitant of the borough, and by the charter the government of

the town and of all the people therein was vested in the mayor and chief burgesses, the court thought that this clause of the charter gave a sufficient interest to the relator in an application for a quo warranto against a chief burgess, and accordingly made the rule absolute. *Rex v. Hodge*, 2 B. & A. 344, n.

A town councillor is disqualified to be a relator to question the validity of the election of another town councillor, he having been cognizant of the objection before the election, being present at the election, and having afterwards administered to him, without protest, the declaration required by 5 & 6 Will. 4, c. 76, s. 50. *Reg. v. Greene*, 2 G. & D. 24; 2 Q. B. 460; 6 Jur. 777.

Where, upon a rule for a quo warranto against A., for exercising the office of a town commissioner, to which he had been elected by rate-payers, the relator was (as it was alleged) not entitled to vote; yet, as he was an owner of rated property in the town:—Held, that he had sufficient interest to be a good relator. *Reg. v. Briggs*, 11 L. T. 372.

Where a relator has twice obtained rules nisi for informations calling upon a party to shew why he exercised the office of mayor of a borough, which rules had been discharged on cause shewn; the court will not allow the same relator, on an application against the succeeding mayor, to raise the same questions as to the title of the former mayor to exercise the office. *Rex v. Langhorn*, 2 N. & M. 618. See *Rex v. Orde*, 8 A. & E. 420, n.

Motive of Relator.—Under circumstances tending to throw suspicion on the motives of the relator, the court will not grant the application where the consequence will be to dissolve a corporation. *Rex v. Trevenen*, 2 B. & A. 479.

The court made a rule absolute, though it was shewn that the relator and other persons with whom he acted were influenced by a strong party spirit, and had, during three or four years, withdrawn themselves from corporation business, to the inconvenience of the borough. *Rex v. Benney*, 1 B. & Ad. 684.

It is no objection that the person applying is in low and indigent circumstances, and that there is strong ground of suspicion that he is applying not on his own account, or at his own expense, but in collusion with a stranger. The court, however, in a case of this kind, will require security for costs. *Rex v. Wakelin*, 1 B. & Ad. 50.

The court discharged the rule where the relator was the legal adviser of the defendant, and advised him that he had been duly elected. *Rex v. Payne*, 2 Chit. 369.

The court refused to grant a quo warranto, because the party applying for it had agreed not to enforce a bye-law, upon which he now grounded his attempt to impeach the defendant's title. *Rex v. Mortlock*, 3 T. R. 300.

A rule was obtained in May, 1841, for a quo warranto information against A. to shew cause by what authority he claimed to be a burgess of a borough. A. was placed on the overseers' list of September, 1840, and was retained on the burgess-roll on the revision of November, 1840, without objection. C. could not object at the time, under 5 & 6 Will. 4, c. 76, s. 17, his name not having been inserted in any burgess list, but in Michaelmas Term, 1839, a rule was made absolute to insert his name in the burgess-roll;

no further steps, however, had been taken thereupon. No question as to the validity of the election of any officer of the borough depended upon A.'s right, and the fact appeared to the court to be, that C. made the application with the view of obtaining an indirect decision upon his own claim. Upon cause being shewn (November, 23, 1841), the court, in its discretion, refused the information. *Reg. v. Anderson*, 2 Q. B. 740; 2 G. & D. 113.

Acquiescence and Concurrence.—It is a valid objection to a relator that he was present and concurred at the time of the objectionable election, even although he was then ignorant of the objection; for a corporator must be taken to be cognizant of the contents of his own charter, and of the law arising therefrom. *Rex v. Trevenen*, 2 B. & A. 339; *S. P.*, *Reg. v. Greene*, 2 Q. & D. 24; 2 Q. B. 460; 7 Jur. 777.

It is a valid objection to a relator applying for a quo warranto information for usurping the office of burgess that he was formerly present at and concurred in the election of another burgess, when the objection he sought by the application to avail himself of was taken and overruled, and he voted for the party then elected. *Rex v. Parkyn*, 1 B. & Ad. 690.

A relator, who has acquiesced in, and himself adopted, the mode of voting he objects to, is disqualified from applying for a rule. *Reg. v. Left-house or Lockhouse*, 1 L. R., Q. B. 433; 35 L. J., Q. B. 141; 14 L. T. 359; 14 W. R. 649; 7 B. & S. 447.

It is no objection to relators applying against a party for exercising the office of an alderman (his election to which they had opposed), that they afterwards made no opposition to his election to the principal office of magistracy (to which the other was a necessary qualification); or that they afterwards attended at and concurred in corporate meetings whereat he presided, or where he attended in his official character, such application being made within the time limited by law, viz., in four years after his election as an alderman. *Rex v. Clarke*, 1 East, 38.

It was no objection to an application for a quo warranto against a mayor for not having taken the sacrament within the proper time before his election, that the relators concurred in his election, because that defect was a latent one, arising from the omission of an act positively required by the legislature. *Rex v. Smith*, 3 T. R. 573.

An application made on the affidavits of several persons of whom all but one have consented to the election proposed to be impeached, may be granted on the affidavit of that one, if he avows himself to be the relator. *Rex v. Symmons*, 4 T. R. 223.

A corporator who has voted at an election of corporate officers is not a competent relator to impeach that election on the ground of an objection to a presiding officer, at least, without shewing that he was ignorant of the objection when he voted at the election. *Rex v. Slythe*, 9 D. & R. 181; 6 B. & C. 240.

On a motion for a quo warranto against a capital burgess, on the ground of irregularity in his election, it is no answer that the relator frequently acted with the party against whom he applies in corporation business, during two years following such party's election, the relator not being shewn to have concurred in the election,

nor is the relator disqualified by the mere circumstance of having formerly taken part in other elections, when the same irregularity existed as that complained of, but was not noticed. *Reg. v. Benney*, 1 B. & Ad. 684.

It is no objection to the persons applying for a quo warranto which would operate in its effect to dissolve the corporation, that they attended the meeting at which the mayor was elected, whose election they impeach on the ground that the corporation was then dissolved by the loss of an integral part, and that they voted for another candidate, and afterwards attended other corporate meetings at which such mayor presided. *Reg. v. Morris*, 3 East, 213.

V. WITHIN WHAT TIME.

1. MUNICIPAL OFFICES.

Where application was made at the end of Hilary Term for a quo warranto against a burgess, who had been inrolled in the previous November without objection to his qualification, the court refused the writ, it not appearing that the title of the burgess, or of any other person, to any other municipal office, depended on his title to be so inrolled. *Reg. v. Hodson*, 4 Q. B. 648, n.; 11 L. J., Q. B. 219; 6 Jur. 968.

The court will not, in its discretion, grant a quo warranto against a mayor of a borough, where the ground of objection to his title is, that he was unduly elected alderman, such election having taken place more than twelve months before the rule was moved for; there being no special circumstances to induce the court to interfere. *Reg. v. Preece*, D. & M. 156; 5 Q. B. 94; 12 L. J., Q. B. 335; 7 Jur. 896.

An application for a quo warranto against a burgess, who became subsequently qualified, for voting without a qualification, being delayed for six months, was dismissed with costs. *Dunn, In re*, 10 Jur. 1095.

Where a party had entered into a continuing contract with the council, and the disqualification continued during the existence of the contract:—Held, that a quo warranto might be applied for, notwithstanding more than twelve months had elapsed from the time of the election, or from the time when the disqualification first attached. *Reg. v. Francis*, 18 Q. B. 526; 21 L. J., Q. B. 304; 16 Jur. 1046.

2. IN OTHER CASES.

The 32 Geo. 3, c. 58, s. 1, means six years before making the rule absolute for the information, and not six years before obtaining the rule nisi; and therefore the court refused to make the rule absolute where the six years had then elapsed, though they had not elapsed before the rule nisi. *Reg. v. Stokes*, 2 M. & S. 71.

Where a corporator de facto had exercised his office more than six years, the court, in its discretion, without entering upon the question of title, refused to grant a quo warranto against him. *Reg. v. Brooks*, 2 M. & R. 389; 8 B. & C. 321.

Where a rule nisi for a quo warranto was granted at the end of Easter Term, calling on the defendant to shew cause on the first day of the ensuing term, and it appeared that two days before Trinity Term commenced he had completed

six years' enjoyment of the franchise:—Held, that the application was barred. *Reg. v. Harris*, 3 P. & D. 266; 11 A. & E. 518; 8 D. P. C. 499; 4 Jur. 459.

Before the 32 Geo. 3, c. 58, the court refused an information against a person who had been in the peaceable possession of his franchise six years. *Reg. v. Dickinson*, 4 T. R. 282.

So, the court refused to grant an information to impeach a derivative title where the person claiming the original title had been in the undisturbed possession of his office six years. *Reg. v. Peacock*, 4 T. R. 684.

VI. PRACTICE.

1. GENERALLY.

No Control exercised after Information.]—Where a proper case has been laid before the court to induce them to grant the information, they have never exercised any control over it afterwards as to the manner in which it is to be conducted. *Reg. v. Brown*, 4 T. R. 276.

Argument.]—If any points, besides the principal one, are stated for argument on a quo warranto, they should be stated distinctly, otherwise the court will not take notice of them. *Reg. v. Alderson*, 1 G. & D. 429; 1 Q. B. 878; 6 Jur. 321.

Trial.]—On the trial of quo warranto informations, if the affirmative is on the defendant, his counsel must begin; but it is otherwise, if it is on the relator. *Reg. v. Yeates*, 1 C. & P. 323.

If on the trial of a quo warranto information against a person for exercising a municipal office, issued on the ground that he had not a majority of good votes, it is intended to set up more than one of the defeated candidates as the person who ought to have been declared elected, the whole matter should be opened by the prosecutor in the first instance to the jury. *Reg. v. Bradley*, 3 L. T. 853.

New Trial.]—A new trial may be granted on an information in nature of a quo warranto. *Reg. v. Francis*, 2 T. R. 484.

Bringing Error on.]—Section 146 et seq. of the 15 & 16 Vict. c. 76, which prescribe a new mode of proceeding to error in any cause, do not extend to informations in the nature of a quo warranto, in respect of which the fiat of the attorney-general must still be obtained, and a writ of error sued out according to the former practice. *Reg. v. Scale*, 5 El. & Bl. 1; 24 L. J., Q. B. 221; 1 Jur., N. S. 693.

If the attorney-general has granted his fiat for a writ of error to issue, the court will not interfere, the fiat being conclusive. *Reg. v. Clarke*, 7 W. R. 601.

Shewing Cause.]—A burgess is not a corporate officer within s. 5 of 6 & 7 Vict. c. 89, and, therefore, cannot be called upon to shew cause in the first instance. *Reg. v. Milner*, D. & M. 495; 5 Q. B. 589; 13 L. J., Q. B. 186.

2. AFFIDAVITS.

Upon an application for a quo warranto information, suggesting that the defendants were elected contrary to the provisions of a particular charter, the affidavit must state that the charter was accepted, or that the usage has been in conformity to the charter; and the court, after determining that the affidavit was ill for omitting so to state, refused leave to amend it. *Rez v. Barzey*, 4 M. & S. 253.

Upon an application for a quo warranto against a town councillor, on the ground that the votes for him were thrown away, an affidavit stating that at the time of his election the fact of his not being a householder "was generally and notoriously known in and throughout the borough," is not sufficient. *Bester, In re*, 7 Jur., N. S. 262; 3 L. T. 667; 9 W. R. 277.

When, upon an application for a quo warranto against a party for claiming to be a member of a local board of health, the affidavits used in support of the rule shewed *prima facie* that the applicant had obtained a majority of votes, the court, upon the argument of the rule, refused to consider the question whether he had in fact obtained such majority or not. *Reg. v. Collins*, 23 W. R. 325.

The affidavit in support of the motion must state at whose instance the application is made. It is not enough for a party to depose that, if the court grants the information, it is his intention to become really and *bona fide* the relator. *Reg. v. Hedges*, 11 A. & E. 163; 9 D. P. C. 493; 1 W. P. C. 63; 5 Jur. 290.

Affidavits in support of a quo warranto should state any usage there may be which differs from what might be held to be the construction of the charter of the incorporation of the borough. *Rez v. Headley*, 7 B. & C. 496; 1 M. & R. 345.

The relator is bound by the day on which, in his affidavit (though founded on information and belief), the election is alleged to have taken place; and if that day is mistaken, the defendant is not bound to shew a regular election on another day. *Rez v. Rolfe*, 1 N. & M. 773.

The rule was dismissed with costs, where the affidavits in support suppressed several material facts. *Rez v. Hughes*, 7 B. & C. 719; 1 M. & R. 625.

The court will receive the affidavit of a person who is himself estopped from being a relator, if the motion is made by a relator properly qualified, although the complete ground of the application appears only from the affidavit of the party estopped. *Rez v. Blame*, 4 A. & E. 664.

An affidavit should shew that the relator is a properly qualified person. *Reg. v. Thirlwin*, 33 L. J., Q. B. 171; 10 Jur., N. S. 206; 9 L. T. 731; 12 W. R. 384.

A rule had been granted upon an affidavit, which described the relator merely as "of B., tailor:"—Held, that the description was not sufficient, and the rule was discharged. *Id.*

A rule for a quo warranto against a mayor on the ground that he did not reside as the charter required, was discharged on affidavits shewing residence. Afterwards a second rule was obtained on the same ground, on affidavits impeaching the former opposing affidavits, and tending to shew that the residence was colourable. The rule was discharged on the ground that the second application ought not to have been made

after the former decision; but without costs, as the court had granted the rule nisi. *Rez v. Orde*, 8 A. & E. 420, n.

A rule nisi for a quo warranto against A., to shew by what authority he claimed to be a burgess of a borough, was obtained on an affidavit of C., who deposed that "he has directed an application to be made" for the rule, and that the motion "will be made at the instance of this deponent as relator; and that this deponent shall be deemed to be the relator in case such rule shall be made absolute, and shall be named as such in such information in case the same shall be filed, unless this court shall otherwise order."—Held, sufficient. *Reg. v. Anderson*, 2 Q. B. 740; 2 G. & D. 113.

3. STATEMENT OF OBJECTIONS TO TITLE.

Where there are several informations pending against the aldermen of a borough, founded on the same objection of title, the court has not power to make a rule binding either party to submit to the result of the first information tried. *Rez v. Cozens*, 2 N. & P. 164; 7 Ad. & E. 285; 6 D. P. C. 3.

Where a quo warranto was applied for against a mayor, the ground specified in the rule nisi being that he was unduly elected as alderman, this was not such a statement of objection as to be defective under the rule of Hilary Term, 1827, if it appeared from the affidavits that his title as mayor, which was challenged, was founded upon his title as alderman. *Reg. v. Precoe*, D. & M. 156; 5 Q. B. 94; 12 L. J., Q. B. 335; 7 Jur. 896.

It is not sufficient to state in the rule that the defendant was not entitled to be appointed, and that the relator was. *Reg. v. Edge*, 12 Q. B. 936; 18 L. J., Q. B. 6; 13 Jur. 8.

The rule is applicable to the pleadings only, and does not prevent the relator at the trial of the information going into objections which may not be specified in the rule. *Reg. v. Tugwell*, 3 L. R., Q. B. 704; 38 L. J., Q. B. 12; 9 B. & S. 367.

A rule nisi was obtained on the ground of an undue removal of one person from, and of an undue election of the defendant to, the office of town clerk of a borough. The rule did not mention, and the affidavit did not distinctly disclose, the objection that the removal and election had taken place at a meeting without due notice that such was the business of the meeting:—Held, that the objection of the want of such notice could not be taken in support of the rule. *Reg. v. Thomas*, 3 N. & P. 288; 8 A. & E. 183.

4. QUASHING INFORMATION.

A quo warranto cannot be quashed on motion, though both parties consent. *Rez v. Edgan*, 4 Burr. 2297.

5. COSTS OF RULE.

A prosecutor shall pay costs where he makes a groundless and frivolous application for a quo warranto, knowing it to be so. *Rez v. Lewis*, 2 Burr. 780; 2 Ld. Ken. 497.

But if circumstances are very strong in favour of a corporate franchise, and against the application, the rule nisi will be discharged with costs. *Rez v. Wardroper*, 4 Burr. 1963; 1 East, 41, n.

Where a rule nisi is discharged, and it appears that the party making the affidavit as relator is indigent, and unable to pay costs, and was procured to make the application by another, who is the real prosecutor, the court will order the costs to be paid by the party so promoting the application. *Reg. v. Greene*, 4 Q. B. 646; 6 Jur. 896.

It makes no difference that such party was employed on the motion as an attorney. *Ib.*

But if the facts rendering him liable appear only by the affidavits in opposition to the rule, the payment of costs by him must be the subject of a distinct motion. *Ib.*

Where the court has discharged the rule, it will, in its discretion, on a subsequent application, order payment of costs by the party who was virtually relator. Such application having been made upon reading new affidavits, which did not state any fresh circumstances beyond those in the affidavits filed in opposition to the original rule, the court granted it, but without costs. *Reg. v. Green*, 12 L. J., Q. B. 239; 7 Jur. 440.

It is not necessary to demand the costs of such third party, before obtaining the second rule, where he is the attorney of the nominal relator, and has joined in the affidavits for the quo warranto. *Ib.*

6. CHANGE OF RELATOR OR SOLICITOR.

After the rule has been made absolute, the court will change the relator, on motion on his behalf, if, by reason of his necessary absence from England, in the conduct of his own private affairs, he is unable to enter into the recognizance required by 4 & 5 Will. & M. c. 18, s. 2. *Reg. v. Quayle*, 9 D. P. C. 548.

If the relator and the defendant employ the same attorney, the court will make a rule absolute to change the attorney for the prosecution, although there is no collusion between the parties, and the attorney intended to proceed bona fide to obtain the judgment of the court. *Reg. v. Anderson*, 3 P. & D. 2; 11 A. & E. 3.

7. CONSOLIDATION OF INFORMATIONS.

The court will not consolidate several informations against several persons for distinct offences, for there must be an information against each to enable each to disclaim. *Reg. v. Warlow*, 2 M. & S. 75.

But four informations were consolidated into one, where the several rights were properly determinable in one information. *Reg. v. Collingwood*, 1 Burr. 573.

8. COSTS ON DISCLAIMER OR RESIGNATION.

Under particular circumstances, the court allowed a disclaimer to be entered without costs. *Reg. v. Holt*, 2 Chit. 366.

The court will make a rule for a quo warranto information absolute, although the defendant has resigned the office and his resignation has been accepted before the rule was obtained, where the object of the relator is, not only to cause the defendant to vacate the office, but to substitute another candidate at once in the office, as in such a case the relator is entitled to have judgment of ouster or a disclaimer entered on the record. In making the rule absolute, the

court will exercise a discretion as to costs. *Reg. v. Blizard*, 2 L. R., Q. B. 55; 7 B. & S. 922.

Where a person has been elected to the office of councillor of a borough for which he was a candidate, and has acted in such office, and afterwards, upon a rule nisi for a quo warranto being obtained against him, declined to shew cause, and submitted to resign, and, if necessary, formally to disclaim, the court will make the rule absolute, without imposing any terms upon the relator as to the costs of any subsequent proceedings. *Reg. v. Earnshaw*, 22 L. J., Q. B. 174.

An unqualified person was elected a town councillor of a borough, without having taken any part in the election; but on being informed by the town clerk, that if he did not accept the office he would be liable to a fine, he signed the usual declaration. Upon application for a quo warranto, he sent in a written resignation to the town clerk, which was accepted.—Held, that the relator was not entitled to the costs of the application. *Reg. v. May*, 2 L. M. & P. 144; 20 L. J., Q. B. 268; 15 Jur. 129. See *Reg. v. Hartley*, 18 Jur. 623.

S. and H. were rival candidates for the office of town councillor of a borough. An objection was taken at the election to the validity of certain votes in S.'s favour, which turned the election. The mayor overruled the objection, and S. took his seat. The rival candidate obtained a rule nisi for a quo warranto against S. The latter thereupon declined to shew cause, and expressed a willingness to resign his seat.—Held, that S. was liable to the costs of the information, as he had been a candidate for the office. *Reg. v. Sidney*, 2 L. M. & P. 149; 20 L. J., Q. B. 269.

Though a person whose election to the office of town councillor is void by reason of a mistake of the presiding officer, is willing to disclaim and consents to a rule for a quo warranto being made absolute, the court will not order that the relator should bear the expense of the information and disclaimer. *Reg. v. Hartley*, 3 El. & Bl. 143; 18 Jur. 623. Contra, *Reg. v. Morton*, 4 Q. B. 146; 3 G. & D. 400; 12 L. J., Q. B. 123; 7 Jur. 85.

Where a rule for a quo warranto for the usurpation of an office has been obtained and served upon the defendant, who thereupon resigns and does not shew cause against the rule, it will be made absolute, but without costs. *Reg. v. Newcombe*, 15 W. R. 108.

VII. PLEADINGS.

The C. L. P. Acts did not apply to the pleadings in quo warranto. *Reg. v. Seale*, 5 El. & Bl. 1; 24 L. J., Q. B. 221.

Rule to Plead.—After a defendant has appeared, the prosecutor must give two four-day rules to plead, and after the expiration of the last must also move in term time for a peremptory rule to plead, otherwise the defendant has until the next term to plead. *Reg. v. Ginecer*, 6 T. R. 594.

Venue.—The court has power to change the venue; and a suggestion on the record, that the trial of the issue can be more conveniently had in the county of the substituted venue, shews

sufficient ground for the change, and for the subsequent proceedings in that county. *Clark v. Reg.*, 3 El. & El. 147; 29 L. J., Q. B. 232; 6 Jur., N. S. 650; 8 W. R. 549—Ex. Ch. Affirmed 9 H. L. Cas. 184; 31 L. J., Q. B. 175; 5 L. T. 66.

Pleas.—If a defendant has two defences, and discovers before trial that he has pitched upon the weaker defence, he may, upon terms, quit it, and insist upon the former. *Rez v. Blatchford*, 4 Burr. 2147.

A defendant may plead several pleas, even though he does not plead (as one of them) the Statute of Limitations. *Rez v. Autridge*, 8 T. R. 467.

A defendant derived title under a custom for "the mayor and burgesses of N. in common council assembled, under their various names of incorporation, from time immemorial till the granting of letters-patent by Queen Elizabeth, and for the mayor, bailiffs, and capital burgesses, in common council assembled, since that time," to admit every person of the age of twenty-one when they chose; after verdict for the defendant, establishing this custom, the court held it well pleaded; it appearing to them to have been always exercised by the same body, the common council, though constituted of different persons at different times. *Rez v. Knight*, 4 T. R. 425.

A plea stated that a court-leet was immemorially holden part in the morning and part in the evening, and that the custom had been to elect the mayor at the morning court, and that he had been accustomed to be sworn into office at the evening court by the steward or his deputy. The replication denied the mode of election. At the trial, it appeared, that, in addition to the custom set out in the plea, it had been usual for the leet-jury to present, in writing, the candidate who had most votes at the morning court to be sworn in by the steward at the evening court, but they had no control over the poll:—Held, that this was a mere ministerial act on their part, and that it was no essential part of the custom, and therefore need not be alleged in the plea. *Rez v. Rowland*, 3 B. & A. 130.

Subsequent Pleadings and Demurring.—Quære, whether the prosecutor can demur to part of the plea, and reply to the rest. *Rez v. Ginever*, 6 T. R. 733.

If a corporation consists of a definite number of aldermen, of whom the mayor is one, and it is pleaded that the office of mayor became vacant, it is not to be inferred thence that the number of aldermen did not remain complete; and therefore the plea averring an election by the residue of the aldermen, which might consist of ten or less, according to the circumstances whether the vacancy in the office of mayor made a vacancy in that of aldermen:—Held, a good replication that only five attended, for it was matter of rejoinder that, under the circumstances, five were a majority: secus, where it was pleaded that the mayor died; for there the presumption was that there was a vacancy of aldermen. *Rez v. Smith*, 2 M. & S. 583.

A quo warranto for the office of bailiff of a borough, described it as "an office of great trust and pre-eminence within the borough, touching the rule and government of the

borough, and the election and return of burgesses to serve in parliament for the borough." Pleas, averring that the defendant had been appointed to the office; "without this, that the said office is an office touching the rule and government of the borough." General replications, taking issue on all the allegations of the pleas except the traverse; and special replications, setting forth several different customs for the appointment of the bailiff:—Held, that the defendant, not having traversed that part of the prescription, had admitted it; and that the general replications being good, the demurrer to all the replications was bad, and entitled the crown to judgment. *Rez v. McKay*, 6 D. & R. 432; 4 B. & C. 351.

A rejoinder of a bye-law of a corporation held to be no departure from a plea of a charter of the same corporation. *Tucker v. Rez (in error)*, 2 Bro. P. C. 311.

The defendant derived a title in his plea to the office of a burgess under a custom for the common council to admit ad libitum any person of the age of twenty-one whom they chose: the prosecutor, after denying that custom, replied, that no person was entitled to be admitted but in right of servitude, and that the defendant had not served a seven years' apprenticeship; rejoinder, stating the special circumstances under which he had served; on a demurrer to this rejoinder, because it was a departure from the plea, the court held the replication itself to be bad, as immaterial to the title in the plea; and gave judgment for the defendant. *Rez v. Knight*, 4 T. R. 419.

In quo warranto for usurping the office of alderman and justice of peace of a city, the plea set out a charter of Car. 2, granting that all the aldermen of the city who had borne the office of mayor, so long as they should continue in their public offices, should be justices of the peace of the city; that the defendant was duly elected an alderman, and still was an alderman; and he became mayor, and thereby became justice. Replication, that the defendant, being such alderman and justice, was duly appointed to be treasurer of the county of the city, and gave such security to the mayor and recorder, being justices of peace for the city, as in that behalf required, and accepted and took on himself the office of treasurer, and entered on the discharge of the duty of his office, which offices of alderman and justice, and of treasurer, were incompatible with each other, whereby the defendant vacated the offices of justice and alderman. Rejoinder, that the defendant did not give such security:—Held, that the rejoinder was bad, as tendering an immaterial issue. *Rez v. Patten*, 4 B. & Ad. 9; 1 N. & M. 612.

In a quo warranto, the crown may reply several matters; and also may traverse the allegations in the plea and demur. *Reg. v. Diplock*, 4 L. R., Q. B. 549; 38 L. J., Q. B. 297; 21 L. T. 24; 17 W. R. 823; 10 B. & S. 174.

VIII. WHAT TITLE PUT IN ISSUE.

Quære, whether a derivative title can be impeached when the person from whom it was derived died in the undisturbed possession of it. *Rez v. Stacey*, 1 T. R. 1.

Such title cannot be impeached by those who have acquiesced and acted under it. *Ib.*

Although, in general, the title of the electors is not to be brought in question, by attacking the title of the person elected by them, the rule does not apply where there is no method of prosecution by which the title of the electors may be questioned in the first instance. *Rez v. Mein*, 3 T. R. 596.

The titles of the electors, corporators de facto, cannot be put in issue against the elected. *Rez v. Hughes*, 6 D. & R. 443; 4 B. & C. 369.

So, against particular members, the title of other corporators de facto cannot be considered. *Symmers v. Rez*, Comp. 508.

In a quo warranto for exercising the office of mayor, upon issue joined, that H., the presiding officer at the defendant's election, was not then mayor, the title of H. to be mayor (and not merely whether he was mayor de facto) is put in issue, and evidence was held admissible to shew that H. had not been lawfully elected, H. being then dead, but an information having been filed against him before his death for usurping the office; and, it seems, that it is not competent on the trial of an information of a quo warranto against the elected, to impeach by evidence the title of the electors, unless they are specially questioned on the record. *Rez v. Smith*, 5 M. & S. 271.

After the death of a mayor, his capability to election cannot be disputed. *Rez v. Spearing*, 1 T. R. 4, n.

The sheriff exercises judicial functions in holding a court for the election of coroner, under 7 & 8 Vict. c. 92; and his declaration of the election is final, and the validity of votes cannot be inquired into on a quo warranto. *Reg. v. Diplock*, 4 L. R., Q. B. 549; 38 L. J., Q. B. 297; 21 L. T. 24; 17 W. R. 823.

A quo warranto was moved for against an officer elected by ballot, on the ground that a large proportion of the persons who voted were not qualified; but it was not shewn for whom the votes of those persons were given:—Held, that on his application the officer could not be required to prove his election valid, but it lay on the opposing parties to shew (if that was practicable) that his majority was obtained by bad votes. *Rez v. Jefferson*, 5 B. & Ad. 855.

Where leave had been granted to file a quo warranto against a party for claiming to be common councilman of York, and the relator by his replication attacked also the defendant's title as freeman, which had been stated in the introductory part of his plea, the court refused to strike it out, or direct their officer to enter a nolle prosequi. *Rez v. Brown*, 4 T. R. 276.

The returning officer, at an election of councillors, under 5 & 6 Will. 4. c. 76, has merely the ministerial duty to perform of returning the candidates who have the actual majority of votes, without reference to their possessing or not, in his judgment, the proper qualification: and where to a quo warranto for exercising the office of councillor, the defendant pleaded that he was duly elected, and issue was joined thereon:—Held, sufficient, for the relator to prove at the trial that other candidates had the actual majority, without proving their qualification. *Reg. v. Ledgerd*, 3 N. & P. 513; 8 A. & E. 335; 1 W., W. & H. 487.

The court admitted a party to defend the defendant's title. *Rez v. Marshall*, 2 Chit. 370.

A title to one office, which is a qualification to hold another office, is not within 32 Geo. 3, c.

58, s. 3; and, therefore, although the party had exercised the first for six years, the court made the rule absolute for an information for exercising the second office upon a defect of title to the first. *Rez v. Stokes*, 2 M. & S. 71.

IX. JUDGMENT AND COSTS.

Judgment.—If a defendant fails in the titles he sets up, judgment must be for the crown. *Rez v. Yarmouth (Mayor)*, 4 Burr. 2143.

There may be a judgment of ouster, though the usurpation is not continued to the trial. *Rez v. Williams*, 1 W. Bl. 93.

A judgment of ouster against a mayor by default was set aside. *Rez v. Winchelsea (Mayor)*, 4 Burr. 2277.

Upon a quo warranto against one for claiming the office of alderman, if he disclaims, and judgment of ouster is given against him, he is concluded from shewing to a second information, for exercising the same office, that he was duly elected before such first information and judgment of ouster, and that he was afterwards sworn in by virtue of a peremptory mandamus from the court. *Rez v. Clarke*, 2 East, 75.

In a quo warranto information against a mayor, he claimed under an election and swearing, pursuant to 11 Geo. 1, c. 4, and shewed an election accordingly, and that he was sworn agreeably to that statute; then specified a swearing according to the charter, but not to the direction of the 11 Geo. 1, c. 4; the replication took issue on this swearing, which, with eleven others, were found for the king without evidence (though admitted to have been rightly founded); the court considering the defendant's whole title as one entire title, was unanimous in setting aside the verdict, upon his payment of costs, and giving him liberty to amend his plea. *Rez v. Philips*, 1 Burr. 292; 1 Ld. Ken. 331.

If a judgment is entered without costs, where costs ought to have been given, it can only be amended in the same term. *Rez v. Amery*, 1 Anst. 178.

So, in the House of Lords, no amendment can be in such a case after the session. *Id.*

Costs.—Costs are not given unless in usurpation of offices, or freedoms in corporations. *Rez v. Williams*, 1 W. Bl. 93.

A defendant in a quo warranto information against him, to shew by what authority he held the office of registrar and clerk of the court of requests of the City of Bristol, was not entitled to costs. *Rez v. Hall*, 2 D. & R. 341; 1 B. & C. 327.

On a judgment for the relator, he is entitled to costs. *Rez v. Amery*, 1 Anst. 178.

Where any one of several issues is found for the prosecutor, on which judgment of ouster is given, he is entitled to costs on all the issues. *Rez v. Downes*, 1 T. R. 453.

The prosecutor of a quo warranto information against a constable of Birmingham is not entitled to costs. *Rez v. Wallis*, 5 T. R. 375.

The returning officer in an incorporated borough sending members to parliament, is not liable to costs within the operation of 9 Anne, c. 10, in the event of judgment against him on a quo warranto information. *Rez v. McKay*, 8 D. & R. 393; 5 B. & C. 640.

A private relator, who has obtained judgment

in a quo warranto, is entitled as of course to the costs of the prosecution, as well as the costs of an interlocutory motion, in which he failed. *Reg. v. Dudley*, 4 Jur. 915.

Previously to 5 & 6 Will. 4, c. 76, the mayor for the time being of a borough corporate, named in schedule (A.), also held and exercised the office of coroner for the borough. Subsequently to that act, the borough petitioned for and obtained a separate court of quarter sessions, and appointed a coroner under s. 62:—Held, that it was not an office within the meaning of 9 Anne, c. 20, s. 5, so as to entitle the relator to costs, on judgment for the crown. *Reg. v. Grimshaw*, 5 D. & L. 249; 2 B. C. Rep. 146; 17 L. J., Q. B. 19; 12 Jur. 134.

An office, to come within the meaning of the 9 Anne, c. 20, ss. 1, 4 and 5, must be a corporate office. *Id.*

A quo warranto alleged that the defendant, within the town of B., in the county of M., exercised, without legal warrant, the office of mayor; and, together with R. and J., the powers and privileges of a body corporate, by the name and description of the mayor and bailiffs of the borough of B. The defendant suffered judgment by default:—Held, that the relator was entitled to costs under 9 Anne, c. 20, s. 5. *Lloyd v. Reg. (in error)*, 2 B. & S. 656; 31 L. J., Q. B. 209; 6 L. T. 610; 10 W. R. 625.

The chairman of a local board of health in a non-corporate district being absent during an annual election of members, and being by reason of defect in his eyesight unable by personal examination to ascertain the validity of the votes, or to cast them up, conducted the election by two persons appointed by the local board before the election to assist and attend upon him for that purpose, and ascertained the validity of the votes by their examination, conducted in pursuance of his directions, and nothing occurred in the examination which had not been provided for by his directions, or which required his presence. On a quo warranto information against one of the persons so elected:—Held, that the election was void, but that the relator was not entitled to costs. *Reg. v. Backhouse*, 7 B. & S. 911.

Upon the trial of a quo warranto for exercising the office of a member of a local board of health, the defendant did not appear, and a verdict passed for the relator. The 9 Ann. c. 20 gives costs upon informations concerning the offices of mayors, bailiffs, portreeves, and other offices within cities, towns corporate, boroughs, and other places:—Held, that, notwithstanding the incorporation of local boards by the Sanitary Act (23 & 24 Vict. c. 90), s. 46, the relator was not entitled to costs. *Reg. v. Morgan*, 26 L. T. 790.

Security for Costs.—The court will not stay proceedings until the prosecutor give security for costs, on the ground that the relator is in insolvent circumstances, where it appears that he is a corporator, and no fraud is suggested. *Rea v. Wynne*, 2 M. & S. 346.

Where the person applying is in low and indigent circumstances, and there is strong ground of suspicion that he is applying not on his own account or at his own expense but in collusion with a stranger, the court will require security for costs. *Rea v. Wakelin*, 1 B. & Ad. 50.

Costs in Error.—On a writ of error to the Exchequer Chamber upon judgment upon a quo warranto information, the party in whose favour the court of error decides is not thereby, and by 11 Geo. 4 and 1 Will. 4, c. 70, s. 8, entitled to enter up a judgment of that court for his costs in error. *Rowley v. Reg. (in error)*, 6 Q. B. 668; 14 L. J., Q. B. 240; 9 Jur. 432.

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I. PLACE OF BUSINESS.

Principal Office of Company.]—A railway company, by an act incorporating the company, was to have two termini, one at Bristol, the other at Paddington: two general half-yearly meetings were to be held, one at Bristol, the other at Paddington: an equal number of directors was to be chosen from the residents near each place. All the general business was transacted at Paddington, where the secretary resided, and where orders were issued:—Held, that Paddington was the only principal office of the company, within the Railways Clauses Act, 8 & 9 Vict. c. 20, s. 138. *Garton v. Great Western Railway Company*, El., Bl. & El. 837; 4 Jur., N. S. 1036; 27 L. J., Q. B. 375.

A railway company carries on its business, within the meaning of 9 & 10 Vict. c. 95 (County Courts Act), s. 60, only at the principal station where the general superintendence of the whole concern is centred, and not at any station, however large, where the local management of any portions of the line is conducted, subject to the supervision of the general manager at the principal station. *Brown v. London and North Western Railway Company*, 32 L. J., Q. B. 318; 8 L. T. 695; 11 W. R. 884; *S. P. Shields v. Great Northern Railway Company*, 30 L. J., Q. B. 331; 7 Jur., N. S. 631; 9 W. R. 739.

The South Eastern Railway Company has a station in Cannon-street, City, where a considerable portion of its business is transacted. Their principal station, where the meetings of the directors are held and the general and substantial business of the company is conducted, is without the city:—Held, that the company does not carry on business within the jurisdiction of the Mayor's Court, within the meaning of s. 12 of the Mayor's Court Extension Act, 1857 (20 & 21 Vict. c. clvii). *Le Tailleur v. South Eastern Railway Company*, 3 C. P. D. 18.

The place where a railway company carries on its business within s. 12 of the Mayor's Court Procedure Act, is where the general superintendence and management of the business take place. *Rogers v. London, Chatham, and Dover Railway Company*, 26 W. R. 192.

When, therefore, it appeared that a railway company had a chief office, which was also a terminal station, in London, but that its business was managed at Victoria Station, which was not within the city:—Held, that the company carried on its business at Victoria Station and not within the city. *Ib.*

II. EXTENT OF WORKS.

Effect of Acts.]—Railway acts are to be construed strictly against the parties obtaining them, but liberally in favour of the public. *Parker v. Great Western Railway Company*, 7 Scott, N. R. 835; 7 M. & G. 253; 3 Railw. Cas. 563; 13 L. J., C. P. 105.

Duty to make.]—Acts authorizing companies to make railways, are regarded as but enabling

statutes which give powers, but do not render compulsory or obligatory the exercise of those powers. *Scottish North Eastern Railway Company v. Stewart*, 3 Macq. H. L. Cas. 382; 5 Jur., N. S. 607.

A railway company authorized to make a line of fifty-six miles, resolved on making only four miles of it, and to abandon the rest:—Held, that such a resolution was illegal, both as against the landowners on the line and the shareholders in the company. *Cohen v. Wilkinson*, 12 Beav. 125; 18 L. J., Ch. 378; 13 Jur. 641.

A railway company in 1846 obtained an act, which recited that it would be of local and public advantage if a line of railway was formed according to the plans and sections deposited as required by the practice of parliament, and referred to in the statutes, and that the company was willing to make it, and enacted that "it shall be lawful for them" to make it, and gave the company compulsory powers for purchasing lands; and if it abandoned the line, or any part of it, the land was to vest in the owners of the land adjoining. By a subsequent act in 1849, the company was authorized to make a deviation line, and the time for making the railway and for the exercise of the compulsory powers was extended. The company had, in the exercise of the compulsory powers, taken the land, and opened part of the line:—Held, first, that the substituted portion of the line was to be considered as if it had been included in the act of 1846. *York and North Midland Railway Company v. Reg. (in error)*, 7 Railw. Cas. 459; 1 El. & Bl. 858; 22 L. J., Q. B. 225; 17 Jur. 690—Ex. Ch.

Held, secondly, that the statutes did not cast upon the company, either by express words, or by implication, the duty to make the railway. *Ib.*

Held, thirdly, that there was no contract between the landowners and the company which could be enforced by mandamus. *Ib.* (overruling *Reg. v. Lancashire and Yorkshire Railway Company, infra.*)

Held, fourthly, that the company, having exercised some of their powers, and made part of their line, was not bound to make the whole. *Ib.*

A company having obtained an act of parliament for making a railway on representation that it will be for the public benefit, with power to take lands along the proposed line, is bound from the time when such act receives the royal assent to execute the work. *Reg. v. Lancashire and Yorkshire Railway Company*, 7 Railw. Cas. 266; 1 El. & Bl. 228; 22 L. J., Q. B. 57; 17 Jur. 62.

The court will enforce performance by mandamus at the instance of one of the adjoining landowners. *Ib.*

Branch Railway.]—A railway extension act enacted, that it shall be lawful for the company to make a branch railway, "and, if they think fit," the diverging lines shewn on the plans, from the branch railway to various collieries, and also to widen and enlarge the railway. The company was empowered to let on lease the diverging lines, either before or after the construction, to the owners of the collieries:—Held, that the statute did not cast upon the company the duty to make the branch railway, and therefore a mandamus would not lie. *Great Western Railway Company v. Reg. (in error)*, 1 El. & Bl. 874; 16 Jur. 675—Ex. Ch.

Purposes.—Action by a reversioner against a company for entering and making a railway on his land. Plea, that, before the reversion of the plaintiff, the dean and chapter of Durham were seised in fee, and by deed between them and the plaintiff, demised to the plaintiff the land for a term, "excepting and reserving the mines under the same, with power to dig, win and carry away the mines, with free ingress, egress and regress, way-leave and passage to and from the same, or to or from any other mines, lands and grounds, on foot and on horseback, and with carts and all manner of carriages, and also all necessary and convenient passages, conveniences, privileges and powers whatsoever, for the purposes aforesaid, and particularly of laying, making and granting waggon-ways in and over the premises, or any part thereof." The defendant justified making the railway as the servant of the dean and chapter, and by their authority. On the trial, it appeared that the company had made a double line of railway on the plaintiff's land, under a deed executed by the dean and chapter, and authorizing the company to make such a railway for the conveyance of passengers, goods, coals, wares and merchandize. The railway was constructed for the purpose of conveying general goods and passengers, as well as coals, but had not been actually so used, and the railway was not more than was necessary for the carriage of coals likely to be sent along it from the country with which it communicated:—Held, first, if the railway was such a railway as the company, at the time when it was made, might lawfully make for the purposes for which, when made, they might lawfully use it, the plaintiff, as reversioner, had no ground of complaint by reason of the intention of the company also to use the railway for other purposes for which they had no right to use it. *Durham and Sunderland Railway Company v. Walker*, 2 G. & D. 326; 3 Railw. Cas. 36; 2 Q. B. 940.

What Persons Empowered.—By an act for making a canal, the "owners or proprietors of any mines of coals" within certain parishes were empowered to make any railways or roads to convey their coals to the canal over the lands or grounds of any person or persons, paying or tendering satisfaction for the damage thereby occasioned:—Held, that this power was not limited to persons who were proprietors at the time of the passing of the act or of the making of the canal, but extended to other persons who had become so since, and that such owners or proprietors were empowered to make railroads to be traversed by locomotive engines. *Bishop v. North*, 11 M. & W. 418; 3 Railw. Cas. 459; 12 L. J., Ex. 362.

Deposit of Plans.—Where a company has a project extending into two adjacent counties, a landowner in one county is not bound to examine the plans or works of the company to be executed out of the county, or any plans or sections except those deposited with the clerk of the peace of his own county. *Bentinch v. Norfolk Estuary Company*, 3 Jur., N. S. 204.

The depositing with the clerks of the peace the plans and sections of a proposed railway, indicating the works proposed to be affected in constructing the line, gives no authority to the company to carry those works into effect, except so far as they are authorized by the 8 & 9 Vict.

c. 20, or the special act regulating the company. *Reg. v. Wycombe Railway Company*, 8 B. & S. 259.

The lines and works of a railway are sufficiently shewn on the plans deposited by a black line, with dotted lines on each side, to mark the limits of deviation. *Weld v. London and South Western Railway Company*, 32 Beav. 340; 33 L. J., Ch. 142; 9 Jur. N. S. 510; 8 L. T. 13; 11 W. R. 448.

Where the plans deposited by a railway company delineated a field, shewing the line, the limits of deviation, and the boundaries on one side of those limits, but leaving the boundaries on the other side undefined, the court restrained the company from taking the land beyond the limits of deviation on the undefined side, though the name of the owner of the whole field was described in the book of reference. *Wrigley v. Lancashire and Yorkshire Railway Company*, 4 Giff. 352.

Necessity of Works.—To a count alleging that the plaintiff was entitled to support for his house from an adjoining house, and that a railway company wrongfully deprived the plaintiff of the support of the adjoining house, by negligently and improperly pulling down the same, without taking any care to secure the house against the consequences of such pulling down, the company pleaded (except as to so much of the count as charged them with having negligently and improperly pulled down the adjoining house) that the same was delineated in the plans, and described in the books of reference deposited, as in their act mentioned; and that because it was necessary in order to make the railway authorized by that act they pulled down the house:—Held, that the plea was good. *Knapp v. London, Chatham, and Dover Railway Company*, 2 H. & C. 212.

Under s. 16, a railway company, empowered by a special act, incorporating the provisions of the general act, to construct "a railway and works" within certain limits as to space and time, may, within such limits, without the consent of the owner, take the land for the purpose of constructing the various works mentioned in s. 16, although such works are not necessary, but only convenient for the purposes of the line. *Sadd v. Maldon, Witham and Braintree Railway Company*, 6 Railw. Cas. 779; 6 Ex. 143; 20 L. J., Ex. 102.

Nature of Deviation.—A vertical deviation of the level of a railway not exceeding five feet, calculated with reference to the datum line shewn on the plans and sections deposited in pursuance of the standing orders of the houses of parliament, is within the powers of deviation conferred by s. 11, although the deviation may exceed five feet, calculated with reference to the surface line shewn on the plans and sections. *North British Railway Company v. Tod*, 12 C. & F. 722; 10 Jur. 975.

The expression "deviation" in s. 15, is used with reference to the medium filum of the railway as laid down in the parliamentary plans. *Doe d. Armistead v. North Staffordshire Railway Company*, 16 Q. B. 526; 20 L. J., Q. B. 249; 15 Jur. 944.

A railway act enacted, that the lands to be taken for the line of the railway should not exceed twenty-two yards in breadth, except

where a greater breadth should be necessary for waiting-places, embankments, cuttings, &c.; and a section provided, that the company, in making the railway and other works, should not deviate from the line delineated on the plan deposited with the clerk of the peace in pursuance of the act, with or without consent of the owners or occupiers of the lands, more than 100 yards, and that no deviation should extend into the lands or property of any person not mentioned in the book of reference of the plan, unless omitted by mistake; and the company was empowered to make such deviations in the section as might be necessary in consequence thereof:—Held, that this section only prohibited the company from making the substituted line of the railway itself, at a greater distance than 100 yards from the line delineated in the plan; but that it did not prevent them from taking lands at a greater distance from it than the 100 yards, for the purpose of embankments, cuttings, &c.; the intention of the act being to give the company the same incidental powers with respect to the deviated line, as they had with respect to the original line:—Held, also, that a party, whose lands were so taken, could not object that the company had taken, for the same purpose, lands of another person not mentioned in the book of reference. *Doe d. Payne v. Bristol and Exeter Railway Company*, 6 M. & W. 329; 2 Railw. Cas. 75.

“Town.”—At a trial of an issue the question was whether a railway at a particular place passed through a town within the meaning of s. 11. The judge merely told the jury that the word “town” in the act was to be understood in its ordinary sense:—Held, that this was a misdirection, and that the judge should have given the jury such a definition as would have been a guide to enable them to decide the particular question before them. “Town” in s. 11 means the space on which the dwelling-houses are collected so near to each other that they may be said to be continuous. *Elliott v. South Devon Railway Company*, 5 Railw. Cas. 500; 2 Ex. 725; 17 L. J., Ex. 262. See *Falkner v. Somerset Railway Company*, 16 L. R., Eq. 458.

An open space occupied as a mere accessory to the convenience of dwelling-houses would also be in the town. *Ib.*

III. POWERS AND DUTIES IN CONSTRUCTING AND WORKING.

1. GENERALLY.

To Divert Stream and Roads.—A railway company is only justified in diverting streams and roads as authorized by the 16th section of the Railways Clauses Act, 1845, when such diversions are strictly necessary to enable the company to carry out the undertaking, and therefore the right to make such a diversion cannot be insisted on where it is only convenient or economical for the company to do so. A railway company, in order to avoid the expense of making two bridges within a very short distance of each other, diverted a stream and carried it along the east side of their line, so that it no longer entered the plaintiff's land, which lay on the west side of the line. The plaintiff only used the stream for the purposes of watering cattle; but

although the company provided (by means of culverts) for a sufficient flow of water for this purpose in the old bed of the stream:—Held, that the diversion of the stream being only convenient and economical, and not strictly necessary, was not justified by the act, and that the plaintiff was therefore entitled to an injunction to restrain the company from interfering with the flow of the stream, as formerly enjoyed. *Pugh v. Golden Valley Railway Company*, 15 Ch. D. 330; 49 L. J., Ch. 721; 42 L. T. 863; 28 W. R. 863—C. A.

The power conferred on a railway by the 16th section of the Railways Clauses Act, 1845, to divert the course of a river or road, “in order the more conveniently to carry the same over or under, or by the side of the railway, as they may think proper,” is to be taken as cut down and qualified by the proviso that it be an act necessary for making, maintaining, altering or repairing, and using the railway. *Ib.*

To Stop up Streets.—In 1864, a railway company was empowered by an act to extend its line into London, and to make a station there. The act referred to plans and sections as being already deposited. The plans and sections shewed Sun-street as crossed by an arch. The Railways Clauses Act, 1845, s. 8 & 9 Vict. c. 20 (incorporated with the special act), provides, s. 13, that where it is intended to carry a railway on an arch as marked on the plan or section the same shall be made accordingly. The special act of 1864 gave the company power to stop up streets within an area (embracing Sun-street) described as the site of the intended station. In 1870, the company obtained an act empowering it to change the level and pass under Sun-street by a tunnel:—Held, that there was nothing in the Railways Clauses Act, 1845, s. 13, to bind the company to cross the street by an arch as described in the deposited plans and sections (in the event of its not doing so by a tunnel under the special act of 1870), so as to interfere with its power of stopping up the street altogether under the clause of its act of 1864, which enabled the company so to deal with streets within the prescribed area. *Att.-Gen. v. Great Eastern Railway Company*, 6 L. R., H. L. 367; 22 W. R. 281.

A railway company was by its special act empowered to stop up certain streets and passages in the metropolis, including L. C., and to appropriate and use such streets and passages, or parts so stopped up for the purpose of the railway and works, and they were authorized to grant leases of superfluous lands. The company erected a station at the north end of L. C., and thereby completely stopped it up as a thoroughfare, and they purchased all the houses along each side of the street, but did not expressly purchase or pay for, or take any conveyance of the soil of the street itself; nevertheless they treated the whole of the space formerly occupied by the street as well as by the houses on each side of it (which they had pulled down) as vested in them, and they surrounded it with a boarding, stopping up the south end of the street, and leased a plot of land comprising the ground at the south end of the street to the defendants for building purposes. Builders occupying premises in the street running at right angles to L. C., claimed a special right of access to them over the end of L. C. for the purpose of conveying long ladders

and poles to their premises, beyond the right of the public in the street as a highway. They filed a bill to restrain the railway company from building so as to interfere with this alleged right, and moved for an injunction:—Held, that the railway company having stopped up the one end of the street which they required for the purposes of their station, and having purchased all the houses in the street, had a right to stop up and appropriate the rest of the street, and accordingly the motion was refused. *Temple v. Flower*, 41 L. J., Ch. 604; 26 L. T. 657; 20 W. R. 587.

The railway company and the attorney-general ought to be parties to such suit. *Ib.*

Must not act Negligently.—When a railway company, in executing works authorized by its statutory powers, took insufficient precautions to secure the safety of an adjoining house, the court granted an injunction to restrain the negligent exercise of its powers, and appointed a surveyor to report what was necessary to secure the premises; and the company having complied with the requisitions of the surveyor, the court granted an inquiry as to damages. *Biscoe v. Great Eastern Railway Company*, 16 L. R., Eq. 636; 21 W. R. 902.

A railway company is bound to exercise the power given to it in derogation of individual rights with moderation and discretion and not negligently. *Ib.*

Percolation of Water.—A statement of claim alleged that the surface of the defendants' land had been artificially raised by earth placed thereon, and that in consequence rain-water falling on the defendants' land made its way through the defendants' wall into the adjoining house of the plaintiff, and caused substantial damage:—Held, upon demurrer, that the statement of claim disclosed a good cause of action. *Hurdman v. North-Eastern Railway Company*, 3 C. P. D. 168; 47 L. J., C. P. 386; 38 L. T. 339; 26 W. R. 489—C. A.

Fall of Embankment.—When an injury is alleged to have arisen from the improper construction or maintenance of a railway, the fact of one of its embankments giving way will amount to *prima facie* evidence of such insufficiency; and this evidence may become conclusive, in the absence of any proof on the part of the company to rebut it. *Great Western Railway Company of Canada v. Braid*, 1 Moore, P. C. C., N. S. 101; 9 Jur., N. S. 339; 8 L. T. 31.

Nuisances — During Construction.—In the Railways Clauses Act, 1845, the "powers aforesaid" in s. 32, in exercise of which a railway company may do certain specified acts upon lands of which they have taken temporary possession, are exercisable for the purposes named in that section only, and the words "action for nuisance or other injury," in the same section, include "suit." *Fenwick v. East London Railway Company*, 20 L. R., Eq. 544; 44 L. J., Ch. 602; 23 W. R. 901.

Therefore, when a railway was in course of construction at the rear of a shop, and the company took temporary possession of an adjoining piece of land not owned by the owner of the shop, and erected a mortar mill thereon, for the

purpose of making mortar to be used in the construction of the railway, that not being one of the purposes named in s. 32:—Held, that an injunction would be granted to restrain the railway company from working the mortar mill, so as to be a nuisance to the owner of the shop. *Ib.*

Held, that the making of mortar was not an act necessary for making the railway within s. 16, for the company might get mortar elsewhere, and it was not an act without which the railway could not be made. *Ib.*

A railway company has not, by reason of the powers in its special act enabling it to work the line in the way most convenient to itself, any power to commit an act which, if committed by a private person, would constitute a nuisance, and be restrainable by injunction accordingly. *Smith v. Midland Railway Company*, 37 L. T. 224; 25 W. R. 861.

The provisions of the Railways Clauses Act, 1845, which authorize a railway company to construct and work its line, do not authorize the commission of acts which would, in the case of a private individual, constitute a nuisance. *S. C.*, 26 W. R. 10.

— When Construction completed.—A railway company purchasing land for the railway acquires an absolute fee-simple, but such fee-simple is acquired solely for the purposes of constructing and using the railway. *Norton v. London and North-Western Railway Company*, 9 Ch. D. 623; 47 L. J., Ch. 859; 39 L. T. 25; 27 W. R. 352. Affirmed, 13 Ch. D. 268; 47 L. J., Ch. 859; 41 L. T. 429; 28 W. R. 173—C. A.

A railway company has no right to erect hoardings to prevent prescriptive rights being acquired for windows looking across the line of railway. *Ib.*

A railway company is liable to an action for nuisance for using its rights so as to injure the neighbouring landowner where they might use them without such injury. *Ib.*

A railway company may by their conduct abandon land outside their fence which was formerly theirs, so as to permit the adjoining owner to acquire such land by adverse possession. *Ib.*

Engines — User of.—By a private act reciting that a proposed railway, between certain termini, and its branches, would be of great public utility, a company was incorporated for the making of such railway, in a line parallel to and in some places within five yards of a highway, from which line no deviation was to be made exceeding 100 yards. A subsequent act authorized the use of locomotive engines on the railway. Upon an indictment for using the engines, whereby horses were frightened, and accidents occasioned on the highway, the alleged nuisance was found by verdict, but it was also found that the engines were of the best construction, and used with due care, and that by reason of these engines the public obtained better and cheaper coal:—Held, that such a restriction of the rights of the public was not unreasonable, and must be presumed to have been contemplated by the legislature, when authorizing the use of locomotive engines, without words of qualification. *Rea v. Pease*, 1 N. & M. 690; 4 B. & Ad. 30.

— Construction of—Smoke.—A penalty is

not incurred under 8 & 9 Vict. c. 20, s. 114, unless the engine using smoke-emitting fuel is so defectively constructed as to be incapable of consuming its own smoke, though used with proper care; and, consequently, no penalty attaches where the engine, though properly constructed on the principle of consuming its own smoke, is so carelessly used on a railway as to emit instead of consuming its smoke. *Manchester, Sheffield and Lincolnshire Railway Company v. Wood*, 2 El. & El. 344; 29 L. J., M. C. 29; 8 Jur., N. S. 70; 1 L. T. 31.

— **Inspection of.**—A court of equity will enforce, by injunction, the provision of s. 115, notwithstanding the practice of railway companies has been to rely on each other with respect to the fitness of their respective engines, and not to enforce the provision of the act; and notwithstanding also, that, to enforce such right of inspection, would occasion great inconvenience to the public traffic, and although it may appear that the provision is sought to be enforced, not from any apprehension of the use of improper engines, but for the purpose of impeding the traffic over their line of a competing company. *Midland Railway Company v. Ambergate, Nottingham, and Boston and Eastern Junction Railway Company*, 10 Hare, 359.

Liability of Railway Company for Damage by Sparks.—A private statute, reciting that a railway for the passage of waggons, engines, and other carriages would facilitate the conveyance of coals and other heavy articles to certain slate quarries, and of slates, copper, and other ores to the seaside, and would otherwise be of great public utility, empowered a company to make and maintain a railway passable for waggons and other carriages, and to erect and set up fire engines or other machines, and to do all other matters and things fit or necessary for the making and using the railway. While one of the company's trains, carrying passengers in accordance with a certificate of the Board of Trade, and drawn by a steam locomotive engine, was passing along the line, sparks from the engine were emitted and blown towards a haystack, which took fire and was burnt:—Held, that the company had not statutory authority to use locomotive engines, and therefore was liable for the damage, notwithstanding all reasonable precautions had been taken by them to prevent the emission of sparks. *Jones v. Festiniog Railway Company*, 3 L. R., Q. B. 733; 37 L. J., Q. B. 214; 18 L. T. 902; 17 W. R. 28; 9 B. & S. 835.

A railway company, authorized by the legislature to use locomotive engines, is not responsible for damage from fire occasioned by sparks emitted from an engine travelling on the railway, provided the company has taken every precaution in its power, and adopted every means which science can suggest to prevent injury from fire, and is not guilty of negligence in the management of the engine. *Vaughan v. Taff Vale Railway Company*, 5 H. & N. 679; 29 L. J., Ex. 247; 6 Jur., N. S. 899; 2 L. T. 394; 8 W. R. 594—Ex. Ch.

— **Evidence.**—Workmen employed by a railway company, after cutting the grass and trimming the hedges bordering the railway, placed the trimmings in heaps between the hedge and the line, and allowed them to remain there four-

teen days during very hot weather, which had continued for some weeks. A fire broke out between the hedge and the rails, and burnt some of the heaps of trimmings and the hedge, and spread to a stubble field beyond, and was thence carried by a high wind across a stubble-field and over a road, and burnt a cottage, which was situated about 200 yards from the place where the fire broke out. There was evidence that an engine belonging to the railway company had passed the spot shortly before the fire was first seen, but no evidence that the engine had emitted any sparks, nor any further evidence that the fire had originated from the engine, nor was there any evidence that the fire began in the heaps of trimmings and not on the parched ground around them:—Held, first, that it being a matter of common knowledge that engines do emit sparks, there was evidence that the fire originated in sparks from the engine that had just passed. *Smith v. London and South-Western Railway Company*, 6 L. R., C. P. 14; 40 L. J., C. P. 21; 23 L. T. 678; 19 W. R. 230—Ex. Ch. Affirming 5 L. R., C. P. 98; 39 L. J., C. P. 68; 21 L. T. 668; 18 W. R. 343.

Held, secondly, that there was evidence that the company was negligent in leaving the dry trimmings, and that the trimmings either originated or increased the fire, and caused it to spread to the stubble-field. *Id.*

In an action against a railway company for so negligently managing and conducting an engine that the premises of the plaintiff adjoining the line were destroyed by fire emitted from the engine, evidence is admissible for the purpose of shewing that other engines belonging to the company, upon other occasions, in passing along the line, threw sparks or ignited matter to a sufficient distance to reach the premises, without shewing the precise circumstances under which this occurred. *Piggott v. Eastern Counties Railway Company*, 3 C. B. 229; 15 L. J., C. P. 225; 10 Jur. 571.

The fact of premises being fired by sparks emitted from a passing engine, is *prima facie* evidence of negligence on the part of the company, rendering it incumbent on it to shew that some precautions had been adopted by the company reasonably calculated to prevent such accident. *Id.*

In an action for injury by fire, alleged to have been caused by a locomotive belonging to a railway company, it was proved that the fire broke out shortly after the passing of the engine, and that the engine had none of the appliances which had been long in use to prevent sparks or hot cinders issuing from the chimney or the fire-box, and that there was no other way of accounting for the fire than assuming it to have been caused by a spark or a cinder from the engine. For the company, the evidence of several scientific witnesses was to the effect that the engine was so constructed that it was unnecessary to provide any of the safeguards suggested by the plaintiff's witnesses, and that it was impossible that sparks or cinders could have been thrown out by it so as to cause the damage complained of. In his summing up, the judge, after a recapitulation of the evidence on both sides, left it to the jury to say whether or not there had been negligence on the part of the company, either in using an improperly-constructed engine or in improperly using an engine of the description mentioned by the witnesses of the company:—Held, no mis-

direction. *Fremantle v. London and North-Western Railway Company*, 10 C. B., N. S. 89; 31 L. J., C. P. 12; 9 W. R. 611; *S. C.*, at nisi prius, 2 F. & F. 337.

In an action against a railway company for damage negligently caused by a fire to the plaintiff's premises, alleged to have arisen from sparks emitted from their engines, the negligence alleged being such as practical men stated would impede the engines, and would not be effectual for the object, it was left to the jury to say whether there were any means which the company ought to have adopted; and the jury having found that there had been no negligence on the part of the company, as to using such means, or in managing their engines, a verdict was directed in their favour. *Dimmock v. North Staffordshire Railway Company*, 4 F. & F. 1058.

In an action against a canal company for damage caused by the emission of sparks from the engines of a steamboat used by them, evidence being given that there were some mechanical appliances which were used to prevent the emission of sparks, and that there were species of fuel and modes of dealing with the furnaces for that object, which had not been adopted, the question was left to the jury whether there had been a neglect by the company of any practicable precautions which they reasonably ought to have used. *Longman v. Grand Junction Canal Company*, 3 F. & F. 736.

In an action against a railway company for carelessly letting sparks fly from their engines so as to set the herbage and pasturage on fire, it is not necessary to prove any specific negligence. *Gibson v. South-Eastern Railway Company*, 1 F. & F. 23.

Damages.]—The compensation, in such a case, should be measured, as in the case of an unwilling vendor. *Ib.*

If the company is negligent it is responsible for the injury that results from their conduct to the owner of the injured property, although they could not have reasonably anticipated that such injury would be caused by it. *Smith v. London and South-Western Railway Company*, *supra*.

2. IN RESPECT OF PARTICULAR WORKS.

a. Stations.

Power to take Land for Building.]—Under the words "railway and works," in the Railways Clauses Act (8 Vict. c. 20), s. 3, a railway company has a right, by the compulsory powers of their act, to take a piece of land for the purpose of building a station. *Cotter v. Midland Railway Company*, 2 Ph. 469; 17 L. J., Ch. 235.

By a clause in a railway act, after reciting that plans and sections of the widenings, enlargements and other works proposed to be made, describing the lands intended to be taken or used for the purposes of such widenings and enlargements, and for the stations, works and conveniences to be connected therewith, and also books of reference, had been deposited with the clerks of the peace, the company was empowered to "widen, alter, enlarge, and complete their railway and other works, in, upon or over the lands delineated on the plans and described in the books of reference, and to enter upon, take and use such of the lands described upon the plans, and in the books of reference, as might

be necessary for such purposes, and to purchase and acquire any easement, right or limited interest upon, over, through or in any of the lands:"—Held, that this authorized the building of a station upon part of the lands described, and not only such works as were necessary for the mere widening of the railway, the station being necessary for the public convenience. *London and Blackwall Railway Company v. Limehouse Board of Works*, 3 Kay & J. 123; 26 L. J., Ch. 164.

"First-Class Station."]—On the purchase of land by a railway company in 1838, the company covenanted with the landowners that a piece of the land purchased should for ever thereafter be used as a first-class station. The station was built, and the railway was completed in 1842; the railway company was afterwards made part of a company with a much greater length of railway. In 1869 the landowner filed a bill to compel the company to build a larger station and to stop all trains at that station:—Held, that as the existing station had not been objected to, and had remained for many years, and as the passengers were not numerous, the court would not compel a larger station to be built; but that as many trains as stopped at any other station between the termini of the original railway, excepting mail, express and special trains, must stop at this station. *Hood v. North-Eastern Railway Company*, 5 L. R., Ch. 525; 23 L. T. 206; 18 W. R. 473.

At Particular Place.]—A contract entered into by a railway company with a landowner to build a railway station at a particular spot, nothing being said as to the user of the station, or the degree of convenience and accommodation to be afforded by it, is too vague and indefinite to be enforced by decree for specific performance; but the court will give damages for the breach of such contract, and in assessing those damages will give the landowner the benefit of all such presumptions as, according to the rules of law, are made against wrongdoers. *Wilson v. Northampton and Banbury Junction Railway Company*, 9 L. R., Ch. 279; 43 L. J., Ch. 503; 30 L. T. 147; 22 W. R. 380.

By Lessees of Covenants.]—A railway company purchased lands from C., and agreed to erect a station at A., and that the trains should stop there for passengers and luggage. They entered into possession of the lands before the conveyance was executed, but did not erect a station, and C. served a writ of ejectment upon them. The company then filed their bill against C. praying for the specific performance of the contract. A decree was made ordering specific performance, and that C. should execute a proper conveyance of the lands, and that such conveyance should contain a covenant by the company to erect the station, and that trains should stop there for passengers and luggage. This conveyance was duly executed. Under acts of parliament of 1867 and 1873, confirming agreements between the company and the S. W. company, the latter company were empowered to take a lease for 1,000 years of the S. railway, and to work it, and were, during such lease, to be liable to all duties and obligations to which the S. company, if the acts had not been passed, would be subject and liable. No

station was erected. On bill filed by C. against both companies :—Held, that though the S. W. company were necessary parties to the suit, no case whatever had been made out against them, inasmuch as they were not bound either in law or in equity by the covenant entered into by the S. company with C. to erect a station, but that they would be bound, when the station was made, to stop their trains there. *Churchill v. Salisbury and Dorset Railway Company*, 23 W. R. 894 (varying 32 L. T. 216 ; 23 W. R. 534).

Condition of.]—See CARRIERS.

b. Sidings.

Taking Land for.]—Land within the limits of deviation in the deposited plans and sections, but not actually taken in the first instance by the company, may be taken for the purposes of making a siding, so as to give local traffic an ingress on to the main line. *Dylar, In re*, 1 Jur., N. S. 975.

Construction of Act—Public Use.]—A railway act provided "that it should not be lawful for the company to make or establish any public station, yards, wharves, waiting, loading or unloading places, warehouses or other buildings and conveniences for the depositing, receiving, loading, or keeping any passengers or cattle, or any goods, articles, matters or things upon the estate of G., without his consent :"—Held, that the word "public" did not necessarily override the whole sentence, and that, if it did, then that, from the subsequent clauses, every convenience connected with the railway must be considered as for the public use. *Gordon v. Cheltenham and Great Western Union Railway Company*, 5 Beav. 229 ; 2 Railw. Cas. 800.

Agreement with Landowner—Specific Performance.]—A railway company agreed with a landowner, through whose estate the railway would pass, to construct and maintain a siding connected with their railway at B., together with all necessary approaches thereto for public use, for the reception and delivery of goods :—Held, that specific performance could be decreed of the agreement to construct the siding and approaches without decreeing the company to maintain them when made. *Lytton v. Great Northern Railway Company*, 2 Kay & J. 394 ; 2 Jur., N. S. 436.

Held, also, that the agreement did not bind the company to erect sheds, or to keep one of their servants in attendance at the siding ; but that it obliged the company to construct a proper siding, with approaches and a wharf or raised platform for the loading or unloading of goods. *Id.*

— Though Offer of Money Payment.]—A railway company having contracted to make a siding for the plaintiff on his land, offered a money payment instead, but specific performance of the agreement was decreed. *Green v. West Cheshire Railway Company*, 13 L. R., Eq. 44 ; 41 L. J., Ch. 17 ; 25 L. T. 409 ; 20 W. R. 54.

— Instead of Damages.]—A railway com-

pany, as compensation for injury to the plaintiff's mill by the construction of their railway, agreed to lay down a siding from their line to the mill. The siding was made, but the plaintiff not having used it, the railway company removed the points, undertaking by a letter of the 2nd March, 1871, to replace them on receiving sufficient notice of an intention to use the siding. In November, 1879, the siding not having been used, the railway company removed the rails, and the plaintiff having required them to be replaced, its secretary, on the 27th November, 1879, wrote to the plaintiff that the rails had been removed under misapprehension, and would be replaced at once, or that the directors would undertake to do so at any time when called on. By regulations of the Board of Trade, issued in July, 1879, railway companies were required to provide signals, &c., on the opening of any siding or branch line which had not been in use before that time. On the 17th September, 1880, the plaintiff required the railway company to replace the siding. On the 19th of October the secretary replied, requiring the plaintiff to indemnify the directors against the expenses occasioned by the regulations of the board, in consequence of the non-user of the siding, if he required it to be replaced. The plaintiff's solicitors refused, and having again required the siding to be replaced, on the 5th of January, 1881, wrote to the secretary that unless in that month the plaintiff should be fully compensated for the injury and expense sustained by him from the construction of the railway, proceedings would be taken to recover full compensation. The secretary replied on the 19th of January, denying the liability of the company in respect of a right never used, and on which the plaintiff apparently placed no value. In an action for specific performance of the agreement to replace the siding :—Held, first, that the non-user of the siding, and the expenses caused thereby, under the regulations of the Board of Trade, were not a defence to the action, and that the company was not entitled to any indemnity against those expenses. *Todd v. Midland Great Western Railway Company*, 9 L. R., Ir. 85.

Held, secondly, that the plaintiffs were entitled to a decree to replace the siding and keep it in working order, the court considering damages an insufficient remedy. *Id.*

What is Sufficient Performance.]—When a railway company was bound by its act to make a good and sufficient siding on a specified field of an owner who had opposed the bill :—Held, that the obligation was not broken, though the company took for other purposes so much of the specified field as not to leave any to furnish access from the siding to an adjoining road without passing over the land taken, or out of the specified field. *Dowling v. Pontypool, Caerleon and Newport Railway Company*, 18 L. R., Eq. 714 ; 43 L. J., Ch. 761.

c. Bridges and Alteration of Roads.

Mandatory Proceedings to Construct over Line.]—A mandamus will not lie to compel a railway company to construct a bridge in lieu of a level crossing pursuant to an order of the Board of Trade, where it appears that the company is wholly without funds, and has not the means of providing the money required for that

purpose. *Bristol and North Somerset Railway Company, In re*, 3 Q. B. D. 10; 47 L. J., Q. B. 48; 37 L. T. 527; 26 W. R. 236.

— **Option.**—Under 8 & 9 Vict. c. 20 (Railway Clauses Act, 1845) s. 46, a railway has the option, when its line of railway crosses a turnpike-road or a public highway (except when otherwise provided by the special act), either to carry the road over the railway or the railway over the road. A mandamus to command a company to do one of these two things, is therefore defective unless it shews on the face of it circumstances which establish the impossibility of the company exercising this option. *Reg. v. South-Eastern Railway Company*, 4 H. L. Cas. 471; 17 Jur. 931. Affirming 17 Q. B. 485; 20 L. J., Q. B. 428; 15 Jur. 871.

— **Height, Span, and Approaches.**—A railway company, before applying for a deviation act, deposited with the clerk of the peace for the county plans and sections of the proposed line, and cross sections, shewing the manner in which roads were to be carried over the line. On one of these sections, No. 3, were delineated the manner in which it was proposed to carry a road at I. over the line by a bridge, and the proposed inclination of the altered line of road. The deviation act, when obtained, incorporated the Railways Clauses Act, and enacted that it should be lawful for the company to construct the bridges for carrying the railway over any roads, or for carrying any roads over the railway, of the heights and spans and in the manner shewn on the sections deposited. The company made the line, and at I. deviated two feet vertically from the level marked on the plans. They carried the road over the line on a bridge of the proposed height and span, but with a different inclination of the altered road. A mandamus having issued, commanding the company to make the bridge and carry the road over it in conformity with cross section, No. 3, and at the rates of inclination delineated thereon as the rates of inclination of the road when altered:—Held, first, that the exhibition of the plans and sections imposed no obligation on the company, except in so far as the plans, &c. were incorporated in the act. *Reg. v. Caledonian Railway Company*, 16 Q. B. 19; 20 L. J., Q. B. 147; 15 Jur. 396.

Held, secondly, that nothing in 8 & 9 Vict. c. 20, rendered the cross sections obligatory on the company. *Ib.*

Held, thirdly, that if the special act was obligatory (which, semble, it was so far as regarded the height and spans of the bridges), the obligation did not extend to the rates of inclination of the altered road, and that the mandatory part of the writ going in this respect beyond the obligation imposed by law, the writ was bad altogether. *Ib.*

Where, in consequence of a company raising the level of their railway within the limits of vertical deviation, it became necessary to raise the height of a bridge over which a road was to be carried:—Held, that there was no restriction as to the powers of the company to alter the levels of the approaches to the bridge, provided the land to be affected was included in the plans and sections deposited, or mentioned in the books of reference, and that full satisfaction was made to all parties interested for the damage sustained. *Beadmer v. London and North-*

Western Railway Company, 1 Mac. & G. 112; 1 Hall & T. 161; 18 L. J., Ch. 432; 13 Jur. 327.

By s. 41 of a railway act, it was enacted, that where any part of any road should be rendered impassable by the operations for making the railway, the company should cause another road to be made as convenient, and in the case of a turnpike-road, the temporary road should be set out, and the principal road restored within six months from the commencement of the operation. By s. 42, where the railway should cross any turnpike-road, either the turnpike-road should be carried over the railway, or the railway should be carried over the turnpike-road, by means of a bridge, of such construction as is thereafter mentioned. By s. 47, where any bridge shall be erected for carrying any turnpike-road over the railway, the road over such bridge shall be formed, and shall at all times be continued of such width, as to leave a clear space between the fences of such road of not less than fifteen feet. The company lifted the road over the railway by a bridge, thirty feet wide between the parapets, and with approaches twenty-four feet wide:—Held, that, though that part of the road which might strictly be called the bridge, need not be wider than fifteen feet, the doctrine that the approaches form part of the bridge did not apply in this case. *Ileg. v. Birmingham and Gloucester Railway Company*, 1 G. & D. 324; 4 Jur. 966.

— **Ascent of Bridge.**—The proviso in 8 & 9 Vict. c. 20, s. 16, that in the exercise of their powers the company shall do as little damage as may be, and shall make satisfaction to all parties interested for all damages sustained by them, applies only to cases of damage to individuals for which compensation may be made, and does not control the enactment in s. 50, as to the ascent of bridges over the line. *Reg. v. East and West India Docks and Birmingham Junction Railway Company*, 2 El. & Bl. 466; 22 L. J., Q. B. 380; 17 Jur. 1181.

— **Impossibility of Performance.**—A local board of health withdrew its opposition to a railway bill upon the insertion in the act of a clause providing that no bridge carrying a road over the railway within their district should have an approach with a slope of more than one in thirty. The making a slope of one in thirty required an encroachment on the land of a person who obtained an injunction to prevent such encroachment, and the company thereupon made a bridge with a slope of one in twenty:—Held, that the company must not have a bridge with a slope of more than one in thirty, and that it was no answer to say that this requisition could not be complied with without stopping the railway. *Att.-Gen. v. Mid-Kent Railway Company and South-Eastern Railway Company*, 3 L. R., Ch. 100; 16 W. R. 258.

— **Over other Railway—Consent of Owner.**—By an act a company was empowered to make a railway over lands to a certain point; and it was enacted that nothing in the act should authorize the company to enter the lands of any person, without the previous consent of the owner; and that, in every case in which the railway should cross any other railway, the communication between the two railways, in case of disagreement, should be made in such manner

as should be directed by two engineers (one to be chosen by each party) and an umpire, whose decision should be binding on all parties; provided, that the engineer of the company, if the owner of the railway to be crossed should, for twenty-one days after notice, neglect to appoint an engineer on his behalf, should have power to make such communication as he should think proper; that the company should make satisfaction for damage occasioned by such crossing, and should have full power at all times to cross such railway by means of such communication:—Held, that the consent in writing of the owner of a railway intended to be crossed by another railway was necessary. *Clarence Railway Company v. Great North of England, Clarence and Hartlepool Junction Railway Company*, 13 M. & W. 706; 3 Railw. Cas. 426; 7 Jur. 65; S. P. and S. C., 3 G. & D. 389; 4 Q. B. 46; 12 L. J., Q. B. 146.

Over Rivers—Notices to Owners.—In an action by an owner of a vessel navigating a public river, against a railway company, the declaration charged the company with filling up and obstructing a part of the bed of the river, penning back the water, and preventing it from flowing in its accustomed channel and course in so ample a manner as it otherwise would have done, and preventing the plaintiff from passing along and navigating that part of the river. Plea, that the company had done the matters complained of under their special act, and under the Lands Clauses Act and the Railways Clauses Act; that plans and books of reference were deposited with the clerk of the peace; that the part of the bed of the river which was obstructed was among the lands delineated on the plans, and described in the books of reference; and that the company, for the purpose of constructing the railway, and under and by virtue of the powers and provisions mentioned in their special act and the acts of parliament therewith incorporated, and not otherwise, entered upon the same part of the bed of the river, and constructed part of the railway thereon, the same being necessary for the purpose of making the railway. Issue thereon:—Held, that the company was not bound under their plea to shew that all notices required by the acts for the purchase of such part of the river from the owners of the bed of it had been given, and all other things done which were requisite to vest that part of the bed of the river in the company. *Abraham v. Great Northern Railway Company*, 16 Q. B. 586; 20 L. J., Q. B. 322; 15 Jur. 855.

—What Rivers.—Held, secondly, that the first clause of s. 16 of 8 & 9 Vict. c. 16, includes navigable rivers as well as rivers not navigable, and therefore the company was authorized by it to construct their railway upon the bed of the navigable part of the river. *Id.*

Refusal to Construct—Remedy.—A company was required to construct a bridge over a public river, so as to leave the same width of waterway under the same as then existed at the point where the river was crossed, and so that there should be a clear height of five feet above the ordinary level of the river: provided, that, after notice given to the company by an owner or occupier of lands adjoining the railway, that the bridge was not made according to the true intent

and meaning of the act, it should be lawful for such owner or occupier to apply for and obtain an order from a justice of the peace, enabling such person to make such bridge accordingly, the expenses to be defrayed by the company. The company was constructing a bridge which did not comply with either of these provisions, whereupon a landowner gave them notice, requiring them to construct a bridge, leaving the former width of waterway, and the clear height of five feet above the water, in the terms of the act. The company replied that they would do the first, and would accept process as to the second. They afterwards made the bridge of the required height, and, to preserve the same width of waterway, commenced cutting the banks of the river, which they afterwards discontinued. To subsequent applications to proceed with the work they returned no answer:—Held, that these facts amounted to a refusal to do what was demanded, and that the applicant was entitled to a mandamus, notwithstanding the powers given him of applying to a justice. *Reg. v. Norwich and Brandon Railway Company*, 4 Railw. Cas. 112; 3 D. & L. 385; 15 L. J., Q. B. 24.

—Mode of Construction—Direction of Owners.—A railway company had power by their act to cross a river, the property of certain persons, by the erection of a viaduct. By a clause to protect the proprietors of the river, it was enacted, that between certain points the works incident to the construction of the railway should be made under the direction of the proprietors, and according to plans to be submitted and approved by their engineer before commencement of the work. The company required the viaduct to be built on piles driven into the river; the proprietors objected that it should be done by a viaduct of one span or arch:—Held, that the company was not restricted to that mode of construction, but might carry the viaduct according to the terms of their act, without doing any permanent damage to the proprietors of the river. *Birmingham Waterworks Company v. London and North-Western Railway Company*, 4 L. T. 398.

Over Roads.—On the plans deposited by the promoters of a railway with the clerk of the peace, a bridge of which it was proposed to carry the line across a turnpike road was described as having a span of forty-five feet:—Held, that under the Railways Clauses Act, s. 13, the company was bound to make an arch conformably to the description in the plan, and was not at liberty to build it with a span of only thirty-five feet. *Att.-Gen. v. Tewkesbury and Malvern Railway Company*, 1 De G., J. & S. 423; 32 L. J., Ch. 482; 8 L. T. 682.

A bridge, forming part of the line of railway itself, is an engineering work, within s. 14. *Id.*
The effect of 8 & 9 Vict. c. 20, s. 51, taken in conjunction with s. 49, is, that if the average available width for the passage of carriages on any road is more than thirty-five feet, the road may be narrowed to thirty-five feet under the arch; where it is less, the arch may be made the same width as the road, so that it be not less than twenty feet wide; if the road is afterwards widened, the arch must be widened in proportion up to, but not beyond, thirty-five feet. *Reg. v. Rigby*, 6 Railw. Cas. 479; 14 Q. B. 687; 19 L. J., Q. B. 153; 14 Jur. 329.

In this reckoning, footpaths are not to be taken into account. *Id.*

By its special act, passed in 1872, a railway company whose line was made in 1857, was authorized to divert a road crossing its line on the level, and to carry it under the line by a bridge, and the soil of the diverted road was to belong to the company. The new road and bridge were to be in accordance with the deposited plans and sections, which shewed a total height from the road to the rails on the bridge of 16 ft. 3 in., but did not mention the height of headway. The special act incorporated the Lands Clauses Act, 1845, and the Railways Clauses Act, 1845 (s. 49 of which provides that all bridges shall have a headway of fifteen feet), and it provided that nothing in the special act should exempt the company from the provisions of the general acts. It also gave the company power to deviate from the deposited sections to the extent of five feet. The company, without altering the levels of the line (no such alteration being shewn on the deposited plans), made the bridge of the prescribed height of 16 ft. 3 in., but with a headway of only fourteen feet, and that partly gained by carrying the road below the level of the adjoining land, so that at times it was flooded from an open ditch near the line, and became impassable. If the surface of the road was raised one or two feet, all serious inconvenience from flooding would be removed, and a headway of twelve or thirteen feet would be sufficient for the traffic of the district. On an information at the relation of the road surveyors:—Held, that the attorney-general was entitled to an injunction restraining the company from making or maintaining the bridge with less headway than fifteen feet, or any bridge which, by reason of the road thereunder being of too low a level, might cause the road to be flooded. *Att.-Gen. v. Furness Railway Company*, 47 L. J., Ch. 776; 38 L. T. 555; 26 W. R. 650.

For Purposes of Station.]—By local acts, paving commissioners of a parish were empowered to remove obstructions from houses and buildings abutting near any streets which, in their judgment, should obstruct the circulation of light and air, or be inconvenient to passengers. An act establishing the Northern and Eastern Railway Company empowered them to construct arches over the railway, or other works, streets, &c., and upon the railway, or any lands adjoining or near thereto, to erect stations. By another act, amending the former, the company was empowered to provide a station and depôt near the London terminus of the Eastern Counties Railway; and it was enacted, that all the "clauses, powers, provisions, directions, regulations," &c., contained in the former act should apply to the purchase of land and buildings for the railway and also for the station. It was also enacted that nothing in that act should extend to prejudice, derogate from, &c., the privilege of any parish over which the railroad should pass, under the local acts:—Held, that the Northern and Eastern Counties Railway Company was empowered by the above acts to arch over public thoroughfares in the parish not only for the construction of the railway itself, but also for the erection of a station. *Att.-Gen. v. Eastern Counties Railway Company*, 10 M. & W. 263; 12 L. J., Ex. 106. See *S. C.*, 2 Railw. Cas. 823.

Lowering Road.]—A company was empowered to raise or lower any roads or ways, in order the more conveniently to carry the same over or under, or by the side of the railway; and where any bridge should be erected by the company over any public carriage-road, not being a turnpike-road, the centre of the arch must be of a height from the surface of the road of not less than sixteen feet. Nothing in the act was to derogate from any of the rights or privileges of any parish over which the railway should pass, acting under any local act. By a local paving act it was enacted, "that no person shall alter the form of any pavements which shall be now made by virtue of this act, without the consent of the commissioners, or in anywise encroach thereon, or put up any posts, boards," &c.:—Held, that the company was entitled, in carrying the railway by a bridge over a street under the control of the commissioners, to lower the street so as to give the height to the centre of the arch required by the statute. *Reg. v. Eastern Counties Railway Company*, 3 Railw. Cas. 22; 2 Q. B. 569; 2 G. & D. 1; 6 Jur. 820.

A company was empowered to divert, raise, sink, or deepen any roads, in order to carry the same over, under or by the side of the railway. By another act, enabling them to vary their line, they were authorized to carry the line of railway across a turnpike-road, by means of a bridge of the width of thirty feet at the least, and for that purpose to lower the bed of the road, provided, that in case it should be expedient to lower the surface of the road, it should not be lawful for the company to lower or alter the bed of the road, unless the same should be lowered on both sides of such bridge, so as to leave a certain inclination, and that the company should make all new fences, and relay and reform the road. The company made a bridge thirty feet wide, over a turnpike-road forty-two feet wide, consisting of thirty feet carriageway, and two footways of six feet each. They lowered the carriageway of the road, but left the footways at their original level. On the trial of traverses to a return to a mandamus which had issued to the company to reform the road, and to lower it the whole width of forty-two feet, the jury found—first, that the company had not so lowered the road; secondly, that they had reformed the road in compliance with the act; and, thirdly, that the road made by the company was more commodious to the public than if the whole road had been lowered to the full width of forty-two feet. The Queen's Bench held, that the word "road" meant the whole road, including footpaths, and, therefore, that the company had not reformed the road as required by the act, and that the finding of the jury upon the issue, as to its being more commodious, was not sufficient to dispense with a compliance with the language and meaning of the act. *Manchester and Leeds Railway Company v. Reg. (in error)*, 3 Railw. Cas. 633; 3 G. & D. 269; 3 Q. B. 528.

Held, by the Exchequer Chamber, that it was not a good return to the mandamus, that the carriage-road and footpath, as they now exist, are more commodious and convenient to the public, &c., than if lowered as required by the writ. *Id.*

But, held, that by the words "bed of the turnpike-road," the act intended that the carriage-road only should be lowered, and that the full breadth of the former carriage-road was not in-

tended to be preserved under the bridge, but only as to the part of the road lowered as it descended to the bridge on one side and ascended from it on the other. *Ib.*

Diverting Public Roads.]—The 8 & 9 Vict. c. 20, s. 16, authorizes the permanent diversion of public roads, and not only a temporary diversion for the purpose of constructing a railway. *Phillips v. London, Brighton, and South Coast Railway Company*, 4 Giff. 46; 9 Jur., N. S. 348; 7 L. T. 663.

The powers conferred by 8 & 9 Vict. c. 20, s. 16, must be understood as restricted to such acts as are necessary to the construction of the railway, and do not extend to acts done for the saving of expense or inconvenience to the company. *Reg. v. Wycombe Railway Company*, 2 L. R., Q. B. 310; 36 L. J., Q. B. 121; 15 L. T. 610; 15 W. R. 489; 8 B. & S. 259.

If a railway crosses a highway without diverting it, a bridge must be made for the highway over or under the railway, but the highway may be diverted to a place where there is a level crossing, if the road so diverted will be more convenient than a bridge. *Att.-Gen. v. Ely, Haddenham, and Sutton Railway Company*, 4 L. R., Ch. 194; 38 L. J., Ch. 258.

Turnpike-road, what.]—Mandamus to a railway company, reciting that the railway crossed a street and turnpike-road, which was carried over the railway by a bridge, and that the company had made the ascent to the bridge with a greater degree of ascent and inclination than one foot in thirty feet, contrary to s. 50; and that the company had deviated from the levels of their railway, as referred to the common datum line shewn in the deposited plans and sections, to an extent exceeding two feet, in the place where the railway passed through this street and turnpike-road. The writ commanded the company to make the ascent to the bridge in conformity with 8 & 9 Vict. c. 20, and to make the levels of the railway, as referred to the common datum line, and as directed in the deposited plans and sections. The road was a public carriage-road, but not a turnpike-road, and the ascent was no greater than was allowed by s. 50, in the case of a public carriage-road:—Held, that as the first part of the writ failed, the prosecutor could not have a peremptory mandamus for the other part against the company. *Reg. v. East and West India Docks and Birmingham Junction Railway Company*, 2 El. & Bl. 466; 22 L. J., Q. B. 380; 17 Jur. 1181.

A carriage-road is not a turnpike-road, unless it is repaired by trustees out of tolls payable by passengers along it. *Ib.*

Property in Old Road.]—Where a railway company, having made a substituted road, inclosed and took possession of the portion of the old road which had ceased by the diversion to form part of the turnpike-road:—Held, that there was nothing in the Turnpike Act (3 Geo. 3, c. 126), or in 8 & 9 Vict. c. 20, s. 16, to place the company in the position of trustees of the substituted road so as to transfer to them the soil of the old road. *Salisbury (Marquis) v. Great Northern Railway Company*, 5 C. B., N. S. 174; 23 L. J., C. P. 40; 5 Jur., N. S. 70.

Substituting other Roads.]—Sects. 53, 55,

56 of 8 & 9 Vict. c. 20, with respect to the crossing of roads, or other interference therewith, are applicable to the interference with roads incidentally, and do not apply where the object of the special act is to change the nature of that road substantially. *Tanner v. South Wales Railway Company*, 5 El. & Bl. 618; 25 L. J., Q. B. 7; 1 Jur., N. S. 1215.

A railway act provided, that, where any part of any road should be cut through, taken, &c., in exercise of the powers given to the company, they should first make another road instead thereof, as convenient for passengers and carriages as the former road; and that, where such road was turnpike, "the substituted road, if temporary, shall be set out and made, and the principal road shall be restored, within six calendar months after the commencement of the operation;" and that, where any bridge should be erected for carrying any turnpike-road over the railway, "the road over such bridge" should be not less than fifteen feet wide. The level of the ascent of every such bridge was also regulated. The company made a bridge fifteen feet wide, with approaches at each end (187 and 126 yards long respectively), for conveying a turnpike-road over the railway, and took part of the former turnpike-road for the purpose of making the approaches, which were carried along and within the space which that road had occupied. On a mandamus to the company to make and restore such part of the turnpike-road according to the statute, alleging that the trustees of the road had duly required them to do so within six calendar months after commencement of the operation:—Held, that it was no sufficient return, that the approaches, though of less width, were as convenient to the public as they could be made in execution of the powers of the act, and as convenient to the public as the original road had been. Or, that the company could not now widen the approaches without taking and purchasing more land; that their compulsory powers of purchasing under the act had expired before they were called upon to widen; and that they had not the power to take or purchase land for such purpose. *Reg. v. Birmingham and Gloucester Railway Company*, 2 Q. B. 47; 2 Railw. Cas. 694.

Injunction—Temporary User.]—A railway company while constructing a railway laid down sleepers and rails for some distance over one side of a high-road, and ran locomotives and trucks over it. No fence had been put up between these rails and the portion of the road left for the ordinary traffic, which was in places narrow:—Held, that although the evidence did not shew that the public had been greatly inconvenienced by this proceeding, the high-road had thereby been rendered "dangerous and extraordinarily inconvenient," and that the railway company must be restrained by a perpetual injunction from using the highway till it had made a substituted road. *Att.-Gen. v. Widnes Railway Company, Widnes Railway Company v. Widnes Local Board*, 30 L. T. 449; 22 W. R. 607—L. J.

Inconvenient Alteration—Indictment.]—By a railway act a company was empowered to divert or alter any roads or ways, in order the more conveniently to carry the same over or under the railway. The company, in carrying a road under the railway, erected a skew bridge, which diverted

the road to an angle of 45° instead of 34°, which was the angle made at that particular point by the old line of road. At the trial of an indictment against the company's engineer for so doing, the judge directed the jury, that, if the public sustained inconvenience by the alteration, they should find for the crown; but that, if the work was done in a mode in which an experienced engineer would do it, having reasonable regard to the interests both of the company and the public, the company had a right to make such diversion. The jury having found for the defendant on the ruling, the court refused to grant a new trial. *Reg. v. Sharpe*, 3 Railw. Cas. 33.

A railway company was empowered by statute to make obstructions in public or private roads, for the purpose of their undertaking, doing as little damage as might be; and a subsequent section enacted, that, wherever it was found necessary to use that power, they should, before any such road should be cut through, make a road instead thereof, as convenient for passengers as the road to be cut through, or as near thereto as may be. The company having obstructed a public road without making a new one equally convenient, or as nearly so as might be:—Held, indictable at common law for a nuisance to the old highway. *Reg. v. Scott*, 2 G. & D. 729; 3 Q. B. 543; 3 Railw. Cas. 187; 6 Jur. 1084.

Action.]—Action, against a railway company for an obstruction of a right of way as appurtenant to the house of the plaintiff, by means whereof he could not have or enjoy his way as he of right ought to have done, and otherwise might and would have done, and had been and was deprived of the use, benefit, and advantage of the same. Plea, justifying the obstruction complained of, for the purpose of making and constructing a railway under the powers and provisions of an act, by which the company was incorporated, and of the acts therewith incorporated. Replication, that the way was a road within the meaning of the 8 & 9 Vict. c. 20; that the company rendered it impassable and thereby interfered with the same, within the meaning of that act; and that the company had not caused a sufficient road to be made, instead of the road so interfered with:—Held, that by ss. 6 and 55 of the above act, the remedy by action for an interference with a private right of way was taken away, except where special damage had been suffered, and therefore that the count was bad. *Watkins v. Great Northern Railway Company*, 16 Q. B. 961; 20 L. J., Q. B. 391.

But one who sustains a private or a particular injury from the diversion or obstruction of a public road by the works of a railway company, which diversion or obstruction, if done without sanction of an act of parliament, would give a right of action, is entitled to compensation. *Wood v. Stourbridge*, 16 C. B., N. S. 222.

An action will lie against a railway company for not restoring a road within the prescribed period where damage has been occasioned. *Caledonian Railway Company v. Colt*, 3 Macq. H. L. Cas. 833; 7 Jur., N. S. 475.

Penalty.]—To entitle a person to proceed against a railway company for penalties for interfering with an existing public road, under

s. 57 of 8 & 9 Vict. c. 20, as "a person having the management of the road," he must be clothed with some duty in respect of the public, ejusdem generis with that of "trustees, commissioners, or surveyor." *Reg. v. Wilson, or Kent (Justices)*, 18 Q. B. 348; 21 L. J., Q. B. 281; 16 Jur. 973.

A railway act imposed a penalty on a company for the interruption of any road, and in case of a private road, made the penalty "payable to the owner thereof":—Held, that the tenant of the farm over which the road passed could not sue for the penalty. *Collinson v. Newcastle and Darlington Railway Company*, 1 C. & K. 546.

But the owner of a private road, entitled under 8 & 9 Vict. c. 20, s. 54, to recover penalties for its interruption, is the person who, for the time being, owns such road in possession. *Mann v. Great Southern and Western Railway Company*, 9 Ir. C. L. R. 105.

Obligation to Repair.]—Under 8 & 9 Vict. c. 20, s. 46, a railway company having carried over the railway by a bridge, is bound to keep both bridge and road, and all the approaches thereto, in repair; and such repair includes not only the structure of the bridge and the approaches, but the metalling of the road on both. *North Staffordshire Railway Company v. Dale*, 8 El. & Bl. 836; 27 L. J., M. C. 147; 4 Jur., N. S. 631.

A railway company having carried a road over the railway by a bridge, is bound to keep both bridge and road, and all the approaches in repair, and such repair includes not only the structure of the bridge and the approaches, but the metalling of the road on both. *North of England Railway Company v. Langbaugh*, 24 L. T. 544.

But a railway company which, in carrying a railway over a highway by a bridge, lowered the level of the highway, is not bound to keep the slope of the road in repair as being part of the approaches on each side of the bridge. *London and North-Western Railway Company v. Skerton*, 5 B. & S. 559; 33 L. J., M. C. 158; 10 L. T. 648; 12 W. R. 1102.

By a special act, with which was incorporated the Railways Clauses Act, where the railway was proposed to cross the turnpike-road leading from Newcastle-under-Lyne to Leek, the company "shall erect a proper and sufficient bridge constructed of bricks, stone, iron, or other materials, so as to carry the turnpike-road over and across the railway, such bridge also to be constructed with parapet walls of brick, stone, or other materials of five feet in height, and of the clear and open width of thirty-three feet at the least between such parapets; and that the turnpike-road shall be made and altered at the expense of the company on both sides of such bridge, so that the surface of the turnpike-road shall, when completed, have one uniform inclination on both sides, not exceeding one in thirty; and so much of the turnpike-road as shall be broken up or damaged for the purposes of the act shall be re-instated and made good with the same materials as the road is now composed of, and the fences thereof, whenever necessary, reconstructed and put into complete order by the company, and kept in repair for the space of twelve calendar months, after the making, forming, and completing thereof":—Held, first, that under 8 & 9 Vict. c. 20, s. 46 (without reference to the special

act), the company was bound, at all times, to keep in repair the approaches to and road over the bridge. *Newcastle-under-Lyne and Leek Turnpike Road (Trustees) v. North Staffordshire Railway Company*, 5 H. & N. 160; *S. C.*, nom. *Leek v. North Staffordshire Railway Company*, 29 L. J., M. C. 150; 8 W. R. 216.

Held, secondly, that their liability was not restricted by the special act to the period of twelve months from the completion of the works. *Ib.*

A railway company pulled down a county bridge, and erected another, at the same time entering into an agreement with the trustees of the road to repair such portions of the approaches to the bridge as had previously been repaired by the county:—Held, that the company had not interfered with the road so as to bring the case within 8 & 9 Vict. c. 20, s. 58, and consequently that a mandamus to the company, commanding them to repair the road, could not be granted. *Exeter Road Trustees, Ex parte*, 16 Jur. 669.

— **Where Turnpike Trust Expired.**—A special act of a railway company (incorporating the Railways Clauses Act, 1845, so far as it was not expressly varied or excepted), provided, that if after notice the company did not, with reasonable expedition, repair a bridge over a turnpike road to the satisfaction of the surveyor of the trustees, the latter might repair and recover the costs; the Turnpike Act, however, was suffered to expire:—Held, that though the Railways Clauses Act, 1845, s. 65, was expressly varied by the special act, yet it revived on the cessation of the turnpike trust, and an order to repair the bridge might be made under it. *London, Chatham and Dover Railway Company v. Wandsworth Board of Works*, 8 L. R., C. P. 8; 42 L. J., M. C. 70.

— **Where Road before Maintained by Parish.**—By 6 Will. 4, c. lxxv. s. 68, all bridges to be constructed by the South-Eastern Railway Company, either under or over the railway, shall be maintained and kept in repair by and at the expense of the company:—Held, that this included the duty to keep in repair the roadway of a bridge constructed over the line, although that roadway had always been maintained and repaired by the inhabitants of the parish. *Reg. v. South-Eastern Railway Company*, 32 L. T. 858.

— **Order of Justices.**—An order of justices directing a company to repair damage done by them to a road in the course of making the railway, need not specify the particulars of the damage, nor what repairs were to be done; it is sufficient if it states the length of the damaged part of the road, and orders the company to make good all damage done. The order and conviction for disobedience of it may include several highways in the same parish. *London and North-Western Railway Company v. Wetherall*, 15 Jur. 247.

A justice of the peace, although interested, is not incompetent to act if the party knowing that he was interested assented to his acting. *Wakefield Local Board of Health v. West Riding and Grimsby Railway Company*, 6 B. & S. 794; 10 Cox, C. C. 162; 13 L. T. 590.

The penalty for disobedience of an order to repair must be imposed by the same justices

who made it. *Ib.*; *S. P.*, *Reg. v. Rawson*, 15 L. T. 179.

Justices have power to make an order upon a railway company to repair highways which they have used by the carriage of materials carried in the carts of contractors or of other persons employed by them. *West Riding and Grimsby Railway Company v. Wakefield Local Board*, 5 B. & S. 478; 33 L. J., M. C. 174; 10 Jur., N. S. 1046; 12 W. R. 1076.

A railway act enacting, that "so much of the Railways Clauses Act, 1845, as relates to the mode of crossing roads and construction of bridges, shall respectively, except so far as the same may be by this act otherwise provided for, and except such of the provisions thereof as may be inconsistent with the provisions herein contained, be incorporated and form part of this act," incorporates not only all the provisions of the general act which regulate the crossing of turnpike-roads by the railway and the construction of railway bridges, together with s. 65, which imposes penalties for suffering the roads and approaches to the bridges to be out of repair, but also s. 145 and subsequent sections, which relate to the mode of enforcing such penalties. *Bristol and Exeter Railway Company v. Tucker*, 13 C. B., N. S. 207; 7 L. T. 464.

d. Level Crossings.

Instead of Bridge—Obligation to Construct.]

—Where a special railway act provided that the line should be made according to the levels shewn on the deposited plans, and that it should be lawful for the company to carry the line across a specified street on the level of the street:—Held, that the latter provision was not obligatory, and did not prevent the company from carrying their line across the street according to the provisions of the general act. *Dover Harbour (Warden) v. London, Chatham and Dover Railway Company*, 3 De G., F. & J. 559; 30 L. J., Ch. 474.

A mandatory injunction will not lie to compel a railway company to construct a bridge instead of a level crossing pursuant to an order of the Board of Trade where the company is wholly without funds. *Bristol and North Somerset Railway Company, In re*, 3 Q. B. D. 10; 47 L. J., Q. B. 48; 37 L. T. 527; 26 W. R. 236.

Duty to Repair.—When a railway, under the powers of an act of parliament, crosses a highway on the level, it is the duty of the company to keep the part of the way used by the public in a state of repair suitable for the ordinary and regular traffic. *Oliver v. North-Eastern Railway Company*, 9 L. R., Q. B. 409; 43 L. J., Q. B. 198.

Duty to Protect.—A plaintiff negligently fastened his horse by the bridle to a railing in the open yard of a public-house, within which he remained for two hours. The highway leading from the house crossed a railway on a level, and the company had set up gates across both ends of the highway at the crossing. The gates opened outwards from the railway, and closed with a catch, but were easy to open, and would open when a train passed, and there was no gatekeeper at the crossing. During the plaintiff's absence the horse escaped from the rail-

owing to the negligent fastening, strayed to the highway and along that to the crossing, and, the gate there not being closed, through the gateway to the railway, where it was killed by a passing engine of the company:—Held, that, under 5 & 6 Vict. c. 55, s. 9, an obligation was imposed on the company to keep the gates closed against any stray cattle on the highway; that the accident had been caused by their statutory misconduct; and that the plaintiff was entitled to recover from them the value of the horse. *Dickinson v. London and North-Western Railway Company*, 1 H. & R. 399.

Where a tramroad ran parallel on land of a railway company with the line for some distance, and afterwards crossed the line on a level, there being gates at the crossing, and a person, who had a licence from the company to use the tramroad with his carts and horses, paying toll therefor to them, had his horse startled, and in consequence the horse, having dashed through the gate (which had been left open by the company), was killed by a passing train, and the jury, in an action to recover for the loss of the horse, found that there was no negligence on the part of the owner, but that the company was guilty of negligence in leaving the gates open:—Held, that a duty arose out of the circumstances, between the company and the owner, to use ordinary care in the management of the gates, and that the company was therefore liable for this loss as arising out of their neglect of that duty. *Marfell v. South Wales Railway Company*, 8 C. B., N. S. 525; 29 L. J., C. P. 315; 7 Jur., N. S. 290; 2 L. T. 629; 8 W. R. 765.

A railway crossed a highway at a level, gates were provided at each side for carriages, and swing gates for foot passengers, and a watch-box and attendant to close the gates. A boy came to the crossing and followed a cart on to the line; then seeing an up train approaching he waited till it had passed, but was caught and killed by a down train, which he might also have seen:—Held, evidence of negligence, the company being bound by 8 & 9 Vict. c. 20, s. 47, to have the gates closed at the time. *North-Eastern Railway Company v. Wanless*, 7 L. R., H. L. 12; 43 L. J., Q. B. 185; 30 L. T. 275; 22 W. R. 561.

A declaration stated that the railway of a railway company crossed a public highway on a level, yet the company, disregarding their duty, and the statutes in that behalf, did not keep gates across the highway, at the point where the same is crossed by the railway, constantly closed, by reason whereof two horses of the plaintiff, lawfully being on the highway near to the railway at the point aforesaid, went and escaped from the highway into and upon the railway, and were by a locomotive engine and train of carriages run over and killed. Plea, that the horses were not lawfully on the highway at the time when the injury was done. The horses, which were grazing in the plaintiff's field, had leaped over the hedge into a turnpike-road, and had strayed thence into a new road formed by the company leading across the railway on a level into an old highway, and, one of the gates at the crossing being open, had got upon the railway:—Held, first, that the road formed by the company was a highway, though the parish might not be bound to repair it. *Fawcett v. York and North Midland Railway Company*,

16 Q. B. 610; 20 L. J., Q. B. 222; 15 Jur. 173.

Held, secondly, that the company being required by their act, and by 5 & 6 Vict. c. 55, s. 9, to keep the gates at the crossings constantly closed, the horses were, as against them, lawfully on the highway, and therefore the plaintiff was entitled to recover against the company. *Id.*

Where Gates a Nuisance.—If a railway company makes the railway so as to intercept a public highway in a manner not authorized by 8 & 9 Vict. c. 20, s. 47, or some other act, by putting up gates at the point of intersection, so as to constitute a nuisance in blocking up the way, a passenger along the highway is not justified in prostrating those gates to make his way good across the line of railway, but should seek his remedy by mandamus or other legal proceeding against the company. *Ellis v. South-Western Railway Company*, 2 H. & N. 424; 26 L. J., Ex. 349; 3 Jur., N. S. 1008.

Duty to keep Attendant.—A railway company, acting under the provisions of special acts, which embodied the Railways Clauses Act (8 & 9 Vict. c. 20), constructed a railway crossing a highway on a level, and erected at the crossing sufficient gates, but did not employ persons to open and shut them. A person coming along the highway at night arrived at the crossing, and finding no person in attendance to open the gates, proceeded to open them himself, and was injured in consequence:—Held, that he had no right of action against the company. *Wyatt v. Great Western Railway Company*, 6 B. & S. 709; 34 L. J., Q. B. 204; *See now* 12 L. T. 568; 13 W. R. 837.

Private Railway Gates.—The provisions of the 5 & 6 Vict. c. 55, s. 9, as to making and maintaining gates where a railway crosses a road on a level, do not apply to a railway belonging to private owners, and not constructed under parliamentary powers, nor used for the conveyance of passengers. *Matson v. Baird*, 3 App. Cas. 1082; 39 L. T. 304; 26 W. R. 835.

A horse escaped from a field without any negligence on the part of its owner, and strayed for two miles along a public highway to a point where the road was crossed on a level by a private railway. The horse then strayed along the railway for about half a mile farther till it reached the place of junction between the private line and the line of the North British Railway Company, where it was killed by a passing train. The private railway was not constructed under parliamentary powers, nor used for the conveyance of passengers, and there were no gates either at the level crossing or at the junction:—Held, that the owners of the private railway were under no obligation to erect gates at the level crossing, and were not liable at the suit of the owner of the horse. *Id.*

Private Way over, how Affected by Statute.]—Lands were bought by the crown under an act enabling the crown to buy lands for the purpose of fortifications, but providing that the lands were not to be built upon or sold. By an act authorizing a railway to be made through these

lands, the railway company was obliged to make level crossings giving access to part of the lands then a marsh or pasture. The crown, under the authority of a subsequent act, sold a part of the lands, and the purchasers proposed to build houses thereon:—Held, that the purchasers could build houses thereon, and that the occupiers of the houses would be entitled to make use of the level crossings, and an injunction granted against obstruction of the level crossings, but not so as to prevent the company from using the railway for the reasonable working of their traffic. *United Land Company v. Great Eastern Railway Company*, 10 L. R., Ch. 586; 44 L. J., Ch. 685; 33 L. T. 292; 23 W. R. 896. Affirming 17 L. R., Eq. 158; 43 L. J., Ch. 363; 22 W. R. 126.

A private railway act contained a recital that it was expedient that certain footways which were crossed by the railway on the level should be dealt with as by the act provided, namely, "that as regards five of such footways, the rights of way in respect thereof should be extinguished, and that the other footway should be carried by a bridge over the railway." One of the five footways to be extinguished was the subject of a previous agreement between the owners and the company, under which the owners, their heirs, tenants, and assigns were to have a free way of passage with horses, carts, waggons, and carriages over the said footway. The act provided no compensation for the extinguishment. The company erected a fence across the level crossing without any notice to the owners, who brought their action to restrain the company from so doing:—Held, that their private rights were not taken away by the act, which only dealt with public rights of way. *Wells v. London, Tilbury, and Southend Railway Company*, 5 Ch. D. 126; 37 L. T. 302; 25 W. R. 325—C. A.

Negligence at.]—See CARRIERS.

e. Fences.

Duty to Owners of Lands.]—The Railways Clauses Act (8 & 9 Vict. c. 20), s. 68, imposes an absolute obligation on railway companies as between them and the owners and occupiers of adjoining lands, to make and maintain fences to prevent cattle straying on the line. *Buxton v. North-Eastern Railway Company*, 3 L. R., Q. B. 549; 37 L. J., Q. B. 258; 18 L. T. 795; 16 W. R. 1124; 9 B. & S. 824.

The obligation of a railway company to fence under this section, against the owners and occupiers of lands adjoining the railway, is co-extensive only with the common-law prescriptive obligation to repair fences. *Manchester, Sheffield and Lincolnshire Railway Company v. Wallis*, 7 Railw. Cas. 709; 2 C. L. R. 573; 14 C. B. 243; 23 L. J., C. P. 85; 18 Jur. 268.

The 68th section of the 8 & 9 Vict. c. 20, is a substitution for the 10th section of the 5 & 6 Vict. c. 55. *Ib.*

The 8 & 9 Vict. c. 20, s. 68, requiring companies to fence their lines against adjoining landowners, does reach a case where the adjoining land belongs to the company themselves. *Marfell v. South Wales Railway Company*, 8 C. B., N. S. 525; 29 L. J., C. P. 315; 7 Jur., N. S. 240; 2 L. T. 629; 8 W. R. 765.

The duty imposed upon railway companies by

8 & 9 Vict. c. 20, s. 68, as to the making and repairing of fences between their railways and the adjoining lands is not more extensive than that imposed upon ordinary tenants by the common law. *Ricketts v. East and West India Docks and Birmingham Junction Railway Company*, 7 Railw. Cas. 295; 12 C. B. 160; 21 L. J., C. P. 201; 16 Jur. 1072.

In consequence of the fences of a railway being out of repair, some sheep got upon it, which were run over and killed by a locomotive engine guided by a servant of the company who had received orders from them to travel at a certain rate per hour:—Held, that the remedy of the owner of the sheep against the company was in case, and not in trespass. *Sharrod v. London and North-Western Railway Company*, 4 Ex. 580; 14 Jur. 23.

B. folded his sheep in a field adjoining a railway, using the quickset hedge forming the company's fence as one side of the inclosure. Some of the sheep escaping through a small hole in the hedge, got upon the railway and were killed:—Held, that the company was liable, and that it was no misdirection to tell the jury that by 8 & 9 Vict. c. 20, s. 68, the company was bound to keep their fences sufficiently strong to prevent sheep and cattle from straying out of the adjoining lands, the jury having found as a fact that the fence was insufficient. *Bessant v. Great Western Railway Company*, 8 C. B., N. S. 368.

Owner releasing Right to Accommodation

Works.]—The plaintiff in 1846 became tenant from year to year of land belonging to one G. In 1847 the defendants, a railway company, acquired part of the land in the exercise of their statutory powers, and by arrangement with G. paid him compensation in lieu of all accommodation works, including the right to have his land fenced from the railway, G. releasing the defendants from their statutory obligation in that respect. The defendants, however, made a fence of posts and rails between the land so occupied by the plaintiff and a ditch in the defendants' land adjoining the railway, and they planted a hedge on the side of the ditch nearest the railway itself, sufficient to prevent animals from straying thereon. They, however, neglected to keep up the posts and rails, and in consequence of their neglect to do so a cow belonging to the plaintiff, in 1879, whilst the plaintiff so continued in the occupation of the land under the original tenancy which had never been determined, fell into the ditch and was killed:—Held, that the defendants were liable for the loss of the cow, for that their arrangement with the owner did not exonerate them from their liability under the Railways Clauses Act, 1845 (8 & 9 Vict. c. 20), s. 68, to maintain the fence for the benefit of the occupier, and so as to prevent his cattle from straying from his land. *Corry v. Great Western Railway Company*, 7 Q. B. D. 322; 50 L. J., Q. B. 386; 44 L. T. 701; 29 W. R. 623; 45 J. P. 712—C. A. Affirming 6 Q. B. D. 237; 50 L. J., Q. B. 313; 45 J. P. 36.

Duty to Passengers.]—The 8 & 9 Vict. c. 20, s. 68, imposes no duty on a railway company towards its passengers to keep up the fences, and a railway company is not bound, at common law, to maintain fences sufficient to keep cattle off the line under all circumstances, but is bound

to use every reasonable care to prevent them straying on to the line. *Buxton v. North-Eastern Railway Company*, 3 L. R., Q. B. 549; 37 L. J., Q. B. 258; 18 L. T. 795; 16 W. R. 1124; 9 B. & S. 824.

There is no duty in a railway company to fence their line of railway as towards passengers or persons already on the line. The duty in them to fence is towards persons off the line, to prevent the latter from getting or straying upon it. *Harrold v. Great Western Railway*, 14 L. T. 440.

Rights of Third Parties.]—A railway company let surplus land to a tenant, separating it from the adjoining land not taken by means of an open post-and-rail fence four feet high. The tenant planted his land with vegetables. Horses kept on the adjoining land of the defendant, by reason of the insufficiency of the fence, passed their heads through and over it, and did damage to the tenant's crops:—Held, that, the duty of fencing being by the Railways Clauses Act, 1845 (8 & 9 Vict. c. 20), s. 68, imposed upon the railway company, the defendant was not responsible to their tenant for the trespass of his cattle. *Wiseman v. Booker*, 3 C. P. D. 184; 38 L. T. 292; 26 W. R. 684.

The liability to fence imposed by s. 68 of the Railways Clauses Act, 1845, is the same liability as that which is imposed on an adjoining owner by prescription at common law. *Id.*

Duty of adjoining Landowner to Servant of Company.]—The plaintiff, a platelayer, in the employment of a railway company, was returning from his work in a trolley propelled by hand, when some pigs belonging to the defendant, which had escaped through the fence, got in the way of the trolley and upset it. The fence erected by the company was sufficient to keep out horses, oxen, and sheep:—Held, that the fence was insufficient, but that the plaintiff was identified with the company, to whose neglect the accident was to be attributed. *Child v. Hearn*, 9 L. R., Ex. 176; 43 L. J., Ex. 100; 22 W. R. 864.

Licence.]—When a railway company has neglected the duty imposed on them by the Railways Clauses Act, 1845 (8 & 9 Vict. c. 20), s. 68, to fence its line from the adjoining lands, and in consequence of such neglect cattle in the adjoining lands pass on to the line and are injured by the company's trains, an action for the injury may be maintained against the company by the owner of the cattle, though he has no more interest in the adjoining lands than a licence from the occupier to graze the cattle there. *Dawson v. Midland Railway Company*, 8 L. R., Ex. 8; 42 L. J., Ex. 49; 21 W. R. 56.

To Fence off their own Yards.]—A colt strayed from a field on to a public road, abutting upon which was a yard not fenced from a railway, the gate of which was, through the neglect of the company's servants, left open. Whilst the colt was being driven back to the field by the servant of the owner, it escaped into the yard, and thence on to the railway, where it was killed by a passing train:—Held, that the company was responsible. *Midland Railway Company v. Daykin*, 17 C. B. 126; 25 L. J., C. P. 73.

A count stated that a company was the owner

and occupier of a railway, and of a station thereon for the loading, unloading, and delivery of cattle carried thereby, and of a yard adjoining the station and railway, into and through which yard cattle brought by the railway to the station were used and accustomed, and were obliged to pass in going from the station to a common highway near thereto; and that the company, by reason of the premises, ought to have made and maintained sufficient fences between the yard and the railway, so as to prevent cattle lawfully being in the yard from straying thereout into or upon the railway; but that they omitted to make and maintain such fences, whereby a bull of the plaintiff, lawfully being in the yard on his way to the highway, without default or negligence on his part, strayed from the yard on to the railway, and was killed by a passing train:—Held, that there was no liability upon the company, either by the common law or by 8 & 9 Vict. c. 20, s. 68, to fence their yard from the railway, and consequently that the count disclosed no cause of action. *Roberts v. Great Western Railway Company*, 4 C. B., N. S. 506; 27 L. J., C. P. 266; 4 Jur., N. S. 1240.

Level Crossings.]—See *ante*, col. 342.

Proof of Negligence.]—A count alleged that a bull of the plaintiff was lawfully in a close adjoining a railway, of which the company was the owner and occupier, along which railway they had not made any fences for preventing cattle being in the close from straying thereout upon the railway, and that whilst the bull was lawfully in the close, the company and their servants negligently and wrongfully chased, startled, and frightened the bull, and so caused it to run upon the railway, where it was killed. At the trial it appeared that the bull, with other cattle, which had been brought by the railway, being in the station yard, a place unlighted and not fenced from the railway, a porter came out of the office with a lantern, such as was ordinarily used by porters, in his hand; and that the light startled some of the beasts, and caused the bull to run upon the line, where it was knocked down and killed by a passing train:—Held, no evidence for the jury that the company's servants had been guilty of negligence. *Roberts v. Great Western Railway Company*, *supra*.

A party kept bullocks on a marsh, which was separated from the railway line by a gate put up by the railway company, under the Railways Clauses Act (8 & 9 Vict. c. 20), s. 68. Three of his bullocks were found dead upon the line, and the gate had been broken down. The gate had become thin and the post decayed; it had been hanging upon hooks without anything to prevent its being lifted off. Hair like that of one of the bullocks was found upon the gate, and a horn of one of the dead animals appeared to have been rubbed. Afterwards the company put bolts into the posts, which prevented the gates from being lifted:—Held, in an action for the value of the bullocks, that these facts constituted evidence of negligence on the part of the company; that the owner was not bound to apply to justices under the Railways Clauses Act, s. 69; and that evidence of what the company did to this gate and posts after the accident was admissible. *Page v. Great Eastern Railway Company*, 24 L. T. 585.

— **Different Species of Animals.**—A plate-layer in the employment of a railway company was returning from his work along their line upon a trolley propelled by hand, when the defendant's pigs got through the fence of his field, which adjoined the railway, on to the line in front of the trolley; the trolley ran over the pigs and was upset, and the plaintiff was injured. The defendant was owner of the adjoining land; the fence erected by the company under 8 & 9 Vict. c. 20, s. 68, was sufficient against horses, oxen, and sheep; but there was enough space between the lowest rail of the fence and the ground for pigs to crawl through, and the pigs had in fact crawled under the fence. There was evidence to shew that the defendant had been warned on a former occasion of his pigs being on the line, but there was no evidence to shew how the pigs got from the defendant's farmyard, where they were last seen, into the field adjoining the railway. In an action against the defendant for the injury sustained by the plaintiff:—Held, that the word "cattle" in 8 & 9 Vict. c. 20, s. 68, included pigs, and that the fence was, therefore, insufficient. *Child v. Hearn*, 9 L. R., Ex. 176; 43 L. J., Ex 100; 22 W. R. 864.

— **Contributory Negligence.**—A railway crossed land on a level, and there was an accommodation road over the railway. Two descriptions of fastenings were provided by the company for the gates leading from this road to the railway, and it was arranged between the owner and the company that one should be used by day and the other by night. The former was insufficient; the latter sufficient. Complaints had been made to the company of the insufficiency of the day fastening, of which no notice was taken. The owner's servants, notwithstanding its insufficiency, continued to use it. A pony strayed through one of the gates on to the line, and was killed, and in an action against the company to recover the value of the pony, the jury found that the company had not provided a sufficient protection, but that the servant had not used the precaution he ought:—Held, that upon this finding, the verdict was rightly entered for the company. *Haigh v. London and North-Western Railway Company*, 1 F. & F. 646; 8 W. R. 6.

A railway crossed an occupation way which connected lands of the plaintiff lying on each side of the railway, and which was also a public footway. The crossing being on the level, at the point of intersection the company set up high gates, of which they gave a key to the plaintiff. The gates obstructed the footway, but the company did not make a bridge over the railway, or provide a stile for foot-passengers, in pursuance of 8 & 9 Vict. c. 20, ss. 46, 61, 68. The key having been lost, one of the gates was left open, and some colts of the plaintiff having escaped on to the railway, were killed by a passing train:—Held, that it was a question for the jury whether the plaintiff, by his own negligence, had contributed to the accident. *Ellis v. London and South-Western Railway Company*, 2 H. & N. 424; 26 L. J., Ex. 349; 3 Jur., N. S. 1008.

— **Remoteness of Damage.**—Cattle were being driven along a road across which were some sidings belonging to a railway company, when some trucks of the company were negligently allowed to run down the siding, across the road, separating the cattle from the drovers, and

frightening them so that some of them ran down the road, broke through an imperfect fence into an orchard, whence they strayed upon the line, and were killed by a passing train:—Held, that the company was liable, and that the damage was not too remote; and that the imperfect state of the orchard fence afforded no defence to the action. *Sneesby v. Lancashire and Yorkshire Railway Company*, 1 Q. B. D. 42; 45 L. J., Q. B. 1; 33 L. T. 372; 24 W. R. 99—C. A. Affirming 9 L. R., Q. B. 263; 43 L. J., Q. B. 69.

f. Junctions.

— **Expenses of erecting Signals.**—Under the Railways Clauses Act, 1863, s. 12, where a railway forms a junction with another railway, the company with whose railway the junction is made is empowered to erect such signals and conveniences incident to the junction, as may be necessary for the prevention of danger to or interference with the traffic at or near the junction; and the expenses of erecting and maintaining such signals and conveniences are at the end of each half year to be repaid by the company making the junction:—Held, that, to sustain an action for such expenses, proof must be given that they have been actually paid: proof that a liability has been incurred for them is not enough. *Cardmarthen and Cardigan Railway Company v. Manchester and Milford Railway Company*, 8 L. R., C. P. 685; 42 L. J., C. P. 262.

g. Tunnels.

— **Deviation.**—The effect of ss. 13—15 of the 8 & 9 Vict. c. 20, taken together, is, in the case of a tunnel marked on the deposited plans, that the tunnel must be made in the exact position indicated, and that the line cannot deviate at all at that portion of it without the consent required by s. 13, or special powers in the special act. *Little v. Newport, Abergavenny and Hereford Railway Company*, 7 Railw. Cas. 280; 12 C. B. 753; 22 L. J., C. P. 39; 17 Jur. 209.

— **Right to Support.**—The grant to a railway company of the right to make, maintain, and use a tunnel does not give the company such a right to support to their tunnel that the grantor, acting duly in accordance with the Railways Clauses Act, ss. 77 and 78, cannot work or have the benefit of mines under and adjacent to the tunnel. *London and North-Western Railway Company v. Ackroyd*, 31 L. J., Ch. 588; 8 Jur., N. S. 911; 6 L. T. 124; 10 W. R. 367.

See further cases, sub tit. LANDS CLAUSES ACT.

h. Accommodation Works.

— **Discretion of Company as to the most convenient Mode of doing the Works.**—Lands required by a railway company for accommodation works are lands required for the purposes of "the undertaking" or "of the railway." Every work which a railway company is empowered to do, not merely what it is compelled to do, is a purpose of the undertaking. The word "necessary" in the 68th section of the Railways Clauses Consolidation

Act, 1845, refers to the obligation to make good the interruption, and does not confine the company to any particular mode of doing the works. Where there are several modes of doing the works, the company, acting under the advice of their engineer, are the sole judges which mode should be adopted; but if they do not act *bonâ fide* the court will interfere. A railway company having intersected the lands of two adjoining landowners, A. and B., by an embankment, proposed to connect the severed portions of A.'s land by an arch through the embankment, and to give B. a right of way through the same arch, which they proposed to connect with his land by an occupation road carried through A.'s land. The strip of A.'s land proposed to be taken for this road was included in the lands delineated. A. objected to this arrangement as being beyond the powers of the company:—Held, that the company had power to take the strip of land compulsorily for the proposed purpose. *Wilkinson v. Hull, &c., Railway and Dock Company*, 20 Ch. D. 323; 51 L. J., Ch. 788; 46 L. T. 455; 30 W. R. 617—C. A.

Remedies for Neglect.—A railway was carried along an embankment upon low lands lying between a river and A.'s land. The low lands were separated from A.'s land by a bank which, before the railway embankment was placed there, sufficed to protect his land from the flood-waters of the river; but, in consequence of the embankment, the flood-waters were unable to spread themselves over the low lands as formerly, and flowed over the bank into his land:—Held, that although the company was not required by their act to make flood-openings to their embankment, and would not be compellable by mandamus to make them, yet, as they might by proper caution have prevented the injury sustained by A., an action was maintainable against them for such injury. *Lawrence v. Great Northern Railway Company*, 16 Q. B. 643; 6 Railw. Cas. 656; 20 L. J., Q. B. 293; 15 Jur. 652.

By a railway act it was provided, that, where any part of any carriage, horse or foot road, railway or tramroad, quay, wharf, slope, or other communication, either public or private, shall be found necessary to be cut through, raised, sunk, taken, or so much injured as to be impassable, or inconvenient for the passengers, cattle, or carriages, or for the transporting, conveying, landing, shipping, or depositing of any goods or merchandize; the company shall, at their own expense, before any such road, quay, wharf, slope, or other communication shall be cut through, raised, sunk, taken, or injured as aforesaid, cause another good and sufficient road, quay, wharf, slope, or other communication as the case shall require, to be set out and made instead thereof as convenient for passengers, and for transporting goods and merchandize, as the road, quay, wharf, slope, or other communication so to be cut through, raised, sunk, taken, or injured as aforesaid, or as near thereto as may be. B. had a wharf on the River Humber, between which and the low-water mark the company constructed their railway (in the line prescribed by the act of parliament), thereby rendering the communication between the wharf and river inconvenient and dangerous:—Held, that the wharf was thereby injured, within the meaning of the section (which was not confined to an injury done bodily to the wharf itself); that he was entitled to have a new wharf con-

structed for him by the company, and was not bound to apply for compensation under another section, which empowered a jury to assess the sum payable for any future, temporary, or perpetual, or recurring damages, done or sustained by reason of the taking of land for the purposes of the act. *Bell v. Hull and Selby Railway Company*, 6 M. & W. 699; 2 Railw. Cas. 279.

Order of Justices.—Under 8 & 9 Vict. c. 20, ss. 68, 69, justices have power only to order accommodation works with reference to the present use of the land, not prospectively. Therefore a jury summoned should assess compensation for severance of agricultural land, valued as building land, on the assumption that no remedy could be afforded by accommodation works ordered by justices. *Reg. v. Midland and South-Western Junction Railway Company*, 8 B. & S. 456.

Insufficient Watering-Places.—A company was required to make watering-places for cattle in all cases where, by means of the railway, the cattle of persons occupying lands adjacent thereto should be deprived of access to their ancient watering-places, and to supply the same with water. After the act passed, by deed made between the company and M., in consideration of the latter withdrawing his opposition to the progress through parliament of a bill to amend that act, the company covenanted to pay M., as and for the special damage to be thereby occasioned to his estate, and particularly to his mansion-house, 5,000*l.*, and that whenever any close of his should be intersected by the railway, the different parts adjoining should be thrown together, and properly levelled; and that the company should at their own expense make and complete such good and sufficient fences, drains, gates, stiles, and other conveniences, as might be necessary for the redividing of the fields which might be intersected by the railway, and for laying them to the adjoining fields of the same estates, for the purpose of convenient occupation, or otherwise would pay to M. the costs incurred by him in so doing. The money was paid by the company. A mandamus issued, rectifying these acts, and suggesting that the company make their railway through and intersected eight closes of M., in which there were ponds or watering-places for cattle, so as to cut off the ponds from such one portion of the closes respectively; and that application had been made to the company, but refused. The writ, therefore, commanded the company to make proper watering-places for cattle in such portions respectively of the several closes. The return stated the deed, and a notice under it by M., that he required the company to make, amongst other conveniences, the ponds in question, and that they executed the works except the ponds, alleging that the cutting off the ponds was part of the damage covered by the 5,000*l.*, and also the ponds were not conveniences within the meaning of the deed. The Queen's Bench held, that the deed furnished no sufficient answer; that, even if the ponds could be included in the word "conveniences," they were not intended to be provided for by the 5,000*l.*, and a peremptory mandamus was, therefore, issued. But held, by the Exchequer Chamber, that the writ was bad, as it ordered the company to do more than the act required, namely, to make a pond in each of the portions of the closes, there being nothing to shew that one watering-place

would not have been sufficient for all the portions. *Reg. v. York and North Midland Railway Company*, 3 Railw. Cas. 764; 15 L. J., Q. B. 379.

Insufficient Drains.]—The owners of mines extending under a railway, which had been made by a railway company under the powers of their act, which contained similar provisions with 8 & 9 Vict. c. 20, gave notice to the company, in 1858, of their intention to work the mine under the line of railway, and the company declined or neglected to purchase. At this point the line of railway was in a deep cutting; and the company had made drains upon the line, for the purpose of carrying off the water which fell upon the railway, and ran from the sides of the cutting. The working of the mine had caused the land on which the railway was constructed to sink, so that the company was compelled to fill up such sinkings, in order to preserve the level of the railway, and thereby the drains had become in some places choked up, and the water percolated through the broken strata, and through the cinders used by the company for filling up the sinkings, and so passed into the mines:—Held, that these drains were not accommodation works, within 8 & 9 Vict. c. 20, ss. 68, 69. *Reg. v. Fisher*, 3 B. & S. 191; 32 L. J., Q. B. 12; 9 Jur., N. S. 571.

A railway company constructed a culvert to carry off water from land adjacent to the railway. No complaint was made by the owner of the land of the insufficiency of the culvert, and no application was made to justices for additional accommodation works within the five years limited by the Railways Clauses Consolidation Act, 1845, s. 73. An injury having subsequently arisen to the land from the insufficiency of the culvert to carry off all the water, an action in respect of such injury was brought by the occupier against the railway company in which it was alleged that the culvert was insufficient:—Held, on demurrer, that the action would not lie. *Colley v. London and North-Western Railway Company*, 5 Ex. D. 277; 49 L. J., Ex. 575; 42 L. T. 807; 29 W. R. 16; 44 J. P. 427.

Bridges.]—Where a person has made a special agreement as to crossings on a line of railway, and, from particular circumstances, he allows that agreement to fall through, he cannot afterwards set up general rights under the railway acts to have other crossings made. *Darnley (Earl) v. London, Chatham, and Dover Railway Company*, 2 L. R., H. L. 43; 36 L. J., Ch. 404; 16 L. T. 217; 15 W. R. 817.

In a contract between a railway company and a proprietor of land to be crossed by the line of railway, the Railways Clauses Act should be expressly referred to, if the company intends to claim the benefit of its provisions. Therefore, where a company contracted "to provide and erect a suitable bridge over a street (marked in a plan referred to in the deed) as then planned and intended:" and the plan shewed that the street was intended to be forty-two feet wide:—Held, in the absence of any reference in the deed to the act, that the company was not at liberty to narrow the street to the dimensions specified in s. 49 (twenty-five feet), but must make a bridge, with an arch of the full width of

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the street (forty-two feet). *Clarke v. Manchester, Sheffield and Lincolnshire Railway Company*, 1 Johns. & H. 631.

A railway company obtained a conveyance, for the purposes of the railway, of land from C.; and in the conveyance the company bound themselves to erect and maintain a bridge over the road leading to C.'s property, which was to be, according to the plans, thirty-five feet wide and leaving a road under it of fifteen feet wide. Afterwards this bridge was made, but the company, some years later, amalgamated with the H. company, and the latter company's act authorized a junction with the former railway, at a point near this bridge. The two companies then agreed as to the mode of effecting the junction; and part of the plan was to widen the arch or bridge over C.'s road, so as to extend the bridge from thirty-five feet to fifty-five feet wide, thereby darkening the road beneath. C. applied for an injunction to restrain the companies from carrying out this plan:—Held, that the first company having, in the first instance, obtained the conveyance from C., on certain conditions as to the width of the bridge, was bound not to depart from those conditions; and the H. company was equally bound, as claiming under the first company; for it was part of the consideration to maintain the bridge of the height and width originally fixed. *Edinburgh and Glasgow Railway Company v. Campbell*, 9 L. T. 151—H. L.

Substituted Agreement for making Roads.]—A landowner, through whose land a railway company proposed to pass, agreed in May, 1864, to withdraw his opposition to their bill on the terms that the company would vary the course of their line and make certain bridges, works, and approaches. The company gave a notice to treat, and on the 20th of March, 1867, they went into possession. On the 27th of May a further agreement was come to that the company should pay 2,250*l.* for purchase-money and compensation, and should construct the bridges askew according to an agreed plan. The company constructed the line as agreed upon, but did not complete the works, nor pay the purchase-money, nor the interest, though the completion of the works was demanded in July, 1868, and payment of interest in December, 1868. On the 6th of February, 1869, a substituted agreement was made between the landowner and the company, whereby it was agreed that an estimate should be made by the company's engineer of the costs of completing the road, and submitted to A., the landowner's agent, "for approval; in case of difference the amount to be determined by B.;" the amount, when agreed or determined, to be paid to the landowner, in discharge of all obligations as to the road; and the purchase to be completed forthwith. In December, 1871, A. died; and in May, 1872, the company, for the first time, sent in an estimate for the cost of completing the road. The purchase had not been completed, and neither the purchase-money nor any interest had been paid. B. was living:—Held, that the submission of the estimate to A. for approval was of the essence of the agreement of the 6th of February, 1869; and that, inasmuch as by his death the agreement was incapable of being performed in the manner and form therein specified, the court could not enforce performance of it. *Firth v. Midland*

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IV. MANAGEMENT OF BUSINESS.

1. OPENING LINE.

Power of Board of Trade.—When an inspector of the Board of Trade reports to the Board of Trade that the opening of a railway will be attended with danger to the public by reason of the incompleteness of the works, and gives the grounds of his opinion, the requisitions of the 5 & 6 Vict. c. 55, s. 6, are satisfied. The Board of Trade has exclusive jurisdiction in the matter, and the court will not enter into the question whether the reasons given by the inspector do not shew on the face of the report that he has come to a wrong conclusion. *Att.-Gen. v. Great Western Railway Company*, 4 Ch. D. 735; 46 L. J., Ch. 192; 35 L. T. 921; 25 W. R. 330—C. A. Affirming 35 L. T. 302; 24 W. R. 1015.

The term "incompleteness" in that section includes defectiveness or imperfection generally, and such incompleteness may arise from the state of the works upon a neighbouring line with which the railway in question is connected. *Id.*

Previous Notice to Board of Trade, when Necessary.—Under statutory powers junctions were made between the main line of a railway company and two branches of a railway on opposite sides of the main line, so that trains coming from one of the branch lines ran for some distance along the main line and then passed on to the other branch line. Some years afterwards the company laid down a line of railway parallel to their main line for about a mile and substituted for one of the original junctions a new junction, nearly opposite to the other original junction, so as to form between the two branch lines a level crossing over the main line. The company also made two new stations on this new line:—Held, that the new line was a railway or a portion of a railway which, under 5 & 6 Vict. c. 55, s. 4, could not be opened without previous notice to the Board of Trade. *Att.-Gen. v. Great Western Railway Company*, 7 L. R., Ch. 767.

Opening of Part.—It being proposed to form a railway from A., through N. and G., to B., and it being known that the line when open from A. to N. would compete with and injure the N. canal, and when open from N. to G. would in like manner compete with and injure the G. canal, a special act of parliament was obtained, which authorized the formation of the whole railway from A. to B., and which stated that it was intended that the canals and railway should be worked in connexion, and that the canal companies should be incorporated with the railway company, and also provided that the railway company should be liable to pay to the canal companies a certain price per share for all their shares "from and immediately after the opening of the railway between A. & G. for public use." The railway was afterwards made and opened for a portion only of the space from A. to G., namely, from N. to G.:—Held, that the opening for public use of any portion of the line between A. & G. rendered the railway company liable to pay for the canal shares. *Grantham Canal Company v. Ambergate Railway Company*, 21 L. J., Q. B. 322; 15 Jur. 991—Ex. Ch.

2. LETTING ROLLING STOCK.

Contract, whether ultra vires.—The doctrine

of ultra vires, as explained in *The Ashbury Railway Company v. Riche* (7 L. R., H. L. 63), is to be maintained, but is to be applied reasonably, so that whatever is fairly incidental to those things which the legislature has authorized by an act of parliament, ought not (unless expressly prohibited) to be held as ultra vires. *Att.-Gen. v. Great Eastern Railway Company*, 5 App. Cas. 473; 49 L. J., Ch. 545; 42 L. T. 810; 28 W. R. 769; 44 J. P. 648—H. L. (E.).

In an act of this kind granting special powers, what is not permitted is prohibited. *Id.*

Per Lord Watson: The test applied in the *Ashbury case* to the powers of a joint-stock company (limited) registered under the Companies Act, 1862, applies with equal force to the case of a railway company incorporated by act of parliament. *Id.*

An act of parliament authorized a company to make a railway to T. and S. There were two other railway companies which were afterwards combined into one called the Great Eastern Railway Company. This latter company entered into a contract with the T. and S. company, with which it was in connexion in several respects, to supply it with rolling stock upon receiving a certain annual payment, and having certain other advantages. The contract was adopted by the shareholders of both companies. An action was brought against the Great Eastern Company, and an injunction asked for to restrain it from executing this contract. One of the acts relating to the two companies contained (clause 14) the following provision: "The two companies may enter into agreements with respect to the working, maintenance and management of the extension railway [this was the T. and S. railway], or any part thereof, and of the railways of the two companies connected therewith [these were the two companies which had been incorporated under the name of the Great Eastern], and with respect to the apportionment of the traffic, and of the tolls, fares and charges for traffic on the extension railway, and the railways of the two companies, the appointment of a joint committee, or any other matters incidental to the carrying out the purposes of this act." The 15th clause of the act was in these words, "The directors of the T. & S. company and the directors of the two companies respectively, may (subject to the sanction of the shareholders) enter into any contracts or agreements for effecting all or any of the purposes of this act, or any objects incidental to the execution thereof, and every such contract or agreement may contain such covenants, clauses, powers, provisions and conditions as may be mutually agreed upon between the parties thereto:—Held, that the contract of the Great Eastern Company to supply the T. and S. company with rolling stock was not ultra vires, but was warranted by the words of these sections of the act. *Id.*

A railway company being in want of money, and being advised that they had no power to borrow, sold part of their rolling stock to a waggon company for 30,000*l.*, at the same time making a contract with the waggon company for the hire of this rolling stock at a rent which would repay the 30,000*l.* and interest in five years. At the same time three of the directors of the railway company guaranteed to the waggon company the payment of the rent. The waggon company brought an action against the sureties

and the railway company for rent due:—Held, that the transaction being *bonâ fide*, and what it purported to be, was not an illegal and void transaction under 7 & 8 Vict. c. 85, s. 19, and 30 & 31 Vict. c. 127, s. 4, by being a cloak for borrowing money. *Yorkshire Railway Waggon Company v. Maclure*, 21 Ch. D. 309; 51 L. J., Ch. 857; 47 L. T. 290; 30 W. R. 761—C. A. Reversing 19 Ch. D. 478; 51 L. J., Ch. 253; 45 L. T. 747; 30 W. R. 288.

Held, also, that if the transaction had been a mere device for borrowing money, it would have been illegal. *Ib.*

—**Rights of Debenture Holders.**—Although the fact of the railway company having a debenture debt could not affect the liability of the railway company on the contract, debenture holders have some sort of security on the rolling stock for the time being, subject to the right of the railway company to use and otherwise deal with it in the ordinary course of business, but the railway company cannot sell the whole of the rolling stock to pay debts which are subsequent in priority to the debentures. *Ib.*

—**"Working Expenses"—"Proper Outgoings."**—A railway company sold its rolling stock to a waggon company for a sum of money, and the waggon company let the rolling stock back to the railway company at a rent, on payment of which for a term the railway company were to become repossessed of the rolling stock, the rent being equal to the purchase-money and interest. The Court of Appeal decided that the transaction was a *bonâ fide* sale and re-hiring, and not a sham transaction as a cloak for a borrowing. (See *Yorkshire Waggon Company v. Maclure*, *supra*.) A receiver of the railway company's undertaking having been appointed under s. 4 of the Railways Companies Act, certain moneys which represented rent of some of the rolling stock let by the railway company to another company, and proceeds of sale of other rolling stock, were paid to the receiver. Debenture holders who had become such after the date of the above-mentioned agreement of sale and re-hiring, and also the waggon company, claimed the money:—Held, that, although by s. 23 of the act "all money borrowed . . . by a company on . . . debenture stock . . . shall have priority . . . over all claims on account of any debts . . . or engagements" (except as in the section specified), that section was subject to s. 4, by which moneys received by a receiver under the act were not payable to creditors until after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, and that the rent of the rolling stock was a "working expense," and a "proper outgoing," and entitled to priority over the claim of the debenture holders. *Cornwall Minerals Railway Company, In re*, 48 L. T. 41—C. A.

3. RUNNING POWERS AND WORKING AGREEMENTS.

Validity of—Generally.—There is no principle of public policy which renders void a traffic agreement between two lines of railway for the purpose of avoiding competition. *Hare v. London and North-Western Railway Com-*

pany, 2 Johns. & H. 80; 30 L. J., Ch. 817; 7 Jur., N. S. 1145.

—**Delegating Powers.**—An agreement between two railway companies, made without the authority of the legislature, whereby one company delegates to another all the powers which have been conferred upon it by parliament, is an unlawful attempt to effect that which parliament alone can authorize, and is against public policy; and a court of equity will not interfere to assist either of the parties in obtaining a collateral benefit, which the agreement would give, or aid them in any manner which would promote the object of the agreement. *Great Northern Railway Company v. Eastern Counties Railway Company*, 9 Harc, 306; 7 Railw. Cas. 643; 21 L. J., Ch. 837.

An agreement that another railway company shall work a particular line of railway, and that the property and plant shall be handed over for that purpose, implies a delegation of the powers conferred by statute on the particular company, which cannot be made by them nor accepted by the other company, without the authority of parliament. *Winch v. Birkenhead, Lancashire and Cheshire Junction Railway Company*, 5 De G. & S. 562; 16 Jur. 1035.

A railway company, constituted under an act of parliament, agreed with two other railway companies that the whole concern, without incumbrance when completed, should be worked by those two companies, who should have perfect control and exercise all the rights of the first-mentioned company, and who should find stock and work the concern for twenty-one years:—Held, that the agreement was illegal, as being in violation of the act under which the first-mentioned company was constituted. *Beman v. Rufford*, 1 Sim., N. S. 550; 20 L. J., Ch. 537; 15 Jur. 914.

An agreement between two companies provided that one company, in the event of their exercising certain running powers, should be at liberty to have their own staff of clerks at the stations on the other company's line, and should carry the local traffic if required to do so:—Held, that this was not a handing over of the management of the one company to the other such as would be contrary to the spirit of the railway acts if done without express parliamentary sanction. *Llanelli Railway Company v. London and North-Western Railway Company*, 7 L. R., H. L. 550; 45 L. J., Ch. 539; 32 L. T. 575; 23 W. R. 927.

Giving Interest in Profits.—The managing body of a railway company has no power to enter into a contract fixing and regulating the future traffic which may be carried upon a line of railway which the company may thereafter be empowered to construct, so as to give to another railway company an interest in such traffic and profits. *Midland Railway Company v. London and North-Western Railway Company*, 2 L. R., Eq. 524; 35 L. J., Ch. 831.

An agreement between two groups of railway companies, being respectively the owners of independent continuous routes, to divide the profits of the whole traffic in certain fixed proportions, calculated on the experience of the past course of traffic, being *bonâ fide*, is not ultra vires. *Hare v. London and North-Western Railway Company, supra.*

An agreement between two railway companies that they shall work together, and that the profits shall be shared, so as to give a certain percentage to each, is beyond the powers of the companies, and illegal. *Charlton v. Newcastle and Carlisle Railway Company and North-Eastern Railway Company*, 5 Jur., N. S. 1096.

A bill in parliament to authorize a railway company to grant a lease in perpetuity to another railway company of certain projected lines was opposed by a third railway company, who withdrew their opposition on an agreement being come to that during the continuance of any lease to be authorized by the act the companies should participate in portions of each other's profits, and that the two former companies should not take traffic on specified portions of their lines:—Held, that the agreement was ultra vires, and ought not to be decreed to be specifically performed. *Shrewsbury and Birmingham Railway Company v. London and North-Western Railway Company*, 4 De G., M. & G. 115; 22 L. J., Ch. 682; 17 Jur. 845.

A stipulation not to compete upon parts of the line held to be no such fraud upon the public as rendered the agreement between the companies invalid. *Shrewsbury and Birmingham Railway Company v. London and North-Western Railway Company*, 17 Q. B. 652; 21 L. J., Q. B. 89; 16 Jur. 311.

A stipulation to divide the profits earned upon the common portion of line held to be no such fraud upon the shareholders of either company as rendered the agreement between the companies invalid. *Ib.*

Payment of Tolls.—A bonâ fide agreement by deed was executed by the plaintiffs and the defendants, two railway companies. The deed provided, first, that the defendants might, for twenty-one years, pass over the railway of the plaintiffs, and have free use of their works and conveniences, with engines and waggons, for the purpose of carrying coal. Secondly, that such passage should be had and made on payment of the tolls, and under the following restrictions and conditions; that is to say, when the quantity of coal carried over any part of the plaintiffs' railways to the defendants' railway, and thence to certain places, should not amount to 125,000 tons in the period of six calendar months, during the term of twenty-one years, then the defendants would pay to the plaintiffs such toll for such passage for such period of six calendar months as would, with any clear profit which might be made by the plaintiffs before the same period after payment of all annual and half-yearly charges for interest and outgoings, and all expenses of management or otherwise, be sufficient to enable the plaintiffs to pay such dividends as might become payable in respect of any guaranteed or preference stock of the plaintiffs already issued or thereafter to be issued with the consent of the defendants, and also a clear net dividend at the rate of 3l. per cent. per annum for such period of six calendar months upon the ordinary capital stock for the time being of the plaintiffs; and when the quantity of coal for any such period of six calendar months should exceed 125,000 tons and not 150,000 tons, such sum as would make up in manner before mentioned the demand upon the preference stock, and 3l. 5s. per cent. upon the ordinary stock; and when the quantity of coal

during the like period of six calendar months should exceed 150,000 tons and not 175,000 tons, such sum as would make up in like manner the dividend upon the preference stock, and 3l. 10s. per cent. upon the ordinary stock, and so on progressively up to the carriage of upwards of 400,000 tons during any such period of six calendar months, in which case the defendants were to pay the plaintiffs such sum as with the clear profits made by plaintiffs during the same period would pay the dividends upon the preference stock, and 6l. per cent. upon the ordinary stock. The deed went on to provide with respect to the calculations of the number of tons, and that if the payment made by the defendants for any period of six months once made up 4l. 10s. per cent. upon the ordinary stock of the plaintiffs, it should never otherwise recede:—Held, that the contract was not ultra vires, but one which the companies were competent to enter into, and valid in law, the payments to be made being tolls within the 8 & 9 Vict. c. 20, s. 87. *Great Northern Railway Company v. South Yorkshire Railway and River Don Company (in error)*, 9 Ex. 642; 23 L. J., Ex. 186—Ex. Ch.

To withdraw Opposition and to Lease.—By a deed between the plaintiffs and defendants, two railway companies, it was recited that a portion of a line was common to the plaintiffs and another company, and that a bill had been introduced into parliament to enable the latter company to lease the undertaking to the defendants, and that such bill had been opposed by the plaintiffs, but that they had agreed to withdraw their opposition, on its being mutually agreed between the plaintiffs and defendants that the covenants in the deed after contained should, upon the passing of the bill, be entered into; and it was further recited that the bill had passed; whereupon it was covenanted and agreed between the plaintiffs and defendants, that the companies working on the common line should, during the lease authorized by the bill, keep accounts of traffic thereon, and should during the lease divide the profits earned thereon; and that during the lease the defendants and the other company should not in any way carry passengers, cattle, &c., between certain points, so as to compete for any traffic which properly belonged to the plaintiffs; and there was a covenant between the plaintiffs and defendants that the agreement come to between them should not in any way be evaded or eluded by the defendants, and that no arrangement, scheme, device, or contrivance should be resorted to or attempted by them for that purpose:—Held, that the last-mentioned covenant was operative upon the passing of the bill, before the granting of the lease; that a breach, by which it was averred that the defendants had evaded the agreement, was good, although there was no averment that the lease had been granted; and that the agreement to withdraw their opposition to the bill in parliament was no fraud upon parliament, so as to make the agreement between the companies invalid. *Shrewsbury and Birmingham Railway Company v. London and North-Western Railway Company*, 17 Q. B. 652; 21 L. J., Q. B. 89; 16 Jur. 311.

To Apply for Powers and meanwhile to Lease.]

—The Brighton and South-Western Railway Companies jointly became purchasers, under an act

obtained in 1847, of a line of railway called the Portsmouth Extension Railway, including the station known as the Landport station. A section enacted, that each of the two companies might at all times thereafter use the joint line for the purposes of conveying passengers, animals, and things upon the same, and for all such other purposes as should be necessary for the traffic or business thereon of the respective companies. There were provisions for the tolls to be demanded, and for enabling the companies to enter into a contract between themselves for the purpose of ascertaining the profits of the joint line and the division of such profits. The South-Western and the Portsmouth Companies entered into an agreement in 1858, by which they agreed to apply to parliament in the then ensuing session for an act to enable the latter company to lease their line to the former company for the term of 999 years, at a rental of 18,000*l.* a year; and, if unsuccessful in obtaining the act, that they should repeat their efforts in 1860, and that in the meantime the South-Western should work the Portsmouth line and pay the rent. By this arrangement the traffic of the South-Western was greatly increased:—Held, that the agreement for the lease between the two companies was illegal, being unauthorized by parliament; and that the South-Western was not entitled to use the joint station for passengers or goods conveyed under such agreement. *London, Brighton and South Coast Railway Company v. London and South-Western Railway Company and Portsmouth Railway Company*, 28 L. J., Ch. 321; 5 Jur., N. S. 801.

A railway company, incorporated by act of parliament, is bound to apply all the funds of the company for the purposes directed and provided for by the act, and for no other purpose whatsoever. A company, incorporated by an act of parliament for making and maintaining a railway and works, was empowered to raise money to be applied in discharging the costs incurred in obtaining the act, and the remainder towards making and maintaining the railway and works; and the profits of the company, after defraying the expenses of making, maintaining and working the railway, were to be divided amongst the proprietors. The company afterwards covenanted with a railway company, to take a lease of their line, and to find the capital necessary for the construction of the branches and works authorized to be constructed by bills then pending in parliament, and to pay the costs of preparing and promoting such bills:—Held, that the railway company having a limited authority only, and being a corporation only for the purpose of making and maintaining the railway sanctioned by the act, could only apply its funds for the purposes provided by the statute; and that such an agreement was illegal, though the object of it might have been the increase of the profit of their railway. *East Anglian Railway Company v. Eastern Counties Railway Company*, 7 Railw. Cas. 150; 11 C. B. 775; 21 L. J., C. P. 23; 16 Jur. 249.

To Apply for Powers.—An agreement between two companies for an application to parliament for the necessary powers to enable one company to work the line of the other is innocent, and equity will not interfere to prevent a company from putting its seal to such an agreement. *Winch v. Birkenhead, Lancashire and Cheshire*

Junction Railway Company, 5 De G. & S. 562; 16 Jur. 1035.

Parties with Running Powers bound by Act.]

—A right to run over a line of railway cannot be claimed independently of the rules and regulations which, by act of parliament, the directors are empowered to make for the management of the line. *Rhydney Railway Company v. Taff Vale Railway Company*, 29 Beav. 153; 30 L. J., Ch. 482; 9 W. R. 222.

Parties, whose right to use a railway is secured by act of parliament, cannot insist upon their right, and at the same time contend that the rules and regulations made for the security of the line, the passengers, and the traffic, are unreasonable, unnecessary, and inapplicable to their particular traffic. *Id.*

Rights on Amalgamation.—A railway company, A., made an agreement with another railway company, B., to allow B. to carry passengers and goods over the A. line on certain terms. There was a station at the A. line, towards the increased extent and accommodation of which the B. company was to contribute a limited sum. The A. company amalgamated with other companies, obtained several branches, and assumed a different name. The B. company did the same:—Held, that the agreement applied to all traffic coming from the B. line upon the A. line, however originating, whether only upon the original B. line, or in, from, or through any of its amalgamated lines. *Lancashire and Yorkshire Railway Company v. East Lancashire Railway Company*, 5 H. L. Cas. 792; 25 L. J., Ex. 278; 2 Jur., N. S. 767; *S. C.*, in Ex. Ch., 9 Ex. 591; 23 L. J., Ex. 157.

How Determinable.—The usages and rules of law applicable to the determination of contracts for hiring, service or partnership, have no application to contracts between railway companies. An agreement between railway companies not ultra vires, and by its terms unlimited in duration of time, can only be determined, failing mutual consent, by an act of parliament. *Llanelli Railway Company v. London and North-Western Railway Company*, 7 L. R., H. L. 550; 45 L. J., Ch. 539; 32 L. T. 575; 23 W. R. 927.

The Llanelli Railway Company executed an agreement by which it conceded to the London and North-Western Railway Company running powers over its lines, subject to the company's bye-laws and to the payment of dues. The agreement specified no limit as to its duration, nor that either company was to have power to determine it, but some of its terms indicated that it was intended to be permanent. It provided that, whether the running powers were exercised or not, there should be a complete system of through booking, and that the two companies should send by each other all traffic, not otherwise consigned, to or from stations on the lines of each whenever such lines formed the shortest route:—Held, that these provisions constituted a sufficient consideration to support the agreement, so that neither company could determine it without the consent of the other on the ground of want of reciprocity, although it neither gave to the Llanelli Company any running powers over the lines of the London and North-Western Company, nor laid any obliga-

tion on the latter company to exercise the powers conceded to it. *Ib.*

Lease of Line—New Rights acquired by Lessor.]—In 1846, the Reading Company proposed to make a railway meeting the South-Eastern and the South-Western lines and another railway. Part of the line proposed to be made ran so nearly in the same direction with part of a branch line proposed to be made by the plaintiffs, that it was proposed that the Reading Company should, for that space, adopt the line to be made by the plaintiffs. The Reading Company and the plaintiffs obtained acts of parliament in 1846, which came into operation on the same day. By s. 44 of the Reading Act, after reciting that a bill was then pending in parliament for enabling the plaintiffs' company to make the portion of the line, and that it was thereby intended that the Reading Company should have the use of it for the purposes of their traffic, it was enacted, that, if the plaintiffs' company did not complete the portion of the line, the Reading Company might make it; and they were empowered to lease their railway to the defendants' company, for such term and upon such conditions as should be agreed upon between the two companies. By the plaintiffs' company's act, after reciting that a bill was then pending in parliament for making the Reading Railway, it was enacted that, in case the bill should pass into a law, the Reading Company might use the portion of the line, and the stations, warehouses, works, and conveniences belonging thereto, subject to such reasonable terms as should be agreed upon between the plaintiffs' company and the Reading Company. By 8 & 9 Vict. c. 20, s. 113, which was incorporated into these special acts, in cases where a railway is authorized to lease its line, or any portion of it, such lease shall entitle the lessees to enjoy all the powers and privileges granted to and enjoyed by their lessors. In 1847, an agreement was entered into between the Reading Company and the plaintiffs, to the effect that the Reading Company should have the right in perpetuity of using, for the purposes of their traffic, the above-mentioned portion of railway, upon certain terms. In 1850, the Reading Company leased their line, with all their powers, privileges, and all the benefit and advantage to be derived from the agreement of 1847, to the defendants for 1,000 years, subject to the obligations and liabilities of the company:—Held, that, by virtue of the special acts of parliament, the 8 & 9 Vict. c. 20, incorporated therewith, and the lease of 1850, the agreement of 1847 was binding upon the plaintiffs and defendants; and that the defendants were entitled, as against the plaintiffs, to stand, in respect of the agreement, in the situation of the Reading Company. *London and South-Western Railway Company v. South-Eastern Railway Company*, 8 Ex. 584; 22 L. J., Ex. 193—Ex. Ch.

Local Traffic, what is.]—When two railway companies gave mutual running powers to one another over parts of their respective lines, with a stipulation that local traffic should be respected:—Held, that by local traffic was meant the traffic between two stations, both being on one of the lines over which the running powers extended. *Midland Railway Company v. Man-*

chester, Sheffield and Lincolnshire Railway Company, 22 L. T. 601.

Construction of Agreement—Passenger Traffic.]—The plaintiffs had constructed a railway which joined the defendants' railway and the Great Western; and by their act, if they abandoned any part of the railway, or if after its completion it ceased to be used for three years, the land purchased was to revert to the owners of the adjoining lands. An agreement was entered into between the plaintiffs and the Great Western Company, by which the latter covenanted to construct a station at the point of junction of the two railways, and to stop their trains at this station. An act was obtained, which empowered the plaintiffs to lease to the defendants their railways, stations, &c., and all their rights, powers and privileges in relation thereto. A lease was accordingly executed, in which there was a covenant that the defendants should "efficiently work and repair the railway and works demised, and indemnify the plaintiffs against all liabilities, loss, charges and expenses, claims and demands, whether incurred or sustained in consequence of not working, or in any manner connected with the working of the railway and works:—"Held, first, that the defendants were not bound to work the demised railway for passenger traffic. *West London Railway Company v. London and North-Western Railway Company*, 11 C. B. 327; 7 Railw. Cas. 477; 22 L. J., C. P. 117; 17 Jur. 301—Ex. Ch.

Held, secondly, that the defendants were not bound to work for passenger traffic, even if such traffic presented itself. *Ib.*

Stopping Trains at Junction.]—Held, thirdly, that the rights of the plaintiffs, under the agreement with the Great Western, were vested in the defendants, and that the defendants had power to compel a performance of the covenant to stop trains by the Great Western, that being a covenant running with the estate in plaintiffs' railway. *Ib.*

Held, fourthly, that although the defendants had power to compel the Great Western to stop their trains at the point of junction, they were not bound to exercise that power. *Ib.*

Mode of Working.]—Held, fifthly, that the defendants were not bound to work the plaintiff's line in connexion with the Great Western, nor with trains on their own line, if they could efficiently work the plaintiffs' line without so doing. *Ib.*

Held, sixthly, that the defendants must not be treated for the purpose of considering their liability under the covenant, as if they were lessees of a separate and independent line, having no control over any other line, but the covenant must be construed with reference to the subject-matter and character of the defendants, the degree of efficient working by the defendants being different and greater than would be required from a company or an individual possessed only of the demised railway. *Ib.*

User of Junction.]—A. company, being owner of a station, entered into agreement with B. company to make a new junction between their respective lines, so that B. company might use such station. C. company, having running powers over A. company's line, subsequently

entered into agreement with B. company for use of B. company's line. An attempt of C. company to go from B. company's line to A. company's line over the junction was resisted on the ground that C.'s agreement with B. did not give a right to use such junction, and even if it did, such agreement was ultra vires and invalid, as being a delegation of statutory powers and as such against public policy:—Held, that the effect in law of the right to make the junction was to make the two lines one continuous line, which the public had a right to use, and therefore also a company working under arrangements with companies owning the two lines; and that the agreement as stated did not amount to a delegation of statutory powers, nor was it ultra vires. *Midland Railway Company v. Great Western Railway Company*, 8 L. R., Ch. 841; 42 L. J., Ch. 438; 28 L. T. 718; 21 W. R. 657.

Alteration and Improvement of Premises.—The S. railway company were authorized by their act to "make and maintain" a railway, with all proper stations, approaches and works, and were empowered to transfer or sell the railway before or after completion, and all the powers of the company, to the D. railway company. By a working agreement, the terms of which were incorporated in the act, it was provided that the S. company were to complete the line, and that, when completed, it should be maintained and worked by the D. company in perpetuity, and that they were to pay an annual sum to the D. company. On the completion of the line the D. company took possession of and worked the same under the agreement, but no sale to them of the railway had been effected. While the D. company was thus in possession the S. company, acting under the alleged powers in the act, in order to provide a better access to a station on the line, erected some stone steps in the station yard, which the D. company removed. In an action for a mandatory injunction to compel the D. company to restore the steps:—Held, that, on the true construction of the act and working agreement incorporated therewith, the D. company were entitled to the exclusive possession and right of maintenance of the railway and works; and that the erection of the steps was a work of maintenance, and was a wrongful act on the part of the S. company. *Sevenoaks, Maidstone, and Tunbridge Railway Company v. London, Chatham, and Dover Railway Company*, 11 Ch. D. 625; 48 L. J., Ch. 513; 40 L. T. 545; 27 W. R. 672.

Under a power to "maintain" a railway and works, reasonable improvements, consistent with the purpose of the undertaking, are included. *Id.*

Transfer of Line—Commencement of Payment.—The Caledonian Railway Company for thirteen years up to July, 1879, had been proprietors of the D. & A. railway, and had incurred certain liabilities in respect to payment of dividends to preference and ordinary shareholders of the D. & A. line. The preamble of the North British Railway (D. and A. Joint Line), passed July, 1879 (42 & 43 Vict. c. clv.), set forth that it was expedient that the Caledonian and North British Companies should have equal rights and powers, and be subject to equal liabilities over and with respect to the D. & A. line. Sect. 3 provided that on and after the 1st February, 1880, called the "vesting period," all interest

which the Caledonian possessed should be transferred to the Caledonian and North British jointly and in equal proportions in manner hereinafter provided by the act. Sect. 6 provided that the consideration for the transfer of the joint line should be as follows: "(1.) From and after the vesting period the company (the North British) shall pay to the Caledonian Railway Company half-yearly, on the 1st of March and 1st of September in each year, a sum equal to one-half of the aggregate of the following half-yearly payments, for which the Caledonian Railway Company are now liable in respect of their acquisition of the D. and A. railway." The Caledonian Railway Company claimed that under this section, there was a half-yearly payment amounting to 5,903*l.* 15*s.* due on the 1st of March, 1880:—Held, that the liability to make payment in 1880 did not arise till September, the time of payment applicable to the first six months following the 1st of February, 1880. *Caledonian Railway Company v. North British Railway Company*, 6 App. Cas. 114; 29 W. R. 685—H. L. (Sc.).

— Railway Commissioners—Jurisdiction of, to Revise.—In 1868 two railway companies entered into a working agreement under a special act, which enabled them so to do, with this proviso, "That no such agreement shall be valid until the same has been approved, both as to the period of its continuance and in other respects, by the Board of Trade." The 17th clause of the agreement empowered the Board of Trade, once in every ten years, "to cause this agreement to be revised, but in the interest of the public only." In 1873, the powers and duties of the Board of Trade "under any special act, with respect to the approval of working agreements between railway companies" were transferred to the railway commissioners:—Held, that the power given under clause 17 of the agreement to the Board of Trade, was a power with respect to the approval of a working agreement, and was also a power under a special act, so that the railway commissioners had power to revise the agreement, and to consider it, in the interest of the public. *Huddersfield Corporation v. Great Northern Railway Company and the Manchester, Sheffield and Lincolnshire Railway Company*, 50 L. J., Q. B. 587.

— Reference to Arbitration of.—*See post*, col. 386.

Arbitration Clause—Notice to Terminate.—An agreement between two railway companies by which one had a right to run over the other's lines, contained a clause referring all matters in difference between the parties to arbitration. The lessor company gave the lessee company notice that they should consider the agreement at an end after a fixed day; the lessees took no heed of the notice and continued running their trains:—Held, that the matter came within the terms of the agreement for reference to arbitration and must accordingly be referred. *Llanelli Railway and Dock Company v. London and North-Western Railway Company*, 20 W. R. 898. Affirmed, 7 L. R., H. L. 550; 45 L. J., Ch. 539; 32 L. T. 575; 23 W. R. 927.

— Ouster of Jurisdiction of Court.—By an agreement of the 26th of February, 1866, and afterwards confirmed by act of parliament, the

plaintiff company agreed to construct a line of railway between certain termini, and the defendant company agreed to work it, and during the continuance of the agreement to develop and accommodate the local and through traffic thereon, and to carry over it certain traffic particularly specified; and it was agreed that all differences under the agreement should be determined by a standing arbitrator to be named by the companies in January in each year, or failing such nomination, by the Board of Trade on the application of either company in February in each year; and that all such clauses of the acts of parliament for the time being in force in regard to railways as should relate to the settlement of disputes by arbitration should, as far as applicable, and except as therein otherwise provided, be deemed incorporated with the agreement, and that the agreement should continue for 999 years from its date. The plaintiff company constructed the line, and the defendant company entered into possession thereof, but carried a large proportion of traffic which ought to have passed over the plaintiff's line by other lines belonging to the defendant company, and a bill was filed to restrain the defendant company from so doing:—Held, first, that inasmuch as no standing arbitrator had been appointed in accordance with the agreement, the jurisdiction of the court was not ousted; and, secondly, that the case was one in which the court could interfere by injunction. *Wolverhampton and Walsall Railway Company v. London and North-Western Railway Company*, 16 L. R., Eq. 433; 43 L. J., Ch. 131.

— **Injunction to Restrain from proceeding.]**

—The Judicature Act, 1873, s. 25, sub-s. 8, has given no power to the High Court to issue an injunction in a case in which no court before that act had power to give any remedy whatever. Therefore the High Court has no jurisdiction to issue an injunction to restrain a party from proceeding with an arbitration in a matter beyond the agreement to refer, although such arbitration proceeding may be futile and vexatious:—Semble, per Brett, L. J., that the Judicature Act, 1873, has dealt only with procedure, and not with jurisdiction at all, and that if no court had power to issue an injunction before that act, the High Court has no such power now. *North London Railway Company v. Great Northern Railway Company*, 11 Q. B. D. 30; 52 L. J., Q. B. 380; 48 L. T. 695; 31 W. R. 490—C. A. Reversing 47 L. T. 383.

4. AMALGAMATION.

Position of Officers on.]—A bill was filed by a former officer of a railway company to obtain distribution of a sum of money which had been set apart for the compensation of the officers of the company on its amalgamation with another company. An inquiry was directed, and the chief clerk found that he was an officer of the company, at an average salary of 500*l.* a year, although at the actual time of the amalgamation he only held the appointment of consulting engineer, at the annual retaining fee of 100*l.*, and in arriving at this result the chief clerk took into consideration his former engagement of traffic manager. The chief clerk submitted to the court what shares the persons entitled were to take. The other parties appealed from the

decision of the chief clerk as to the right of the party to participate in the fund:—Held, that he was an officer of the company, and that the shares of the parties entitled to share must be determined on the principle of annuities, having regard to their several ages and the amount of their salaries. *Bruff v. Cobbold*, 30 L. T. 597.

Action on a bond given by a party to the L. and C. railway company, as surety for the due performance by G. of his duties as clerk. The condition of the bond was, that if G. should render to the L. and C. railway company, or to the committee for managing the London terminus of the L. and C., L. and B., and S. E. railways, a true account of all the receipts and payments of him, as such clerk, and also should pay to the L. and C. railway company, or to the committee, all sums as he should receive on account of the company or committee, then the obligation to be void. The surety pleaded that the bond was made before the passing of an act to consolidate the L. and B. and L. and C. railway companies, and that the action was commenced afterwards, and that the L. and C. railway company thereby became dissolved:—Held, that the plea was bad, and was no defence to the action, inasmuch as the new company was the same as the two old ones, with additional powers, and that the amalgamation of the companies did not affect the responsibilities of the surety or G. *London and Brighton Railway Company v. Goodwin*, 6 Railw. Cas. 177; 3 Ex. 736; 18 L. J., Ex. 337. See *S. C.*, 3 Ex. 320; 18 L. J., Ex. 174; *Eastern Union Railway Company v. Cochran*, 9 Ex. 197; 7 Railw. Cas. 792; 23 L. J., Ex. 61.

Effect of, on Agreement to withdraw Opposition.]

—A landowner, being a peer of parliament, entered into an agreement with the projectors of a railway, stipulating that they should take certain portions of his land, and pay him specified sums for the same, and by way of compensation for permanent injury to his mansion and estate, that they should execute certain works of utility and ornament on his property, and make and maintain a station adjoining or near to a particular road, at which all trains passing along the railway should stop for the accommodation of passengers, and for the receiving and unloading of goods, luggage, carriages, and horses; with a provision that the landowner should withdraw his opposition to the bill of the projectors and co-operate with them, and use his best endeavours to prevent the bill of a rival company from passing into law, but that if the bill of the rival company should pass, then the first-mentioned company should pay him certain sums for the land the rival company might take, and recover from the latter and pay to the first-mentioned company the largest amount of price and compensation which could be obtained; and also a provision that either of the parties might determine the agreement by notice to the other, if the bill of the first-mentioned company should not pass within six months; and a further provision that if the two projected companies should be amalgamated, the amalgamated company should pay certain sums to the landowner as purchase-money and compensation; and that the covenants and agreements concerning the purchase and taking of land, not making deviations without his consent, and the making and maintaining such station, and all other the covenants and agreements thereinbefore contained on the part

of the first-mentioned company, so far as the same should be applicable, should be performed by the amalgamated companies. By an act passed within six months, the subscribers to the two projected companies were incorporated in one body, and authorized to make certain of the projected lines of railway, and it was enacted that the shareholders of each company should be entitled in certain rates or proportions to the shares of the united company:—Held, that, notwithstanding the bill of the first-mentioned company did not pass, the agreement could not be determined by a notice given by the projectors who were parties to the agreement, or by the amalgamated body. *Lindsey (Earl) v. Capper*, 2 Ex. 801—Ex. Ch. Affirmed in Dom. Proc., 3 H. L. Cas. 293.

The amalgamated company having then taken the land referred to in the agreement, and paid for it the price thereby stipulated, and having, in a suit in equity brought against them by the landowner claimed the benefit of the agreement, he filed a bill for a specific performance of his contract with the projectors of the first-mentioned company:—Held, in equity, that the union and incorporation of the shareholders of the two companies in one body and the consolidation of their several shares under the act of parliament, constituted an amalgamation within the meaning of the agreement, and that the amalgamated company was bound by the agreement entered into with the landowner by the projectors of the first-mentioned company. *S. C.*, sub nom. *Lindsey (Earl) v. Great Northern Railway Company*, 10 Hare, 665; 22 L. J., Ch. 995; 17 Jur. 552.

Powers of Directors — Effect of Act.]—Two companies proposing to construct railways which would necessarily interfere with each other, their respective subscribers' agreements empowered the respective managing committees or directors "to demise or sell the undertaking, or any part thereof, or to amalgamate the same, or any part thereof, with any other railway or railways." In pursuance of the powers thus conferred upon them, the directors of the two companies agreed to amalgamate and to form a united company, and this agreement was carried into effect by resolutions made at board meetings of the respective committees, and by a deed executed by a competent number of the directors of each company:—Held, that the power to amalgamate was vested in the two boards, and that those powers were well and effectively exercised, and that the company so united and amalgamated might maintain an action for calls against a shareholder of either company who had executed the parliamentary contract and subscribers' agreement. *Cork and Youghal Railway Company v. Paterson*, 18 C. B. 414.

A company for making a railway from Dublin to Mullingar was incorporated in July, 1845, under the name of the Midland Great Western Railway Company of Ireland. Some of its directors provisionally registered another company for making a railway from Mullingar to Galway, to be called "The Galway and Mullingar Junction Railway Company." Three months afterwards this name was altered at the registration office to "The Midland Great Western Railway Company of Ireland (Extension from Mullingar to Galway)." Most of the directors of the two companies were the same.

L. applied for and received scrip certificates in the extension company, and paid deposits thereon, and received receipts headed with the altered name, and signed the shareholders' agreement and parliamentary contract. The Midland Great Western presented in its own name and under its corporate seal, a petition to parliament for an act to make a railway from Mullingar to Galway, undertaking at its own expense to make the railway. The act which was passed upon this petition, in July, 1846, only gave authority to make the railway from Mullingar to Athlone, or but a part of the distance. The directors had power under the act to raise the necessary sums, "by contributions among themselves or by the admission of other parties." The additional capital required for extension was directed to form "part of the general and original capital of the company;" and the provisions of the recited act (that of 1845) were to extend to and be read with the new act. The expression "the company," in the new act, was declared to mean the Midland Great Western Company. In September, 1846, at a meeting of the directors of the Midland Great Western, a resolution was passed stating on what terms the holders of the extension scrip should be entitled to certificates in the joint company, and another resolution approving of and confirming those terms. At that meeting the seal of the Midland Great Western was affixed to the shareholders' book, which, however, did not then contain the names of the shareholders in the extension line. The latter were added in March, 1847, when one of them, that of L., was inserted; three calls were made, the first was dated previously to the insertion of the extension subscribers in the shareholders' book; the two others after that insertion:—Held, that the act did not amalgamate the two companies, and that even if the directors possessed a power of amalgamation, the resolution of September, 1846, was not an exercise of that power so as to render L. liable for any one of the calls at the suit of the Midland Great Western. *Midland Great Western Railway of Ireland v. Leech*, 3 H. L. Cas. 872.

Referee under Contract for.]—A contract between a railway company and certain contractors for works upon the line, contained a stipulation, that any difference arising thereon should be referred to T., "if and so long as he should continue to be the company's principal engineer." After the making of the contract, the railway company became merged in and amalgamated with another railway company, under an act, which provided that, notwithstanding the amalgamation, and the partial repeal of the special act of the first-mentioned railway company, all contracts should be proceeded with and enforced as if such repeal had not taken place, the new railway company being in all respects with reference to such matters substituted for the former railway company:—Held, that T., who still continued to be the engineer of a portion of the former railway, but was not the "principal engineer" of the amalgamated company, was the proper referee in cases of disputes arising out of the contract. *Wansbeck Railway Company and Trowsdale, In re*, 1 L. R., C. P. 269; 12 Jur., N. S. 746.

Arbitration — Method of taking Accounts — Jurisdiction.]—On an amalgamation of railway

companies under an act of parliament, some of the shareholders filed a bill for the purpose of determining the principle upon which the accounts were to be taken :—Held, that the question being merely one of account as between two classes of shareholders for the determination of which the act of parliament had provided sufficient machinery by means of arbitration, the court would not interfere, and the bill was dismissed with costs. *Yool v. Great Western Railway Company*, 39 L. J., Ch. 562; 22 L. T. 781; 18 W. R. 825.

5. USER OF RAILWAY BY THE PUBLIC.

Court cannot compel Use of Signals.—A railway company having refused to allow a colliery company to run engines and carriages over part of its line under the powers of the Railways Clauses Act, 1845, s. 92, the colliery company filed a bill for an injunction to restrain the railway company from preventing its exercise of the right :—Held, that, inasmuch as the colliery company could not run over the line unless the points and signals on the line were properly worked by the railway company, the court could not grant relief, as it does not order the performance of a continuous act like working signals, the doing of which requires continuous attention, and cannot be seen to by the court. *Powell Duffryn Steam Coal Company v. Taff Vale Railway Company*, 9 L. R., Ch. 331; 43 L. J., Ch. 575; 30 L. T. 208. Affirming 29 L. T. 575; 22 W. R. 182. See *S. C.*, 26 L. T. 357; 20 W. R. 460.

The absence of a proper method of enforcing the provisions of s. 92 is no reason for extending the jurisdiction of the court. *Id.*

Approval, under s. 115, of the engines to be used, is a condition precedent to the user of the line under s. 92. *Id.*

Whether inclusive of Power to use Stations.]

—Although the expression "the railway" is, by the interpretation clause of the Railways Clauses Act, s. 3, defined to mean "the railway and the works by the special act authorized to be constructed," and these words have been construed to include a station, yet it is doubtful whether the power reserved to the public by s. 92 of 8 & 9 Vict. c. 20, to use "the railway" with engines and carriages, upon payment of tolls which are calculated at a certain rate per mile, includes the power of using also the stations of the company. *Midland Railway Company v. Ambergate, Nottingham, and Boston and Eastern Junction Railway Company*, 10 Hare, 359.

Liability of Company for Condition of Foreign Trucks.]

—A railway company is compelled to forward foreign traffic from other lines, and they must take due care that trucks belonging to other persons are in such a state as to travel safely. But the company cannot stop all foreign trucks and empty them for the purpose of a minute examination; to do so would practically destroy the right given by statute to other companies of having the traffic forwarded, and give a monopoly to the company itself. There must be some reasonable limit to the amount of examination required, and the substantial question in cases of accident is whether the mode of examination adopted by the forwarding company was reasonable. *Richardson v. Great Eastern Railway*

Company, 1 C. P. D. 342; 24 W. R. 907. Reversing 10 L. R., C. P. 486; 37 L. T. 248.

Express Trains, what are.]—A train on a local line running in connexion with trains between London and Scotland cannot be said to lose its character of an express train by stopping at junctions connecting the line with other important lines, although it should stop at two such junctions within eight miles of one another. *Hood v. North-Eastern Railway Company*, 19 W. R. 523.

Charges for weighing Goods carried on Railway.]—Weighing goods carried on a railway at a railway station for the convenience of the consignee, is incidental to the statutory powers of the railway company and not ultra vires, and an action may be maintained by the company to recover charges for weighing them. *London and North-Western Railway v. Price*, 11 Q. B. D. 485; 52 L. J., Q. B. 754.

Refreshment Rooms—Covenant to stop Trains.]

—A railway company covenanted with the builders of refreshment-rooms at a station on the line of railway that all trains which should pass the station carrying passengers, not being goods trains or trains to be sent express or for special purposes, and except trains not under the control of the company, should stop for a reasonable period of about ten minutes. The postmaster-general, proceeding under 1 & 2 Vict. c. 98, which was passed before the covenant was made, required the company to run a train carrying mails at a certain hour, and stopping at the station for five minutes only :—Held, that such a train was a train "not under the control of the company" within the meaning of the exception. *Phillips v. Great Western Railway Company*, 7 L. R., Ch. 409; 41 L. J., Ch. 614; 26 L. T. 532; 20 W. R. 562.

Right of Landowner to stop Ordinary Trains.]

—When a branch railway act gave a landowner the right to stop by signal all ordinary trains :—Held, that accelerated trains, forming part of fast through trains from London, were not ordinary trains, though the fares charged were at the ordinary rate. *Turner v. London and South-Western Railway Company*, 17 L. R., Eq. 561; 43 L. J., Ch. 430.

When an act confers upon a landowner a private right creating a burthen upon a railway, and restraining the directors from regulating the traffic so as best to accommodate the public, it must be construed strictly. *Id.*

6. BRANCH RAILWAY.

What is.]—The Taff Vale Railway obtained a lease from the trustees of the Bute Docks at Cardiff of land which they required for the purposes of their railway. The lease was for 250 years. With a view to securing that the proposed railway should not be used so as to take custom from the docks in which they were interested, the trustees inserted a covenant in the lease, on the part of the railway, that the company, so far as it was able, should cause all minerals which should be conveyed upon their line, or any part or branch of it, for shipment, to be shipped into vessels in the Bute Ship Canal (West Bute Dock), or in some basin or cut thereto belonging. Also,

that when any minerals which should have been conveyed along the Taff Vale Railway, or any part or branch thereof, should be shipped into any vessel in any dock or basin whatsoever other than the Bute Ship Canal (West Bute Dock), or in some dock, basin or cut belonging thereto, the Taff Vale Railway Company should pay to the owners of the Bute Ship Canal for the time being the same wharfage dues in respect of such minerals as would have been payable for the same if such minerals had been shipped at the Bute Ship Canal. After the line of railway had been constructed on the land so leased to the Taff Vale Railway Company, the company took a lease of another line (the Penarth Railway) which terminated at Penarth Docks on the south-west side of the River Ely, the Bute Docks being on the north-east side of that river. The Penarth Docks and the Penarth Railway were one concern; the whole was leased by the Taff Vale Railway Company. The two were connected at a station on the Taff Vale Railway:—Held, that the Penarth Railway was not a part or branch of the Taff Vale Railway; that the words in the covenant, “any dock or basin whatsoever,” must be controlled by some limitation, and so controlled, the covenant must be confined to any dock or basin in connexion with the Taff Vale Railway, or some part or branch of it, terminating in or at a dock or basin, and that as the Penarth Railway was not a part or branch of the Taff Vale Railway, the covenant did not apply to minerals shipped or unshipped at Penarth Harbour, though they were carried for a certain distance along the Taff Vale Railway. *Taff Vale Railway Company v. Macnabb*, 6 L. R., H. L. 169; 42 L. J., Q. B. 153; 22 W. R. 65.

Opening Main Line before Construction of.]—A declaration stated, that, before and after the passing of an act for making a railway from Chester to Birkenhead, the plaintiff was the owner of a ferry across the Mersey, from Tranmere to Liverpool; and that by the act the company was empowered to make a railway, with all necessary stations, commencing in Chester, and terminating at or near Grange-lane, in Birkenhead. The declaration then stated a section of the act, whereby the company was prohibited making a railway from the station at or near Grange-lane, in or to communicate with Woodside Ferry, until a branch railway should have been made from the main line to Birkenhead and Tranmere Ferries, and alleged that the company wrongfully, and for the purpose of evading the act, opened a railway from Grange-lane station to and to communicate with the shore of the Mersey between Woodside Ferry and Birkenhead Ferry, and near Woodside Ferry, and conveyed passengers along the same to the Grange-lane station, although no branch had been made from the main line to Tranmere Ferry, in contempt of the act, and to the plaintiff's damage:—Held, first, that the declaration was bad, inasmuch as it did not contain any averment that the company had made a railway to, or to communicate with, Woodside Ferry, or anything which amounted in terms to an infringement of the act. *Chamberlaine v. Chester and Birkenhead Railway Company*, 1 Ex. 370; 18 L. J., Ex. 494.

Held, secondly, that had the declaration contained such an averment, the action might have been maintained without any allegation of special

damage, the prohibition being obviously for the special protection of a particular person. *Id.*

Compelling Construction.]—A railway extension act enacted that it should be lawful for the company to make a branch railway, “and if they think fit,” certain diverging lines to collieries shewn on the plans. The company was empowered to let on lease the diverging lines, either before or after the construction, to the owners of the collieries:—Held, that the statute did not cast upon the company the duty to make the branch railway, and therefore a mandamus would not lie. *Great Western Railway Company v. Reg. (in error)*, 1 El. & Bl. 874; 16 Jur. 675—Ex. Ch.

Private Powers under Private Act.]—By a statute a company was empowered to make a railway through certain districts. By s. 5, they were directed to form new roads in lieu of any existing ones that might be injured by their railway. Sect. 70 empowered proprietors of lands, mines, &c., to make railways through their own lands and those of other persons consenting, and across any road or roads, to communicate with the principal railway, and no reference was made to any former limitation of powers:—Held, nevertheless, that the power in this clause was not absolutely given, but must be subject to the provision of s. 5, or to the condition of leaving space enough, independently of the railway, for the public to pass. *Rea v. Morris*, 1 B. & Ad. 441.

Permission to make Communications.]—By a clause in an act (similar to s. 76 of the Railways Clauses Act), owners or occupiers of land adjoining or near the railway might lay down or extend on their own lands, or on lands on the sides thereof, belonging to the company, any collateral or continuous branch from such lands to communicate with the railway for bringing carriages upon or across the same; but all the openings and communications for that purpose were to be made at such places as might, so far as practicable, be most convenient to all the parties interested, and so as not to endanger the safety of persons travelling on the railway, and in case of difference as to the proper places for the openings, they were to be determined by two justices of the peace; provided always, that the company should not be bound to make any such opening where they should have erected any building, station, or yard:—Held, that the assent of the company to an opening being made at a station was not in the nature of a licence, and could not be revoked. *Bell v. Midland Railway Company*, 3 De G. & J. 673.

Private or Public Purposes.]—By a clause in a railway act, after reciting to the effect that the proposed line skirted the sea, and would obstruct the traffic between the sea and the lands on its shore, and so deprive the lands of their natural advantages of position as respected the sea, and that the lands abounded with minerals, which in some cases belonged to persons not owners of the surface, and were well situated for manufactories and other purposes of commerce, and that it was desirable to give facilities of access between the lands and the sea, and from the sea and the lands on the seaward side of the line to parts inland; it was enacted to the effect

that owners or occupiers of any lands, manufactories, or mines, lying near or adjoining the railway, and at parts adjacent, might at any time make any railways across the railway (not crossing it on a level), and use them "for the benefit of themselves and of all and every other person and persons to whom they or any of them may from time to time give leave, and in such way and for such purposes as they or any of them may require." A neighbouring landlord proposed to construct a railway on his own land, and to carry it under the company's railway, and to use it as a public railway for general traffic.—Held, that he was entitled so to do, and that the clause in the act did not restrict the use of the cross railway to purposes connected with the more convenient enjoyment of the neighbouring lands. *Hughes v. Chester and Holyhead Railway Company*, 3 De G., F. & J. 352; 31 L. J., Ch. 97; 8 Jur., N. S. 221.

Obstruction by Railway to.—As to what acts constitute a permanent obstruction by a railway company to the right to use a private line communicating with their railway, so as to entitle the reversioner to maintain an action, see *Bell v. Midland Railway Company*, 10 C. B., N. S. 28; 30 L. J., C. P. 273; 4 L. T. 293; 9 W. R. 612.

7. CLEARING-HOUSE.

Sureties—Demand of Secretary.—The defendants as sureties for a railway company by deed covenanted to pay to the plaintiffs as trustees for the railway clearing committee under the Railways Clearing Act, 1850, such balances and sums as, from time to time, should be settled and adjusted by the secretary of such committee as due from the company pursuant to the said act, or should be settled or determined by such secretary as the amount to be from time to time contributed to the funds of the clearing system by the company, or should in case of difference respecting the accounts of the clearing system be decided by such committee to be the balance or sum payable by the company to the committee, or should in any way become a debt due by the company to the committee pursuant to the said act, or should by such secretary be demanded of the company by a written demand in the form given in the schedule to the said act, and reciting that it was of paramount importance that the adjustment of such accounts by the clearing system should not be disputed and should be indisputable, it was by the said deed further declared and agreed that the said sureties were not to be at liberty to dispute the amount which should be so settled and adjusted by such secretary, as due from the company to such committee, or which should be settled and determined by such secretary as the amount to be contributed to the funds of the clearing system by the company, and which should be decided by the clearing committee to be the balance or sum payable by the company, or the amount which should as aforesaid be demanded by the secretary; and every such amount should be payable and forthwith paid by the said sureties, notwithstanding any error or alleged error in law, in principle or in fact, and no plea or defence should be admissible or evidence be necessary or required in any action or proceedings under the said deed which should be admissible or required

against the said company under the said act:—Held, that construing the words of the covenant according to their obvious and ordinarily reasonable meaning, the demand of the secretary made in accordance with the terms of the covenant was alone sufficient to entitle the plaintiffs to sue the defendants for the amount so demanded, it being the manifest intention of the parties that such demand should be conclusive in the matter; and also that the word "or" prefixed to the several alternative clauses in the deed of covenant was meant to have its usual meaning as a disjunctive conjunction, and could not therefore be read in a conjunctive sense as "and." *Benson v. Dunn*, 23 L. T. 848.

8. TRESPASS ON RAILWAY.

By Cabs.—A railway company was possessed of a thoroughfare which had the appearance of a public street. The company allowed certain cabs to stand in the thoroughfare upon payment of a weekly sum by the drivers. A person, not being one of the drivers who paid, stood his cab in the thoroughfare, and refused to leave when requested on behalf of the company to do so:—Held, that he was a wilful trespasser within 3 & 4 Vict. c. 97, s. 16. *Foulger v. Steadman*, 8 L. R., Q. B. 65; 42 L. J., M. C. 3; 26 L. T. 395.

Van outside Public-house.—G. kept his van standing for twenty minutes outside a public-house, during part of which time he was refreshing himself within. The ground upon which the van stood was part of the premises of a railway company, whose station was close by, but the only access to the public-house was across this ground, and the customers frequently went there with vehicles. G. was charged, under 3 & 4 Vict. c. 97, s. 16, with wilfully trespassing on railway premises, but the justices considered his claim of right to use the ground as a customer of the public-house to be *bonâ fide* and their jurisdiction to be ousted thereby:—Held, that, as there might be a legal foundation for this claim of right, the justices came to a proper conclusion. *Wilkinson v. Goffin*, 33 L. T. 824, D. C. A.

Undue Preference.—If a railway company licenses one man to ply with carriages for passengers within their station yard, any person not so licensed may not do so, and if in attempting to do so he commits a trespass within the meaning of s. 16 of 3 & 4 Vict. c. 97, s. 16, the justices cannot acquit him on the ground that such licence is, in their opinion, an undue preference, and, therefore, contrary to 17 & 18 Vict. c. 31, s. 2. *Hole v. Digby*, 27 W. R. 884.

By adjoining Owner after Receipt of Compensation.—An owner of lands severed by a railway claimed compensation from the company, and it was submitted to a jury, who awarded to him compensation, on the footing that there was to be a total separation of the land without any communication being made, and he received from the company the amount awarded as such compensation:—Held, that the verdict of the jury, and the receipt of compensation under it, was an arrangement with the company; and that the party had no right afterwards to cross the railway for the purpose of the occupation of his lands, and was, in so doing, a trespasser within 3 & 4 Vict. c. 97, s. 16. *Manning v. Eastern Counties*

Railway Company, 12 M. & W. 237; 3 Railw. Cas. 637; 13 L. J., Ex. 265.

Where no Accommodation Works—Special Act.]—By the construction of the act 3 & 4 Will. 4, c. xxxiv., establishing a railway, a party whose property has been cut through by the railway is entitled to cross it at any point by himself, his servants and cattle, in order to get to his land on the other side, unless the company, under the provisions of the act, makes a sufficient and proper communication for him to pass from one side of it to the other. *Grand Junction Railway Company v. White*, 8 M. & W. 214.

Workman of Third Party—Wilful Trespass.]—Upon complaint against A. before justices for wilfully trespassing upon the premises of a railway company, and refusing to quit them upon request, it appeared that A. had gone on to the premises for the purposes of repairing, under a contract to do so, a carriage which was there, by the permission of the company, and which belonged to a third party; that he had previously been prohibited by the company from entering; and that, upon being requested by the company to quit, he refused to do so, insisting on his right to remain, for the purpose of completing the repair, without which repair the carriage could not quit the yard. The magistrates having refused to convict:—Held, that they were not bound to convict, inasmuch as it was competent to them, if they thought fit, to decide that A. was not a wilful trespasser. *Jones v. Taylor*, 1 El. & El. 20.

Obstruction to Railway—Evidence.]—Upon an information before justices on behalf of a railway company, for an offence against its act of incorporation, in placing stones and rubbish on the railway, and thereby obstructing the free passage of the same, evidence that the act was done by certain persons employed by the defendant to repair a wall between the railway and his premises adjoining; and that on one occasion the defendant himself, who was standing by, nodded his head, and directed the workmen to go on, is sufficient to warrant the justices in convicting him. *Roberts v. Preston*, 9 C. B., N. S. 208. See 24 & 25 Vict. c. 97, s. 35.

Accidental.]—By a railway act it was enacted "that if any person shall do any act, matter or thing to obstruct the free passage of the railway or any part thereof," he shall be liable to a penalty:—Held, that, to render a party liable, he must have intended to have committed the obstruction complained of. *Batting v. Bristol and Exeter Railway Company*, 3 L. T. 665; 9 W. R. 271.

Where, therefore, a person was crossing the railway at a crossing which he had a right to use with a waggon laden with timber, and the waggon got accidentally hitched with the gate-post, and a collision occurred with it and a train whilst it was so hitched:—Held, that, although the party was guilty of carelessness, yet, as he did not intend to create an obstruction, he was not liable to a penalty. *Id.*

By Telegraph Company.]—An act which incorporated an electric telegraph company enacted, that it shall be lawful for the company to lay down and place their pipes and wires under any

public roads, streets and highways, and along or across the same for the telegraph, and to break up the pavement or soil for that purpose, but that nothing in this provision contained shall extend to any railway or canal, except that it shall be lawful for the company to carry their wires and pipes "directly, but not otherwise, across any railway." A railway company had carried their railway on a level across a part of a public highway, the public having the full use of the highway, except when the trains were passing:—Held, that the highway was not a highway within the telegraph act, and that it was a trespass to dig and bore under the railway for the purpose of carrying the telegraph under the spot where the railway crossed the highway. *South-Eastern Railway Company v. European and American Electric Printing Telegraph Company*, 9 Ex. 363; 23 L. J., Ex. 113.

Distress Damage feasant—Engine.]—A railway company has a common-law right of distress damage feasant on an engine incumbering the railway, if there is no certificate of approval. *Ambergate Railway Company v. Midland Railway Company*, 2 El. & Bl. 793; 23 L. J., Q. B. 17; 18 Jur. 243.

Proceedings against Persons for Obstructing Trains and Signals.]—See CRIMINAL LAW.

Liability of Passengers in respect of Fares and Tickets.]—See CARRIERS (*Of Passengers*).

9. RECURRING DAMAGE, REMEDY FOR.

Floods.]—When, in consequence of the construction of the works of a railway, a constantly-recurring injury arose by floods or heavy rains washing earth on to the plaintiff's property, an injunction was granted as the proper remedy, instead of sending the case to have the damage assessed under the Lands Clauses Act, s. 68. *Keates v. Holywell Railway Company*, 23 L. T. 183.

In such a case the court will not grant a mandatory injunction, but direct the injury to be stopped simpliciter, leaving it to the company to find the means of so doing. *Id.*

V. RAILWAY COMMISSIONERS.

Jurisdiction of.]—The railway commissioners, under 36 & 37 Vict. c. 48, made an order requiring the London, Chatham and Dover and South-Eastern Railway Companies to make arrangements and to afford facilities for the transference of traffic from the line of one company to the other; to arrange the arrivals of their trains at a junction in a particular manner, and directing the former company to run trains over a disused branch line; and, upon non-compliance with the order, made a further order imposing penalties upon both companies for their disobedience:—Held, that the first order was invalid, and that a prohibition must be granted to restrain the commissioners from enforcing it; for, assuming that they had jurisdiction to require each company separately to give facilities according to its powers, they were not entitled to order two companies to act jointly in doing what neither could do separately. *Toomer v. London, Chatham and Dover Rail-*

way Company, 2 Ex. D. 450; 47 L. J., Ex. 276; 37 L. T. 161; 26 W. R. 31.

Some Matters within and some without Jurisdiction.]—In a declaration in prohibition by a railway company against the railway commissioners it appeared that a complaint, under the Railway and Canal Traffic Act, 1854, had been made to the commissioners against the company, and that the commissioners proposed to order certain things to be done by the company in respect of such complaint, and that the company denied the jurisdiction of the commissioners to hear and determine the complaint or any part of it, and prayed for a writ to prohibit the commissioners "from further proceeding in any way touching the premises before them." The court being of opinion that the commissioners had jurisdiction over the general matter of the complaint, and that they had jurisdiction to order some of the things they proposed ordering, though not to order the others:—Held (Brett, L. J., dissenting), that a general demurrer by the commissioners to the whole declaration should be allowed. *South-Eastern Railway Company v. Railway Commissioners*, 6 Q. B. D. 586; 50 L. J., Q. B. 201; 44 L. T. 203; 45 J. P. 388.

Prohibition.]—If the railway commissioners act beyond their powers, prohibition will lie, notwithstanding the power of the Court of Common Pleas over railways under 17 & 18 Vict. c. 31, was transferred to such commissioners by 36 & 37 Vict. c. 48. *Ib.*

To order Structural Alterations to Station.]

—The railway commissioners, to whom has been transferred the jurisdiction of the Court of Common Pleas under the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), have under that act jurisdiction to hear and determine a complaint against a railway company of not, according to its powers, affording all reasonable facilities for receiving, forwarding, and delivering passengers and other traffic at and from any of its stations which are used by the company for such passengers or other traffic; and although the commissioners have no jurisdiction to order the company to make a new railway station, or to order any particular works, or otherwise to interfere with the discretion of the company in the mode of performing its obligation to afford such facilities, according to its powers for the receiving, forwarding, and delivering of the traffic, yet they have jurisdiction to order such facilities, even if their doing so would necessitate the making by the company of some structural alteration of such station. *Ib.*

To Restrain excessive Charges for Conveyance of Passengers.]

—The mere fact that railway companies make charges for the conveyance of passengers in excess of those authorized by their special acts, but without any undue preference, is not a breach of their obligation under 17 & 18 Vict. c. 31, s. 2, to "afford according to their respective powers all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively and for the return of carriages, trucks, boats, and other vehicles." And the railway commissioners have no jurisdiction to grant an injunction to restrain the making of

such excessive charges. *Great Western Railway Company v. Railway Commissioners, Brown, Jr. & Co.*, 7 Q. B. D. 182; 50 L. J., Q. B. 483; 45 L. T. 206; 29 W. R. 901; 46 J. P. 35—C. A. Affirming 45 L. T. 65; 45 J. P. 830.

Semble, per Brett, L. J., and Cotton, L. J., that if the overcharges were of such an amount and of such a nature that they had the effect, or it could be presumed that they were made with the intention, of preventing the use by passengers of particular trains and stations, the commissioners might have jurisdiction to entertain a complaint in respect of them as being a refusal of "facilities" within the meaning of 17 & 18 Vict. c. 31, s. 2. *Ib.*

The words in s. 2 of the Railway and Canal Traffic Act, "every railway company shall afford all due and reasonable facilities for the receiving and forwarding of traffic," do not refer to the fares charged for passenger traffic.—Per Bramwell, L. J. *Ib.*

To alter Tolls fixed by Statute—Absence of Party interested.]

—Under an act in 1846 the B. Canal Company were authorized to charge certain tolls, rates and dues for goods traffic in respect of the canals and other works of the company, and were prohibited from making an order to reduce, advance or otherwise vary all or any of such tolls, rates or dues, without the consent of a railway company, who guaranteed that, if the income of the canal company in any year was insufficient to pay a dividend of 4l. per cent. on the capital of the canal company, the railway company would make up the deficiency. The B. Canal Company was one link in a chain of canals owned by various companies, and forming a continuous line of navigation between two points. In pursuance of an application made to them by one of those companies, the railway commissioners, under the Regulation of Railways Act, 1873, s. 11, made an order allowing through rates for goods traffic between those two points, the effect of which would be to reduce the tolls of the B. Canal Company below the maximum allowed by the Act of 1846, and below the amounts theretofore charged by the company. The railway company were not represented before the commissioners, and did not consent to the order or to any variation of the tolls:—Held, that the order was made without jurisdiction, and must be restrained by prohibition. By Kelly, C. B., because the commissioners could not make an order affecting the liability of the railway company under their guarantee without at least hearing them. By Pollock, B., and Hawkins, J., because the consent of the railway company had not been obtained, and the Regulation of Railways Act, 1873, gave the commissioners no power without such consent to reduce the tolls, rates or dues as authorized by the Act of 1846. *Warwick Canal Company v. Birmingham Canal Company*, 5 Ex. D. 1; 48 L. J., Ex. 550; 40 L. T. 846.

Through Traffic, Facilities for Forwarding

—Through Rate.]—By s. 2 of the Railway and Canal Traffic Act, 1854, every railway company shall afford all reasonable facilities for the receiving, forwarding, and delivering of traffic upon its railway whether belonging to or worked by such company, and by s. 11 of the Regulation of Railways Act, 1876, the facilities to be so afforded are declared to be and shall include

"the due and reasonable receiving, forwarding, and delivering by every railway company, at the request of any other such company, of through traffic to and from the railway of any other such company at through rates." The Central Wales Railway Company applied to the Railway Commissioners for an order under s. 11, allowing through rates in respect of the traffic in certain goods between Chester and Haverfordwest, the route claimed being from Chester, over lines owned or worked by the London and North-Western Railway Company, and over the applicants' own line, which was worked by the same company under an agreement with the applicants, and thence to Haverfordwest over the Great Western Company's line, which was worked and owned exclusively by that company, and vice versa from Haverfordwest to Chester. The applicants had no rolling stock, and did not work their railway, but maintained and managed their line, and collected, forwarded, and delivered their own traffic, the whole of the staff at their stations being employed and paid by them, and subject to their orders:—Held, that the traffic was "through traffic to and from" the applicants' railway, and that the applicants were a railway company entitled to request a through rate in respect of such traffic, within the meaning of s. 11, and therefore that the Railway Commissioners had jurisdiction to make the order. *Great Western Railway Company v. Central Wales Railway Company*, or *Central Wales Railway Company v. Great Western Railway Company*, 4 Nev. & Mac. 110; 10 Q. B. D. 231; 52 L. J., Q. B. 211; 48 L. T. 234, 315; 31 W. R. 321.

Discretion as to Costs.—The railway commissioners have no jurisdiction under the Regulation of Railways Act, 1873, s. 28, to order a railway company, in whose favour they have decided upon an application to them against such company, to pay costs to the unsuccessful applicant. *Foster v. Great Western Railway Company*, 4 Nev. & Mac. 58; 8 Q. B. D. 515; 51 L. J., Q. B. 233; 46 L. T. 74; 30 W. R. 398—C. A. Reversing 8 Q. B. D. 25; 51 L. J., Q. B. 51; 45 L. T. 538.

Reference to Arbitration.—Before the H. railway company was formed, B., purporting to act on its behalf, entered into an agreement with two other companies for the working of the H. railway. When the H. company was formed and obtained its private act, the following section was contained in it: "The heads of agreement, bearing date April 29, 1865, between B. on behalf of the H. company; C. on behalf of the Midland Railway Company; and Y. on behalf of the Great Western Railway Company; which heads of agreement are set forth in schedule 1 to this act, are hereby confirmed and made binding on the said companies respectively." By clause 18 of the agreement in the schedule, "All differences between the three companies, or any two of them, and all questions as to the carrying into effect of the provisions of this arrangement, shall be determined by arbitration under the Railway Companies Arbitration Act, 1859." By 36 & 37 Vict. c. 48, s. 8, it is provided that "Where any difference between railway companies . . . is, under the provisions of any general or special act, . . .

required or authorized to be referred to arbitration, such difference shall, at the instance of any company party to the difference, and with the consent of the railway commissioners, be referred to the commissioners for their decision in lieu of being referred to arbitration." The H. company applied to the commissioners for an order enjoining the Great Western and Midland Railway Companies to work the H. line, and the Great Western Company objected that the H. company had not constructed certain platforms:—Held, by Smith, J. (Grove, J., dubitante), that the provision of the agreement requiring all differences to be referred to arbitration was not, although made binding by the act, a provision of any general or special act, within 36 & 37 Vict. c. 48, s. 8, and that the railway commissioners had, therefore, no jurisdiction. *Great Western Railway Company v. Halesowen Railway Company*, 4 Nev. & Mac. 224; 52 L. J., Q. B. 473; 48 L. T. 710.

By clause 1 of the agreement, "The H. company agree, at their own expense, to make and complete the railways, stations, buildings, and works by this act authorized, including a terminal station at H., with the necessary conveniences thereto, and proper sidings at the junction with the Midland Railway for the convenient interchange of traffic in passengers and goods, to the satisfaction of the respective engineers of the three above-named companies; or, in case of their difference, to the satisfaction of an engineer to be appointed by the Board of Trade." By clause 2, "From and after the time when the railways are so completed, the Midland Company and the Great Western Company at all times, at their own joint expense and risk, shall work the H. line:—Held, that the question as to the necessity for the platforms was within clause 1, and that, as the application of the H. company did not and could not allege that the works had been completed to the satisfaction of the engineers, clause 18 of the agreement did not apply, that, on that ground, the railway commissioners had no jurisdiction, and that the H. company should be prohibited from proceeding further with the application. *Id.*

Two railway companies were empowered by a special act to enter into a working agreement, but no provision was made respecting arbitration. The agreement made under this act contained a clause providing that any difference between the companies should be determined by arbitration, in accordance with the provisions of the Railway Arbitration Act, 1859. Differences having arisen, one of the companies called upon the railway commissioners to decide the differences under the 8th section of the Regulation of Railways Act, 1873. The other company accordingly issued a writ for an injunction against the first company, which was amended by making the railway commissioners parties, and asking for a prohibition:—Held, that the railway commissioners had no jurisdiction to undertake the arbitration, and a prohibition was issued accordingly. *Stokes Bay Railway and Pier Company v. London and South-Western Railway Company* (2 Nev. & Mac. 143) and *Portpatrick Railway Company v. Caledonian Railway Company* (3 Nev. & Mac. 189), disapproved. *Great Western Railway Company v. Waterford and Limerick Railway Company*, 17 Ch. D. 493; 60 L. J., Ch. 513; 44 L. T. 723; 29 W. R. 826—C. A.

When s. 8 of Regulation of Railways Act, 1873, applies.]—The clause in the 8th section of the Regulation of Railways Act, 1873, which enables one party to apply for the arbitration of the railway commissioners, "where any difference between railway companies is, under the provisions of any general or special act, required or authorized to be referred to arbitration," does not apply to all cases in which the agreement under which the difference has arisen has been made under the provisions of a general or special act, but only to cases in which the specific difference has been required or authorized by a general or special act to be referred to arbitration, *Ib.*

Jurisdiction to revise Working Agreement in Public Interest.]—See *Huddersfield (Corporation) v. Great Northern Railway*, 50 L. J., Q. B., 587, *ante*, col. 370.

VI. PASSENGER DUTY.

Cheap Trains.]—A cheap train within the meaning of 7 & 8 Vict. c. 85, s. 6 (the fares of passengers travelling in which are exempted from the payment of duty to government), must necessarily be a train carrying third-class passengers at an uniform rate of one penny a mile, both for the whole distance between the termini of the railway on which it travels and for the intermediate distances between any one station and another on such railway. *North London Railway Company v. Att.-Gen.*, 1 App. Cas. 148; 45 L. J., Ex. 315; 34 L. T. 297; 24 W. R. 852. Affirming 9 L. R., Ex. 330; 43 L. J., Ex. 223; 31 L. T. 377.

A cheap train must necessarily stop for the purposes of taking up and setting down passengers at every passenger station between each end of the trunk, branch, or junction line on which it travels. *Ib.*

The power conferred on the Board of Trade by 7 & 8 Vict. c. 85, s. 8, of dispensing with "any of the conditions hereinbefore required with regard to the conveyance of passengers," does not authorize the Board of Trade to dispense with either of the above-mentioned requisites. *Ib.*

Exemption from Duty where no Third-class Passenger charged more than Parliamentary Fare.]—To constitute a train complying in other respects with the statutory requirements a cheap train within s. 6 of 7 & 8 Vict. c. 85, entitling the railway company to exemption from passenger duty under s. 9, no third-class passenger must be charged more than the parliamentary fare. *Att.-Gen. v. Metropolitan Railway Company*, 50 L. J., Q. B. 573.

Duty is Payable upon Sums charged to cover Duty.]—By the 2nd section of 5 & 6 Vict. c. 79, and the schedule to that act, a duty at the rate of 5 per cent. is made payable upon all sums received or charged for the hire, fare or conveyance of passengers conveyed for hire upon any railway. The defendants, by a local act, were prohibited from charging to their passengers more than certain specified sums per mile, which sums were to include all expenses incidental to their conveyance, except government duty. The defendants, in addition to the sum charged by them to their passengers for conveyance, charged to and received from such passengers a further sum at the rate of 5 per cent. on the former, to

cover the government duty. The crown claimed duty on the latter sum as well as on the former;—Held, that the crown was entitled to duty on the whole amount received from the passengers, even though such amount should exceed the maximum charge for conveyance fixed by the local act. *Att.-Gen. v. London and North-Western Railway Company*, 6 Q. B. D. 216; 50 L. J., Q. B. 170; 44 L. T. 236; 29 W. R. 346; 45 J. P. 390—C. A.

Duty upon Sums charged for Sleeping Accommodation.]—The defendants attached to certain of their night trains sleeping carriages for the accommodation of such of their first-class passengers as might choose to avail themselves of it. For the use of these carriages such passengers were charged an extra sum in addition to the ordinary first-class fare. In addition to couches with pillows, sheets and blankets, each carriage contained a lavatory, water-closet, and other conveniences. Passengers using such carriage were not disturbed during the night by demands for their tickets; and if they arrived at their destination in the middle of the night the carriage was put into a siding, and the passengers allowed to remain in their beds until the morning. A special servant was employed to wait upon them, call them in the morning, and bring them hot water. The crown claimed duty upon the sums charged to passengers for the accommodation provided in the sleeping carriages:—Held, that such accommodation was incidental to the conveyance of the passengers, and that the crown was entitled to the duty claimed. *Ib.*

Where Working Agreement.]—The Midland was entitled, upon payment of a percentage, to use a loop line belonging to the Great Western, for the purpose of traffic originating in or extending to their own line, and they exercised their powers by their own trains and servants, but the moneys paid at the stations on the loop line were collected by the clerks and servants of the Great Western:—Held, that the Great Western was bound to keep the accounts, and pay the duty required by 5 & 6 Vict. c. 79. *Great Western Railway Company v. Att.-Gen.*, 1 L. R., H. L. 1; 35 L. J., Ex. 123; 12 Jur., N. S. 417; 14 L. T. 33; 14 W. R. 519.

VII. ABANDONMENT, ARRANGEMENT, WINDING-UP, AND EXECUTION.

1. ABANDONMENT.

Branch Undertaking—Return of Deposit—General Assets.]—A railway company in 1873 obtained an act of parliament authorizing them to construct a branch line, the parliamentary deposit being paid by B., who was the principal proprietor in the company, and the act containing the usual provisions for return of the deposit, if, as happened, the requirements of the act were not complied with. In 1875, a receiver of the branch undertaking was appointed, and in 1876, an act was obtained extending the time for completion of the line to May, 1881. In 1880, an act was obtained for the abandonment of the undertaking, providing that rights to compensation should not be affected thereby, and that, subject to such rights, and the protection of the company's creditors, the court might order the de-

posit money to be repaid to the persons named in the parliamentary warrant. There were no creditors' claims in respect of the branch undertaking, but the costs of the act of 1876 and the abandonment act were owing to B., who had paid them, and the general creditors of the company had large claims. On the application of B., as representing the persons named in the warrant, for the payment to him of the deposit money:—Held, that the deposit money had become part of the general assets of the company, and must be applied for the benefit of the general creditors. *Manchester and Milford Railway Company, In re*, 45 L. T. 129.

Without Consent of Depositor.—A warrant of abandonment of a railway was issued by the Board of Trade on condition that the money deposited as security for the completion of the railway or the securities in which the same was invested should be applied as part of the assets of the company:—Held, that the court had jurisdiction to make an order for winding up the company without the consent of a party who had advanced the deposit on a security from the railway company. *Waterford, Lismore, and Fermoy Railway Company, In re*, 4 Ir. R., Eq. 490; 19 W. R. 145.

It is not necessary, under the Railway Abandonment Act, 1869, s. 5, to save the rights of a party so circumstanced. They may be asserted and allowed in the administration of the assets of the company under the winding-up order. *Id.*

Costs of Depositor's Petition.—A railway having been abandoned under the Railways Abandonment Act, the costs of a petition by the depositor for the transfer out to him of the bulk of the deposit moneys were ordered to be paid out of the general assets of the company. *Laugharne Railway Company, In re*, 12 L. R., Eq. 454; 19 W. R. 1108.

Costs of Solicitors and Parliamentary Agents.—Claims in respect of expenses incurred by parliamentary agents in getting the bill of a projected railway company passed through parliament, and for moneys advanced by the intending contractor for the same purpose, are debts which have been incurred on account of the promotion of the company; and the court, under the discretion given by the Railways Abandonment Act, 1869, s. 5, will not hold it reasonable, as between such creditors and the surety to the bond, that their debts should be paid out of the bond, which, by the warrant for the abandonment of the railway, has been directed to be applied as part of the assets of the company. *Brampton and Longtown Railway Company, In re*, 10 L. R., Eq. 613; 39 L. J., Ch. 681; 23 L. T. 356; 18 W. R. 994.

A Board of Trade warrant of abandonment of a railway, under the Abandonment of Railways Act, 1850, and the Railway Companies Act, 1867, was made with a condition that moneys deposited in the Court of Chancery as security should be applied as part of the assets of the company:—Held, that the solicitor and parliamentary agent, not being promoters of the company, were entitled to be paid thereout their costs and charges for obtaining the act. *Kensington Station Act, In re*, 20 L. R., Eq. 197; 32 L. T. 183; 23 W. R. 463.

A solicitor was employed in the promotion of a railway and in obtaining the act for its incorporation. He was then appointed solicitor of the company, and was employed in obtaining two other acts by which the scheme was amended and fresh powers granted. The undertaking proved abortive, and the railway was never constructed. A warrant of the Board of Trade was obtained under the Railways Abandonment Act, 1869, for the abandonment of the railway, which contained the usual clause that the bond which had been given for the completion of the railway should be assets of the company:—Held, that the costs of the solicitor incurred in getting up the company, and, after its incorporation, in obtaining the subsequent acts, were costs incurred on account of the promotion of the company within s. 5 of the Railways Abandonment Act, 1869, and ought not to be paid out of the bond. *Barry Railway Company, In re*, 4 Ch. D. 315; 46 L. J., Ch. 206; 37 L. T. 125; 25 W. R. 201.

Proof of Claims.—G., having entered into a provisional contract for the construction of a railway, expended considerable sums of money for the use of the company, in payment of the costs of promoting one of the special acts of the company, of office rent, stationery, &c. No resolutions of the board of directors authorizing the payments appeared in the minute books, but the secretary and some of the directors were at the time aware that such expenses were being defrayed by G. The railway was afterwards abandoned, and an order was made for the winding-up of the company:—Held, that the sums paid by G. constituted a liability on the part of the company, and that a claim by his assignees for the amount should be allowed. *Dublin and Rathcoole Railway Company, In re, Stevens, Ex parte*, 1 Ir. L. R., Ch. 98.

A claim for sums paid by G. to the secretary of the company, but not proved to have been applied for the company's benefit, was disallowed. *Id.*

In order to obtain from the Board of Trade an extension of the time limited by the act for completing the line, G. executed a bond to the crown in 40,000*l.* The company subsequently obtained a further act, allowing an additional extension of time for the completion of the railway, but containing a clause saving the liability of G. on foot of the bond. By the warrant of abandonment it was provided that the sum due on foot of the bond should be applied as assets of the company, and the bond was assigned by the lords commissioners of the Treasury to the official liquidator. G.'s claim against the company had been previously assigned to T. & Co. for valuable consideration:—Held, that the official liquidator could not set off against the claim of T. & Co. the amount due on foot of the bond. *Id.*

2. ARRANGEMENT.

Effect of Scheme.—The 7th and 9th sections of the Railway Companies Act, 1867, apply only to the time between the filing of a scheme of arrangement and its enrolment, and after enrolment the court has no jurisdiction without a bill being filed to restrain an action against the company, nor does a judgment creditor require the leave of the court to issue execution. *Potteries, Shrewsbury and North Wales Railway Company*

Scheme, In re, 5 L. R., Ch. 67; 39 L. J., Ch. 273; 22 L. T. 53.

Assent of Preference Shareholders to.—A petition was presented for the confirmation of a scheme of arrangement between a railway company and their creditors, which had been assented to by all the preference and ordinary shareholders present at an extraordinary general meeting. The special act of the company enacted that all preference shares should confer the like right of voting at meetings as ordinary shares:—Held, that the special act did not qualify the enactments of the Railway Companies Act, 1867, and that the assent of the preference shareholders must be given in writing. *Cambrian Railways Company, In re*, 24 L. T. 417; 19 W. R. 871.

Binding Character of.—A debenture holder, although he has obtained judgment and issued execution against a railway company before the filing of a scheme of arrangement under the Railway Companies Act, 1867, still remains a debenture holder for the purposes, and is therefore bound by the scheme when assented to by three-fourths in value of the holders of the company's debentures, and after enrolment of the scheme will be restrained from taking any further steps to enforce his judgment. *Potteries, Shrewsbury and North Wales Railway Company v. Minor*, 6 L. R., Ch. 621; 40 L. J., Ch. 685; 25 L. T. 522; 19 W. R. 883.

Parties who have recovered a judgment against a railway company, and converted it into a statutory mortgage under 13 & 14 Vict. c. 29, are not bound by a scheme of arrangement under the Railway Companies Act, 1867, to which they have not assented. *Stephens v. Cork and Kinsale Junction Railway Company*, 6 Ir. R., Eq. 604.

An outside creditor is not bound by a scheme of arrangement filed by a railway company under the Railway Companies Act, 1867, and cannot derive any indirect benefit from it; his rights are entirely unaffected by it. *Stevens v. Mid Hants Railway Company; London Financial Association v. Stevens*, 8 L. R., Ch. 1064; 42 L. J., Ch. 694; 29 L. T. 318; 21 W. R. 858.

Unpaid vendors of land sold to the company, and debenture holders of the company, do not, by accepting debenture stock under the provisions of a scheme, lose any priority which they previously had over an elegit creditor, who is not bound by the scheme. *Id.*

Confirmation of, by Court.—When, upon a petition for the confirmation of a scheme of arrangement between a railway company and its creditors, some of the outside creditors appeared and opposed the scheme, the court, on its appearing that their opposition was reasonable, and based on a due regard to their own interests, dismissed the petition. *Somerset and Dorset Railway Company, In re*, 21 L. T. 656; 18 W. R. 332.

When a scheme under the Railway Companies Act, 1867, provided for the borrowing of large sums of money, and that the entire authorized loan capital should be applied, first, in completing and stocking the line, and then to all lawful purposes of the company, and did not contain any special provisions for the payment of or arrangement with creditors, the court refused

to confirm it as a scheme of arrangement with creditors. *Letterkenney Railway Company, In re*, 4 Ir. R., Eq. 538.

A scheme of arrangement under the Railway Companies Act, 1867, provided that, upon the allotment of certain debenture stock to the creditors, all their debts and claims should be deemed to be satisfied and their securities given up, to which almost all the outside creditors gave their assent; and, as none of them opposed the petition to confirm the scheme, the court made an order confirming it, upon the company giving their personal security to make no allotment of the debenture stock to any of the outside creditors who had not given their assent. *West Cork Railway Company, In re*, 7 Ir. R., Eq. 96.

The court cannot sanction a scheme under the Railway Companies Act, 1867, giving to the holders of debenture stock the right to vote like shareholders. *Stafford and Uttoxeter Railway Company, In re*, 41 L. J., Ch. 777; 20 W. R. 921.

3. WINDING-UP.

When Possible.—A dock company incorporated by a special act, with power to construct a short subsidiary branch railway, is not a railway company within the exception in the Companies Act, 1862, s. 199. *Ermouth Docks Company, In re*, 17 L. R., Eq. 181; 43 L. J., Ch. 110; 29 L. T. 573; 22 W. R. 104.

4. EXECUTION AGAINST.

Protection of Rolling Stock and Plant, even though Railway be closed.—The protection from seizure in execution by a judgment creditor, given by the Railway Companies Act, 1867, s. 4, to the rolling stock and plant of a railway, after such railway is open for public traffic, continues although the railway is afterwards closed for traffic. *Midland Waggon Company v. Potteries Railway Company*, 6 Q. B. D. 36; 50 L. J., Q. B. 6; 43 L. T. 511; 29 W. R. 78.

Receiver.—A railway company which has never commenced to acquire the lands, or construct the railways authorized by their act, is not an "undertaking" within the meaning of s. 4 of the Railway Companies Act, 1867, of which a receiver can be appointed under that section. *Birmingham and Lichfield Junction Railway Company, In re*, 18 Ch. D. 155; 50 L. J., Ch. 594; 45 L. T. 164; 29 W. R. 908.

Powers of.—Semble, the powers of a receiver appointed under the above section do not extend to getting in unpaid calls. *Id.*

Dedication of Fund to Payment of Dividend on Share Capital—Undertaking worked at a Loss.—By a railway act (35 & 36 Vict. c. cvi.), reciting that it was expedient that certain baronies adjoining the proposed line which would be greatly benefited by the construction of the railway, should guarantee the payment of a limited dividend on the share capital of the company; and that, for such purpose, the lands within the said baronies should, when necessary, be chargeable with any deficiency of such limited dividend, it was enacted that, if and

whenever, after the opening of the whole of the railway, and for twenty-two years after, the receipts over the working expenses should not amount to a dividend of 5 per cent. on the share capital, the amount required to make up such dividend should become payable half-yearly by the baronies rateably, as by the act prescribed; provided that so much of the receipts over the working expenses as should be necessary for such purpose should, during the said period, be applied to the payment of the said dividend, in priority to any sum due on any mortgage deed, bond or debenture stock, or to any dividend on any other portion of the capital. By a subsequent act (36 & 37 Vict. c. cxxxii.) the foregoing enactments of the earlier act were repealed, the liability was extended to other baronies, and it was enacted that, if and whenever, during the period of thirty-five years after the opening of the railway, the net profits, deducting from the gross receipts the working expenses and the interest of any debt or demand created by any mortgage deed, bond or debenture stock, should not amount to a dividend of 5 per cent. on the share capital, the amount required to make up such dividend should be payable rateably by the baronies. The mode of ascertaining the proportions in which the baronies were to pay was regulated by the 11th section of the later act, in which the sums were designated as the "half-yearly sums necessary to pay the interest and dividends" on the share capital; and, under a subsequent section, regulating the mode of presenting for the levy of such sums, they were to be paid by the grand juries to the treasurer of the company, or in such other manner as the company should direct:—Held, on a petition for a receiver by a judgment creditor of the company, that the baronial guarantee fund was dedicated to the payment of the dividend on the share capital, and was not general assets of the company for payment of its debts; and, it being satisfactorily shewn that the undertaking was worked at a loss, the application for a receiver was refused. *Waterford, Dungarvan and Lismore Railway Company, In re, Finlayson, Ex parte*, 5 L. R., Ir. 584—C. A.

— **Appointment of Manager at instance of Judgment Creditor.**—Under the Railway Companies Act, 1867, s. 4, whenever a judgment creditor of a railway company is unpaid, the appointment of a receiver, or if necessary a manager, is a matter of right, and amounts to a sort of equitable execution. The words "if necessary" point to the necessity of carrying on the business, and whenever a railway company is carrying on business in the ordinary way and conducting its own traffic, a manager is necessary within the meaning of the act, and such manager should be appointed by the court. In order to make "due provision" for the working expenses of the company required by the section, the court will assume control over the management of the railway and the power of seeing that the money spent is applied to the proper management of the railway. *Manchester and Milford Railway Company, In re, Cambrian Railway Company, Ex parte*, 14 Ch. D. 645; 49 L. J., Ch. 365; 42 L. T. 714—C. A.

A receiver would be properly appointed when the railway is a leased line or, under a working arrangement with another company, merely receives the rent and the tolls. *Ib.*

In 1879, a railway company, whose line was partially completed, gave their secretary (the petitioner) a certificate of indebtedness, and an undertaking to pay a certain sum with interest, upon which he recovered judgment and issued execution. The amount was due for services, partly rendered prior to the passing of the Railway Companies Act, 1867. It appeared that the company was in considerable financial difficulties, and that there were judgment creditors to a large amount prior to that of the petitioner. The portion of the line open (about eight miles) was being worked by another company, at a remuneration of 60 per cent. of the gross earnings. The court, on the application of the petitioner, granted a receiver over the portion of the line open for traffic, with liberty to extend him over any part of the line which might thereafter be opened. *Southern Railway Company, In re, Quinton, Ex parte*, 5 L. R., Ir. 165.

Director appointed Manager as a general Rule.—As a general rule the directors or some of them would be appointed managers where they were acting fairly, and the order will generally be made without prejudice to any application by the directors to propose themselves or some of their number as managers. *Manchester, &c., Railway Company, In re, supra.*

Evidence in support of Application for Manager.—The only evidence requisite in support of a petition by a judgment creditor for a manager under that section is an affidavit verifying the fact that he is a judgment creditor, that his judgment debt is unpaid, and that the company is a going concern conducting its own business. *Ib.*

Sufficiency of Service of Petition.—When a petition was presented by a judgment creditor, for the appointment of a receiver of the tolls of a railway company, and it appeared that the line had not been used by the company, although a portion of it had been occupied and maintained by another company, without payment of compensation; that the contract on which the judgment was recovered had been entered into previously to the passing of the act; and that the service of the petition had been effected at a house which had formerly been, but was no longer, the office of the company, and on a person who had acted as, but who was not properly constituted, the secretary:—Held, that service of the petition was insufficient. *Beddgelert Railway Company, In re*, 19 W. R. 427.

Nature of Liability.—Held, also, that the railway had not been opened for public traffic within the meaning of the act; and that as the judgment had been recovered upon a contract entered into before the passing of the act it could have no effect. *Ib.*

Restraining Actions.—The Cambrian Railway Company's Act, 1868, restrains the commencement or continuance of actions and suits against the company by creditors except with leave of the court. The court will not in general give leave unless it is shewn that the company has money applicable to the payment and refuses to pay. *Parry, In re*, 22 L. T. 116 18 W. R. 416

Scheme for Reconstruction.]—When at a duly convened meeting of the debenture holders of a company in a ruined condition, a scheme for the reconstruction of the company was assented to by an overwhelming majority, the court held the will of the majority to be binding on the minority. *Tunis Railways Company, In re*, 30 L. T. 512; 22 W. R. 639. Affirmed, 31 L. T. 264.

Against Members.]—Upon an application under the Companies Clauses Act, s. 36, for leave to issue execution against shareholders of a company which had been ordered to pay a sum of money and failed in doing so, the court will give the shareholders an opportunity of questioning the validity of the order; but is not bound to do so by directing a scire facias to issue. *Healey v. Chichester and Midhurst Railway Company*, 9 L. R., Eq. 148; 39 L. J., Ch. 387; 21 L. T. 811; 18 W. R. 270.

RAPE.

See CRIMINAL LAW.

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A. CONSTRUCTION OF STATUTES.

Statutory Authority.]—Whenever it is sought to impose a rate, the burthen lies on those seeking to enforce it to shew that the words used by the legislature are clear and unambiguous in order to charge the subject. *Ingram v. Drinkwater*, 44 L. J., P. C. 83; 32 L. T. 746—P. C.

Acts in order to infringe upon the legal rights of the subject, and especially to impose a tax, must be expressed in language clear beyond all reasonable doubt. *Shaw v. Rudden*, 9 Ir. C. L. R. 214; *S. P., Reg. v. Mallow Union*, 12 Ir. C. L. R. 35.

— **Local and General Act.]**—A partial exemption from the payment of rates for borough improvement purposes, conceded by a local act, is not taken away by the mere passing of public general acts for similar purposes. *Reg. v. Lon-*

don and North-Western Railway Company, 35 L. T. 626; 25 W. R. 59.

Borrowing Powers—Rate made to Pay Interest.—Where trustees under a local act were authorized to borrow, by annuity, or at common interest, a sum not exceeding 30,000*l.* for the purpose of building a chapel, and the moneys so borrowed, and the interest, were to be made payable out of the burial fees, and out of the rates and assessments to be made in pursuance of the act; and the trustees, in fact, borrowed 32,636*l.*, and made a rate to pay the interest of that sum:—Held, that the trustees had exceeded their power, as the act only empowered them to borrow a specific sum, and as the rate was made to pay the interest due upon the whole sum borrowed, it was bad in toto, although the defect did not appear on the face of it. *Richter v. Hughes, 3 D. & R. 788; 2 B. & C. 499.*

Repayment of Money Borrowed.—By an act of parliament, commissioners were appointed, who were to expend money in improving a town; they were authorized to levy rates on the town and to borrow money on the security of the rates, giving bonds for the money so borrowed, of which 100*l.* at the least should be chosen by lot, and paid off every year. Interest on the bonds had been duly paid, and except in two years, 100*l.* had been paid off every year, but above 15,000*l.* remained on the security of the bonds:—Held, that holders of bonds to the amount of 800*l.* were not entitled to immediate payment out of the rates or to a receiver of the rates. *Preston v. Corporation of Great Yarmouth, 41 L. J., Ch. 310; 26 L. T. 235.* Affirmed on appeal, 7 L. R., Ch. 655; 41 L. J., Ch. 760; 27 L. T. 87; 20 W. R. 875.

Commissioners were authorized by act of parliament, to raise money for parish purposes, and to secure it by debenture or assignment of the rates. They gave a debenture for 1,000*l.* to A., who was treasurer, and also a commissioner. A. advanced nothing at the time, but he subsequently advanced the amount, and from that time only he received interest. By subsequent receipts of rates, the balance was turned, and A. had funds in hand:—Held, that the transaction was not invalid, and that A. was entitled to charge full interest on his debenture until he had been formally paid off. *Fletcher v. Gibbon, 23 Beav. 212.*

Amount Limited.—Where commissioners with power to raise money resolved that it was necessary to raise a sum not exceeding 1,300*l.*:—Held, that the fair import of the resolution was, that such was the smallest sum necessary, and that it was sufficiently certain. *Curtis v. Kent Waterworks Company, 7 B. & C. 314.*

Where the commissioners made at the same time two rates, one for the poor, and the other for the highways, and it appeared that the first, if the whole had been collected, would have exceeded the sum required, held good, as the act did not require separate rates for the poor and the highways, and the entire sum directed to be raised would not exceed the sum required:—Held, also, good, because it was impossible ever to collect the whole of the rate, and the sum actually collected was less than that required. *Id.*

By a local act a town council was empowered, for certain purposes therein specified, to make rates, "provided that the amount to be levied for all and any of the purposes shall not in any year exceed 1*d.* in the pound upon the rateable value of the property within the borough liable to such rate:—Held, that such deficiencies as might arise in levying the rate, by reason of insolvency of occupiers and other causes, were not to be cast upon the general body of ratepayers, by charging them in excess of the rate of 1*d.* in the pound. *Reg. v. Liverpool (Justices), 31 L. J., M. C. 108; 8 Jur., N. S. 642; 6 L. T. 241.*

By a local act for improvement of a town, commissioners were invested with all the powers, provisions and authorities, and were to be in the receipt and possession of all compositions, rates, &c., granted by 13 Geo. 3, c. 78; and the surveyors to be appointed by the commissioners were to have the same powers of demanding, collecting and recovering payment of such compositions, &c., as under that act. The surveyors of the highways within the ambit of the act were, on a day to be appointed by the commissioners, to produce to them their accounts, and to pay over all balances in their hands to the treasurer of the commissioners, and thenceforward their office was to be determined. The commissioners were empowered, in order to raise money for carrying the purposes of the act into execution, to lay one or more rates once in every year, or oftener, if necessary, on all houses, shops, &c., within the town, so as such rates should not exceed 8*d.* in the pound in a year on their yearly value. By a subsequent act, reciting that the commissioners had borrowed considerable sums of money on the rates, and that they were inadequate to the purposes of the act, the power of rating houses, shops, &c., was extended from 8*d.* to 1*s.* in the pound in the year:—Held, that the commissioners had no power, in case the rates so levied proved insufficient for the purpose of the act, to levy a subsidiary rate by application to be made to the justices by the surveyor under 13 Geo. 3, c. 78, s. 45. *Higgins v. Green, 10 M. & W. 703; 12 L. J., M. C. 27.*

When Nature of Rate Limited.—Under a local act improvement commissioners were appointed, with power to make rates. It enacted, "that no person shall be rated in pursuance of this act on account of any arable, meadow or pasture land exceeding two acres . . . or the farmhouses, and buildings used exclusively for farming purposes." The commissioners became an urban sanitary authority under the Sanitary Act, 1873. By s. 43 of that act, any limit imposed on, or in respect of any rate, by any local act of parliament, shall not apply to any rate required to be levied for the purpose of defraying any expenses incurred by a sanitary authority for sanitary purposes:—Held, that the word "limit" did not apply to the exemption in the local act, so as to authorize the commissioners to impose a rate for expenses incurred for sanitary purposes, on a person on account of land exceeding two acres. *Walton Improvement Commissioners v. Walford, 10 L. R., Q. B. 180; 44 L. J., Q. B. 74; 31 L. T. 825; 23 W. R. 292.*

District Rates — Apportionment — Persons and Property not equally benefited.—By a local act of Geo. 3, commissioner were appointed

for paving the footways and cleansing, lighting, and watching the streets in the town of Monmouth. By s. 59, the commissioners shall and are hereby authorized and required once in every year to rate and assess any sum not exceeding one shilling in the pound upon or in respect of all houses, &c., . . . being within the limits of the town of Monmouth. By s. 67, all and every person or persons paying the rates and assessments hereby authorized to be levied within the town shall be and they and every of them is and are hereby exempted and discharged from all charges and expenses of paving, lighting, watching, cleansing, or fencing off any part or parts of the footways and crosspaths of the town and borough. By the Public Health Act, 1872, the borough of Monmouth (within which was the town of Monmouth) was created an urban sanitary district, and the mayor, aldermen, and burgesses of the borough, acting by the town council, were the urban sanitary authority for such district. By s. 16, all expenses incurred or payable by an urban sanitary authority under the sanitary acts shall . . . be defrayed . . . in the case of the council of a borough out of the borough fund or borough rate. By the Sanitary Law Amendment Act, 1874, all the powers and duties of the commissioners under the Local Paving Act relating to any objects or purposes of the sanitary acts were transferred to the council. By the Public Health Act, 1874, s. 144, every urban authority shall, within their district, exclusively of any other person, execute the office of and be surveyor of highways, and have, exercise, and be subject to all the powers, authorities, duties, and liabilities of surveyors of highways. By s. 207, all expenses incurred or payable by any urban authority in the execution of this act, and not otherwise provided for, shall be charged on and defrayed out of the district fund and general district rate leviable by them under this act. The town council, as the urban sanitary authority for the borough of Monmouth, made a general borough rate to meet expenditure, which included the paving, lighting, and cleansing of the town. A ratepayer, who occupied a house within the borough, but outside the town of Monmouth, appealed on the ground that the rate was made in part for raising money towards defraying the expenses of carrying the Monmouth Paving Act into execution:—Held, that the rate was invalid. *Monmouth (Mayor, &c.) v. Monmouth (Churchwardens and Overseers)*, 38 L. T. 612.

By the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 159, where it appears to any vestry or district board that all or any part of the expenses for defraying which any sum is by such vestry or board ordered to be levied, have or has not been incurred for the equal benefit of the whole of their parish or district, such vestry or board may by any such order direct the sum or sums necessary for defraying such expenses or any part thereof to be levied in such part, or exempt any part of such parish or district from the levy, or require a less rate to be levied thereon, as the circumstances of the case may require:—Held, that a precept which required the rate to be levied as regards such parts of the parish as consisted of land used as arable, meadow, or pasture land only, or as woodland, orchard, market-garden, hop, herb, flower, fruit, or nursery ground in the proportion of one-fourth part only of the net annual value of such

land, was good, although the classes of land so mentioned in the precept did not lie together or form any particular division marked out by metes and bounds, but were scattered through the parish. *London, Brighton and South Coast Railway Company v. Lewisham (Guardians)*, 4 Q. B. D. 389; 48 L. J., M. C. 116; 40 L. T. 716; 27 W. R. 783. Affirmed, 5 Q. B. D. 89; 49 L. J., M. C. 32; 41 L. T. 577; 28 W. R. 288—C. A.

— **Valuation.**—General district rates made under 21 & 22 Vict. c. 98, s. 55, are not required to be based on the poor rate, where, in the opinion of the local board, the poor-law valuation list is an unfit criterion for making them. *North Eastern Railway Company v. Scarborough Local Board*, 4 L. R., Q. B. 163; 38 L. J., M. C. 65; 17 W. R. 574.

B. POOR RATE AND RATES IN GENERAL.

I. MAKING RATE.

1. IN WHAT MANNER AND FOR WHAT PURPOSE.

Requisite Formalities.—The words "of no force," &c., in 6 & 7 Will. 4, c. 96, s. 2, apply solely to default in signing the declaration, and where default in following the form given in the columns has not been made a ground of appeal by the statute, the sessions have no power to quash a rate for such default. *Reg. v. Fordham*, 3 P. & D. 95; 11 A. & E. 73; 4 Jur. 218.

The poor law commissioners have no power to require compliance with a schedule varying from or more full than that in the statute. *Id.*

A poor-rate is not invalid because the declaration at its foot is not in the very words of the form given by the schedule to the statute. *Paynter v. Reg. (in error)*, 10 Q. B. 908; 16 L. J., M. C. 136; 11 Jur. 973—Ex. Ch.

A poor-rate, which is lawfully made in other respects, is not rendered invalid by the circumstance that some of the vestrymen who concurred in making it were vestrymen de facto and not de jure. *Scadding v. Lorant*, 3 H. L. Cas. 418.

A rate, without giving a specification of the property, for which each individual is rated, is bad. *Re v. Aire and Calder Navigation*, 4 D. & R. 253; 2 B. & C. 713.

The amount to be inserted in the column headed "rateable value," of the valuation under 25 & 26 Vict. c. 103, is the true rateable value of the property, independently of whether such property is subject to the provisions of the Small Tenements Act, 13 & 14 Vict. c. 99, or not. *Sunderland-near-Sea (Overseers) v. Sunderland Poor Law (Guardians)*, 18 C. B., N. S. 531; 34 L. J., M. C. 121; 11 Jur., N. S. 688; 13 L. T. 239; 13 W. R. 943.

A poor-rate in which the overseers omit a class of inhabitants on account of poverty is not void. *Reg. v. Check*, 11 Jur. 86.

A rate made in fact for the relief of the poor, but which does not shew by intrinsic evidence, either by the heading or by something in the body of the rate, for what purpose it is made, is void, and the court discharged a rule in lieu of a mandamus to order justices to issue their distress warrant to levy such a rate. *Reg. v. Eastern*

Counties Railway Company, 5 El. & Bl. 974; 25 L. J., M. C. 49; 2 Jur., N. S. 161.

Rule calling upon justices to issue their warrant against the goods of a railway company for the amount assessed upon them for the relief of the poor, by two rates. It appeared that one was headed, "Parish of M., May 24, 1855;" the other was properly headed, but the property rated was described as "land, &c.:"—Held, that the first rate was void independently of the 6 & 7 Will. 4, c. 96, but the second was irregular only. *Id.*

A poor-rate was not made until it was signed by the overseers, according to 6 & 7 Will. 4, c. 96 (Parochial Assessment Act). *Ainsworth v. Creeke*, 4 L. R., C. P. 476; 38 L. J., C. P. 58; 19 L. T. 824; 17 W. R. 229; 1 Hopw. & C. 141.

The word "made" in 30 & 31 Vict. c. 102 (Representation of the People Act, 1867), s. 3, par. 3, is to be construed as completely made; and therefore where a poor-rate, purporting to be made on the 18th July, 1867, was allowed by the justices on the 4th September, 1867, and published on the 8th September, 1867:—Held, that it was not made during the time of occupation of a claimant seeking to qualify for the twelve months succeeding July 31, 1868. *Jones v. Bubb*, 4 L. R., C. P. 468; 38 L. J., C. P. 57; 19 L. T. 483; 17 W. R. 205; 1 Hopw. & C. 128.

Time for Making.—A poor-rate need not be made monthly. *Rees v. St. George (Overseers)*, 2 W. Bl. 694.

Concurrent Rates.—A rate may be made and levied, although there is another rate existing at the time, which was made on a former day for the same purpose, but is not wholly collected; but concurrently existing rates are illegal if made for the same period of time. *Reg. v. Best*, 2 B. C. Rep. 90; 2 New Sess. Cas. 655; 16 L. J., M. C. 338.

A concurrent rate, made for the same period as a former subsisting rate, is illegal. *Rees v. Fordham*, 3 P. & D. 95; 11 A. & E. 73.

It is a principle of rating, that the rate shall not be imposed to reimburse for past expenses, but the rule is subject to necessary exceptions. *Reg. v. Read*, 13 Q. B. 524; 4 New Sess. Cas. 7; 18 L. J., M. C. 164; 13 Jur. 789.

A rate cannot be made to repay money borrowed to repair and rebuild a workhouse. *Rees v. Wacell*, 1 Dougl. 116.

Purpose—Retrospective Rate.—There is no rule of law which prohibits a retrospective rate. *Harrison v. Stickney*, 2 H. L. Cas. 108.

In every case of rating the question is, whether the act under which a rate is made, either expressly or impliedly, prohibits such rate from being retrospective. *Id.*

Where a body of persons is by statute constituted trustees for certain public purposes, and powers are conferred on them to levy rates upon the district to a limited amount, they are authorized, if not expressly prohibited, to apply the rates of any year in the payment of debts properly incurred in a previous year in the execution of their trust. Secus, if their power of rating is unlimited in amount. *Att.-Gen. v. Church*, 2 Hem. & M. 697.

Bill in Parliament.—A court of equity will not allow money raised for poor-rates, under

a local act, to be applied in payment of the expenses of a bill in parliament promoted by the guardians, but rejected. *Att.-Gen. v. Southampton*, 17 Sim. 6; 18 L. J., Ch. 393; 13 Jur. 669.

The jurisdiction of the court is not taken away by the power given to the poor law commissioners, by 11 & 12 Vict. c. 91, of remitting lawful disallowances. *Id.*

Costs of Opposing Bill.—A bill before parliament provided for the punctual payment of interest on the share capital of the undertaking, for which authority was sought by declaring that the overseers of the parish in which such undertaking was situated should when required so to do raise as part of the poor-rate money for the payment of such interest. The overseers opposed the bill, which was rejected by a committee of the House of Lords. On an application for a writ of certiorari to bring up and quash the certificate of the district auditor allowing the taxed costs of such opposition:—Held, that there was no duty on the part of the overseers to oppose the bill, and that they were not entitled to charge the costs of the opposition on the poor-rate. *Reg. v. White, or Sibley, Ex parte*, 11 Q. B. D. 309; 52 L. J., M. C. 128; 49 L. T. 183; 31 W. R. 811; 47 J. P. 741.

By whom made.—The 54 Geo. 3, c. 4, s. 16, authorizing the levying of a gaol rate, directed that the overseers of each parish should levy it in the same way as the poor rate:—Held, that where the power to levy the poor rate in a particular parish was in certain commissioners, they were the proper persons to make the gaol rate, and not the overseers. *Cortis v. Kent Waterworks Company*, 7 B. & C. 314.

Valuation Lists—Time for Making and Depositing.—J. and P. were the occupiers of rateable property situate in a parish within the limits of the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67). Upon the 27th of September, the overseers made and deposited a valuation list, in which the property was assessed at certain amounts. The list was transmitted to the assessment committee on the 18th of October. On the 7th of December the assessment committee met, when J. and P. objected to the amounts at which their property was assessed, and these were reduced by the committee; after the meeting of the assessment committee no special sessions were held to which J. and P. could have appealed, but they appealed to the assessment sessions, who confirmed the list:—Held, that delay in making, depositing, transmitting, and approving the valuation list within the times prescribed by s. 42 of the Metropolis (Valuation) Act, 1869, did not make it a nullity, for the provisions of that section were directory and not imperative. *Reg. v. Ingall*, 2 Q. B., D. 199; 46 L. J., M. C. 113; 35 L. T. 552; 25 W. R. 57.

Re-deposit after Alteration.—The valuation list of a parish under the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), must, when altered by the committee, be deposited for inspection, and if not so deposited, it is invalid, together with any contribution order based upon it. *Reg. v. Chorlton Union (Guardians)*, 8 L. R., Q. B. 5; 42 L. J., M. C. 34.

It is the duty of the overseers to deposit the valuation list, after alteration by the assessment committee, in the place where the rate books are kept, and to give due notice thereof in the same manner as in the case of the original deposit of the valuation list. *Reg. v. Chorlton-on-Medlock*, 35 L. J., M. C. 56; 12 L. T. 581; 13 W. R. 925.

— **After Appeal.**—Notice of appeal against a poor-rate having been given to the assessment committee, under 27 and 28 Vict. c. 39, s. 1, they amended the valuation list, and gave notice to the overseers, but the list was not re-deposited as required by 25 & 26 Vict. c. 103, s. 21:—Held, that it was not necessary to re-deposit the list. *Reg. v. Edmonds*, 9 L. R., Q. B. 598; 43 L. J., M. C. 156; 31 L. T. 237; 22 W. R. 924.

A contribution order, based on the list as so altered, having been brought up by certiorari and a rule obtained to quash it on behalf of a ratepayer, whose rating was but inappreciably affected by the alterations; no recognizances having been entered into; the court discharged the rule with costs, as a vexatious abuse of the process of the court. *Ib.*

— **Time for Signing.**—The 32 & 33 Vict. c. 67, s. 42, is directory and not imperative, and non-compliance with its directions as to dates does not make a valuation list void, which was in fact signed and approved in time to be discussed and adjudicated upon, on the hearing of appeals against it at the General Assessment Sessions, and in such cases the justices cannot, under s. 35, order another list to be made. *Reg. v. Ingall*, 2 Q. B. D. 199; 46 L. J., M. C. 118; 35 L. T. 552; 25 W. R. 57.

— **Contents of—Mode of Valuation.**—Valuers employed by an assessment committee under 27 & 28 Vict. c. 39, s. 4, to value a farm, furnished a valuation list giving the estimated acreage of each of the several fields comprising the farm, but not the gross estimated rental or the rateable value of each or any of the fields separately, but giving these two last-named amounts in lump sums in the proper columns at the end of the several items comprising the entire farm:—Held, that such a list was sufficient, and in conformity with the requirements of the act of parliament, and that it was unnecessary to give the value of each individual field of the farm separately. *Rawlence v. Hursley Union (Guardians)*, 3 Ex. D. 44; 47 L. J., M. C. 31; 37 L. T. 503; 26 W. R. 81.

— **Gross and Rateable Value.**—In making out the valuation list under the above act, the gross value and rateable value, as defined by s. 4, of each hereditament, must be inserted, without reference to any privilege of being assessed on an exceptional principle of valuation. *Reg. v. Foundling Hospital (Governors)*, 7 L. R., Q. B. 83; 41 L. J., M. C. 41; 25 L. T. 562.

— **Houses not Let or Occupied.**—Houses finished and fit for occupation, but not let or occupied, which had been omitted in the valuation list made by the overseers under 25 and 26 Vic. c. 103, s. 14, are rateable hereditaments, and ought to be inserted in the valuation list

by the assessment committee. *Reg. v. Malden (Overseers)*, 10 B. & S. 323.

— **Charges for Making.**—An assessment committee required the overseers of one of their townships to make out and copy a valuation list under 25 & 26 Vict. c. 103, s. 26. The board of overseers passed a resolution that its clerks and collectors had no time to do the work required, and that certain persons should be employed for the purpose. The overseers obtained a resolution of the vestry that the expense of this employment, which had then been defrayed, should be charged upon the poor rates. The poor law auditor disallowed this charge, on the ground that the overseers' ordinary clerks and collectors ought to have done the work themselves:—Held, that by 27 & 28 Vict. c. 39, s. 7, when a vestry consents to such a charge, even after the expense has been defrayed, the auditor has no power to disallow it. *Reg. v. Chorlton-upon-Medlock (Overseers)*, 1 Q. B. D. 62; 45 L. J., M. C. 33; 33 L. T. 526; 24 W. R. 110.

A charge was made on the poor-rates for the expenses of a survey and valuation of the parish made under 6 & 7 Will. 4, c. 96, s. 3. In the bond creating the charge were inserted provisions for paying off not less than one-fifth of the sum charged, with interest, in each succeeding year, till the whole was repaid:—Held, that the charge under 6 & 7 Will. 4, c. 96, s. 3, was a charge on the rates generally, and might be enforced against the rates in years subsequently to the five years next after the making of the charge. *Reg. v. Hurstbourne Tarrant (Overseers)*, El., Bl. & El. 246; 27 L. J., M. C. 214; 4 Jur., N. S. 783.

— **When Vestry Clerk Employed.**—The duties of a vestry clerk under the Vestry Clerks Act (13 & 14 Vict. c. 57), s. 7, do not include that of preparing a valuation list under the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67); but the overseers may employ the vestry clerk to prepare such list, and if they do so, may charge his reasonable remuneration therefor, not limiting it to his actual disbursements, upon the poor-rate under the Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), s. 7. *Reg. v. Cumberlege*, 2 Q. B. D. 366; 46 L. J., M. C. 214; 36 L. T. 700; 25 W. R. 605.

— **Valuer Appointed by Committee.**—The assessment committee of a union acting under 25 & 26 Vict. c. 103, s. 14, directed the overseers of a township within the union to send in a valuation list within three months. Before the expiration of that time the committee appointed a valuer for themselves. Subsequently the overseers sent in their valuation, which the committee rejected as unsatisfactory. The valuer then made his valuation, which exceeded by one-sixth that of the overseers:—Held, first, that the power of the overseers to make the valuation was superseded by the appointment of the valuer by the committee. *Reg. v. Richmond*, 6 B. & S. 541; 34 L. J., M. C. 186.

Held, secondly, that the parish was not liable for the expense of the valuation made by the committee either as costs or as compensation. *Ib.*

Rate Books—Insertion of Names.—By a

local act, no person shall be qualified to be elected a commissioner under the act, unless at the time of his being elected he shall be rated in the rate made for the relief of the poor of a township. E.'s name was not in the last rate made previously to the declaration at the time it was allowed, but he came into occupation of premises after the rate was made, and his name was inserted, in the rate book, under 17 Geo. 2, c. 38, s. 12, before the day of election:—Held, that he was not rated within the meaning of the local act, and therefore was not qualified. *Reg. v. Edlowes*, 1 El. & El. 330; 28 L. J., Q. B. 84; 5 Jur., N. S. 469.

By a local act, the management of a parish and the relief of the poor were intrusted to trustees, but the vestry was to make the poor rates, and a collector was to collect them. The overseers had nothing to do with making the rates or their application:—Held, that the overseers were not the proper parties to whom a person who wished to have his name inserted on a poor rate should make application for that purpose. *Reg. v. Islington (Overseers)*, 32 L. J., M. C. 257; 11 W. R. 760.

Mandamus to Make Rate.—An overseer may sue out a writ of mandamus, commanding the churchwardens and overseers to make a poor-rate, and the writ need not state in express terms that a poor-rate was necessary. *Reg. v. Edlston (Churchwardens, &c.)*, 1 N. & P. 20; 2 H. & W. 429; *S. P.*, *Reg. v. Gadsby*, 1 N. & P. 572.

The rule for a mandamus, to concur in making a rate, is absolute in the first instance. *Id.*

2. ALLOWANCE AND PUBLICATION.

Necessity of.—A rate is not a complete and valid rate until allowance and publication. *Bushell v. Luckett*, 2 C. B. 111.

Allowance by Justices—Jurisdiction.—The allowance of a poor-rate by the justices is purely a ministerial act; and if the rate is good on the face of it, they cannot inquire into its validity. *Reg. v. Godolphin (Lord)*, 1 D. & L. 830; 1 New Sess. Cas. 1; 13 L. J., M. C. 57; 8 Jur. 574; *S. P.*, *Reg. v. Yarborough (Earl)*, 12 A. & E. 416; 3 P. & D. 491.

Where a poor-rate had been made by the overseers of a parish alone, there being also two churchwardens who had not been sworn in, and the justices had refused to allow it, as not being made by the majority of the parish officers, a mandamus to the justices to sign and allow the rate was granted. *Id.*

A mandamus to justices to allow a poor-rate is absolute in the first instance. *Id.*

A poor-rate which has not been allowed by two justices is a nullity, although there has been no appeal against the rate. *Fox v. Davies*, 2 Lutw. Reg. Cas. 97; 6 C. B. 11; 18 L. J., C. P. 48.

In allowing a rate two justices may act separately. *Reg. v. Hamstall Ridware*, 3 T. R. 380. And see *Wootton v. Harvey*, 6 East, 75.

Notice of.—The notice of allowance need not be signed, and therefore a notice signed only by an overseer and an assistant overseer is good. *Burnley v. Methley (Overseers)*, 1 El. & El. 789; 28 L. J., M. C. 152; 5 Jur., N. S. 914; 7 W. R. 422.

Publication—Notice of.—Notice of a publication of a poor-rate need not state that the rate has been allowed. *Paynter v. Reg. (in error)*, 10 Q. B. 908.

In Church—Next Sunday.—If a poor rate was not published in the church on the Sunday next after it was allowed under 17 Geo. 2, c. 3, s. 1, it was a nullity. *Reg. v. Newcomb*, 4 T. R. 368.

Notice of the allowance of a rate affixed, the next Sunday after allowance, to the door of the only church of the parish, previously to the commencement of the usual afternoon service, and after the conclusion of the usual morning service, is a sufficient publication. *Burnley v. Methley (Overseers)*, 1 El. & El. 789; 28 L. J., M. C. 152; 5 Jur., N. S. 914; 7 W. R. 422.

On what Doors and Buildings.—It is not necessary to publish a poor-rate on *all* the doors of any church or chapel, nor on the door of a church or a chapel in which divine service has ceased to be performed, nor on the door of any building, not being a church or chapel, in which divine service is performed. *Ormerod v. Chadwick*, 16 M. & W. 367; 2 New Sess. Cas. 697; 16 L. J., M. C. 143.

It is a sufficient publication, if a copy of it is affixed, before divine service on the Sunday next after its allowance, on the principal or most usual door of all the churches or chapels of the Established Church within the parish in which divine service is performed. *Id.*

In the same place, a room was hired for a school-house, in which divine service was regularly celebrated on Sundays, according to the rites of the Church of England:—Held, that it was not necessary to affix any notice on the door of the school. *Id.*

It is sufficient if the notice is affixed to the principal door of the church. *Id.*

Where District has its own Church.—Where a rate is made for a district within a parish, which district has its own church, and maintains its own poor; the rate is sufficiently published, if notice of it is affixed on the door of such church, although there are chapelries within the parish, having their own respective chapels, all which belong to some vicarage with the church. *Reg. v. Marriott*, 12 A. & E. 779; 4 P. & D. 440.

The notice need not be affixed at such chapels; nor at the church of a neighbouring parish in the same town, though the churches nearly adjoin each other, belong to the same vicarage, and are used indiscriminately by the same persons, the one being sometimes frequented by the congregation of the other while that is closed; and although many persons have rateable property in both parishes. *Id.*

Where more than one Established Church.—By 3 & 4 Will. 4, c. 90, for lighting and watching parishes, the overseers are required to proceed in the same manner for the purpose of collecting, raising and levying the rate under that act as for levying money for the relief of the poor. A lighting and watching rate was made for the township of Clitheroe, and written notice of it was affixed to the door of the church of St. Michael, in the township, which was stated to be the only place where rates had theretofore

been published. At the time of the publication of the rate, there were two other churches of the Established Church in the township of Clitheroe, on the doors of which no notice of rate was affixed:—Held, that the publication of the rate was insufficient. *Reg. v. Whipp*, 4 Q. B. 141; 3 G. & D. 372; 12 L. J., M. C. 64; 7 Jur. 194.

— **Where no Church or Chapel.**—By 17 Geo. 2, c. 3, s. 1, public notice of every rate for the relief of the poor shall be given in the parish church the next Sunday after the allowance of the rate by the justices, “and no rate shall be esteemed or reputed valid and sufficient so as to collect or raise the same unless such notice shall have been given;” and by 7 Will. 4 & 1 Vict. c. 45, a written notice, to be affixed on the doors of all the churches or chapels in the parish, is substituted for any notice theretofore by any law or statute given in churches or chapels. By 20 Vict. c. 19, s. 1, every extra-parochial place wherein no rate is levied for the relief of the poor shall for all purposes of assessment to the poor rate and the relief of the poor “be deemed a parish.” The overseers of a parish which, before the passing of 20 Vict. c. 19, was an extra-parochial place, made a rate for the relief of the poor, but did not publish any notice of the rate within the parish, in which there was no church or chapel:—Held, that the rate could not be collected. *Reg. v. Dyott*, 9 Q. B. D. 47; 51 L. J., M. C. 104; 30 W. R. 799; 47 J. P. 54. *But see now* 45 & 46 Vict. c. 20, s. 4.

3. IN WHAT PARISHES AND PLACES.

Parish, what is.—By 20 Vict. c. 19, s. 1, after the 31st December, 1857, every place entered separately in the report of the registrar-general on the last census, which now is, or is reputed to be, extra-parochial, and wherein no rate is levied for the relief of the poor, shall, for all the purposes of the assessment to the poor-rate, be deemed a parish. In the report, “Thornbury with Netherwood” was entered as one place, with the following note: “Netherwood, deemed extra-parochial, maintains its own poor, but pays church rate to Thornbury parish:”—Held, that Netherwood was not a “place entered separately,” and therefore was not to be deemed a parish for the purpose of the poor-rate. *Alyton v. Thornbury (Churchwardens and Overseers)*, 29 L. J., M. C. 109; 6 Jur., N. S. 341; 8 W. R. 275.

Accuracy of Locality.—W. appealed against a poor-rate by which he was rated in the parish of H., as occupier of land to an amount named and of a value named. The sessions affirmed the rate, subject to a case which stated that W. did occupy that quantity of land in H., and that it was of the value stated; but that he also occupied land in the adjacent parish of C.; and that it was not known which portion of the land was in H., and which in C., though the quantity occupied in each was known, and the value was rightly assessed whichever portion was in H.:—Held, that the rate should stand, the sessions not being bound to determine the particular portion which was within H. *Reg. v. Woods*, El., Bl. & El. 481; 27 L. J., M. C. 289; 4 Jur., N. S. 1233.

Usage—Particular Place.—The hamlet of T.

had for a hundred years past, and for anything that appeared to the contrary before that time, been rated to the poor and highway rates of the adjacent township of H., which maintained its own poor and highways separately, and together with another township formed the parish of H. On the other hand, the lands in T., from the earliest period, were titheable to the adjacent parish of K., as being situate in that parish, and the occupiers were rated to and paid church rates in that parish, and also Easter and other ecclesiastical dues, and never paid tithes, &c., to H.:—Held, that there was no ground for disturbing the long-established usage of rating T. to the poor-rates of H., as it was impossible to say that this usage could not have had a legal origin from the tithes having been severed from T. and conferred upon the parish of K., while T. itself was associated with H. as one township for rating purposes according to 13 & 14 Car. 2, c. 12. *Reg. v. Watson*, 37 L. J., M. C. 153; 18 L. T. 556; 16 W. R. 977; 9 B. & S. 219.

Allotments under Inclosure Act.—An inclosure act gave power to the commissioners to award in what townships the allotments should be assessed to the rates and taxes. They awarded that certain allotments, which before were within the district of H., were within the township of C.:—Held, that they did not thereby become rateable in C. *Fenton v. Boyle*, 1 Taunt. 344. And see *S. C.*, 2 N. R. 399.

On the inclosure of a waste in the parish of A., on which the landowners of B. had a right of common appurtenant, the allotments given in lieu of that right shall be assessed in the parish of A. *Kempe v. Spence*, 2 W. Bl. 1244.

In Aid of different Parish.—An order of justices for assessing contribution to the poor-rates, in aid of a parish situate in a liberty, upon a place also within the same, is warranted by 43 Eliz. c. 2, s. 3, when that is a division of country equivalent to a hundred. *Re v. Mil-land*, 1 Burr. 576; 2 Ld. Ken. 267.

An order for taxing one parish in aid of another, under 43 Eliz. c. 2, s. 3, is valid. *Re v. St. Helen, Worcester*, 2 East, 417.

— **Jurisdiction.**—County justices cannot rate a parish within their jurisdiction in aid of another parish, lying within a borough, which has an exclusive jurisdiction. *Re v. Holbeache*, 4 T. R. 778.

4. ON WHOM.

Resident Inhabitants.—“Inhabitant or other,” in 43 Eliz. c. 2, s. 1, means resident inhabitant or other inhabitants. *Re v. North Curry*, 7 D. & R. 424; 4 B. & C. 953.

— **Partners.**—Only one of several partners resided in a parish:—Held, that he must be rated in respect of his share only of the partnership property. *Re v. Gosse*, 7 B. & C. 236; 9 D. & R. 759.

II. PERSONS AND PROPERTY LIABLE.

1. OWNERS AND OCCUPIERS IN GENERAL.

a. Liability.

Of Occupier.—The poor-rate is not a tax upon the land, but a personal charge in respect of

the land. *Rouls v. Gells*, Cowp. 452; 1 Dougl. 304.

And the occupier is rateable by whatever tenure he holds. *Bute (Lord) v. Grindall*, 1 T. R. 343; *S. P., Rex v. Bell*, 7 T. R. 598.

Occupation by Servants or Agents.—Y. had been put into a dwelling-house, No. 157, Plymouth Grove, in the township of Chorlton, by his own master, who was one of the joint owners of the house, and in whose employment Y. had been for some time previously. At the time the dwelling-house was empty, and Y. was put into it with his wife and children, for the purpose of taking care of it while it was so empty. Y. was not otherwise in the employment of the said owners, and, except the benefit of living rent free with his wife and children in two rooms of the said dwelling-house, he received no remuneration for his services in taking care of the same. A. had been for some years previously in the employment of the joint owners of the dwelling-house, No. 163, Plymouth Grove. His duties were to look after and attend to any houses in the neighbourhood of Plymouth Grove belonging to the said owners, which might from time to time be vacant, to prevent trespass being committed thereon, to look after the gardens, and to show unlet houses to persons coming to see the same. The dwelling-house, No. 163, Plymouth Grove, being vacant, A. with his wife and children was put into it by the owners, as caretaker, performing the same duties to the owners as before. A. was liable and ready to leave the said house at the command of the owners at any time. Under these circumstances Y. and A. were assessed by the rating authority to the relief of the poor as occupiers of the said houses respectively. Upon appeal to the general quarter sessions of the peace for the city of Manchester, the recorder allowed the appeal, but stated two cases for the opinion of the court:—Held, that Y. and A. were not liable to be rated for the relief of the poor in respect of the said premises, on the ground that the occupation in each case was that of a servant and not that of a tenant. *Yates or Almond v. Chorlton-upon-Medlock Union*, 48 L. T. 872; 47 J. P. 630.

The residence in a lighthouse by a servant of the owner, at an annual salary to take care of the light, is the occupation of the master, who alone can be rated in respect of such occupation of the lighthouse. *Rex v. Tynemouth*, 12 East, 46.

The mere fact of an employer's paying the rent and taxes of his clerk, does not make the occupation of his clerk the occupation of his master; if the clerk is responsible to the landlord, he is, except under special circumstances, the occupier, and as such, liable to be rated. *Reg. v. Lynn*, 3 N. & P. 411; 8 A. & E. 370; 1 W., W. & H. 366; 2 Jur. 541.

S. was a collier, and resided in a house belonging to his employers, for which he paid no rent; he was not entitled to any notice to quit, and the occupation of the house would cease at the time when his service ceased. His employers had several houses, and they filled these up with their workmen in their discretion, giving preference to married men. A workman could not go into a house without the owner's concurrence. Some of the workmen were single men, and no house was given to them; these got the same wages as all other workmen, but no allowance for rent. If there were not sufficient houses an

allowance was made to the married men to assist them in paying their rent. If a house was vacant the owners would call upon a married man to go into it; if he did not go his allowance would cease. It was not absolutely necessary for a workman to live in one of the houses to perform his work. The employers of S. did not compound for their rates under 32 & 33 Vict. c. 41, but paid upon the full amount, and were rated to the poor as occupiers of the houses. The overseers of the township in which S.'s house was situate were summoned before justices for that they had negligently omitted to enter the name of S. in the occupier's column of the rate-book, contrary to 32 & 33 Vict. c. 41, s. 19:—Held, first, that the occupation by S. was not that of a servant, but that of a tenant. *Smith v. Seyhill (Overseers)*, 10 L. R., Q. B. 422; 44 L. J., M. C. 114; 32 L. T. 859; 23 W. R. 745.

Held, secondly, that 32 & 33 Vict. c. 41, s. 19, was not confined to the cases mentioned in ss. 3 and 4, but was of general application, and that S. was entitled to have his name entered in the occupier's column of the rate-book. *Id.*

One who went from home with his family for nearly a year, but left his assistant to carry on his business in his shop in one room of the house, which for this purpose was parted off by laths from the rest, and left the key of the house door with a friend, and had the garden cultivated for his own benefit as usual:—Held, that he was liable to be rated as occupier of the whole house. *Rex v. Aberystwith*, 10 East, 354.

Where Occupation a shifting one.—The owner of land under which there were coprolites granted to a company the exclusive right to dig, raise and carry them away. The company was to pay for this privilege 115*l.* per acre, and was to pay a minimum rent of 1,000*l.* per annum, payable quarterly, whether they worked out sufficient land to cover that rental or not. The land to be worked was taken by them bit by bit as they required it, but they were not entitled to have more than ten acres a year allotted to them, or to use the land for any purpose but that of digging and preparing the coprolites. After digging out the coprolites, more than a year was required to permit the land to dry, after which the subsoil was restored and levelled, the surface soil replaced, and the land again given over by the company to the agricultural tenant. Owing to the time required for this, the company was, at any period of time, in the occupation of ten acres, of which two and a half acres were in process of digging, one acre was occupied by mills, tramways, and other works, and the remainder had been worked out and was in process of drying, but the ten acres so occupied were continually shifting, as the company took land at one place to work, and restored it at another worked out. In this manner they actually worked out ten acres per annum. In an appeal against a poor-rate for the parish where the lands were situated, in which the rates were made quarterly:—Held, that the company was rateable, in each quarterly rate, upon ten acres of land, at the enhanced value, although the occupation was a shifting one, and although the company was never at one time in the profitable occupation of more than three and a half acres. *Reg. v. Whaddon (Overseers)*, 10 L. R., Q. B. 230; 44 L. J., M. C. 73; 32 L. T. 633; 23 W. R. 653.

Right to Dig for Coprolites.]—It was agreed between A. and B. that A. should forthwith enter upon B.'s land, and there dig for coprolites in a specified manner, and should effectually fence the excavations and complete them by a given time, and should reinstate the land, and then yield and deliver up the land to B. There were no express words giving a right to the exclusive occupation of the land; but the excavations and works contemplated by the agreement required a constant occupation of the land until the coprolites were raised, and the land could not be used for any other purpose from the commencement of the excavations until it had been reinstated, which could not be done for a year or more after the coprolites were raised. B. reserved to himself the right of going upon the land where the excavations were for the purpose of inspecting the works, but he was not required by the agreement to do anything upon the land.—Held, that A. had the right of exclusive occupation of the land, and that he was therefore liable to be rated to the relief of the poor in respect of such occupation. *Roads v. Trumpington*, 6 L. R., Q. B. 56; 40 L. J., M. C. 35; 23 L. T. 821.

Occupation on Default under Agreement.]—An agreement was entered into between the owners of certain limestone quarries and a canal company, whereby the former covenanted to deliver to the latter, yearly, for ever, as much limestone as they should require, in a merchantable state, paying 7d. per ton, with a stipulation that if the owners neglected to supply the stone required the company should themselves be at liberty to enter upon the quarries and work them, paying 2d. per ton to the owners; and the latter having made default, the company entered upon and worked the quarries on the terms stipulated.—Held, that they were not rateable occupiers of land. *Rez v. Trent Navigation Company*, 6 D. & R. 47; 4 B. & C. 57.

Temporary Occupation under Supervision of Owners.]—By an agreement between the royal commissioners for the Exhibition of 1862 and M., the former agreed, in consideration of certain money, that M. should have the right of selling refreshments while the Exhibition was open, on a space of 40,000 square feet at the least of the portion of ground occupied by the Exhibition. He was to fit up the space allotted to him with counters and fittings, to provide cellars, and to lay on gas and water. He was to be subject to the bye-laws and regulations made by the commissioners for the orderly conduct of the Exhibition, and the persons employed therein. Provisions were only to be brought in at specified times; he was to keep the space clean, and to remove the rubbish, &c., every night. All fittings and erections made by him were to become the property of the commissioners on the erection thereof. M. went into occupation under this agreement, and erected fixtures, counters, pipes, &c., and made cellars and drains. He continued to sell refreshments through the whole time the Exhibition was open. The keys of the doors opening from the refreshment-rooms into the Exhibition buildings were always kept by the police, employed by the commissioners, and the said police usually locked M. and his servants out every evening, and admitted them again in the morning; but during part of the time, he

had an entrance from the outside.—Held, that he was not liable to be rated, inasmuch as he had no exclusive occupation of the space so allotted to him. *Reg. v. Morrish*, 32 L. J., M. C. 245; 10 Jur., N. S. 71; 8 L. T. 697; 11 W. R. 960.

Barge attached to Posts in a River.]—The corporation of Oxford was the owner of the soil and bed of the river Isis. A boat club, composed of members of the University of Oxford, was possessed of a barge or house-boat floating on the river, and moored there at a distance of about thirty feet from the bank, by two iron rings fixed to the barge, and passing loosely and movably round two solid fixed posts driven into the bed of the river. These posts were of such a diameter as to allow the rings to pass freely up and down them, and to allow the barge to rise and fall with the water of the river. Between the barge and the bank four other posts were driven into the bed of the river, and the club was possessed of a movable frame of boards laid down on the top of these four posts, but not fixed either to them or the bank, so as to form a gangway from the barge to the bank. The posts had remained driven in the bed of the river without the express licence of the corporation for more than twenty years, and no rent had ever been paid by the club in respect of any of the posts. The barge was used as a means of access to boats, and as a dressing-room.—Held, that the club was not rateable as an occupier of the posts and of the barge attached to them. *Grant v. Oxford Local Board*, 4 L. R., Q. B. 9; 38 L. J., M. C. 39; 19 L. T. 378; 17 W. R. 76.

Sale of Grass and Right of Grazing.]—The appellant was the owner of certain land, and such land being unlet, he sold the grass upon it by auction. The conditions of sale described the sale as a sale of grass for a certain time, and set forth certain conditions under which the purchasers were to be entitled to turn cattle in to eat the grass. The conditions also provided that the purchasers should dress the dung, cut the thistles, and leave the fences in good repair. It was a term of the sale that the vendor should pay the rates and taxes. The appellant was rated to the poor-rate in respect of the land in question for a period coincident with part of the period for which the grass was sold. An application having been made to the justices to enforce the rate against him.—Held, that there was evidence that the appellant was the occupier of the land; that the effect of the sale of the grass was not to put the purchasers in occupation of the land, but merely to licence them to graze their cattle thereon; and that, consequently, the appellant was liable to be rated. *Mogg v. Yatton (Overseers)*, 6 Q. B. D. 10; 50 L. J., M. C. 17; 29 W. R. 74; 44 J. P. 748; 45 J. P. 324.

Right of Shooting severed from Occupation of the Land.]—Under 37 & 38 Vict. c. 54, s. 6, sub-s. 2, where the owner of land lets the right of sporting over part of the land, which he retains in his own occupation, the lessee may be rated in respect of the right of sporting. *Kenrick v. Guilefield (Overseers)*, 5 C. P. D. 41; 49 L. J., M. C. 27; 41 L. T. 624; 28 W. R. 372; 44 J. P. 202.

Series of Chambers or Blocks of Buildings.]

—An association was owner of certain chambers, consisting of seven blocks of building, each with an entrance door and a staircase. They contained altogether 117 sets of rooms, structurally divided, each with an outer door on to the staircase, and having no other communication with each other. The street door to each block was kept locked at night, and a porter, who was hired by the association, resided in each block, and had a key of and access to all the sets of rooms in the building for the purpose of a general superintendence, and as the servant of the occupiers. The form of agreement between the association and occupiers, contained the usual clauses in the lease of a separate house—such as power to the landlord to enter and paint, and to enter and see repairs carried out:—Held, that each set of rooms ought to be separately placed upon the valuation list of the parish, and each occupier separately rated to the relief of the poor. *Reg. v. St. George's Union Assessment Committee*, 7 L. R., Q. B. 90; 41 L. J., M. C. 30; 25 L. T. 696; 20 W. R. 179.

Railway Company—Stables.—A railway company granted to coal-owners the use of stables (situate within the premises of the railway station, and approachable only through the gates between the station and the public roads) underagreements containing the following terms: "In consideration of the London and North-Western Railway Company permitting us to occupy and use a stable for the accommodation of four horses at or near the C. station of the company, we undertake and agree that we will pay the railway company the clear monthly rent or sum of 11. 5s., without any deduction. And we undertake and agree, so long as we shall occupy or use the stable, to observe, perform, and be bound by the bye-laws, rules, and regulations which shall, for the time being, be issued or prescribed by the railway company for the government and use of their railway station, premises, and conveniences. And we further undertake and agree to give and deliver up possession of the stable at the expiration of one month after a notice in writing for that purpose." The railway company did not, in fact, exercise any control over or use any of the stables during the currency of these agreements; and none of the bye-laws, rules, or regulations of the company had reference to them:—Held, that under the circumstances, the railway company was properly rated for these stables as occupiers: for that on the true construction of the agreement, looking at the situation of the stables, it was the intention of the railway company to retain control over the stables, and not to part with the exclusive occupation to the coal-owners. *London and North-Western Railway Company v. Buckmaster*, 10 L. R., Q. B. 444; 44 L. J., M. C. 180; 33 L. T. 329; 24 W. R. 16—Ex. Ch. Affirming 10 L. R., Q. B. 70; 44 L. J., M. C. 29; 31 L. T. 835; 23 W. R. 160.

Bookstall on Platform—Exclusive Enjoyment.—By indenture the South-Western Railway Company granted to S. & S. (therein called "the tenants") for seven years "the sole and exclusive licence and privilege to vend, sell, lend, and exhibit for sale and loan, newspapers, books, periodicals, stationery, &c., and such other like

articles required for the convenience of passengers by railway, as should be approved by the secretary of the company, at all their stations," &c.; and also full liberty for the "tenants," subject to the approval of the engineer of the company, to erect and place bookstands, &c., on the platforms for exhibiting and keeping their books, &c., and to post and exhibit advertisements and placards on the station walls; and also full and free ingress and egress at all reasonable times for the "tenants," their servants and agents, to and from the several stations for the purposes of the grant. The persons employed by S. & S. were to be under the control of the station-master, and liable to immediate removal from the station in case of insobriety or misconduct. S. & S. were to pay the company certain fixed monthly rents, and also a percentage (quarterly) on the gross amounts received by S. & S. for the posting of the advertisements, &c., with a proviso that in case the rent or the quarterly payments should be in arrear for fourteen days after notice, the same should be recoverable by the company in addition to any other remedies, "by distress, as in the case of rent in arrear." And it was provided that the "tenants" should not vend or offer for sale, or exhibit or publish, any books or advertisements or placards of an indecent, immoral, or seditious character, or which should be forbidden by the company; and should abide by and observe the regulations from time to time made by the company touching the placing on the platforms any of the necessary bookstands; and the company warranted to the "tenants" "the quiet and peaceable enjoyment and benefit thereby granted for the period and upon the terms and stipulations and in manner aforesaid." S. & S. erected bookstands upon the platforms at W. station, and had the exclusive use of them; and these bookstands were closed at night with shutters, and were locked up, the keys being kept by their servants. No rights of ingress and egress to and from the station, or of access to the bookstands, were exercised by S. & S., or their agents or servants, except under the provisions and for the purposes of the indenture. The company were assessed to the poor-rate for the station generally:—Held, that S. & S. had no "exclusive occupation" of any portion of the platforms, so as to render them liable to be rated in respect of these bookstands. *Smith v. Lambeth Assessment Committee*, 10 Q. B. D. 327; 52 L. J., M. C. 1; 48 L. T. 57; 47 J. P. 244—C. A. Affirming 9 Q. B. D. 585; 50 L. J., M. C. 106; 31 W. R. 31; 46 J. P. 599.

Advertisement Hoardings.—When a person, in consideration of a yearly payment, had permission from the owner of land to affix to such land hoardings for advertising purposes, and such hoardings were accordingly affixed, but not in such a way as to necessitate any disturbance of the soil if they were removed, or as to indicate any intention on the part of the owner that there should be a permanent occupation of any part of the land by the person erecting the hoarding:—Held, that such person was not rateable as an occupier of an advertising station, and that his name was therefore wrongly inserted in the supplemental valuation list of a metropolitan parish. *Reg. v. St. Pancras Assessment Committee*, 2 Q. B. D. 581; 46 L. J., M. C. 243; 37 L. T. 126; 25 W. R. 827.

Rifle Range and Sheds.—Under the provisions of a special act of parliament the conservators of Wimbledon Common were to permit the National Rifle Association to occupy from year to year as a rifle shooting ground and place for an encampment for the purposes of the annual rifle meeting any part of a specified area of the common, together with the butts, targets and other conveniences for rifle shooting for the time being thereon. The occupation was not to be for more than seventy-seven consecutive days in each year, which days were not to commence earlier than the 1st of May, and were to terminate not later than the 31st of August. The association was empowered to put up a paling round the part occupied by them, and to erect temporary buildings. Prior to the passing of the special act, the association erected butts for shooting and also a store shed, used for the storage of materials, except during the annual meetings, when it was intended to be used as a workshop for the repairs of targets, &c. By the terms of the act, the association was not to acquire any right in or easement over any part of the common, and was to be deemed to be merely in the enjoyment of a statutory privilege over the common. On the 27th of March last, before the period of occupation in that year commenced, a poor-rate was made for the parish of Wimbledon, in which the association was rated in respect of the area, the butts and the store shed:—Held, that with respect to the area and the butts there was no such exclusive occupation as to render them liable to a poor-rate, but that with respect to the store shed which was occupied by them for their own purposes throughout the year they were liable. *Mildmay v. Wimbledon (Churchwardens and Overseers)*, *Reg. v. Surrey (Justices)*, 41 L. J., M. C. 133; 27 L. T. 265; 20 W. R. 986.

Stall in Market—No Right to definite Portion of Ground.—The appellant rented two stalls in Bodmin market year by year at a rent payable weekly. The stalls in question had been put up to auction and were bought by the appellant and used by him on market-days. The stalls thus rented were capable of being removed, and there was no agreement that they should always stand on the same identical spot, though the appellant had a right to retain the same relative position in the row:—Held, that there was no such occupation of the stall as rendered the appellant liable to be rated under 43 Eliz. c. 2, he having acquired only the right to a given stall in a given row, and not the right to place one on any definite portion of ground. *Spear v. Bodmin Union*, 49 L. J., M. C. 69; 43 L. T. 127; 44 J. P. 764.

Occupier going out before Rate wholly discharged, and leaving Premises unoccupied.—An occupier assessed in a poor-rate, but who ceases to occupy before the rate has been wholly discharged, is not relieved by 32 & 33 Vict. c. 41, s. 16, from liability to pay the whole rate, unless some one succeeds or comes into the occupation who is liable to pay a proportionate part of such rate; and semble, that such occupier remains liable to the whole rate until the name of some one liable to be assessed is substituted for his in the rate book. The Metropolitan Board of Works purchased Putney

Bridge of the Fulham Bridge Company, who transferred the bridge to the board under the provisions of an act of parliament, which required the tolls in respect of the bridge to cease, and enacted that the bridge should be open free to the public, and should be maintained by the board, the justices of Surrey paying an annual sum to the board in discharge of the liability of that county to maintain the bridge. Before the transfer, the Fulham Bridge Company received tolls for the passage over the bridge and were duly assessed to the poor-rate in the parish of Putney in respect of the bridge, and at the time of the transfer there remained undischarged a rate for which the bridge company had been so assessed, and which had been made by that parish for a period extending beyond the transfer:—Held, that the board had no beneficial occupation of the bridge in respect of which they were capable of being rated, and that, therefore, as there was no succeeding occupier liable to be rated, the bridge company remained liable for the whole rate. *Hare v. Putney (Overseers)*, 7 Q. B. D. 223; 50 L. J., M. C. 81; 45 L. T. 337; 29 W. R. 721; 46 J. P. 100—C. A.

The 16th section of 32 & 33 Vict. c. 41, relieving the occupier who was in occupation at the time of making the rate, but who has gone out before it was wholly paid, from the rate except in proportion to the time he has occupied, applies only to the case where there is an incoming occupier, and not where the premises are left unoccupied. *St. Werburgh, Derby (Overseers) v. Hutchinson*, 5 Ex. D. 19; 49 L. J., M. C. 23; 42 L. T. 153; 28 W. R. 153.

P. was the owner of grass lands and his tenant quitted on 11th October, 1881. A rate was made on the 25th October, 1881, stating the previous tenant as still occupier. Another rate was made on 25th April, 1882, stating the occupier blank. On 7th July, the land still being unlet, P. entered and cut the grass and stacked the hay, and offered to pay the rate as from 7th July, but the overseers insisted on both rates being paid entire from 11th October, 1881, and entered P.'s name as occupier from that date. The justices found that P. occupied all the time and issued a distress warrant:—Held, that the occupation commenced from 7th July only, and that the overseers had no power retrospectively to enter P. as occupier before that date. *Pembroke v. Wye (Overseers)*, 47 J. P. 359.

Owner rated instead of Occupier—"Sturges Bourne's Act."—The owner of a house let "on any agreement by which the rent is reserved or made payable at any shorter period than three months," cannot be assessed to the poor-rates instead of the actual occupier under Sturges Bourne's Act (59 Geo. 3, c. 12), s. 19, if the rent is at a rate which amounts to more than 20l. by the year. *West Ham (Overseers) v. Iles*, 8 App. Cas. 386; 52 L. J., Q. B. 650; 49 L. T. 205; 31 W. R. 928; 47 J. P. 708—H. L. (E.). Affirming 8 Q. B. D. 69; 51 L. J., Q. B. 17; 46 L. T. 149; 30 W. R. 303; 46 J. P. 660—C. A.

— **Small Tenements Act, 13 & 14 Vict. c. 99.**]

—Six persons each occupied a room in a six-roomed dwelling-house in a parish within a parliamentary borough, and had the use in common of the street-door, passage, staircase and domestic

conveniences; the owner did not occupy any part of the premises, nor retain any control over the tenants, each of whom had the exclusive possession of his own room. At the time of the passing of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), the owner was rated in respect of the whole house, instead of the occupiers, by virtue of the Small Tenements Act. After the passing of the Representation of the People Act, the overseers made a rate, in which each of the six occupiers was separately rated:—Held, that the owner of the house was, and not the several occupiers were, rateable: for that the house came within the exception in s. 7. *Stamper v. Sunderland-near-the-Sea (Overseers)*, 3 L. R., C. P. 388; 37 L. J., M. C. 137; 18 L. T. 682; 16 W. R. 1063.

—**Adoption of the Act.**—The inhabitants of a parish met in vestry, and drew up the following document: "A meeting was held this day at W., for the purpose of carrying out the provisions in 13 & 14 Vict. c. 99, for the better assessing and collecting the poor-rates upon small tenements situate within the parish, and it was agreed that the same should be carried out in the parish:—"—Held, a valid order for the adoption of the act. *Bavin v. Hutchinson*, 31 L. J., M. C. 229; 6 L. T. 604; 10 W. R. 807—Ex. Ch.

Effect upon "Rateable Value."—The amount to be inserted in the column headed "Rateable value" of the valuation (in a parish which has adopted the Small Tenements Rating Act), under 25 & 26 Vict. c. 103, is the true rateable value of the property, independently of whether such property is subject to the provisions of the Small Tenements Act or not. *Sunderland-near-the-Sea (Overseers) v. Sunderland Poor Law (Guardians)*, 18 C. B., N. S. 531; 34 L. J., M. C. 121; 11 Jur., N. S. 688; 13 L. T. 239; 13 W. R. 943.

—**Under Poor Rate Assessment and Collection Act.**—By the Poor Rate Assessment and Collection Act (32 & 33 Vict. c. 41), s. 19, the overseers in making out the poor-rate shall in every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier, enter in the occupiers' column of the rate-book the name of the occupier of every rateable hereditament, and such occupier shall be deemed to be duly rated for any qualification or franchise as aforesaid:—Held, that this applies only where the owner has entered into "an agreement in writing with the overseers to become liable to them for the poor-rate," according to s. 3, or where there has been an order by the vestry under s. 4, for rating the owner instead of the occupier, and therefore where there has been neither such agreement nor order, an occupier of part of a house, who is jointly rated with the occupiers of the rest of the house for the rateable value of the whole house instead of being only separately rated for the value of the part occupied by him, is not to be deemed duly rated for a borough qualification so as to satisfy the Representation of the People Act, 1867, s. 61, which requires part of a house to be separately rated to the relief of the poor in order to be a dwelling-house within the meaning of that act. *Cross v. Alsop*, 6 L. R., C. P. 815; 40 L. J., C. P. 53; 23 L. T. 589; 19 W. R. 131; 1 Hopw. & C. 444.

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Proprietor of Theatre.—A local act enacted that the yearly sum of 250*l.* should be charged upon the houses of the inhabitants of St. Paul's, Covent-garden, except Bedford-house, for the support of the rector, curate, clerk, and sextons. Another local act, repealing the former, enacted, that, in lieu of the sum of 250*l.*, the yearly sum of 520*l.* should be charged upon all houses within the parish of St. Paul; and that such rates and assessments should be paid by the respective occupiers of such houses:—Held, that the word "houses," in these acts, *prima facie* meant dwelling-houses; and that the proprietors in possession of Covent-garden Theatre, in which no person slept or resided, and who did not themselves reside within the parish, were not liable to be rated for the same. *Surnam v. Darley*, 14 M. & W. 181; 14 L. J., M. C. 145.

Lessee of a Private Box.—By a local act, poor-rates might be assessed for a parish "upon all and every person or persons who do or shall inhabit, hold, occupy, possess or enjoy any land, house, shop, wharf, warehouse or any other buildings, tenements, or hereditaments, or any person or persons who by law is or are chargeable to the relief of the poor:—"—Held, that a lessee for a term of years of a private box in Drury-lane Theatre was rateable. *Rdg. v. St. Martin's-le-Grand or in-the-Fields*, 2 G. & D. 426; 3 Q. B. 205; 6 Jur. 850.

Owner occupying Part of House.—If the owner of a house occupies part of it, he is liable to be rated for the whole, unless there is a distinct occupation of the rest by some other person. *Rees v. Mary-the-Less (Durham)*, 4 T. R. 477.

Furnished House—Let or Unlet.—The owner of a house in Dublin furnished it suitably for letting. The house so furnished was occasionally let; but during certain intervals of time remained unlet and unoccupied, except by the furniture which remained in it:—Held, that he was liable to rates in respect of the premises, both while the house was let and while it was so unlet. *Staunton v. Powell*, 1 Ir. R., C. L. 182—Ex. Ch.

Unoccupied House.—By 17 Geo. 2, c. 38, s. 12, where any person shall come into or occupy any house, out of which any other person assessed to any poor-rate shall be removed, or which at the time of making the rate was empty or unoccupied, every person so removing from, and every person so coming into or occupying the same shall be liable to pay such rate, in proportion to the time that such person occupied the same respectively. A poor-rate for eleven months having been made on the appellant on the 25th of October, 1866, in respect of a house which he was then occupying, he went out of occupation on the 8th of November following; the house remained unoccupied till the 10th of May, 1867, when a new tenant entered:—Held, that the appellant was liable to pay to the rate for the time the house remained unoccupied as well as for the fourteen days during which he occupied it. *Edwards v. Rusholme (Overseers)*, 4 L. R., Q. B. 554; 38 L. J., M. C. 153; 17 W. R. 821.

Houses newly erected and not yet occupied are rateable hereditaments within the Union

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Assessment Act (25 & 26 Vict. c. 103), and ought to be inserted in the valuation lists. *Malden (Overseers) v. Reg.*, 4 L. R., Q. B. 326; 38 L. J., M. C. 125.

A local act of parliament gave a corporation power to levy rates "on the occupiers of all such kinds of property as by the laws in force for the time being are assessable to any rate for the relief of the poor :"—Held, that the owners of unoccupied and unfurnished premises were not liable. *Sligo Corporation v. Wyane*, 7 Ir. R., C. L. 465.

— **Disused Mill.**—A cotton mill, owing to depression in the cotton trade, was no longer worked, but was maintained at some expense as a factory, with its machinery in a fit state for working when the trade should revive :—Held, that the occupiers were rateable for the mill, and that the rate should be made upon its annual value as a storehouse for the machinery in it, and not upon an estimate of the rent which might fairly be expected for it, if let for a reasonable term of years, with the prospect of improvement in value. *Staley v. Castleton (Overseers)*, 5 B. & S. 505; 33 J. J., M. C. 178; 10 Jur., N. S. 1147; 10 L. T. 606; 12 W. R. 911.

In March, 1863, the owner of a silk mill gave up his business with the intention of never resuming it, and the mill had not since been worked, but, with the machinery and other articles and things in it, had been advertised for sale. All the contents of the mill were essential articles and things for a tenant to have in working it for the manufacture of silk. The machinery, some of which was affixed to the floors and ceilings, was in the nature of tenants' fixtures. A man occasionally went to the mill in order to protect the property against trespass or depredation :—Held, that the owner of the mill was rateable for the mill, but only upon its annual value as a warehouse for the machinery, articles, and things in it. *Harter v. Salford (Overseers)*, 6 B. & S. 591; 34 L. J., M. C. 206; 11 Jur., N. S. 1036; 13 W. R. 861.

When Tenant excused from Rate.—A landlord cannot be rated in respect of houses let to tenants, who have been excused their rates on account of poverty. *Re v. Hull Dock Company*, 5 D. & R. 359; 3 B. & C. 516.

Assessment of Company and Liquidator—Liability for Liquidator on Distress.—A poor-rate was made upon premises which had been occupied by a joint-stock company, then being wound up by order of the court, and whilst the official liquidator was carrying on the company's business on the premises. In the rate-book the name of the company appeared, and also the name of the liquidator, with the description of "official liquidator." Upon non-payment of the rate, application was made to a magistrate for a distress warrant upon the liquidator's goods and chattels, but was refused :—Held, upon a rule to compel the magistrate to issue the warrant, that whether or not the liquidator was in form rated as the occupier of the premises, he was not such an occupier as to be liable for the rate in respect of his personal goods and chattels, and that the court would not compel the magistrate to issue his warrant. *Reg. v. Curzon*, 46 L. T. 159; 30 W. R. 521; 47 J. P. 37.

Serjeants' Inn — Special Provisions.—Dis-

putes having arisen between Serjeants' Inn and the parish of St. Dunstan as to whether or not the inn was part of that parish and liable to the parochial burthens there, it was agreed, under the sanction of a private act of William 4, that the inn should pay the parish 80*l.* a year, and that the parish should accept that sum as "a full satisfaction and discharge of all poor-rates from time to time due or claimed to be due in respect of the inn :"—Held, that this special bargain was not repealed or affected by the Representation of the People Act, 1867 (30 & 31 Vict. c. 107), s. 7, or the Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 27, or by any of the intermediate general acts for the regulation of parishes or the assessment or collection of poor-rates therein. *Thorpe v. Adams*, 6 L. R., C. P. 125; 40 L. J., M. C. 52; 23 L. T. 810; 19 W. R. 352.

b. Mode of Assessment.

Rateable Value, what is.—The occupiers of property capable of a beneficial occupation are liable to be rated in respect of its full rateable value, without regard to the amount of benefit which they themselves derive from that occupation. *Reg. v. Rhymney Railway Company*, 4 L. R., Q. B. 276; 38 L. J., M. C. 75; 17 W. R. 530; 10 B. & S. 198.

In assessing premises the overseers should proceed on the estimate, not of the rent actually paid for the premises by the occupier, but of the rent at which they might reasonably be expected to let from year to year. *Hayward v. Brinkworth, Wilts (Overseers)*, 10 L. T. 608.

Three farms were let at a certain sum annually. They might, however, reasonably have been expected to let, and might have let, at a larger sum. The overseers assessed their occupiers at the rent actually paid by them :—Held, that they were wrong; that they should have adopted the larger sum, viz. the rent at which the farms might have been reasonably expected to let, as the estimate of the net annual value. *Id.*

Enhanced Value—Brewery and "Tied Houses."—A. being owner of a brewery, and also of thirty-three public-houses, not all situated in the same township as the brewery, demised to B. the brewery, together with the goodwill and trade of the public-houses, for seventeen years; B. yielding and paying for and in respect of the brewery, 300*l.*, and for and in respect of the goodwill and trade of the public-houses, 150*l.* B. occupied the brewery, and, under the contract contained in this lease, was enabled to compel the lessees of the several public-houses to purchase their beer at the brewery; and it would have been a breach of the contract between B. and A. if their custom had been diverted elsewhere. The public-houses, in consequence of this agreement, fetched less rent than they would have done if the occupiers had been free to get their supplies where they would; and the advantage of their compelled custom to the occupier of the brewery was worth 150*l.* a year :—Held, by Lord Campbell, C. J., and Crompton, J., that he was properly rated of the enhanced value, it being an advantage connected with the occupation, which would be taken into calculation by a tenant in estimating the annual rent; and that it was not material that the origin of this advantage was in a personal contract: Erle, J., dissentiente,

and holding that this advantage was not an incident to the occupation, properly to be taken into account in estimating the rent, but a personal contract, transitory with the persons of the contractors, and only accidentally connected with the hereditaments so occupied. *Allison v. Monkwearmouth Shore (Overseers)*, 4 El. & Bl. 13; 23 L. J., M. C. 177; 18 Jur. 1075. *S. C., Reg. v. Allison*, 2 C. L. R. 1544.

In a parish were certain breweries, the occupiers of which were possessed, as owners or lessees, of a number of public-houses known as "tied houses," some of which were in the parish and some in other parishes. These public-houses were let to tenants at a smaller rent than they would have been let at if they had been free public-houses, the tenants being bound by contracts with the landlords to purchase from them all the malt and other liquors consumed in their houses, and so, probably, paying a higher price for their liquors than they would have paid had they been free. In valuing these breweries and public-houses for the purpose of making the valuation list, under 25 & 26 Vict. c. 103, s. 14, the overseers applied to them the same principles of valuation as to the other rateable hereditaments in the parish, pursuant to 6 & 7 Will. 4, c. 96, s. 1. The union assessment committee having ascertained that the overseers, in arriving at the gross estimated rental and rateable value of the breweries, had not taken into their consideration the advantages which the occupiers of such breweries derived from the before-mentioned contracts with their tenants, the publicans, and having obtained the numbers of such tied public-houses attached to each brewery, increased the gross estimated rental and the rateable value of such breweries by such an increased sum as the committee in their opinion considered the breweries might reasonably be expected to let for, with the advantages attending the contracts with the tied public-houses. They, however, made no reduction in the valuation list in respect of the several tied public-houses:—Held, that the union assessment committee had done wrong in so increasing the rateable value of the breweries, such rateable value not being affected by these personal contracts with the tenants of the tied public-houses. *Sunderland (Overseers) v. Sunderland (Union)*, 18 C. B., N. S. 531; 34 L. J., M. C. 121; 11 Jur., N. S. 688; 13 L. T. 239; 13 W. R. 943.

Held, also, that the rateable value of the public-houses was not to be decreased by reason of the burthen cast upon the tenants by their contracts with the brewer landlords. *Id.*

— Under the Small Tenements Rating Act.]

—In making out the valuation list in a parish which has adopted the Small Tenements Rating Act (13 & 14 Vict. c. 99), the reduction to be made under 14 & 15 Vict. c. 39, ss. 3 and 4, to the owners of small tenements who are rated instead of the occupiers, should be made, not from the rateable value of the hereditaments assessed, but from the rate in the pound to be levied and collected. *Id.*

Estimate of Rent—How made—Brickfield.]—On appeal against a poor-rate by an occupier of a brickfield, a case was stated, shewing that he held the land (ten acres) for the purpose of getting from it clay to make bricks, under a lease for seven or fourteen years, or till the

earth should be all dug out; that he paid 2l. per acre, without reference made to the use of the land, and the royalty of 1s. 6d. for every 1,000 bricks moulded in any one year; that the value of land in the parish let for agricultural purposes was 2l. 6s. a year; that he had on the field four brickmaking stools, each stool capable of producing 750,000 bricks; that the field originally contained sufficient clay for 31,000,000 of bricks; that in the year before the rate was laid, he had nearly 3,000,000, and that there remained clay enough for 12,000,000. The sessions also found that the rent which a tenant would have been willing to pay, on taking a lease of the premises, with liberty to consume the brick-earth, and without being liable to royalty, was 10l. per acre; and they confirmed the rate by which he was assessed at 2l. 6s. per acre, and for royalty 1s. 6d. per 1,000, on as many bricks as the stools were capable of producing in a year:—Held, that the rent, estimated according to 6 & 7 Will. 4, c. 96, s. 1, was the proper criterion of the rate on this property. *Reg. v. Westbrook*, 10 Q. B. 178; 2 New Sess. Cas. 599; 16 L. J., M. C. 87; 11 Jur. 515.

And assuming the above facts to have appeared without any specific finding as to the rent which a tenant would be willing to pay:—Held, that the royalty, together with a fixed annual charge, was properly considered as the rent; that the payment in respect of the brick-earth was not the less a rent because the subject-matter of the renting was in a course of being wholly consumed; that, in absence of proof to the contrary, the sessions were right in assuming the number of bricks, which the stools could make, to have been actually made within the year of rating; that the rate was properly assessed on the number supposed to remain in the particular year; and that no deduction was to be made for the breeze, ashes, and other materials used in making the bricks, it being presumable that these were allowed for in fixing the royalty. *Id.*

Held, also, that the sessions having found specifically the sum which a tenant would give on taking a lease with liberty to consume the earth, and without a royalty, namely, 10l. a year per acre, that sum (from which tenants' rates and taxes were to be deducted) must be considered as the rent, within 6 & 7 Will. 4, c. 96, s. 1, and no inference from other facts was admissible. *Id.*

In another case not materially differing, but in which the sessions neither expressly stated the rent which, in their opinion a tenant might reasonably be expected to pay, nor gave data for estimating it, except by stating the number of stools at work, and the amount of royalty actually paid (under an agreement still subsisting) in the five years immediately before that for which the rate was made; and the question propounded was, What is the net annual value of the land?—Held, that the fixed sum paid for occupation and the royalty constituted the rent; but that the court could not determine the amount which, at the time of making the rate, a tenant about to take a lease might reasonably be expected to pay; nor, in the absence of materials for such estimate, could the assessment be grounded on the ordinary amount of rent paid for land in the parish used for agricultural purposes, or the amount paid for the best garden ground in the parish

Reg. v. Everist, 10 Q. B. 178; 2 New Sess. Cas. 599; 16 L. J., M. C. 87; 11 Jur. 515.

— Interest Paid by Lessees on Borrowed Money.]—Commissioners of a navigation having borrowed 28,000*l.* on mortgage, and being still in want of funds, agreed to let the navigation and tolls for ninety-nine years, the lessee undertaking to pay the interest of the 28,000*l.* An act was afterwards passed confirming the agreement, and empowering the commissioners to lease the navigation and tolls for the remainder of the term to the persons entitled under the former agreement; and enacting, that they should pay the interest of the 28,000*l.* yearly to the mortgagees, in default of which the commissioners might require the toll collector to pay such interest to the mortgagees out of the moneys in his hands:—Held, that the interest paid by the lessees was in substance a rent, and that the rate ought to be calculated upon it; and that the lessees were not occupiers under a beneficial lease, though the interest was only about 1,400*l.* a year, and the annual earnings at the time of making the rate were 3,418*l.* (from which, however, about 1,000*l.* was to be deducted for repairs, &c.), one year's value being no criterion, and there being no proof that the rent was unduly small. *Rez v. Chaplin*, 1 B. & Ad. 926.

— Actual Profits.]—The occupiers of cement works, and also of a chalk pit situated close by, were assessed separately as to their works and their pit. There were other equally good chalk pits in the neighbourhood, the chalk from which was used only for ballast and other purposes not so profitable as that of manufacturing cement, for which the occupiers used theirs. They appealed to quarter sessions against the assessment of the chalk pit; and the counsel who supported the rate, proposed to ask their manager for information as to the profits they obtained from the chalk, but the quarter sessions refused to admit evidence upon that subject:—Held, that the quarter sessions were right, and that although the convenience and situation of the chalk pit were to be considered in estimating what rent a tenant would reasonably pay, the actual profits derived by the occupiers were not material in forming that estimate. *Reg. v. Aylesford Union*, 26 L. T. 618.

Cotton Mill—Working Stopped.]—A cotton mill, owing to depression in the cotton trade, was no longer worked, but was maintained at some expense as a factory, with its machinery in a fit state for working when the trade should revive:—Held, that the occupiers were rateable for the mill, and that the rate should be made upon its annual value as a storehouse for the machinery in it, and not upon an estimate of the rent which might fairly be expected for it, if let for a reasonable term of years, with the prospect of improvement in value. *Staley v. Castleton (Overseers)*, 5 B. & S. 505; 33 L. J., M. C. 178; 10 Jur., N. S. 1147; 10 L. T. 606; 12 W. R. 911.

In March, 1863, the owner of a silk mill gave up his business with the intention of never resuming it, and the mill had not since been worked, but, with the machinery and other articles and things in it, had been advertised for sale. All the contents of the mill were essential articles and things for a tenant to have in working for the manufacture of silk. The machinery,

some of which was affixed to the floors and ceilings, was in the nature of tenants' fixtures. A man occasionally went to the mill in order to protect the property against trespass or depredation:—Held, that the owner of the mill was rateable for the mill, but only upon its annual value as a warehouse for the machinery, articles, and things in it. *Harter v. Salford (Overseers)*, 6 B. & S. 591; 34 L. J., M. C. 206; 11 Jur., N. S. 1036; 13 W. R. 861.

Machinery increasing Value of Premises.]—In a rate laid upon buildings, to which machinery is attached for the purpose of manufacture, the real property ought to be assessed according to its actual value as combined with the machinery, without considering whether the machinery is real or personal property, and liable, or not, to distress or seizure under a *fi. fa.*, or whether it would go to the heir or executor, or, at the expiration of a lease, to the landlord or tenant. *Reg. v. Guest*, 7 A. & E. 951; 2 N. & P. 663; W., W. & D. 651.

A gaslight company laid down pipes in a parish, the soil not belonging to the company, and manufactured the gas out of the parish. In the valuation of their property they were entered for their mains, pipes, &c., for the value at which they would let, and for the land at the value of the land for a pipe-way. In certain houses of the parish there were steam-engines and other machinery affixed to the houses. These houses were valued at what they were worth to let, without reference to the value which they derived from the engines, &c.:—Held, that the valuation was bad. *Rez v. Birmingham and Staffordshire Gas Light Company*, 6 Ad. & E. 634.

Fixtures.]—The occupiers (not being owners) were rated for them to the poor as for "chemical works, lands, and buildings." Parts of the works consisted of chambers used for the manufacture of sulphuric acid. The chambers were vessels of sheet lead, weighing each several tons, 13 feet high, 13 feet wide, and from 40 to 60 feet long, the lower part forming a dish 12 inches deep, in which the acid was deposited, the upper shutting down upon the lower, and receiving vapour. They stood in the open air, each was surrounded by walls of strong masonry, forming an oblong, which was filled up with sand, and the chamber rested on the sand, being also supported by and riveted to a frame of wood, which ran round the tops of the walls. In some instances the wooden frame was laid in mortar on the tops of the walls, in others it merely rested upon them. At each end of the chamber was a pipe to convey gases and vapours in and out. Each pipe was fixed at its extremity into buildings which were part of the freehold. Where the pipes entered and passed out of the chamber, the lead of the chamber was beaten round the pipe, and the insertion was made vapour-tight by luting. Steam (necessary to the manufacture) was conveyed into the chamber also by a pipe which passed from the boiler, and was riveted to the wooden framework. The boiler was affixed to the freehold, and the pipe to the boiler. Every pipe might be removed by taking it to pieces, or by unfastening the rivets, without injury to the freehold, and then the chamber would rest on the ground by its mere weight, and might, with sufficient force, be lifted from the soil without displacing any part of the freehold. The sessions found

that the chambers were attached to the freehold in manner before mentioned, but not affixed thereto:—Held, that assuming the chambers not to be so annexed as to form part of the freehold, yet being fixed machinery attached to buildings, and necessarily so attached for the purpose of being used, they were properly considered in a rate as increasing the rateable value of the buildings, and a rate calculated on such increased value was confirmed. *Reg. v. Haslam*, 17 Q. B. 220; 15 Jur. 972.

The premises of a distillery contained tanks which formed the roofs of rooms and houses, boiling backs and mash tuns, lying on brick piers against the walls, which formed the floors of some of the rooms and were connected by pipes to other houses, reservoirs and other articles necessary for the process of distilling. They were all heavy, and either unattached, except by the communicating pipes, to the walls or piers upon which they stood, or fastened only by screws for the purpose of being steadied. Each was to be bought and sold as a separate article, and if all were removed the premises might be used for other manufacturing purposes:—Held, that these articles were not fixtures, and could not be properly rated in the assessment of the premises to the poor-rate. *Chidley v. West Ham (Churchwardens)*, 32 L. T. 486.

Refreshment Rooms at Railway Station—Evidence of actual Profits.—The refreshment-rooms upon a railway station having been let to a contractor for a term of years at a fixed annual rent, he appealed against a poor-rate made upon him as occupier of the premises, and at the hearing of the appeal sought to prove by his own testimony, and by his account-books, shewing the receipts and expenditure during the past year in respect of the refreshment-rooms, that the business was carried on at a loss, and that the rent reserved did not represent the true annual value of the premises:—Held, that such evidence ought to have been received as an element in ascertaining the rateable value. *Clark v. Fisherton-Angar (Overseers) or Alderbury Union*, 6 Q. B. D. 139; 60 L. J., M. C. 33; 29 W. R. 334; 45 J. P. 358.

Canteen—Money paid for Privileges.—Where a canteen in barracks was demised to B. by the barrack board for a year, at a rent of 15*l.* for the canteen and buildings, and also the further sum of 510*l.* for the privilege of using the same as a canteen, and selling therein provisions and liquors, usually sold by sutlers, with power of distress for the aggregate sum:—Held, to be one entire rent for the canteen; and therefore that B. was rateable, as occupier of the canteen, in respect of the 525*l.* aggregate rent, and not merely in respect of the 15*l.* *Reg. v. Bradford*, 4 M. & S. 317.

Right of Shooting.—The appellant was the owner and occupier of certain woodlands which were included in the rate. He used the lands as woods or plantations, and also enjoyed the right of sporting over them. The overseers, in assessing the property, added a fixed sum of 2*s.* per acre to the natural and unimproved value of the woodland in respect of the right of sporting:—Held, that by 37 & 38 Vict. c. 54, s. 4, sub-s. a, this mode of rating was right, as the sporting enhanced the value of the occupation. *Eyton v.*

Mold (Overseers), 6 Q. B. D. 13; 43 L. T. 472; 29 W. R. 122; 45 J. P. 54.

Rent of Cows and Right of Grazing.—Where the farmer is rated for the whole farm, it is no ground of objection to the rate by a third person, that a dairyman who rented under him his stock of cows to be depastured on the same land, was not rated for such dairy. *Reg. v. Brown*, 8 East, 528.

Racecourse—Discovery of Profits.—In ascertaining the rateable value of land used as a racecourse, the assessment committee may call for the books of the racecourse proprietors, or give affirmative evidence of the amounts of the profits made, the profits being a material element, though not a test, in determining the rateable value. *Reg. v. Verrall*, 1 Q. B. D. 9; 45 L. J., M. C. 29; 33 L. T. 379; 24 W. R. 139.

According to present Value.—Every person is to be rated according to the present value of his estate, whether that value has or has not been increased by his own improvements. *Reg. v. Mast*, 6 T. R. 154.

A lessee of lands should be rated according to the present value of the lands. *Reg. v. Shingle*, 7 T. R. 549.

Houses and Lands.—Whether houses are to be rated in a different proportion from lands must depend on local circumstances. *Reg. v. Sandwich*, 2 Dougl. 582.

Proportion to other Lands.—A poor-rate imposed in respect of two-thirds of the net rent of farms, lands and tithes, and of one-half of the net rent of houses and other buildings, collieries and coal mines, is not necessarily unequal. *Reg. v. Tomlinson*, 4 M. & R. 169; 9 B. & C. 163.

Allowable Deductions—Necessary Expenses.—When houses or other buildings, either with or without land, are let to a tenant, and the tenant agrees to take upon himself, either wholly or in part, the repairs to which the 6 & 7 Will. 4, c. 96, s. 1, refers, and which would ordinarily fall upon the landlord, no allowance is to be made in respect of those repairs, and the rent actually paid is the rateable value of the premises. *Reg. v. Wells*, 2 L. R., Q. B. 542; 36 L. J., M. C. 109; 16 L. T. 790; 15 W. R. 1059; 8 B. & S. 607.

No allowance in respect of contingent or future renewal of buildings or machinery ought to be made from the rent before the latter is adopted as the test of value. *Id.*

The annual profit is the rent which a tenant would give, he paying the poor-rates and the expenses of repairs, and the other annual expenses necessary for making the subject of occupation productive, and allowing him a deduction from the rent, where the subject is of a perishable nature, towards the expense of renewing or reproducing it. *Reg. v. Lower Mitton*, 4 M. & R. 711; 9 B. & C. 810.

By the Everton Drainage Act, 1860, the owners and proprietors of land in Nottinghamshire were charged with embankment and drainage works, without which the annual value of the neighbouring lands would be considerably diminished. The rates so charged were made payable by the occupiers, who were authorized to deduct the amount from their rent:—Held, that the aver-

age annual cost of the works ought to be deducted from the occupier's rent, in order to estimate the net annual value under the Parochial Assessment Act, 1836. *Gainsborough Union v. Welch*, 25 L. T. 689.

Proprietors of lands situate in parish V. and other parishes of the Isle of Canvey, granted one-third of all the lands in fee to J., in consideration of his embanking all the lands in the island. By a local act afterwards passed, commissioners were appointed to keep up the embankment, and for that purpose they were to tax the owners and occupiers of the lands by an annual rate, to the full annual rent or value of such lands, and, if the moneys so levied should be insufficient (but not otherwise), to tax the lands in the island. H., being the owner and occupier of all the granted lands in V., was rated by the commissioners for that property, described in the rate as house, premises and lands. H. had taken the lands subject to the above liability, paying no purchase-money. The assessment on these and the rest of the granted lands equalled the rack-rent or full annual value. The annual expenditure on the embankment was necessary to maintain the lands within the island in a state to command any rent from a tenant, or to be capable of occupation by the owner:—Held, that H. was rateable for the full annual value of his lands, without deduction on account of the embankment tax. *Reg. v. Vange*, 3 Q. B. 242; 2 G. & D. 476; 6 Jur. 893.

— **Cemetery Company—Salary of Directors and Auditors.**—By an act incorporating a cemetery company, the company was required periodically to appoint directors, who should manage the business and concerns of the company subject to their control, keep and use the common seal, have the custody of books, deeds, &c., call meetings, purchase and sell lands, appoint and displace chaplains and other officers, allow them stipends, take of them securities, make contracts touching the company's undertaking, regulate the mode of interment and the disposition of vaults, catacombs and graves, and the sums to be paid for exclusive right of burial therein, and for placing monuments, direct the issuing, receiving and disposal of the company's moneys, and all their other dealings, superintend their correspondence, and the keeping of their accounts, and all other things necessary for carrying on their business, and maintaining actions or suits in their name in respect of debts or contracts, and making, enforcing and rescinding contracts, also auditors who should examine the report to be made by the directors of disbursements and receipts, audit the accounts from which the report was drawn, and inspect the vouchers. The company had two cemeteries in Middlesex and Surrey. The duties and authority of the directors extended to both:—Held, that they were not entitled to deduct from the rateable value the salaries of the directors and auditors, and the expenses of an office in London, at which the directors transacted the business of the company. *Reg. v. St. Giles, Camberwell*, 14 Q. B. 671; 19 L. J., M. C. 129; 14 Jur. 519.

— **Dock Company—Use of Steam Tug.**—On appeal by the Southampton Dock Company against a poor-rate, they claimed deductions from the amount at which the rateable value of their property was assessed, as follows. For the ex-

penses of a steam-tug alleged by them to be part of their movable plant, but by the respondents to be independent of the dock establishment. The company was authorized by their act to build, purchase or hire steam-tugs for the purpose of towing vessels into or out of the docks from or to Southampton Water, or any part of the British Channel, and to pay the expense out of the rents, rates and sums receivable under the act. The steam-tug was used for the above purpose, and was a useful appendage to the docks, and advantageous to those who frequented them, and conducive to the general profit of the concern, though not indispensably necessary, as other steam-vessels might have been hired and employed, but with less convenience and advantage:—Held, that the deduction was allowable, the steam-tug being ancillary to the dock undertaking. *Reg. v. Southampton Dock Company*, 14 Q. B. 587; 6 Railw. Cas. 428; 20 L. J., M. C. 155; 15 Jur. 268.

— **Machinery not fixed to the Soil.**—Cranes, steam-engines, shears and other heavy machinery attached to the freehold, and essential to the business, but capable of being detached as easily and with as little injury to the freehold as other fixtures put up for the purpose of the tenant's trade, and usually valued as between incoming and outgoing tenant, are not an allowable deduction. *Id.*

— **Works in different Districts.**—Where works producing rateable value are situate in several districts, and can be divided into two parts, the first directly producing the value, and the second indirectly conducing to such production, such division should be made. Then all the expenses incidental to the second part, including the rates to which it may be liable, being deducted from the gross proceeds, and the net rateable value being ascertained, such value is to be apportioned among the districts in which the first part is situate, in the ratio of the portion of that value. *Reg. v. Hammersmith Bridge Company*, 3 New Sess. Cas. 424; 15 Q. B. 369; 18 L. J., M. C. 85; 13 Jur. 190.

— **In respect of Rates and Taxes.**—In ascertaining the net rateable value of property assessable to the poor-rate, an allowance is made for rates and taxes. And such allowance ought to be made upon the net rateable value after the rates and taxes themselves, in addition to all other proper allowances, have been deducted. *Tyne Improvement Commissioners v. Chirton (Churchwardens)*, 32 L. J., M. C. 192; 6 L. T. 489.

The payment by the landlord of water rent for water supplied to a house (such supply and payment being optional) does not entitle the occupier to a deduction in respect thereof as being an expense necessary to maintain the premises in a state to command the rent. *Reg. v. Bilston (Overseers)*, 1 L. R., Q. B. 18; 35 L. J., M. C. 73; 12 Jur., N. S. 139; 13 L. T. 327; 14 W. R. 83; 6 B. & S. 908.

By a local act it is provided that the owner of every tenement assessed to the poor-rate at any annual sum under 6l. 10s., the said sum to be ascertained according to the provisions of the 6 & 7 Will. 4, c. 96, s. 1, shall be rated to and pay the poor-rates; but that in all cases where the owner is so liable to be rated, he may compound

for the same by the payment of a reduced rate, whether such tenement be occupied or not; in which case he shall pay one-half of the rates only:—Held, that an owner so compounding is entitled to the same deductions as might be claimed by the tenant in whose place, for rating purposes, he stands, and that the amount is not to be regulated by the sum actually paid by him. *Reg. v. Dodd*, 1 L. R., Q. B. 16; 12 Jur., N. S. 159; 6 B. & S. 903; *S. C.*, nom. *Reg. v. Bilston (Ocerneers)*, 35 L. J., M. C. 97.

The owner and occupier of lands situate in a level within the jurisdiction of a commission of sewers, being rated, claimed deductions: first, in respect of the general sewers tax; secondly, in respect of the amount at which he was taxed for the maintenance and cleansing of the sewers in the level; and, thirdly, in respect of the sum annually expended by him in the maintenance and repair of a floodgate, sluice and gate upon his own lands; and, fourthly, in respect of the expenses of keeping in repair a sea-wall:—Held, that he was entitled to the deductions claimed. *Reg. v. Hall Dore*, 5 B. & S. 785; 34 L. J., M. C. 17; 11 Jur., N. S. 59; 10 L. T. 301; 13 W. R. 70.

In rating land liable to sewers rate, the amount of such rate must be deducted from the valuation. *Re v. Adames*, 1 N. & M. 662; 4 B. & Ad. 61.

Under an act for the embanking and draining a district consisting of several parishes, an annual rate was imposed on the district, and lands occupied by A. were rated at a certain proportion yearly. The rate by the act was expressly made a landlord's tax, and A.'s landlord had accordingly always paid the amount. The whole rate under the act was necessary for and was spent in each year in maintaining the drainage works. Without such drainage works the land occupied by him would have been under water at certain seasons, and the annual value would have been considerably diminished:—Held, that in assessing him to the poor-rate, a deduction was to be allowed under 6 & 7 Will. 4, c. 96, s. 1, in respect of the drainage rate, as an expense necessary to maintain the land in a state to command the rent. *Reg. v. Gainsborough Union Assessment Committee*, 7 L. R., Q. B. 64; 41 L. J., M. C. 1; 20 W. R. 250.

A rate upon the Hull Dock Company to the full amount of their profits, without regard to the amount of poor-rates with which they are chargeable, is bad. *Re v. Hull Dock Company*, 5 D. & R. 359; 3 B. & C. 516.

The income-tax which a tenant would have to pay on his net profits after payment of his rent is not an allowable deduction. *Reg. v. St. Giles, Camberwell*, 14 Q. B. 571; 19 L. J., M. C. 129; 14 Jur. 519.

c. Right of Tenant to Deduct from Rent.

Assessment of Landlord—Necessity of.—A local act for the parish of Marylebone makes the occupiers of houses liable to be assessed to parochial rates. The lessor, landlord, owner, or proprietor of houses let out in parts shall be deemed the occupier, and be liable to the payment of rates; and every person renting or occupying any such part shall be liable and compellable to pay such rates, and may deduct the same out of the next or any other rent due to such lessor, &c.:—Held, that to render the occupier of part liable to pay, and to enable him

to deduct the rates for the whole of the house, the landlord must be assessed to the rates. *Lobban v. Cook*, 3 H. & N. 238; 27 L. J., M. C. 254.

Arrears Leviable on present Occupiers.]—

Rates charged by act of parliament upon land, but which the occupiers are to pay, retaining the same out of their rent, and not paying more than the rent which shall from time to time become due from them, and leviable by distress on the occupier neglecting to pay them, are, if left unpaid by outgoing tenants (in the absence of any remedy either against the owners or against occupiers who may have left the rates unpaid, or of any provision for a different course), leviable on the present occupier to the amount of any rent becoming due on any current reservation. *Mattison v. Hart*, 14 C. B. 357; 2 C. L. R. 314; 23 L. J., C. P. 108; 18 Jur. 380.

An act directed that landlords should allow their tenants half the gaol rate:—Held, that a rate was bad which the commissioners made on the parishioners long subsequently to the parish being rated by the county, and by which they collected more than was required, though they carried the overplus to the poor-rate, because it tended to charge the landlords beyond what they were obliged to pay, and occupiers of land who were not so at the time the parish was rated. *Cortis v. Kent Waterworks Company*, 7 B. & C. 314.

In the Case of Mines.]—A lease of an iron mine made before the passing of the Rating Act, 1874 (37 & 38 Vict. c. 54), contained a covenant by the lessee to "pay or cause to be paid all manner of taxes, rates, assessments, charges, and impositions whatsoever, parliamentary or parochial, which now are or which shall at any time or times hereafter during the continuance of this demise be taxed, rated, charged, assessed, or imposed upon the said demised mines and premises, the landlord's property-tax only excepted":—Held, that the lessee had not "specifically contracted" to pay the whole of the poor-rate on the mine, in the event of the abolition of its exemption from the poor-rate, within 37 & 38 Vict. c. 54, s. 8. *Chaloner v. Bolekow*, 3 App. Cas. 933; 47 L. J., Q. B. 562; 39 L. T. 134; 26 W. R. 541. Affirming 2 Q. B. D. 286; 46 L. J., Q. B. 435—C. A.

The exception in s. 8 of 37 & 38 Vict. c. 54, to the right of a tenant of a mine to deduct one-half of the rate newly imposed by that act, and paid by him, from the rent payable to his lessor, namely, "unless he has specifically contracted to pay such rate in the event of the abolition of the exemption," does not take effect in favour of the lessor, unless the lease has in terms anticipated the imposition of this new liability and thrown it upon the tenant; and a covenant to pay the rent, "free of and from all rates, taxes, tithe rent-charges, expenses and deductions whatsoever, parliamentary, parochial, or of any other nature," will not deprive the tenant of his right to make the deduction given by the above section. *Devonshire (Duke) v. Barrow Hamatite Steel Company*, 46 L. J., Q. B. 96. Affirmed, 2 Q. B. D. 286; 46 L. J., Q. B. 435; 36 L. T. 355; 25 W. R. 469—C. A.

Costs within "all Taxes, Rates," &c.]—By a local act, the commissioners appointed thereby

were authorized to pave and flag footways, and the costs thereof were to be paid by the tenants or occupiers of the houses next adjoining, in default whereof they were to be recovered by distress. Another clause empowered the tenant to deduct the costs so paid by him out of the rent:—Held, that this charge was within the terms of a covenant in a lease subsequently made, whereby the tenant covenanted to pay all taxes, rates, duties, levies, assessments, and payments whatever, which were, or during the term might be, rated, levied, assessed, or imposed on the premises. *Payne v. Burridge*, 12 M. & W. 727; 13 L. J., Ex. 191.

2. ON PROMOTERS OF COMPANIES.

The Metropolitan Board of Works are promoters within the Lands Clauses Act, 1845, s. 133, and may be liable for an action in respect of any deficiency in the poor-rate caused during the construction of their works by their acquisition of rateable land in a parish. *Wheeler v. Metropolitan Board of Works*, 4 L. R., Ex. 703; 38 L. J., Ex. 165; 20 L. T. 984.

S. 133 applies, if it appears that the works, when constructed, may, in part or in whole, be the subject of beneficial occupation. *Ib.*

Under the Lands Clauses Act, 1845, s. 133, the promoters of the undertaking are not liable to be assessed. *London (Mayor) v. St. Andrew's, Holborn*, 2 L. R., C. P. 574; 30 L. J., M. C. 95; 16 L. T. 665; 15 W. R. 928.

3. CROWN, GOVERNMENT, AND PUBLIC PROPERTY.

Exemption of Crown Property.—The possessions of the crown are not rateable. *Amherst (Lord) v. Somers (Lord)*, 2 T. R. 372.

The royal palaces are not rateable; but where the site of a palace is demised to a subject for a permanent interest, the grantee who occupies is rateable. *Portland (Duke) v. St. Margaret's, Westminster*, Cald. 3, n.; Bott's P. L. 131.

— **House of Lords.**—The statutes which authorize assessments for relief of the poor are silent as to the crown. Hence the crown is subject to no poor-rate. To this immunity a wide signification is ascribed; for not only are the palaces of which her Majesty is in actual occupation deemed free from assessment, but even the House of Lords is exempt on the ground that it is regal. *Leith Harbour Commissioners v. Poor Inspectors*, 1 L. R., H. L. (Sc. App.) 17.

— **Government Offices.**—So likewise government offices, as the Post-office, the Horse Guards and the Admiralty, simply because they are in the service of the crown. *Ib.*

— **National Gallery.**—The National Gallery in Trafalgar-square is not rateable. *Reg. v. Shee*, 3 G. & D. 80; 4 Q. B. 2; 12 L. J., M. C. 53, 186; 7 Jur. 810.

Nor the Museum of Practical Geology. *De la Beche v. St. James, Westminster (Vestrymen, &c.)*, 4 El. & Bl. 385; 24 L. J., M. C. 74; 1 Jur., N. S. 375.

— **Barracks and Buildings.**—A building intended to be the dépôt and storehouse for the arms and accoutrements of the London Militia,

which are the property of the crown, is within the exemption in 18 & 19 Vict. c. 122, s. 6, as a building employed for her Majesty's use or service, though it is erected by the commissioners of lieutenantancy for London, under the superintendence of their architect, and when completed will be their property. *Reg. v. Jay*, 8 El. & Bl. 469. *S. C.*, nom. *Jay v. Hammon*, 27 L. J., M. C. 25; 4 Jur., N. S. 407.

Property devoted to public Purposes.—To exempt property from poor-rates as being devoted to public purposes, it is not sufficient that it produces no benefit to the occupiers individually, and that the occupation is in some degree beneficial to the whole public, yielding additional benefit also to a limited district or community; the benefit must be exclusively public. *Reg. v. Harrowgate (Commissioners)*, 15 Q. B. 1012; 4 New Sess. Cas. 319; 20 L. J., M. C. 25; 15 Jur. 422.

The 43 Eliz. c. 2, is, in its provisions, general and inclusive, and no other principle applying to create an exemption from those provisions all property capable of beneficial occupation, and which, if let to a tenant would be capable of producing rent, is liable to be rated, though in the hands of trustees who occupy it under acts of parliament for the maintenance of works declared to be beneficial to the public, though such trustees derive no benefit from the occupation, and though the revenues arising from such occupations are exclusively applied to the maintenance of the works. *Mersey Docks and Harbour Board Trustees v. Cameron*, 11 H. L. Cas. 443; 20 C. B., N. S. 56; 35 L. J., M. C. 1; 11 Jur., N. S. 746; 12 L. T. 643; 13 W. R. 1069.

Trustees cannot rely upon the mere circumstance of their being trustees, and so not entitled to any personal advantage from the property vested in them, for the purpose of shewing that they are not occupiers of lands and houses within a parish, and therefore that they are exempted from being rated to the poor-rate. *Reg. v. Birkenhead Docks (Trustees)*, 2 El. & Bl. 148; 21 L. J., M. C. 209; 17 Jur. 162.

A statute which vests property in trustees for purposes of public advantage, and authorizes the trustees, for the maintenance of the property and such purposes, to levy tolls upon such portions of the public as may use the property, does not thereby exempt the trustees from the liability to be rated; such exemption can only arise from the use of express negative words, or by necessary implication from other words in the statute, amounting to a prohibition to apply the tolls to the payment of poor-rates. *Ib.*

— **Receipt of Tolls.**—The commissioners of works and buildings were empowered to construct a bridge at Chelsea, and to borrow money from the Treasury on an assignment of the tolls. The commissioners were authorized to take tolls, which were to be applied in payment of the expenses of the bridge, then in repayment of the sum borrowed, and when that had been repaid there was to be no toll charged for foot passengers. There was no ultimate appropriation of any surplus:—Held, that the commissioners were not liable to be rated, as they were in occupation of the bridge as servants of the crown, deriving themselves no benefit from the receipt of the tolls. *Reg. v. McCann*, 3 L. R., Q. B. 141; 37 L. J., M. C. 25; 17 L. T. 643; 16 W. R.

397; 9 B. & S. 33. Affirmed, 3 L. R., Q. B. 677; 37 L. J., M. C. 123; 19 L. T. 115; 16 W. R. 985.

Trustees of a market, under a local act were held rateable for a market site occupied by them and for which they received the tolls, although there was no surplus profit after paying the annual expenses and interest on the mortgages charged thereon. *Reg. v. Badoock*, 6 Q. B. 787; 1 New Sess. Cas. 543; 14 L. J., M. C. 58; 9 Jur. 250.

— **Lease of Property.**—An act having vested the aftermath of a meadow in trustees for the burgesses and principal householders of a town, freed from all other interests in the same, with power to let the same or any part or parts annually to any person or persons for the best rent, and also to let it in pastures for horses, cattle and sheep to different persons, at such rates and subject to such regulations as the trustees should appoint; or, by writing under their hands and seals to demise the same for a term of years, and that the rents and profits should, after payment of all charges, be divided by the trustees amongst the objects of the trust:—Held, that the trustees not having let the aftermath to any persons for any certain term, or in any certain proportions, but having let it out, as it was called, in pastures at so much a head for horses, cattle, and sheep, to various persons, must themselves be taken to be the occupiers of the land, and were consequently rateable for the same. *Re v. Tewkesbury (Burgesses)*, 13 East, 155.

Where A. demised a messuage to trustees, for the maintenance of a schoolmaster for teaching children residing in a parish, who was to teach without a fee, and expressed his desire "that the parish would exempt the messuage from the payment of all rates," and the parish had had the use of the school for 125 years, and had, up to that date, exempted the property from rates, the messuage being beneficially occupied, and the rent paid to trustees for the use of the schoolmaster:—Held, that the property was rateable; and that, supposing that the devise had been entirely for the benefit of the poor, which it was not, and that the desire expressed by the testator amounted to a condition, it was a condition which the law would not allow. *Reg. v. Ellis*, 2 D., N. S. 361; 12 L. J., M. C. 20; 7 Jur. 108.

Held, also, that the previous inhabitants of the parish had no power to bind their successors to exempt the property from rates; and that the time during which no rate had been paid did not affect the question. *Ib.*

Property owned by Local Boards.—A corporation was by their town council constituted a local board of health of a district co-extensive with the borough. The local board occupied a yard within the borough in a parish, solely for the purposes of repairing the highways in the district of which they, as local board, were surveyors. The parish was partly not within the borough:—Held, that the local board of health was rateable in the parish, as occupiers of the yard; their occupation not being for such public purposes as to exempt them from rateability. *Reg. v. Kingston-upon-Hull (Justices)*, 4 El. & Bl. 29; 23 L. J., M. C. 183; 18 Jur. 899.

— **Sewers.**—The Metropolitan Board of Works was empowered to make the necessary

sewers and works for the improvement of the main drainage of the metropolis. The sewers, except at the pumping stations, passed under the highways of the metropolis, or under land on which the board had no property. The pumping stations were erected upon land the property of the board, but were used solely as part of the main drainage scheme. The board was also in occupation of a wharf, lay-by for barges, tramways, engine-houses, coal sheds and dwelling-house, all of which were occupied for the purposes of the main drainage scheme. The board derived no pecuniary advantage from the sewers and other drainage works, but the whole was maintained out of funds raised by a rate made in pursuance of the statutes:—Held, that the sewers were not rateable, on the ground that they were not the subject of a beneficial occupation; but that the rest of the property had an occupation value, and the board was rateable in respect of them, as there was nothing in the statutes exempting them from rateability. *Reg. v. Metropolitan Board of Works*, 4 L. R., Q. B. 15; 38 L. J., M. C. 24; 17 W. R. 1094.

The Metropolitan Board of Works constructed sewers on an embankment in a parish, and erected a pumping station and other works, forming part of the main drainage scheme. The board derived no pecuniary advantage from the sewers and other drainage works, and the whole were maintained out of funds raised by a rate made in pursuance of the statutes:—Held, that the sewers were not rateable to the poor-rate, on the ground that they were not the subject of a beneficial occupation; but the rest of the property was rateable at the value for which the same would let to a tenant from year to year, supposing they were not used for the purpose of the main drainage scheme, but were entirely disconnected from it; and applied to any other purpose for which they might be available. *Metropolitan Board of Works v. West Ham*, 6 L. R., Q. B. 193; 40 L. J., M. C. 30; 23 L. T. 490; 19 W. R. 246.

— **Highways.**—When land assessed to the poor-rate is taken for public purposes, the promoters, under the Lands Clauses Act, 1845, are liable, until completion of the works, to make good all deficiencies in the poor-rate, even in respect of works such as public highways, which can never become assessable. *Stratton v. Metropolitan Board of Works*, 10 L. R., C. P. 76; 44 L. J., M. C. 33; 31 L. T. 673; 23 W. R. 447.

By the Thames Embankment Act, 1863 (26 & 27 Vict. c. 75), the Metropolitan Board of Works was authorized to construct an embankment on the right bank of the Thames, new streets and other works in a parish. By s. 14, when the roadway and new streets respectively were completed, of which completion a certificate signed by the chairman of the board was to be conclusive evidence, the same with the power of rating the hereditaments within the same respectively, were to be under the jurisdiction of the same persons as the other streets in the parishes in which the same were situate. The Thames Embankment Act, 1863, also incorporated the Lands Clauses Act, 1845, s. 133, which enacts, that "if the promoters of the undertaking become possessed, by virtue of this or the special act, or any act incorporated therewith, of any lands liable to be assessed to the poor-rate, they shall, from time to time,

until the works shall be completed and assessed to such poor-rate, be liable to make good the deficiency in the several assessments for poor-rate by reason of such lands having been taken or used for the purpose of the works, and such deficiency shall be computed according to the rental at which such lands with any building thereon were rated at the time of the passing of the special act, and on demand of such deficiency, the promoters of the undertaking or their treasurer shall pay all such deficiencies to the collector of the assessments respectively." The board in 1865 proceeded with the execution of the works, and took various lands in a parish. On the 11th of May, 1870, the chairman certified that the roadway and new streets were completed:—Held, that the board was liable to pay the deficiency in poor-rates on lands taken by them under the powers and for the purposes of the Thames Embankment Act up to the 11th of May, 1870, and that the churchwardens and overseers of the parish could enforce payment in a lump sum of the arrears of the deficiency in the poor-rate up to that date. *Ib.*

Prisons—Use of Corn-mill and Tread-mill.]—The justices of the West Riding of Yorkshire were assessed as occupiers of a corn-mill, tread-mill, rooms, work-rooms and warehouse, which were within, and formed part of the house of correction. The tread-mill, and the corn-mill to which it was annexed, were maintained for the employment of the prisoners, and corn was ground partly for hire, but chiefly for consumption in the gaol. The work-rooms and warehouses were used exclusively for the prisoners to work in, principally for the use and repair of the gaol, and in a small proportion for hire:—Held, that the justices were not rateable. *Reg. v. Shepherd*, 1 Q. B. 170; 4 P. & D. 534; 5 Jur. 432.

—Governor's House and other Parts of Building.]—The governor was rated for a house and garden in the gaol. He occupied nine apartments; he was obliged, by the rules, to reside within the walls, and the accommodation provided for him was not more than was necessary and convenient. His family used the garden as a pleasure-garden, by permission of the justices, but it was not specially appropriated to their use, the area being essential to the health of the prisoners:—Held, that he was not rateable. *Ib.*

The officers and matrons of a gaol are not rateable, though they occupy distinct dwellings within the wall, if it is their duty to reside in the gaol, and the accommodation provided for them is not more than is necessary for the discharge of their respective offices. *Ib.*

Land and buildings were rented by the directors of convict prisons from the duchy of Cornwall, to be used as an establishment for convicts. The land was cultivated, and the produce of it was consumed in the establishment, or sold, and the profits applied to the service of the prison expenditure. The buildings consisted of a prison and a governor's house within the prison walls; also residences at some little distance from the prison, and not connected with it by any boundary wall or otherwise, occupied by the medical officer, the chaplain and other persons employed in the prison. These houses were allotted to the officers as their official residences; in some cases rent was paid; in others the value of the occupation was taken into account in the amount of wages

paid. Part of the building within the walls was occupied as a canteen for the sale of beer to the officers of the prison, and part of the buildings outside the walls was occupied by a grocer, who supplied the residents within the walls, and other customers. The governor had a coach-house and more stabling than was necessary for the discharge of his duties:—Held, that the prison and the governor's house were exempt, with the exception of so much in the governor's occupation as was found to be beyond what was necessary for the discharge of his duties. *Gambier v. Lydford (Overseers)*, 3 El. & Bl. 346; 2 C. L. R. 951; 23 L. J., M. C. 69; 18 Jur. 352.

Held, also, that the land used for the employment of the convicts was rateable. *Ib.*

Held, also, that the official residences without the walls were rateable. *Ib.*

Held, also, that the canteen and the grocer's shop were rateable. *Ib.*

Three houses situate beyond the actual wall of a county gaol, but within its precincts, were appropriated to the occupation of the governor and of two of the warders of the gaol respectively, and they inhabited these houses solely as officers of the gaol. The house of the governor had an internal communication with the gaol, but the other houses had no communication with it, except by means of the principal entrance of the gaol:—Held, that the occupier of each of these houses was exempt from liability to be assessed to the poor-rate, on the ground that the houses were virtually part and parcel of the gaol. *Beds (Justices) v. St. Paul, Bedford*, 7 Ex. 650; 21 L. J., M. C. 224.

Assize Courts and Police Buildings.]—So buildings occupied for the county police and the county assize courts, being in the occupation of the crown for public purposes, are exempt. *Reg. v. St. Martin's, Leicester*, 2 L. R., Q. B. 493; 36 L. J., M. C. 99; 16 L. T. 625; 15 W. R. 1096; 8 B. & S. 536.

By a local act the magistrates of a county were empowered to build assize courts, and to let them for other purposes; they accordingly let them to the borough magistrates to be used as courts of quarter sessions, and made a net profit on such letting, after deducting the expenses incurred thereby:—Held, that they were rateable in respect of the profit so made. *Lancashire (Justices) v. Cheetham (Overseers)*, 3 L. R., Q. B. 14; 37 L. J., M. C. 12; 16 W. R. 124; 8 B. & S. 548.

—Judges' Lodgings.]—By a local act certain buildings were vested in the justices of a county, to permit and suffer all the courts of assize, sessions and others, to be holden there, and also to permit the courts, and the lodgings provided for the judges of assize, to be used and enjoyed for the purposes for which the same might be designed. The buildings were supported by the county at large, and the justices were authorized to let the buildings when not used for county purposes. A quantity of plate and wine, the former paid for by the county, the latter by subscriptions amongst the magistrates, was kept in that part of the buildings used as the judges' lodgings during the assizes, and the plate was used by the judges, and by the magistrates at sessions; the wine was used by the latter exclusively. There were also sleeping-rooms at this building, which were used by the magistrates

during the sessions:—Held, that as the buildings were vested in the justices at large for public purposes only, a beneficial occupation of them by certain of the number did not make the whole body rateable. *Reg. v. Worcestershire (Justices)*, 3 B. & D. 8; 11 A. & E. 257; 1 Arn. & H. 80; 3 Jur. 1050.

County Court—Occupation by Treasurer.—A treasurer of a county court was lessee under 9 & 10 Vict. c. 95, s. 48, of a building used for the court-houses, and for other purposes of the act exclusively:—Held, that neither the treasurer nor any one else had such an occupation of the building as to be liable to poor-rates. *Reg. v. Manchester (Overseers)*, 3 El. & Bl. 336; 2 C. L. R. 974; 23 L. J., M. C. 48; 18 Jur. 267.

A building, leased by the treasurer as a county court, is not rateable to the relief of the poor, there being no beneficial occupier of it, nor any profit derived from the use of it by any definite class of persons. *Reg. v. Manchester (Township Overseers)*, 3 El. & Bl. 336; 2 C. L. R. 974; 23 L. J., M. C. 48; 18 Jur. 267.

Occupation by Servants, Officers or Lessees of the Crown.—A storekeeper or a porter employed by the crown in the public service, occupying premises belonging to the crown for the purpose of performing such service, is not rateable in respect of such occupation, although it constitutes part of the emoluments of his office. But if he has an occupation of more than is reasonably necessary for the performance of such service, he is rateable in respect of the excess and of no more. *Reg. v. Stewart*, 8 El. & Bl. 360; 27 L. J., M. C. 81; 4 Jur., N. S. 187.

When Excessive.—In estimating the question of excess, the station of the party employed should be taken into consideration, and reasonable accommodation for his family will not constitute an excess. An excess which is merely trifling ought to be disregarded. *Ib.*

The same rule applies to the governor of a garrison town, occupying crown property within the town, though he is also commanding officer of a military district much more extensive than the town. *Ib.*

The rule is applicable though none of the duties are executed on the premises occupied. *Ib.*

By Permission of the Crown.—By permission of the crown certain persons occupy apartments in Hampton Court Palace, which was formerly a royal residence, but in which the sovereign has ceased to reside. A housekeeper employed by the crown has superintendence of other apartments, containing pictures (which the public are allowed to see) and lumber. The housekeeper resides with her family in the palace for this purpose, and has also the power to enter the apartments first mentioned. In other respects the occupiers of these have exclusive possession of them. Before the entry of each occupier, his apartments are put into ordinary repair by the crown, but afterwards the occupiers themselves do such repairs as are considered necessary by the crown surveyor. They reside there with their families and servants, providing their own furniture, and in some instances (but without the sanction or the privity of the crown) have allowed others, on payment of a sum of money, to use the

apartments:—Held, that the occupiers by permission of the crown were rateable in respect of the apartments so held by them. *Reg. v. Ponsonby*, 3 Q. B. 14; 1 G. & D. 713; 6 Jur. 642.

According to Profits.—The ranger of a royal park is rateable for inclosed and cultivated lands in the park, if he is in the enjoyment of the profits of those lands. *Bute (Earl) v. Grindall*, 2 H. Bl. 265; 1 T. R. 338.

But not for the herbage and pannage, which yield no profits. *Ib.*

Officers' Quarters.—Where the commanding officer in barracks had distinct apartments allotted to him, one in particular for transacting the business of the regiment, and the others fitted up for the accommodation of himself and his family, who resided there with him, containing a kitchen, wash-house and coach-house, together with a stable, yard and garden:—Held, that he was rateable for the same, having a beneficial enjoyment of them beyond his necessary accommodation as an officer for the purpose of the public service. *Rees v. Terrott*, 3 East, 506.

An adjutant having charge of militia stores, under 17 & 18 Vict. c. 109, s. 4, and occupying, for that purpose, premises provided for such stores, under 17 & 18 Vict. c. 105, s. 2, is rateable to the poor in respect of such occupation so far only as he has a use of them exceeding what is necessary for himself and family, taking into account his station in life. *Reg. v. Fuller*, 8 El. & Bl. 365, n.

Stables rented for a Regiment.—Stables rented by the colonel of a regiment, by order of the crown, for the use of the regiment, are not rateable to the poor. *Amherst (Lord) v. Somers (Lord)*, 2 T. R. 372.

Houses occupied by Postmaster-General.—Houses, the property of a subject, taken by the postmaster-general, and occupied as a post-office for the purposes of the Post-office revenue, being occupied by the servants of the crown for public purposes, no one is rateable in respect of the occupation of them. *Smith v. Birmingham (Guardians)*, 7 El. & Bl. 483; 26 L. J., M. C. 105; 3 Jur., N. S. 769.

Where Employee leases Premises to the Crown.—A. let to the Inland Revenue department, for their offices, five rooms of a house in his occupation, it being stipulated that the rent was to be 90l. per annum, this sum to include all expenses, namely, rent, rates, taxes, gas, wood, coals; also providing a trustworthy person to reside on the premises, to keep clean, light fires, and attend to the same. A. himself occupied the shop as distributor of stamps for the district:—Held, that the premises so let and occupied were not exempt. *Smith v. St. Michael, Cambridge (Churchwardens and Overseers)*, 30 L. J., M. C. 74; 7 Jur., N. S. 24; 3 L. T. 687.

Lessees of Crown Property—Actual Occupiers.—Gasworks were erected by the crown at Aldershot for the use of the camp there, and by an arrangement with A. and B., who agreed to make and supply gas to the camp upon certain terms, a licence was granted by the crown to them to use the premises for seven years, for the

purpose of enabling them to perform their contract, the crown reserving a right to enter by its servants for certain purposes at all times, the licence also containing a stipulation that it should be revocable at any time by writing, and that full possession might thereupon be had without any proceeding at law or equity. A. & B. were rated in respect of occupation of the premises:—Held, that as actual occupiers, they were liable to be so rated. *Reg. v. Stevens*, 12 L. T. 491.

Police-station—Occupation by Officer.]—Officers of the county constabulary under 2 & 3 Vict. c. 93, are not rateable in respect of their occupation of rooms in the police-office, in which, by the terms of their appointment, they are required to live. *Reg. v. St. Martin's, Leicester*, 2 L. R., Q. B. 403; 36 L. J., M. C. 99; 16 L. T. 625; 15 W. R. 1096; 8 B. & S. 536.

Under 3 & 4 Vict. c. 88, a house was provided as a police-station for a district of the county; the police constables required to be stationed there, resided in it, having no more accommodation than was necessary for the discharge of their duties, and suitable for their degree in life; a deduction was made from their wages as a charge for rent:—Held, that the station being occupied for a public purpose, no one was rateable in respect of it. *Lancashire (Justices) v. Stretford (Overseers)*, EL. & BL. 225; 27 L. J., M. C. 209; 4 Jur., N. S. 1274.

A cottage was let by the owner to the chief constable of a county, as yearly tenant, at 6*l.* 4*s.* per annum. This cottage the chief constable underlet to one of the county constabulary, whom he appointed and had power to dismiss, as a weekly tenant at 2*s.* per week (deducted from his wages) as long as he continued such constable, or until he should be removed to another district, determinable upon a week's notice. The constable being assessed to the poor-rate as occupier of the cottage:—Held, that he was properly rated, there being nothing in the nature of the occupation to create exemption. *Reg. v. Bridgehouse*, 20 L. T. 658.

A superintendent of the police for a county police division had as his quarters a house, which was rented for him by the county authorities, and which he furnished; his rent was paid out of the police rates, and the amount deducted from his salary as superintendent. The house was liable to be examined and its fitness reported by one of her Majesty's inspectors, and to be used for purposes connected with the police force as the chief constable might direct, but no room in it was specially set apart for any other purpose than for the use of the superintendent and his family. The house was a quarter of a mile from the police station, within a convenient distance of which it was necessary that the superintendent should reside for the performance of his duties; and he was compelled to live in it as long as it was rented for him by the county authorities, but he was liable to be removed from it at any time, and from one police division to another:—Held, that such superintendent was rateable to the poor-rate in respect of such house, as his occupation was a beneficial one, and the house, being no part of the police station, did not come within the recognized heads of property which is treated as crown property. The case of *Gambier v. Lydford Overseers* (3 EL. & BL.

346) approved. *Martin v. West Derby Union*, 11 Q. B. D. 145; 52 L. J., M. C. 66; 31 W. R. 489; 47 J. P. 500—C. A. See also *Reg. v. St. Martin's, Leicester*, ante, col. 436.

When Rateable at diminished Value.]—The gross estimated rental and rateable value of buildings occupied by municipal corporations and other public bodies are to be ascertained for the purpose of parochial assessment by reference to the amount of rent which a tenant, unfettered as to user and unrestricted as to charges, would give if the premises were in the market, and not by reference to the annual profit, if any, made or capable of being made by those using the premises for public purposes. *Chorlton-upon-Medlock (Overseers) v. Chorlton (Guardians)*, 51 L. J., Q. B. 458; 47 L. T. 96; 46 J. P. 535.

When land is used for a public purpose, and the occupiers are prevented by statute from deriving the full pecuniary benefit which it is capable of producing, the land is to be rated to the poor with reference to the amount of profit actually made, and not with reference to the amount which might be earned by the occupiers if they were not subject to restrictions. *Worcester (Mayor) v. Droitwich Assessment Committee*, 2 Ex. D. 49; 46 L. J., M. C. 241; 36 L. T. 186; 25 W. R. 336—C. A.

A local board of health erected and occupied works for the purpose of supplying the inhabitants with water. The works were situate within a parish. In order to benefit the inhabitants, the local board made the scale of charges so low, as to leave a profit far less than would have accrued to a company carrying on the works as a commercial undertaking. In adopting the scale of charges above mentioned, the local board intended to carry out those provisions of the Public Health Act, 1848, the object of which was to insure a supply of water at a low price for sanitary purposes. The assessment committee of the union, within which the parish was situate, by a valuation list assessed the local board at a rateable value of 1,400*l.*, based upon the amount which might have been earned by a trading company carrying on the waterworks for its own benefit; the local board claimed to be assessed at a rateable value of 540*l.*, based upon the profit actually earned by them:—Held, that the assessment at 1,400*l.* was wrong, and that the local board was liable to be assessed at 540*l.* only; for under the provisions of the Public Health Act, 1848, they could not make rates of an amount more than sufficient to enable them to maintain the waterworks, and they could be lawfully assessed only with reference to the profit actually earned. *Id.* Affirming 45 L. J., M. C. 81; 34 L. T. 288; 24 W. R. 490.

4. HOSPITALS AND CHARITABLE INSTITUTIONS.

Profitable Land—Charitable Purpose.]—If land and houses produce profit which is not entirely applied to purely charitable purposes, the occupiers are rateable, although they apply it to purposes beneficial to the public, unless the benefit is enjoyed by all who contribute to the poor-rate, and by them exclusively. *Reg. v. Temple*, 2 EL. & BL. 160; 22 L. J., M. C. 129; 17 Jur. 572.

Occupants of Almshouses.]—The objects of a

charitable foundation, in the actual occupation of the almshouse and lands for their own benefit, in the manner prescribed by the rules of the institution, and liable to be dismissed for any breach of such rules, are rateable in respect of such occupation. *Ree v. Munday*, 1 East, 583.

So, where paying no rent, they are removable at the pleasure of the patrons of the charity. *Ree v. Green*, 9 B. & C. 203; 4 M. & R. 164.

Lunatic Asylum—Producing a Profit.—Lands purchased by voluntary contribution were conveyed to trustees for the purpose of erecting thereon a lunatic asylum, and for such purposes relative thereto as should be determined by the subscribers. The asylum was originally designed for parish paupers or other indigent persons, but, the funds being insufficient, a limited number of affluent persons were afterwards admitted at certain rates of payment in proportion to their abilities. From this and other sources of revenue the trustees, after paying all the expenses of the establishment, had accumulated, in five years, profits to the amount of 2,000*l.*, part of which had been laid out in buildings and purchases for the institution, and part continued to accumulate. All benefactors of 20*l.* or upwards were governors, and they exercise the entire control over the asylum and its funds. The trustees derived no personal benefit from the institution:—Held, that, as the building produced a profit, it was rateable. *Ree v. St. Giles, York*, 3 B. & Ad. 573.

Bethlehem Hospital—Effect of Residence.—Bethlehem Hospital was erected on lands in the parish of St. George, Southwark, demised to trustees for the corporation of London, under a private act, which directed the building thereon of a new lunatic hospital, in lieu of the old one situate in the city of London, of which the corporation were governors, under letters-patent of Henry 8. In this hospital indigent lunatics were received for cure, and if not capable of cure, were admitted into the incurable class. Payments were made for some of the incurable by friends of the patients, or by the officers of the parishes from which they were sent, but the payments were in no instance sufficient to afford a profit. Part of the hospital was used for the custody, care, &c., of criminal lunatics, for whom government made a payment as nearly as possible equal to the expense of their maintenance, but without charge of lodging. The whole funds were applied for the purposes of charity:—Held, that the corporation was not rateable for these premises, although by a local act, persons occupying any land, ground, house, building, tenement, hereditament or premises in the parish were rateable, it being enacted, after noticing by recital the existence of many charitable institutions in the parish which contributed nothing to its exigencies, that no settlement should be gained in the parish by any occupation, residence, &c., in any hospital or other charitable institution then or thereafter situated or established in the parish. *Reg. v. St. George, Southwark*, 10 Q. B. 852; 16 L. J., M. C. 129; 11 Jur. 968.

County Lunatic Asylum.—A county lunatic asylum, built upon land acquired under 8 & 9

Vict. c. 126, and 16 & 17 Vict. c. 97, consisted of buildings and of land; twenty acres of which were laid out as a garden, and thirty acres were under cultivation as a farm. The farm and garden were cultivated by gardeners, who were part of the establishment, assisted by the patients, and the result was a source of profit arising from the sale of produce not required for the establishment. The committee of visitors acting under the powers contained in 16 & 17 Vict. c. 97, ss. 42, 43, admitted other pauper lunatics than those belonging to their county, and also private lunatics, thereby realizing considerable profit:—Held, first, that this was an asylum within 16 & 17 Vict. c. 97, s. 35, and therefore rateable only at the value at which the land was assessed at the time of the purchase. *Reg. v. Fulbourn (Overseers)*, 6 B. & S. 451; 34 L. J., M. C. 106; 11 Jur., N. S. 620; 12 L. T. 344; 13 W. R. 713.

Held, secondly, that the building and land were used for the purposes of an asylum within s. 35, the primary object of the farm and garden being the sanitary occupation of the patients with a view to their cure. *Ib.*

Held, thirdly, that the committee of visitors was not rateable in respect of the profits. *Ib.*

—**Chaplain—Medical Officer of.**—The committee of a lunatic asylum appropriated for their chaplain a residence on ground purchased since the passing of the 16 & 17 Vict. c. 97, but detached from the asylum buildings; and appropriated for their medical superintendent a house, reasonably fit for a person in his station of life and his family, being on land purchased when the asylum was first erected, adjoining to it, but not being within the curtilage, and he discharged a portion of his official duties in that house:—Held, that the chaplain was rateable to the relief of the poor like any other occupant; but that, by force of s. 35, the medical superintendent was liable to be rated only according to the value or rent of the land at the time it was purchased. *Congreve v. Upton (Overseers)*, 4 B. & S. 857; 33 L. J., M. C. 83; 10 Jur., N. S. 638; 9 L. T. 684; 12 W. R. 403.

Infirmary.—A local act imposed a rate on "all halls, gaols, chapels, meeting-houses, schools, almshouses and other public buildings, churchyards, chapel-yards, and meeting-house yards, for every yard running measure of the length in front of such halls, gaols, chapels," &c. An infirmary for sick persons, supported by voluntary contributions, stood within its own grounds, the principal entrance to which was on the south-east side, from a public highway; and there was also an entrance on the north-west side, from a public road, by a private avenue through pasture land not occupied by the governors of the infirmary; and on the north-east side it was bounded by a public footway, which extended beyond its grounds, along the pasture land, up to the public road, but there was no entrance from this footway to the infirmary:—Held, first, that the infirmary was a public building, within the act. *Bedford Infirmary (Governors) v. Bedford Improvement (Commissioners)*, 7 Ex. 768; 21 L. J., M. C. 225.

Held, secondly, that the rate ought to be assessed according to the running measure on the whole of the south-east side, and on so much of the north-east side as the footpath extended in

front of the grounds of the infirmary, but not beyond, or on the north-east side. *Ib.*

Hospitals from which Revenue may be derived.]—A hospital founded by royal charter as a house for the cure and healing of the diseased and infirm poor brought to or received in the house, is rateable to the poor under 43 Eliz. c. 2, s. 1, it being possible that a revenue might be derived from its occupation. *St. Thomas's Hospital (Governors) v. Lambeth (Overseers)*, 7 L. R., H. L. 477; 45 L. J., M. C. 23; 23 W. R. 882. Affirming Ex. Ch. 30 L. T. 37; 22 W. R. 321.

Semble, that the hospital would also have been rateable had it, by charter or statute, been prohibited, strictly and expressly, from being made a source of profit. *Ib.*

St. Thomas's Hospital was founded by royal charter for the relief and sustenance of poor sick and infirm people, and vested in the mayor, commonalty and citizens of London. The patients pay nothing for their maintenance or the medical services rendered to them. There is a medical school connected with the hospital, and its students pay fees which are wholly devoted to the expenses of the medical school, and are not paid to or in any way accounted for to the governors of the hospital:—Held, that the hospital was liable to be rated, and not at a merely nominal sum. *Ib.*

Missionary Society—Occupation by Honorary Treasurer.]—The London Missionary Society occupied, under an agreement for a lease, a building for conducting the affairs of that institution. The society was founded entirely for religious and charitable purposes, and was supported by charitable and voluntary contributions. No person slept on the premises. The officers of the establishment attended during a portion of the day only, and the honorary treasurer attended once a week to superintend the society's affairs. Neither he nor any other person connected with the society derived any pecuniary profit or emolument from the occupation of the premises. The treasurer was assessed:—Held, that the treasurer, not being a beneficial occupier, was not liable to be assessed. *Reg. v. Wilson*, 4 P. & D. 130; 12 A. & E. 94.

— **Sale of Works to defray Expenses.]**—The objects of the Baptist Missionary Society are, the sending out and supporting missionaries for the conversion of the heathen: it is entirely supported by voluntary contributions, except a fund of 20,000*l.* the interest of which it devotes to the widows and orphans of missionaries dying abroad, and two funds remitted from Calcutta, to be applied to preaching abroad. No member derives any private advantage from his connexion with the society. The society occupies a building comprising various apartments; and employs a secretary, an accountant, three clerks and a porter, some of whom live in a small house in the rear of the main building. The society prints a report and other periodicals, and sells them, if applied for, occasionally, on the premises, the proceeds of which sale are carried to the credit of the society, but do not cover the original cost. Two other charitable societies connected with the Baptist denomination, no member of which has any private benefit from the occupation of any part of the premises, use some part of the building for the purpose of

holding their meetings, for which they pay a sum for gas, fire, cleaning, and attendance, equal to the expense incurred by the society on behalf of each, but no more:—Held, that the society had such a beneficial occupation of the premises as made it rateable. *Reg. v. Baptist Missionary Society*, 3 New Sess. Cas. 555; 10 Q. B. 884; 18 L. J., M. C. 194; 13 Jur. 748.

Held, also, that persons occupying premises merely for the purpose of diffusing religious instruction are not, on that account, exempt from rateability. *Ib.*

5. SCHOOLS.

National Schools.]—National schools are rateable, although the sums received from the schools are insufficient for the support of the school. *Laughlin v. Saffron Hill (Overseers)*, 12 L. T. 542; 13 W. R. 678.

Sunday and Ragged Schools.]—Under 32 & 33 Vict. c. 40, s. 1, which enacts that every authority having power to impose rates, "may exempt" a building used as a Sunday or ragged school from any rate, the rating authority has a discretion whether they will or not exempt such a building. *Bell v. Crane*, 8 L. R., Q. B. 481; 42 L. J., M. C. 122; 29 L. T. 207; 21 W. R. 911.

Industrial Schools.]—Premises occupied as a school, the managers of which have received a certificate under 29 & 30 Vict. c. 118, s. 7, constituting it a certified industrial school, are liable to be rated to the poor-rate. *Reg. v. West Derby (Overseers)*, 10 L. R., Q. B. 283; 44 L. J., M. C. 98; 32 L. T. 400.

Reformatory.]—A reformatory established under 17 & 18 Vict. c. 86, 18 & 19 Vict. c. 87, 19 & 20 Vict. c. 109, and 20 & 21 Vict. c. 53, is not rateable, though a part of its support is derived from weekly payments contributed by the parents of the inmates, and part from the proceeds of work done by the inmates, washing, mangling, and needlework, for strangers. *Sheppard v. Bradford (Overseers)*, 16 C. B., N. S. 369; 33 L. J., M. C. 183; 10 Jur., N. S. 799; 10 L. T. 421; 12 W. R. 867.

Master of Charity School.]—A master of a free school, appointed by the minister and inhabitants of a parish under a charitable trust, whereby a house, garden, &c., were assigned "for the habitation and use of the master and his family, freely without payment of any rent, income, gift, sum of money or other allowances whatsoever," for the teaching of ten poor boys of the inhabitants, is rateable for his occupation of the same. *Reg. v. Catt*, 6 T. R. 332.

Premises and land were conveyed to trustees, to use the same as a school and a dwelling for a certain number of poor boys, with power to appoint a schoolmaster and necessary servants, who should reside in the school-house, for the management and carrying on thereof. Part of the premises was appropriated to the master, as a dwelling-house, the remainder of the building being occupied by the servants and boys, the objects of the charity:—Held, that the master was rateable in respect of so much of the premises as was in his occupation, and that the trustees were rateable for the remainder; the occupation not being one for public purposes.

Reg. v. Stapleton, 4 B. & S. 629; 33 L. J., M. C. 17; 10 Jur., N. S. 44; 9 L. T. 322; 12 W. R. 49.

Superintendent with no distinct Apartments.]

—A person employed by the Philanthropic Society to superintend the children at annual wages, under an agreement that she should have a dwelling free from taxes, with certain other perquisites, and who might be dismissed at a minute's warning on receiving three months' wages, is not rateable as the occupier of the house provided by the society: she having no distinct apartments in the house but in a bed-chamber, and her family not being allowed to live there. *Rez v. Field*, 5 T. R. 587.

Trustees—Beneficial Occupiers.]—The trustees of a Friends' school were assessed in respect of a house and a garden in their possession. The school was a charitable institution supported by donations and voluntary subscriptions, and managed by a committee, for the maintenance and education of poor children. No child was admitted whose parents could not contribute 12l. annually towards its maintenance and education, or could afford to educate it elsewhere. The average annual cost of each child was about 20l. The trustees and committee received no pecuniary benefit. The superintendent, matron, and servants, who alone (except the scholars) resided on the premises, received salaries and wages. The house contained a room for the meetings of the committee, and sufficient apartments, but no more, for the officers and servants of the establishment. The garden was cultivated for the use of the children:—Held, that the trustees were beneficial occupiers, and were liable to be rated. *Reg. v. Sterrey*, 4 P. & D. 122; 12 A. & E. 84.

Use of Hall for General Purposes.]—The society of licensed victuallers was established by charter, which directed that the members of the society should meet together for the purposes of the society four times in every year, and have power to make bye-laws. A school was established for the clothing, educating, and putting out in the world of the children of distressed, decayed, and deceased licensed victuallers, in which such children were maintained, clothed and educated free of charge. The school-house contained a hall, in which the quarterly and other meetings of the society upon the general business of the society were held. By a bye-law the meetings of the society were to be held in the school, or at such other place as the committee might appoint:—Held, that the society was liable to be assessed in respect of the school premises, by reason of their holding meetings in the hall. *Licensed Victuallers' Society v. St. Mary, Lambeth (Overseers)*, 1 B. & S. 71; 30 L. J., M. C. 131; 7 Jur., N. S. 521; 4 L. T. 241; 2 W. R. 599.

College for Religious Purposes.]—A college was founded and endowed for the education of young men for the ministry of the Presbyterian church, and high-class education was therein provided for a comparatively trifling sum. Each professor was paid out of the college funds a fixed salary, and received in addition certain fees from the pupils:—Held, that this was not an exclusively charitable institution within the meaning of the Valuation Statutes, 15 & 16 Vict.

c. 63, and 17 Vict. c. 8 (Ir.), and therefore not exempt from liability to be rated. *Magee College (Trustees) v. Commissioners of Valuation*, 19 W. R. 328.

6. WORKHOUSES.

Workhouse for Employment of the Poor.]—The guardians of a union formed under 4 & 5 Will. 4, c. 76, s. 28, comprehending a parish, and others, built a workhouse in the parish, for the employment of the poor, under 4 & 5 Will. 4, c. 76, s. 23:—Held, rateable in the parish as occupiers of the workhouse, though it was built on land which, from the nature of the former occupation, had not previously been rated. *Reg. v. Wallingford Union (Guardians)*, 10 A. & E. 259; 2 P. & D. 226.

Exemption "for Public Purposes."]—By 22 Geo. 3, c. 56, the workhouse of the parish of St. Luke shall not be liable to be rated to any greater amount than it was at that time assessed at, "during such time and so long as the same shall be used and occupied" for the purposes of the poor of St. Luke's parish. In 1869 the parish of St. Luke was added to the Holborn Union, and since that time the workhouse has been, with others, for the common use of the union, and (under the powers conferred on the Poor Law Commissioners by 4 & 5 Will. 4, c. 74, s. 26), the poor of the union have been so classified that many of the poor of St. Luke's parish are maintained in its own workhouse whilst some of the poor of St. Luke's parish are maintained in the workhouses of other parishes of the union, and some of the poor of other parishes are maintained in the workhouse of St. Luke's parish. Notwithstanding this, and notwithstanding that the Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), charges all the cost of the relief of the poor upon the common fund of the union:—Held, that the workhouse of St. Luke's parish still continues to be "used and occupied" for the purposes of the poor of St. Luke's parish, within the meaning of the original act, and that its exception from a higher rateability, conferred by that act, still continues. *Holborn Union (Guardians) v. St. Leonards (Vestry), Shore-ditch*, 28 L. T. 106; 21 W. R. 541.

A local act enabled the directors of the poor of Bedford to erect a workhouse, and enacted, that all buildings erected by virtue of the act should be free from "all parochial and parliamentary taxes:—Held, that a workhouse erected under the act was liable to be assessed under another local act, which imposed a rate on public buildings, for the improvement of the town of Bedford. *Bedford Union (Guardians) v. Bedford Improvement (Commissioners)*, 7 Ex. 777; 21 L. J., M. C. 225.

House outside Special District.]—Governors of the poor hiring a house without their district, for the purpose of setting their own paupers to work there, and using it for that purpose only, are rateable in the parish in which the house is, as occupiers, whether the employment of the paupers there is profitable or not. *Bristol (Governor) v. Wait*, 5 A. & E. 1; 6 N. & M. 383.

By 21 & 22 Vict. c. 98, s. 55, the district rate shall be made and levied upon the occupier of all such kinds of property as by the laws in force

for the time being are or may be assessable to any rate for the relief of the poor. The guardians of the poor of an extra-parochial place maintaining its own poor, and situated partly within and partly without a borough, occupied a workhouse in the part without the borough, which part was a separate district for the purpose of levying district rates:—Held, that they were liable to a district rate for works in the part without the borough, as occupying a kind of property assessable to the poor-rate within s. 55. *Torteth Park (Guardians) v. Torteth Park Local Board of Health*, 1 B. & S. 167; 30 L. J., M. C. 154; 7 Jur., N. S. 860; 4 L. T. 283; 9 W. R. 691.

What is a Workhouse within 4 & 5 Will. 4, c. 76.—Eight cottages were erected by a parish (for the better lodging the impotent and other poor), partly by means of benefactions, and partly by a fund raised under an inclosure act, according to which such fund was to be applied to the relief of the poor, and accounted for as rates. The cottages were repaired out of the poor-rate. Four of these cottages were always let, at a rent under their value, to industrious labourers; these tenants paid no poor-rates, and occasionally received relief; but, at the time of their being admitted, were liable to pay the rent, which was always collected:—Held, that these four cottages were not workhouses for the purposes of 4 & 5 Will. 4, c. 76, and 5 & 6 Will. 4, c. 69. *Cantrell v. Windsor Union*, 2 Bing. N. C. 348; 5 Scott, 716.

7. PLACES OF DIVINE WORSHIP.

Receiving Rents for Pews.—The trustees of a Methodist chapel, receiving money annually for the rents of the pews, were rateable for the profits made of the building, though in fact they expended the whole of what they received in making disbursements for repairs, and to attendants in the chapel, and in paying the salaries of the preachers; considering that these latter in effect were entitled to receive the surplus profit, after paying all necessary expenses of the chapel; and, therefore, that the rate was substantially upon them, through the medium of the trustees, who received the profits in the first instance. *Rex v. Agar*, 14 East, 256.

The trustees of a Quaker's meeting-house, of which no profit was made by the pews, were not rateable. *Rex v. Woodward*, 5 T. R. 79.

8. CEMETERIES AND CHURCHYARDS.

Company owning Graveyard.—By an act a cemetery company was empowered to purchase land to be exclusively used and applied for the purpose of burial; and, in pursuance thereof, to sell and dispose of the exclusive right of burial, either in perpetuity or for a limited period, in the vaults made by them; and also the right of making any family or other vault, with the exclusive right of burial therein, either in perpetuity or for a limited period; and also the right of single interment in any of the vaults made by the company, or in the open ground of the cemetery; which rights were to be exercised subject to the regulations of the company. And the company was required to keep the cemetery and the buildings, and external walls, and all other parts of it, in repair.

The company purchased the necessary land in pursuance of the act, and used a portion of it as a common burial-ground, and made vaults which they sold to some parties in perpetuity, to others for a limited period, and disposed of portions to be used as family graves:—Held, that the company was rateable as an occupier of the vaults and family graves, as well as of the common burial-ground. *Reg. v. Kensington*, 4 P. & D. 327; 12 A. & E. 824; 1 Arn. & H. 105; 5 Jur. 170.

A company purchased lands and laid them out as a cemetery. They received fees for interments and conveyed plots of ground to be used as graves. In one year the sum of 2,333*l.* was received by the company as purchase-money for such plots of ground. Each plot was conveyed by indenture purporting to grant it in fee-simple upon trust that the grantee might use it as a place of burial, subject to the regulations of the company, and, subject to such trusts, in trust for the company as part of their property. The company was rated as the occupiers of the lands, and upon the principle that the sum of 2,333*l.* was to be treated as part of the annual value of the occupation of the lands by the company in that year:—Held, that the company was in occupation of the plots of ground which had been sold; and that the principle upon which they were rated was correct. *Reg. v. Abney Park Cemetery Company*, 8 L. R., Q. B. 515; 42 L. J., M. C. 124; 29 L. T. 174.

Receiving Rents and Profits for Graves.—

Commissioners were authorized "to pave and cleanse streets, squares, &c., within a township, and to charge the expenses upon the owners of buildings, ground or land within or adjoining the streets, squares," &c.; provided that if the sewers required enlarging, "the owners of houses, buildings, lands, grounds and hereditaments," should pay only a proportion of the expense. B., a clergyman, desirous of building a church and setting out a churchyard, purchased a plot of ground, which was conveyed to trustees for the purpose; and the church and churchyard, having been built and set out accordingly, were consecrated. By the deed of consecration, the right of letting or otherwise disposing of the pews, vaults and graves in the churchyard was reserved to B. The church and churchyard adjoined a street which had been paved by the commissioners. B. conveyed to the defendant, in fee, by way of mortgage, the pews and vaults in and under the church remaining unsold, and so much of the churchyard as had not been sold, together with the rent, pensions, stipends, &c., thereunto belonging. The defendant received the rents and profits arising from the pews, vaults and graves in the church and churchyard, and appropriated the same in part satisfaction of his debt:—Held, that he was not liable to be charged, as he was not "the owner of buildings, ground or land" within the meaning of the act. *Chorlton-upon-Medlock (Constables) v. Walker*, 10 M. & W. 742; 12 L. J., Ex. 88.

Mode of Assessment—Deductions.—By an act incorporating a cemetery company the company was required periodically to appoint directors who should manage the business and concerns of the company subject to their control, keep and use the common seal, have the custody of books, deeds, &c., call meetings, purchase and

sell lands, appoint and displace chaplains and other officers, allow them stipends, take of them securities, make contracts touching the company's undertaking, regulate the mode of interment, and the disposition of vaults, catacombs and graves, and the sums to be paid for exclusive right of burial therein, and for placing monuments, direct the issuing, receiving and disposal of the company's moneys, and all their other dealings, superintend their correspondence, and the keeping of their accounts, and all other things necessary for carrying on their business, and maintaining actions or suits in their name in respect of debts or contracts, and making, enforcing, and rescinding contracts, also auditors, who should examine the report to be made by the directors of disbursements and receipts, audit the accounts from which the report was drawn, and inspect the vouchers. The company had two cemeteries in Middlesex and Surrey. The duties and authority of the directors extended to both:—Held, that they were not entitled to deduct from the rateable value the salaries of the directors and auditors and the expenses of an office in London at which the directors transacted the business of the company. *Reg. v. St. Giles, Camberwell*, 14 Q. B. 571; 19 L. J., M. C. 129; 14 Jur. 519.

9. ON UNIVERSITIES AND COLLEGES.

Oxford.—The University of Oxford is exempt from liability to be rated in respect of the occupation of the Bodleian Library, the Divinity and other schools, the Convocation House, the Old Convocation House, and Law School, the Clarendon Buildings, and the University Galleries, such occupation being necessary for the purposes for which the university was erected, namely, the advancement of national religion and learning, and appearing not to be used for any quasi private purpose inconsistent with the public purposes of the university. *Oxford University, In re*, 8 El. & Bl. 184; 27 L. J., M. C. 33; 3 Jur., N. S. 1249.

— **Colleges.**—The colleges are liable to be rated in respect of the occupation of college chapels and college libraries. *Id.*

Edinburgh.—The property of the Edinburgh University is neither held by the crown nor for the crown. It is therefore rateable. *Greig v. Edinburgh University*, 1 L. R., H. L. (Sc. App.) 348.

10. LITERARY AND SCIENTIFIC SOCIETIES.

Absence of Money Profits.—A society is not entitled to exemption from rates, under 6 & 7 Vict. c. 36, s. 1, unless it has an express law prohibiting the making of "any dividend, gift, division, or bonus in money unto or between any of its members." *Reg. v. Jones*, 2 New Sess. Cas. 382; 8 Q. B. 719; 15 L. J., M. C. 129; 10 Jur. 613.

Purpose exclusively for Literature, Art or Science.—A society had a news-room, where many of the periodical publications and usual newspapers of the day were taken in; and the Parliamentary Votes, the Course of Exchange, Mark-lane Express, and shipping lists, also share-lists and advertisements of sales, were supplied for the perusal and information of the

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subscribers. A library was attached to it, in which were 300 volumes, comprising statistical and topographical works, the Mirror of Parliament, and the Statutes at Large. The commercial and general directories and other documents were preserved and filed for the use of commercial subscribers:—Held, that the society was not instituted for purposes of science, literature, or the fine arts exclusively. *Reg. v. Phillips*, 3 New Sess. Cas. 134; 8 Q. B. 745; 17 L. J., M. C. 83; 12 Jur. 431.

Institution for the training of Teachers as well as Pupils.—By the rules of a society, it was provided that this institution should be designated the Institution for promoting Education of the Labouring and Manufacturing Classes of Society of every Religious Persuasion; and for the purpose of making manifest the extent of its object, the title of the society should be the British and Foreign School Society; that a school should be maintained to educate children for the purpose of supporting and training up teachers; and it was stated that the grand object of the institution was to promote education in general. In the normal school, for training teachers, lectures were to be given on specified branches of literature, science and the fine arts, also lectures on the art of teaching and Bible lessons. Instruction was also given in needlework. There were model schools for boys and girls, for the purpose of elucidating the art of teaching; and it was stated, that the number of children in them was large, in order to afford a sufficient scope and opportunity for the pupil-teachers to instruct and put in practice the science of teaching, the object of the institution being to train up teachers, who might promote education, according to the particular system of this institution, in the United Kingdom and in the colonies:—Held, that the society was not "instituted for the purposes of science, literature, or the fine arts exclusively," and, therefore, that the lands, &c., belonging to it were not exempted from rates. *Reg. v. Pooock*, 8 Q. B. 729; 15 L. J., M. C. 132; 10 Jur. 662.

Subscription Library—Interest of Members Transferable.—By the rules of a society formed for the purpose of creating and maintaining a library, it was provided that a person admitted a member should pay two guineas, and 1*l.* annually, in advance, towards the expenses of the current year; that if the annual subscription was in arrear for three months he should be deprived of all privileges of a subscriber till the subscription was paid; and that he should have the power of transferring his property in the library by any of the methods by which personal property is usually transferred; but that no dividend, gift, or bonus in money should be made to or between any of the members:—Held, first, that the society was instituted for purposes of literature exclusively. *Birmingham New Library, In re*, 3 New Sess. Cas. 445; 18 L. J., M. C. 89; 13 Jur. 357; *S. C.*, nom. *Birmingham (Churchwardens) v. Shaw*, 10 Q. B. 868.

Held, secondly, that it was supported by voluntary contributions. *Id.*

Held, thirdly, that the rule allowing subscribers to transfer their property in the library was not a contravention of the rule prohibiting any dividend, and therefore that the land belonging to the society was exempted from rates. *Id.*

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Rent for Part of Premises.]—A poor-rate was assessed on part of a building occupied by a society, the rules of which declared that its purposes were the promotion of literature, science and the arts. The society was partly supported by annual voluntary contributions. Objections to the claim of exemption were raised under the following circumstances:—The building was the property of the society. The part in question was occupied by it wholly for its own purposes; the rest was let to tenants; the tenants were rated in respect of their own occupations. The rents were received by the society, and formed part of, and were applied as, its general funds:—Held, that this fact did not affect the exemption from rates of the part occupied by the society. *Reg. v. Manchester Overseers*, 16 Q. B. 449; 20 L. J., M. C. 119; 15 Jur. 219.

Receipt of Money to defray Expenses.]—The society exhibited on the premises at intervals works of art, which it allowed to be sold there. The society paid the carriage of such works of art as were sent to its exhibition from a distance, and on the sale of such of these as were sold received five per cent. on the price to defray the expense of carriage, to which purpose, however, the receipt was not adequate. Strangers were admitted to the exhibition on payment at the door:—Held, that the exhibitions appearing to be made bona fide with a view of promoting the fine arts, the receipt of money as above in the course of such exhibitions did not affect the exemption. *Ib.*

In the trust deed of the society was a power to use the premises for the imparting and diffusion of education and knowledge, consistent with the general purposes of the institution:—Held, that these words did not authorize the use of the buildings for the diffusion of education or knowledge, except as connected with the general purposes of the institution, viz., the promotion of science, literature and the fine arts, and therefore did not prejudice the exemption. *Ib.*

Dividing Proceeds on Dissolution.]—The trust deed of the society contained a provision, that on its dissolution the property should be sold, and the proceeds divided among the then members:—Held, that this was no answer to the claim of exemption, the provision not appearing to be a pretext for accumulation. *Ib.*

Letting Premises for other Purposes.]—A society instituted for purposes of science, literature, or the fine arts, is not exempt from rates, unless their premises are occupied solely for those purposes. *Purvis v. Traill*, 3 Ex. 344; 3 New Sess. Cas. 469; 18 L. J., M. C. 57.

Such a society letting their premises for other purposes are liable to be rated, although the funds are applied to the objects of the institution. *Ib.*

— **Musical Society.]**—A society by its rules declared to be instituted exclusively for the promotion of the science or art of music within a town, by the giving of concerts or other musical performances at the concert-hall now belonging to the institution. The hall was occupied for the purpose of giving concerts, to which members of the society, and persons having tickets, which members had authority to give, were admitted. These concerts were much sought after; the music was of a high order,

and the art of music was promoted in consequence in the town. The society was rated in respect of their occupation. On one occasion, before the time of the rate, the society had granted the use of the hall gratuitously for a concert, the proceeds of which were given to a charity:—Held, that the casual use of the concert-hall in one instance for a purpose of charity before the rate did not affect the claim to exemption; but that the society, though instituted for the purpose of promoting the fine arts, and producing that effect, was not exempt, since it appeared that the promotion of the fine arts was not the primary object of the society, but only incidental, the primary object being the gratification of the subscribers. *Reg. v. Brandt*, 16 Q. B. 462; 20 L. J., M. C. 119; 15 Jur. 223.

— **Society with Privilege confined to Members, but open to all.]**—A society, called the London Library, was established for the purpose of lending books to its members, being supported in part by annual subscriptions, and in part by the voluntary contributions of its members, and precluded by its laws from making any dividend, gift, division, or bonus in money, to or between any of its members:—Held, that such society, being duly certified, was exempted from rates. *Clarendon (Earl) v. St. James's (Rector)*, 10 C. B. 806; 20 L. J., M. C. 213; 15 Jur. 492.

But, where portions of the premises leased by such society were underlet to other scientific bodies:—Held, that this was not such an exclusive occupation of the premises for the purpose of the society as to entitle it to the exemption. *Ib.*

Society for Literary Purposes—Privileges confined to Members.]—Premises called the Portico were held in trust for a society consisting of the subscribers for the time being, during such time as they should continue members, pay certain annual subscriptions, and conform to the rules. Their numbers were 400. Books and newspapers were provided out of the annual subscriptions. The Portico consisted of a library of 15,000 volumes on scientific and general subjects, for reference and for circulation among the subscribers; a reading-room, containing magazines, reviews, and other periodical works; and a news-room, in which were the newspapers, gazettes, reports of the markets, notices of sales, &c.:—Held, that the society was not exempt in respect of the premises, for that the purposes to which they were appropriated were not exclusively purposes of science, literature, or the fine arts; and the promotion of these was not the primary object of the society, inasmuch as the use of the premises and their contents was confined to the members themselves. *Reg. v. Gaskell*, 16 Q. B. 472; 21 L. J., M. C. 29; 15 Jur. 1156.

Society for training Members for a particular Profession.]—A society known as "The Institution of Civil Engineers" was formed for the purpose of promoting the general advancement of mechanical science, and more particularly the acquisition of that species of knowledge which constitutes the profession of a civil engineer, being the art of directing the great sources of power in nature for the use and convenience of man, as the means of production and of traffic in states both for external and internal trade, as applied in the construction of roads, bridges, &c., and in the art of navigation by artificial power

for the purpose of commerce, and in the construction and adaptation of machinery, and in the drainage of cities and towns. The bye-laws and regulations of the society stated under the head of "Objects," that the institution was established for the general advancement of mechanical science, and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer. The institution consisted of three classes, namely, members, associates, and honorary members, with a class of students attached, and papers were read at the institution on various subjects:—Held, that the primary purpose of the institution was the edification and instruction of its members and students in sundry arts, with the view of enabling them the better to practise a particular profession, and consequently that such institution was not entitled to be exempted from rates under 6 & 7 Vict. c. 36, as a society established exclusively for the purposes of science, literature, or the fine arts. *Reg. v. Institution of Civil Engineers*, 5 Q. B. D. 48; 49 L. J., M. C. 34; 42 L. T. 145; 28 W. R. 253; 44 J. P. 265.

When Publications restricted for Religious Purposes.]—The Working Men's Educational Union was founded in 1852, having for its object the support of the efforts variously put forth for the elevation of the adult operative population, as it regarded their physical, intellectual, moral, and religious condition. The means were, by encouraging popular literary and scientific lectures, by preparing suitable diagrams and other aids to lectures, and by promoting the formation of popular lending libraries and mutual instruction classes. There was a provision that the publications issued or recognized by the society should be free from the party politics of the day, and should be scriptural and unsectarian in their character. The lectures and discussions embraced political subjects:—Held, that both by the laws and usages of the society some of the purposes for which it was instituted were different from those of science, literature, or the fine arts, and therefore it was not exempted from rates by the statute. *Scott v. St. Martin's-in-the-Fields, Westminster (Churchwardens)*, 5 El. & Bl. 558; 27 L. J., M. C. 42; 1 Jur., N. S. 1207.

Subscriptions in Form of Shares—Fines Levied for Non-Payment.]—A library was an institution formed to provide a fund of literary instruction and entertainment, adapted to the various tastes of the proprietors, among whom the books were to circulate. The property was held in 893 shares, the holders of which subscribed one guinea annually. Proprietors might assign their shares, which were saleable at about 9l. a share. If the annual subscriptions were unpaid for a certain period, fines became due; if unpaid for two years, the shares might be forfeited. The proprietors might introduce strangers. The committee had power to dispose of the earlier copies of periodical works, which from the nature of their contents required to be renewed by later editions. It was not lawful to make any dividend, gift, division, or bonus, in money or otherwise, unto or between any of the members, and no such division was in fact made. No newspapers were supplied to or introduced into the institution:—Held, that the premises occupied by the society were exempt; and, first, that the

possible increase in the value of the shares did not deprive the society of the benefit of the enactment; and, secondly, that the annual payments were voluntary, because the society could not enforce the payment of them. *Liverpool Library v. Liverpool (Mayor)*, 5 H. & N. 526; 29 L. J., M. C. 221; 8 W. R. 498.

Effect of Local Act.]—A local act empowered the council of a borough to make rates on every person occupying any house or land within the borough, for certain purposes therein named. It provided that no person shall be rated in respect of any church, chapel, &c., "or in respect of any building used for the education of the poor exclusively:"—Held, that this act did not repeal the 6 & 7 Vict. c. 36, s. 1, or affect the exemption from rates of a house occupied by a society established for the purposes of literature within the borough. *Ib.*

A society occupied premises occupied exclusively for the objects of a literary society. By the rules, the number of proprietors was limited to 600, each shareholder paying eight guineas for the purchase of each share, which was transferable; and an annual subscription of one guinea in advance, or fifteen guineas as composition for such subscription. Fines were imposed on subscribers in arrear; and, if arrears were not paid up in three years, the defaulter's share was forfeited. No dividend, gift, bonus, or division in money was to be made among the proprietors. Each proprietor signed a deed binding the subscribers to obey the rules. The funds by which the society was supported were derived from the following sources, exclusively so applied: the purchase-money of shares; the annual subscriptions; the fines and forfeited shares; the sale of spoiled or useless works, and of catalogues; money raised on mortgage of the building; rents from tenants occupying other portions of the society's property; and the quarterly subscription of temporary residents in the town, admitted to the library under certain regulations. The books in the library consisted of standard authors, reviews, magazines, pamphlets, and novels, and such other books as the committee might determine to admit, were circulated solely among the shareholders and such temporary residents as aforesaid; and the library was open daily to those parties only:—Held, that the society was instituted for purposes of literature exclusively; that the annual contributions, by which it was partly supported, were voluntary; and that it was therefore exempt from rateability. *Bradford Library and Literary Society v. Bradford (Churchwardens)*, 1 El. & El. 88; 28 L. J., M. C. 73.

Lectures Delivered—Money taken from the Public.]—An institution comprised a library, a theatre or lecture-room, and a news-room, and was founded in 1808 for the following objects: "First, the formation of a library, consisting of the most useful works in ancient and modern literature; secondly, the establishment of a reading-room provided with the best foreign and English journals and other periodical publications; and thirdly, for lectures on literary and scientific subjects." The funds for purchasing the building and supporting the institution were raised by shares, which were transferable. Persons who were not shareholders might become annual subscribers, and by reason of their sub-

scriptions were entitled to the privileges of proprietors. The members and the annual subscribers amounted to about 400, and the privilege of resorting to and using the establishment was confined to them, except as to the admission to lectures. The library consisted of about 18,000 volumes: the principal reviews, magazines and other periodicals were taken in, together with books of reference, directories, the mining and railway journals and railway time-tables. Of the twenty-four daily newspapers and the weekly newspapers so taken in, some were filed, and the rest were sold for the benefit of the institution. Lectures were delivered on subjects connected with science, literature and the arts, to which the public were admitted on paying for their admission. The whole income was applied in defraying the expenses of the institution; and no dividend, gift, division or bonus in money or otherwise could be made unto or between the members. On appeal against a poor-rate assessed on the premises of the institution:—Held, that it was not a society instituted for the purposes of science, literature or the fine arts exclusively within 6 & 7 Vict. c. 36, s. 1. *Russell Institution v. St. Giles-in-the-Fields and St. George, Bloomsbury*, 3 El. & Bl. 406; 2 C. L. R. 755; 23 L. J., M. C. 65; 18 Jur. 597.

Periodical Papers taken in not for Objects of the Society.—The Cambridge Philosophical Society was originally established for the promotion of philosophy and natural history, and, to carry out its objects, occupied a house consisting of first floor, ground floor and basement, divided into rooms, which were used as a museum, lecture-room, library, and reading-room. In the reading-room were reviews, magazines and periodicals, some of which only were of a purely scientific character; and also the daily newspapers. Part of the subscription of every fellow of the society was paid for the use of the reading-room, and it was generally used by all:—Held, that the society was not entitled to be exempted from rateability, as, whatever might be the objects of the society as originally instituted, the premises rated were not occupied at the time when the rate was imposed for the purposes of science, literature or the fine arts exclusively. *Purchar v. Holy Sepulchre, Cambridge (Overseers)*, 4 El. & Bl. 156; 3 C. L. R. 6; 24 L. J., M. C. 9; 1 Jur., N. S. 304.

Held, also, that the society was liable to be rated in respect of the whole building, and not merely in respect of the reading-room. *Ib.*

Institution confined to a particular Profession.—The United Service Institution comprised a museum of natural history, curiosities and armour, a library, a lecture-room, and rooms for meetings of the members and council or committee of management. The trust deed and the laws of the institution declared it "to be instituted as a central repository for objects of professional art, science and natural history, and for the books and documents relating to those studies, or of general information and the delivery of lectures on appropriate subjects." By the laws the members consisted of officers of the navy, army, marines, regular and local militia, the East India Company's land and sea services, yeomanry, and civil functionaries attached to the naval and military departments. Gentlemen above the age of fifteen, whose names were on the list of the commander-in-chief for com-

missions in the army, were admissible to become provisional members; and eminent individuals and benefactors to the institution, and ladies who contributed to the institution might be admitted honorary members:—Held, that the institution was not established exclusively for the purposes of science or the fine arts, and therefore was not exempted from liability to be rated. *Reg. v. St. Martin's-in-the-Fields (Churchwardens and Overseers)*, 21 L. J., M. C. 53; 16 Jur. 335; *S. C.*, nom. *Reg. v. Cockburn*, 16 Q. B. 480.

Institution in Occupation of the Crown.—The Museum of Practical Geology is built on part of the hereditary property of the crown. It is used as a museum and a place of education, the institution being under the control of the Lords of the Treasury. Professors lecture there, being partly paid by fees received from pupils, besides salaries from the public money; but they have no occupation beyond what is necessary for the purpose of giving lectures. A housekeeper resides there, appointed and paid by the Board of Trade, to take care of the premises, but having no further occupation than is necessary for that purpose:—Held, that the premises were in the occupation of the sovereign for public purposes, the Commissioners of Woods and Forests being in the nature of her managers, and the other persons being in the occupation as her servants, and consequently no one was rateable in respect of the premises. *De la Beche v. St. James, Westminster (Vestrymen)*, 4 El. & Bl. 385; 24 L. J., M. C. 74; 1 Jur., N. S. 375.

Society established by Royal Charter—Part Underlet to Stranger.—The Linnean Society, incorporated by royal charter, and instituted for the purpose of science exclusively, was supported in part by annual contributions of the fellows, who, before admission, signed an obligation for the payment of such contributions; which, in case of default in payment, might be sued upon. The society was lessee of contiguous premises, 32, Soho-square, and 17, Dean-street, which had formerly been one house, and underlet 17, Dean-street, and five rooms in Soho-square to B. The other part of the premises in Soho-square was occupied for the purposes of the society, the librarian and house-keeper occupying as his dwelling two rooms, and the porter also dwelling in the house, the use of the rooms being taken into account in fixing the amount of salary. On appeal against a poor-rate assessed on the society in respect of 32, Soho-square:—Held, first, that it was "a society supported in part by annual voluntary contributions." *Linnean Society v. St. Ann, Westminster (Churchwardens)*, 3 El. & Bl. 793; 2 C. L. R. 761; 23 L. J., M. C. 148; 18 Jur. 859.

Held, secondly, that it was entitled to exemption from rating in respect of the rooms in 32, Soho-square, in the occupation of the librarian and housekeeper and the porter. *Ib.*

Held, thirdly, that B. was liable to be rated for the rooms in 32, Soho-square, underlet to him. *Ib.*

Special Privileges to Members.—The Zoological Society, which was incorporated by charter for the advancement of zoology and animal physiology, occupied land and buildings for housing animals, a museum for stuffed animals, a porter's lodge and greenhouses, and residences for the keepers. Part of the land was cultivated

as a flower-garden. Refreshments were sold in the gardens by a person who paid to the society an annual sum for that right, and a band usually played there every Saturday during the months of June, July and August. The fellows of the society paid an annual contribution, or composition. There were also annual subscribers and honorary foreign and corresponding members, who, as well as the fellows, were entitled to a copy of the scientific proceedings of the society. They might obtain, on the payment of one guinea annually, an ivory ticket, which would admit a named person of their immediate family to the gardens and museum, with one companion, daily. Each fellow was entitled to personal admission, with two companions daily:—Held, that it was not a society for the purpose of science exclusively, nor supported in part by annual voluntary contributions within 6 & 7 Vict. c. 36, s. 1. *Reg. v. Zoological Society*, 3 El. & Bl. 807; 2 C. L. R. 766; 23 L. J., M. C. 139; 18 Jur. 786.

Purpose at the Time of Rating.]—In order to entitle a society to exemption from rates, as being instituted for the purposes of science, literature, or the fine arts exclusively, the purposes to which the society is applied at the time when the rate is made must be such as described in the statute; it is not enough that its original purposes should have been such. *Purshas v. Holy Sepulchre Cambridge (Overseers)*, 4 El. & Bl. 136; 24 L. J., M. C. 9; 1 Jur., N. S. 304.

Certificate of Exemption.]—The certificate of a barrister that a society is entitled to the benefit of the statute, although a condition precedent to the claim for exemption, is not conclusive proof of a right thereto. *Reg. v. Phillips*, 3 New Sess. Cas. 134; 8 Q. B. 745; 17 L. J., M. C. 83; 12 Jur. 431.

—Appeal.]—After a society has obtained a certificate of exemption, and is afterwards rated to the poor-rate, the remedy is by appeal to the quarter sessions. *Birmingham (Churchwardens) v. Shaw*, 10 Q. B. 868.

11. CORPORATIONS.

Power to Rate.]—By a local act power was given to levy a rate upon all and every the person or persons who did inhabit, hold, &c., any land, house, &c.:—Held, that this authorized a rate being made on a corporation, although by a clause giving an appeal they were bound to enter into a recognizance. *Cortis v. Kent Waterworks Company*, 7 B. & C. 314.

When Seised of Land for Profit.]—A corporation seised of land in fee for its own profit is within the words "inhabitants or occupiers" in 43 Eliz. c. 2, s. 1, and, liable in its corporate capacity to be rated in respect of such land. *Reg. v. Gardiner*, Cowp. 79.

Where a corporation, consisting of a mayor, aldermen, and twenty-four capital burgesses, was seised in fee of pasture lands, and appointed a ranger to keep the keys of the gates, cleanse the ditches, preserve the fences, impound cattle, &c.: and by a court of orders and decrees, regulations were annually made concerning the right of common to be exercised by the freemen as to the number of their cattle to be turned on, the time to be turned on, and the price to be paid for each head; which price was always paid

by the freemen exercising the right to the treasurer of the corporation, and which money, after deducting the expense of management, was distributed among the poorer burgesses who had no cattle to depasture:—Held, that the corporation was liable to be rated, as beneficial occupiers of the land in question. *Reg. v. Sudbury (Mayor)*, 2 D. & R. 651; 1 B. & C. 389.

The freemen of York had certain rights of common over land, which being inclosed under an inclosure act, other lands were set out to the mayor and commonalty for the use of the freemen, who turned out cattle to the extent of 2l. a year value, but the mayor and commonalty, although they appointed the pasture masters, who regulated the apportionment of the right, derived no benefit:—Held, that the mayor and commonalty were rateable. *Reg. v. York (Mayor)*, 1 N. & P. 539; 6 A. & E. 419.

Within the precincts of a city was a commonable pasture containing about thirty acres of land, over which the resident freemen of the city, in number about five hundred and fifty, had rights of pasturage, the soil being vested in the corporation as lords of the manor. The corporation always maintained and repaired out of their corporate funds the fences of the common, and, since 1835, had appointed and paid out of those funds an officer called the commons warden to check the illegal stocking of the common, with power to inflict fines, the average amount of which did not cover the expenses. The freemen enjoyed by prescription a right of depasturing on the common all the year round two head of cattle; if a freeman had no stock his right was in abeyance. The exercise of these rights exhausted all the profits of the land:—Held, that the corporation was the occupier of the soil, subject to a right in gross, which exhausted the profits of the land, and therefore either it had no beneficial occupation or the rate must be reduced to nothing. *Lincoln (Mayor) v. Holmes Common (Overseers)*, 2 L. R., Q. B. 482; 36 L. J., M. C. 73; 16 L. T. 739; 15 W. R. 786; 8 B. & S. 344.

Before 4 & 5 Vict. c. 48, a corporation was not rateable in respect of lands, of which the profits were payable to the borough fund, although the land was situated in a parish without the limits of the borough. *Reg. v. Exminster*, 4 P. & D. 69; 12 A. & E. 2.

Exemption under 4 & 5 Vict. c. 48.]—A corporation created since 5 & 6 Will. 4, c. 76, is by 16 & 17 Vict. c. 79, s. 2, entitled to the exemption in 4 & 5 Vict. c. 48, s. 1, because, it being an affirmative enactment that property so situate should be exempt, the exemption continues, notwithstanding the decisions which originally created the exemption of corporate property have been overruled, and the Union Chargeability Act (28 & 29 Vict. c. 79) does not affect this exemption of corporate property, in a parish in a union. *Reg. v. Oldham (Mayor)*, 3 L. R., Q. B. 474; 37 L. J., M. C. 169; 18 L. T. 240; 16 W. R. 789; 9 B. & S. 202.

Occupation of Yard for the Repair of Highways.]—A municipal corporation was by its town council constituted a local board of health of a district co-extensive with the borough. The local board occupied a yard within the borough in a parish, solely for the purposes of repairing the highways in the district of which they, as

local board, were surveyors. The parish was partly not within the borough:—Held, that the local board of health was rateable in the parish, as occupiers of the yard; their occupation not being for such public purposes as to exempt them from rateability. *Reg. v. Kingston-upon-Hull (Justices)* or *Cooper*, 4 El. & Bl. 29; 23 L. J., M. C. 183; 18 Jur. 899.

12. BRIDGES.

Lease of Tolls—Liability of Owner.—The lessee of the tolls of a public bridge is not rateable as such, whatever rent he may pay; it not appearing that he was the occupier of any local visible property within the parish, nor that he was an inhabitant resident there, deriving profit there from such tolls, beyond the rent paid by him for the same, which was applicable to the public purposes of the bridge. *Reg. v. Eyre*, 12 East, 416.

Where tolls traverse of a bridge were let at yearly rent, but not by deed:—Held, that no interest passed, and that the owner of the bridge was rateable in respect of his beneficial occupation. *Reg. v. Salisbury (Marquis)*, 3 N. & P. 476; 8 A. & E. 716.

Company occupying Bridge—Use of Tolls for temporary Purpose.—A local act recited, that it would be of great utility to the public to build a bridge, and empower a company to raise a capital sum amongst themselves by shares, and to borrow a further sum by mortgage or annuity, for the building thereof, and authorized tolls to be taken; and enacted, that the tolls should be applied, first, in discharging the expenses of the act and paying the mortgagees their interest, and that the surplus should be divided among the proprietors, not exceeding $7\frac{1}{2}$ per cent. on their shares. The excess arising from the tolls beyond the dividends was to be applied in paying off the capital advanced by the proprietors, afterwards to pay off the mortgage debt, afterwards to form a fund for the repairs of the bridge, and then the tolls to cease altogether. The company raised the sums authorized under the act, and also incurred a further debt in completing the bridge. The tolls were applied in discharging this further debt and the interest of the money raised. This debt had not been wholly discharged, and no dividend to the proprietors had ever been made:—Held, that the company was beneficially interested in the tolls till their capital was paid off, and therefore rateable as occupiers of the bridge. *Reg. v. Blackfriars Bridge Company*, 1 P. & D. 603; 9 A. & E. 828.

Bridge in the Hands of Public Commissioners.—The commissioners of works and buildings were empowered to construct a bridge at Chelsea, and to borrow money from the Treasury on an assignment of the tolls. The commissioners were authorized to take tolls which were to be applied to the payment of the expenses of the bridge, then in repayment of the sum borrowed, and when that had been repaid there was to be no toll charged for foot-passengers. There was no ultimate appropriation of any surplus:—Held, that the commissioners were not liable to be rated, as they were in occupation of the bridge as servants of the crown, deriving themselves no benefit from the receipt of tolls. *Reg. v. McCann*, 3 L. R., Q. B. 677; 37 L. J., M. C.

123; 19 L. T. 115; 11 W. R. 985. Affirming 3 L. R., Q. B. 141; 37 L. J., M. C. 25; 17 L. T. 643; 16 W. R. 397; 9 B. & S. 33.

Bridge vested in Trustees for Benefit of Shareholders.—The property in Putney-bridge was vested in trustees to permit thirty shareholders to receive the tolls, and to have the entire management of the bridge. The shareholders were assessed jointly for the relief of the poor of Putney; and the amount not being paid, a summons was issued to all the shareholders to appear before a magistrate of the district. A., a shareholder, living at the toll-house on that side of the bridge which was not within the parish making the rate, appeared in pursuance of the summons served on him, but refused to pay the whole amount of the assessment, whereupon application was made to the magistrate to grant a distress warrant, which he refused to do:—Held, that the shareholders were properly assessed, and that the rule must be made absolute for a mandamus to the magistrate to issue a distress warrant to levy on the goods of A. for the assessment due from all the shareholders. *Reg. v. Paynter*, 1 New Sess. Cas. 631; 7 Q. B. 255; 14 L. J., M. C. 179; 9 Jur. 877.

Land occupied in two Parishes—Toll taken in one.—A bridge was erected over a navigable river pursuant to an act of parliament. The proprietors purchased on each side of the river in parishes A. and B. land on which they erected a pier and an abutment. They were authorized to erect toll-gates, and to take certain tolls, before any foot passenger should be permitted to pass or return over or through the bridge. The proprietors took tolls at one side of the bridge only, in parish A.:—Held, that they were rateable for the land occupied by them in parish B. *Reg. v. Barnes*, 1 B. & Ad. 113.

The owner of a bridge, resting on piles driven into the soil, one end of which was in the parish of A., and the other in the parish of B., in which parish was situate the toll-house, is rateable for an occupation of land in A., pro rata, although the road over the bridge was repaired by other persons. *Reg. v. Salisbury (Marquis)*, 8 A. & E. 716; 3 N. & P. 476.

By two local acts, a company was authorized to erect a bridge across the Thames, from H. to B., and to make roads and approaches, and maintain them at their own expense; and to erect toll-gates and to collect a portion of the tolls on the roads for the roads alone, and the remainder on the bridge; or to take the whole toll for the bridge and roads in one sum, and at any part of the bridge or roads. Half of the bridge was to be deemed to be in H. and half in B. In pursuance of the acts the company erected a bridge and formed roads and approaches, and took the tolls at a toll-house at the entrance on the bridge in H.:—Held, that the net rateable value of the bridge, the expenses incidental to the roads and approaches, including the rates to which they were liable, being deducted, was to be divided between H. & B. in equal moieties. *Reg. v. Hammersmith Bridge Company*, 3 New Sess. Cas. 424; 15 Q. B. 369; 18 L. J., M. C. 85; 13 Jur. 190.

Liability for Bridges as "Buildings."—By a paving act, commissioners were to rate all "houses, shops, warehouses, coach-houses,

stables, cellars, vaults, buildings and tenements," and the rates "upon or in respect of any chapel, meeting-house, hospital, school or other public building, or any wall, garden, yard or void space of ground, should be ascertained according to the number of square yards of pavement paved, &c., belonging to such chapel, to the middle of the street on which the same should abut; but so, nevertheless, as that no rate or assessment should be laid upon, or so collected or received for or in respect of any wall, garden, yard, or void space of ground, unless the space should abut upon or front some street, &c., to be paved." A railway company was required to build and for ever after keep in repair a bridge over their railway, with a brick wall at each side thereof, at a spot where their railway intersected a public street or road, which was paved or repaired under the local act. The land upon which that part of the railway was constructed and the bridge erected was conveyed to the company in fee by a former owner, with a reservation of the use and enjoyment of the bridge. The surface of the bridge was paved by the local commissioners:—Held, that the company was liable to be assessed under 57 Geo. 3, c. xxix.; for although the bridge was not a public building within the meaning of that act, the company was rateable in respect of the side walls, under the description of "dead walls." *Arnell v. London and North-Western Railway Company*, 12 C. B. 697.

By a local act, commissioners are empowered to view any street, square or other public passage or place (within the limits of the act) which now is or hereafter may be built upon or in building; and if of opinion that the foot and carriage ways are fit to be levelled and paved, to give notice to the owner, proprietor or lessee of any such land, ground, house, . . . tenement or hereditament, situate in any such street, square, or other passage or place, to meet and compound with them for the paving, &c., of such foot and carriage ways; and in default of the owner compounding, the occupier of the premises may do so, and deduct the composition-money from the rent. The defendants were owners of a canal within the limits of the act, over which they had built a bridge, as required by their private act; the bridge was of brick, having brick walls four or five feet high on each side, and was a public highway, and connected two public streets, the houses of which were built up to either end of the bridge:—Held, that the defendants were not liable to compound for paving the bridge, as it was not within the meaning of the act, not being "a place or passage built upon or in building." *Arnell v. Regent's Canal Company*, 14 C. B. 564; 23 L. J., C. P. 155; 18 Jur. 632.

13. CANALS.

Land occupied by Canal—Other Property—Mode of Assessment.—By a private act of Geo. 3 it was provided that a canal company should from time to time be rated to all parliamentary and parochial taxes, in respect of the lands and grounds already purchased or taken, or to be purchased or taken, and all warehouses or other buildings to be erected by the company, in the same proportion as other lands, grounds and buildings lying near the same are or shall be rated, and as the same lands, grounds and buildings would be rateable in case they were the

property of individuals in their natural capacity. Land was purchased by the company, and the canal was made with towing-paths and lock-houses and buildings attached thereto; subsequently a railway was made on land lying near the canal, running parallel with, and in one place crossing, the canal. Buildings were erected on much of the land lying near the canal, and portions of such lands were converted into gardens for watercresses, and otherwise greatly improved in value. In 1848, the company adopted the 8 & 9 Vict. c. 42, and commenced business as carriers on their own account on the canal:—Held, first, that the land occupied by the canal was to be rated in the same proportion as the open land lying near, the value of which might be increased from time to time by circumstances; and the buildings belonging to the company in the same proportion as the buildings lying near. *Grand Junction Canal Company v. Hemel Hempstead (Overseers)*; *Grand Junction Canal Company v. King's Langley (Overseers)*, 6 L. R., Q. B. 173; 40 L. J., M. C. 25; 24 L. T. 228; 19 W. R. 433.

Held, secondly, that the land occupied by the canal lying near the railway was not to be rated in proportion to the improved value of land with a railway upon it. *Id.*

Held, thirdly, that the rateable value of the canal under the private act was not affected by reason of the company carrying on the business of carriers. *Id.*

By a local act of 1793, a canal company was to be rated in respect of their lands and grounds, and all warehouses and other buildings, in the same proportion as other lands, grounds, and buildings lying near the same were rated. Near the offices, machine-houses, wharf, canal, towing-path, and premises, for which the company was rated in a parish, were pieces of vacant land, a piece of garden ground, and sets of premises consisting of warehouses or gasometers, and also of yards and wharves used therewith:—Held, that the wharf, canal, and towing-path of the canal company ought not to be rated in the same proportion as the neighbouring piece of garden ground; nor as if it were land occupied by the canal company, supposing no canal to exist; but that the land upon which the neighbouring sets of premises stood ought to be calculated in the proportion. *Warwick and Birmingham Canal Company v. Birmingham (Guardians)*, 27 L. T. 487.

By a canal company's special act, it was provided that the lands of the company, whether covered with water or not, and also all dwelling-houses, wharves, warehouses, lock-houses, and other houses of the company, should be rateable; the lands according to their quantity and quality, and the dwelling-houses, &c., according to the nature and respective uses, dimensions and descriptions thereof; and should be charged and assessed in like manner as lands of a like quality, and dwelling-houses, &c., of a like and similar size, nature, dimension or description in the respective parishes where the same should be situate, were, or should be assessed or charged. The lands adjoining the canal were all built upon, and the assessment committee sought to assess the canal and towing-path on the following principle. They assumed the area occupied thereby to be covered by buildings similar in rateable value to the buildings adjoining the canal, allowing for necessary roads, access, &c.,

and then took a proportionate part of such rateable value as representing the rateable value of the lands so covered as distinguished from the buildings:—Held, that the canal ought to be rated in like manner as land of the like quality in the parish uncovered with buildings, the value of which might be increased from time to time by circumstances, and that the mode of assessment proposed by the assessment committee was therefore incorrect. *Regent's Canal Company v. St. Pancras Assessment Committee*, 3 Q. B. D. 73; 47 L. J., M. C. 37; 37 L. T. 637; 26 W. R. 281.

An act incorporating a canal company provided that the company should from time to time be rated to all parliamentary and parochial rates and assessments for and in respect of the lands and grounds to be purchased or taken by the company, in the same proportion as other lands lying near the same are or shall be rated, and as the same lands and grounds so to be purchased or taken would be rateable in case the same were the property of individuals in their natural capacity. In pursuance of the act, the company purchased lands, and made the canal. At that time the lands adjoining those so purchased were let for use as mere land; but they afterwards greatly increased in value, and, at the time that the rate appealed against was made, were extensively built over, and worth, if let for the purpose of being built on, 6d. per annum the square yard. The average rateable value, at the time of making the rate, of the nearest land to the canal, which was then still used as mere land, was about 3l. per acre per annum. Upon other land adjoining the canal, wharves, yards and buildings had, before then, been erected, the average rateable value of which was then 5d. the square yard:—Held, that the company was not rateable in proportion only to the rateable value of the whole of the lands adjoining the canal, considered as mere land; but that the true principle of their rateability was that the adjoining land covered with buildings should be brought into hotchpot with adjoining lands of other descriptions, and that the company should be rated for the lands occupied by the canal, according to the aggregate value, at the time of making the rate, of the whole land brought into hotchpot; the value being the rent which a tenant from year to year would give for the whole; in estimating which, regard was to be had to that proportion of the rent paid by the tenant of any buildings standing on the land, which he might be supposed to pay in respect of its site, as enhanced in value beyond the uncovered land, by being built upon. *Reg. v. Glamorganshire Canal Company*, 3 El. & El. 186; 29 L. J., M. C. 238; 6 Jur., N. S. 1146.

By 3 & 4 Will. 4, c. 90 (Lighting and Watching Act), s. 33, the owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor in any parish, shall be rated at a rate in the pound three times greater than that which the owners and occupiers of land shall be rated at for the purposes of that act. A company was possessed of a canal and a towing-path, bridges, and a dry dock, lined with masonry, used for repairing the canal boats:—Held, that "property" meant things ejusdem generis with houses and buildings, and did not include a canal and a towing-path; that the bridges and dry dock were accessories to the canal and must be considered part; and that the whole ought to be rated as

land. *Reg. v. Neath (Overseers)*, 6 L. R., Q. B. 707; 40 L. J., M. C. 193.

The possessors of canal property, consisting of the canal, towing-path and warehouses and offices adjacent, are to be assessed upon the same principle as the occupiers of land. *Reg. v. Bridgewater Trustees*, 4 M. & R. 143; 9 B. & C. 68.

A canal company, being rateable as occupiers of land, can only be rated by the same estimate as the other land in the parish, namely, according to the value of their tolls, to be let by the year. *Reg. v. Oxford Navigation Company*, 6 D. & R. 86; 4 B. & C. 76.

— Improvement of Land by Use of Canal.]

—An act directed that a canal company should be rated for all lands and buildings in the same proportion as other lands and buildings lying near the same, and as the same would be rateable if they were the property of individuals in their natural capacity; and a subsequent act directed that all rates and assessments upon the personal estate of the company should be assessed in every parish in proportion to the length of the canal in such parish:—Held, that the company was liable to be rated for their lands and buildings only at the same value as other adjacent lands, and not according to the improved value derived from the land being used for the purposes of the canal. *Reg. v. Grand Junction Canal Company*, 1 B. & A. 289.

By a clause in a canal act, tolls were not to be rated, and the company was to be rated from time to time for and in respect of the lands taken, and the warehouses and other buildings to be erected by the company, "in the same proportions as, but not at any higher value or improved rent than other lands, grounds and buildings lying near or adjacent thereto, are or shall for the time being be rated, and as the lands, warehouses and other buildings so taken and erected would have been rateable in case the same had been continued in their former state, and not been used for the purpose of the navigation:—"—Held, first, that the proper mode of laying a poor-rate on the company was according to the fluctuating value of adjacent lands and buildings, and not according to their value at the time of the formation of the canal; and, secondly, that the increased value was to be taken for the time being, from whatever source it might arise, and not that the increase arising from the canal itself was to be omitted. *Reg. v. Monmouthshire Canal Navigation Company*, 5 N. & M. 68; 3 A. & E. 619; 1 H. & W. 464.

By an act for making a navigable communication between two places, a company was formed, and authorized to purchase lands. The act then directed that the company should be rated and charged to all parliamentary and parochial taxes, rates and assessments for any lands to be purchased or taken, or warehouses or any other buildings to be erected by them in pursuance of that act, in the same proportion as other lands and buildings adjoining to or lying near the same:—Held, that the company was liable to be rated for their lands and buildings at the same value as other adjacent lands and buildings, and not according to the improved value derived from their being used for the purposes of the navigation. *Reg. v. Chelmer and Blackwater Navigation Company*, 2 B. & Ad. 14.

— Lease to Railway Company—Annual

Rent.—In pursuance of an act of parliament a canal company granted a lease in perpetuity of their undertaking to a railway company, under the provisions of which a canal, part of their undertaking, was worked and managed by a joint committee in the name of the canal company, and was worked by the railway company, and the railway company made up to the shareholders of the canal company the deficiency in the earnings of their undertaking in accordance with the guarantee in the lease of the payment of certain rents or sums of money in the nature of rent:—Held, that the annual rent or sum of money received by the canal company from the railway company under the lease was not to be taken into account in determining the rateable value of the canal. *Reg. v. Lapley (Overseers)*, 9 B. & S. 568.

— **Deduction of Expenses.**—In fixing the amount of a rate on a canal company, the sum paid by the proprietors for poor-rate, the expense of collecting the tolls, of repairing the banks of the canal, and of supplying it with water, ought to be deducted from the gross profits. *Reg. v. Oxford Canal Company*, 5 M. & R. 100; 10 B. & C. 163.

— **When Tolls on Part of Canal exempt from Rateability.**—Where goods are carried along two different lines of canal, one of which is by statute exempted from being rated in respect of the tolls, and the other not; though the voyage happen to finish on the unexempted line, yet the canal company shall not be rated for more than such proportion of the tolls as accrued in respect of the carriage along the unexempted line. And the toll arising in respect of so much per ton per mile is to be rated only for so many miles as the goods were carried along the unexempted line. And where the act directs that the tolls should be exempt from any taxes, rates, &c., other than such as the land which should be used for the purpose of the navigation would have been subject to if the act had not been made, that goes to exempt the tolls, quâ tolls, altogether from being rated in respect of the line so exempted, leaving the land rateable as before. *Reg. v. Leeds and Liverpool Canal Company*, 5 East, 325.

Assessment of different Parts of Canal Property.—A company was the owner of a canal and premises such as wharves, engine-house and reservoirs. The assessment to the poor-rate upon the wharves was made upon the whole area, each taken as a whole, on wharf, land and buildings, with fixtures and machinery attached, and deriving some additional value from the capacity of being applied to such purposes as those of a canal company. As regarded the engine-house, that was assessed at the rent which it was considered reasonable for the company to pay from year to year. As regarded the canal proper, it was assessed to the gross receipts along the whole line of the canal, allowing certain deductions for repairs, salaries, tenants' profits, &c. As regarded the reservoirs, these were assessed as land independently of their contributing to the earnings of the canal:—Held, that the principle of assessment was correct. *Birmingham Canal Navigation Company v. Birmingham (Overseers)*, 19 L. T. 311.

A canal company is rateable in each and every

parish through which its canal passes, as an occupier of land covered with water. *Reg. v. Trent and Mersey Canal Company*, 2 D. & R. 752; 1 B. & C. 545.

The tolls payable for passing through locks belonging to a canal company are rateable wholly in the parish in which the locks are situate. *Reg. v. Lower Mitton*, 4 M. & R. 711; 9 B. & C. 810.

A navigation act empowered the proprietor to take so much per mile per ton for all goods carried along the canal:—Held, that they were rateable for the tolls in the different parishes where the tolls became due, that is, where the respective voyages finished, though for convenience they were authorized to collect the tolls where they pleased, and did collect them in other parishes. *Reg. v. Stafford and Worcester Canal Navigation*, 8 T. R. 340.

Where a canal runs through several parishes, a rate in one should be in proportion to the earnings in that parish, not in proportion to the length of the part of the canal there. *Reg. v. Kingswinford*, 1 M. & R. 20; 7 B. & C. 236; *S. P.*, *Reg. v. Chaplin*, 1 B. & Ad. 926.

— **Under a Local Act—Construction.**—By a local act a canal company was incorporated, and power was given to the company to hold lands, without restriction as to amount or locality, and to take lands, and to form a canal in enumerated parishes, amongst which H. was not. By s. 101, lands of the company were to be rated like other lands of a like quality in the same parishes. Subsequently, lands were purchased in the parish of H., in the name of a trustee, and occupied by the company as a reservoir:—Held, that the section was prospective, and applied to all lands acquired by the company, and that the lands in H., the fee of which was in another party, but which were substantially occupied by the company, were to be rated as other lands of a like quality in the parish of H. *Regent's Canal Company v. Hendon (Overseers)*, 6 El. & Bl. 852; 8 Jur., N. S. 208.

A local act enacted that a canal company should be rated to all parliamentary and local taxes and assessments for its lands and buildings in the same proportion as other lands and buildings lying near and as the lands and buildings would be rateable if they were the property of individuals:—Held, that a parish in Buckinghamshire was to be assessed to the county rate on an estimate in which the company's lands and buildings were assessed as directed by the statute. *Reg. v. Aylesbury with Walton*, 9 Q. B. 261; 4 Rail. Cas. 315.

— **Deduction of Expenses.**—In assessing a canal passing through several townships, and having locks and other works in the particular township, the expenses of repairing and maintaining those locks and works are not to be deducted from the gross earnings of the canal in that township, but only such proportion of the whole expenses of repairing and maintaining the locks and works on the entire canal as, upon an apportionment on the mileage principle, would attach to that township. *Reg. v. Coventry Canal Navigation Company*, 1 El. & Bl. 572; 28 L. J., M. C. 102; 5 Jur., N. S. 862.

Exemption of Land from Rates.—Where a statute empowered the proprietors of a canal to

make rates in respect of vessels, and expressly exempted such rates from all taxes, rates, &c.:—Held, that the land occupied by the canal was also thereby exempted. *Re v. Calder and Hebble Navigation Company*, 1 B. & A. 263.

14. WATERWORKS.

Assessment—Profitable Occupation.]—The Public Health Act, 1848 (11 & 12 Vict. c. 63), was applied to the city of Worcester, and the corporation of Worcester became the local board of the city, and for the purposes of supplying the sanitary requirements of the city took land, and erected waterworks thereon, in a portion of the parish of Claines, which was within the municipal boundary of the city. The parish of Claines forms part of the Droitwich Poor Law Union, and its area is partly without and partly within the city of Worcester, but for poor-law purposes is distinct and separate from the city. The city was supplied with water from these works, and the corporation fixed a rate of fourpence in the pound per annum on the net annual value of the dwelling-houses supplied with water for domestic purposes, and made an additional charge for water used for trade and other special purposes, and a certain rate for water supplied by meter. These prices were fixed with a view to the sanitary improvement of the city and not as a commercial transaction, and, in fact, left but little profit above the actual cost of supply. In the case of small tenements, the charge was still further reduced. The sums charged for domestic purposes would, where the rent of the house was twenty pounds or less, be less than twopence per week, to which limit they were permitted to rate by 11 & 12 Vict. c. 63, s. 76. In the other cases the statute did not limit the rate to any particular sum:—Held, that the rateable value of the waterworks was to be assessed on the profitable occupation, as it was in fact, and not on what it might be in the hands of a trading company without restrictions. *Worcester (Mayor) v. Droitwich Union (Assessment Committee)*, 45 L. J., M. C. 81; 34 L. T. 288; 24 W. R. 490. Affirmed, 2 Ex. D. 49; 46 L. J., M. C. 241; 36 L. T. 186; 24 W. R. 336—C. A.

A waterworks company was empowered to lay pipes in the streets, and did lay pipes accordingly. The company was assessed to the land-tax as holders of land in a district in which they had pipes laid down, but in which they had no other property:—Held, that the company was not liable to be assessed to the land-tax for the land occupied by their pipes. *Chelsea Waterworks Company v. Bowley*, 17 Q. B. 358; 20 L. J., M. C. 520.

Where land is occupied by a local authority for public purposes the land is to be assessed to the poor-rate at the rent which a tenant would pay if subject to the same restrictions as are imposed upon the local authority. Therefore, where a sanitary authority occupies land and works for the purpose of supplying its town with water, the authority being precluded by law from making a profit out of these works, the rateable value of the lands and works is nothing. *Peterborough (Mayor) v. Stamford Union*, 31 W. R. 949.

— **Land covered by Water and Land occupied by Pipes.]**—By 30 & 31 Vict. c. 113, s. 17, the occupier of any land covered with

water . . . shall pay to the sewer-rate in respect of his property one-fourth part only of the rate in the pound payable in respect of houses and other property. A waterworks company was possessed of a canal, of filter beds supported on brick arches, and sometimes covered with water, at other times not, and of land used for keeping sand for the filter beds; and they also occupied land by iron pipes, mains and service pipes:—Held, that the canal and the filter beds were land covered with water within the meaning of s. 17, and ought to be assessed at one-fourth of the amount to be imposed on houses; but that the land used for the purpose of keeping sand, and the land occupied by iron pipes, mains, and service pipes, did not come within that description, and ought to be assessed at the full value. *East London Waterworks Company v. Leyton Sewer Authority*, 6 L. R., Q. B. 669; 40 L. J., M. C. 190; 20 W. R. 98.

An act for lighting a hamlet, empowered trustees to raise money by rate upon all persons who should inhabit, occupy or enjoy "any messuages, tenements, coachhouses, stables, cellars, vaults, houses, shops, warehouses or other buildings, tenements or hereditaments, situate or being in any of the streets, squares, lanes or other public passages and places within the said hamlet;" so as all rates after the first be laid upon all persons who should inhabit, occupy or enjoy "any messuages, tenements, coach-houses, stables, cellars, vaults, houses, shops, warehouses or other buildings, tenements or hereditaments, situate and being in such of the streets, squares, lanes and other public passages and places only within the hamlet as shall from time to time be lighted by virtue of this act:"—Held, that a waterworks company was not rateable for their mains and other pipes, plugs and apparatus fixed in the ground and used for the conveyance of water in the streets, roads and public places in the town, as tenements. *Reg. v. East London Waterworks Company*, 21 L. J., M. C. 49; 17 Jur. 121; S. C., nom. *East London Waterworks Company v. Mile End Old Town (Trustees)*, 17 Q. B. 512. See S. C., 2 El. & El. 447.

Paving commissioners appointed under a local act were empowered to make rates upon all persons who "shall inhabit, hold, occupy, possess or enjoy any land, house, shop, warehouse, cellar, vault, or other tenements or hereditaments within any of the streets, &c., of a district; such rate not to exceed 1s. 2d. in the pound of the yearly rents or value of such of the lands, houses, &c., situate in the streets, &c., the greater part of which should be paved in a certain manner, and not to exceed 7d. or 6d. in the pound respectively for such of the lands, houses, &c., situate, &c., the greater part of which should be paved in a certain other manner, or only repaved under the act." Different assessments were provided for public buildings, dead walls, and vacant ground adjoining the streets, &c., and for unoccupied houses. No specific assessment was provided for water-pipes laid down in the district. The commissioners, in whom the paving materials of the streets, &c., were expressly vested, were empowered to alter the position of the pipes belonging to any water or gas company underneath such streets, squares, &c.:—Held, that an incorporated water company, whose mains, pipes and other apparatus were laid down within the district, was liable under the act to be rated as occupiers of land. *Reg. v.*

East London Waterworks Company, 18 Q. B. 703; 21 L. J., M. C. 174; 16 Jur. 711.

Occupiers of Reservoir—Use of Pipes.—Geo. 1 granted to a company a canal or basin and an old pond in St. James's-park, to be converted into reservoirs, and to be used and enjoyed by them as such, for the purpose of supplying Westminster with water during the royal pleasure. Liberty was also granted to them to break up the ground through the park for laying pipes from the old pond and canal for the purpose aforesaid, making good the ground so broken as soon as possible. The company took the basin and pond in pursuance of the warrant, and used it accordingly, making a reservoir, but was never allowed to alter or repair it but under the inspection of the crown surveyor. They paid no rent. The ranger was rated for the herbage growing on the surface of the soil in the park, including that under which the pipes passed:—Held, first, that the company was rateable as occupiers of the reservoir; and secondly, that they were rateable for the occupation of land below the surface of the soil by their pipes, though the ranger was rated for the herbage. *Reg. v. Chelsea Waterworks Company*, 2 N. & M. 767; 5 B. & Ad. 156.

Waterworks occupied under Special Enactments.—By a local act commissioners were empowered to erect waterworks for the purpose of supplying water for watering the streets, used in case of fires, and other public purposes, in Liverpool, and to levy a rate on the borough for the expenses thereof. The act contained express prohibitions against using this water for domestic purposes. The commissioners erected waterworks in an adjoining township of West Derby. By subsequent acts the property and powers of these commissioners became vested in the corporation of Liverpool. Water was supplied in Liverpool for domestic purposes by trading companies from waterworks also situated in the township of West Derby. The corporation was, by a local act, empowered to purchase the undertakings of these companies, and for that purpose to borrow money. When purchased, the corporation was to supply water for domestic purposes to the inhabitants of Liverpool, which then comprised the parish of Liverpool and part of the township of West Derby, and of parts of other townships, with power to supply the inhabitants of an adjoining district, including the whole township of West Derby. It was enacted that the corporation was so to regulate the charges for the water so supplied as to raise no more money than the interest of the money borrowed, and the expenses of managing the waterworks. The purchase was completed, and those waterworks were vested in the corporation. By a subsequent act the corporation was empowered to use the water from the commissioners' waterworks and the company's waterworks indiscriminately, and the pipes were accordingly united, and the two sets of waterworks were occupied in common:—Held, that the corporation was rateable in the township of West Derby for the waterworks there occupied by them under these enactments. *Liverpool (Mayor) v. West Derby (Overseers)*, 6 El. & Bl. 704; 25 L. J., M. C. 112; 2 Jur., N. S. 1002.

Licence to Lay down Pipes.—By a paving and lighting act, the tenants and occupiers of all

messuages, houses, warehouses, shops, cellars, vaults, stables, coach-houses, brewhouses, and other buildings, gardens or garden ground, and other tenements within the same town, were liable to be rated for the purposes of the act:—Held, that, under such act, a waterworks company was not rateable as occupiers of a tenement, in respect of their water-pipes carried under ground, for supplying those towns with water. *Reg. v. Manchester Waterworks Company*, 3 D. & R. 20; 1 B. & C. 630.

A mere liberty granted under an act of parliament to a water company to break up the ground and lay down pipes is not liable to be rated. *Ib.*

"Property other than Land," what is.—A water company were occupants of pipes under the surface of the soil in a parish in which the provisions of the 3 & 4 Will. 4, c. 90, had been adopted. The parish was within the metropolitan district. In a lighting rate imposed under the Metropolitan Management Act (18 & 19 Vict. c. 120), the company was rated as coming within the description in s. 165 of occupants of "houses, buildings, and property, other than land," at a rate three times greater than that at which the occupiers of land were rated:—Held, that they were rateable at the lower rate, as occupiers of land. *Reg. v. Southwark and Vauxhall Water Company*, 6 El. & Bl. 1008; 3 Jur., N. S. 41.

By an improvement act, a town council was empowered to make and levy a rate upon any person who occupied any house, shop, &c., except as thereafter excepted, according to the full net annual value thereof respectively; and by a section it was provided, that "the occupiers of any land covered with water," shall be rated in respect of the same at one-fourth part only of the net annual value:—Held, that a reservoir of a water company came within the proviso, but that water-pipes did not. *Reg. v. Birmingham Waterworks Company*, 1 B. & S. 84; 4 L. T. 242.

Held, secondly, that the pipes and mains of the company within the borough were rateable to the borough to the full extent, and not thereby to one-fourth part of their net annual value as land covered with water. *Ib.*

Reservoir—Property occupied solely for Public Purposes.—Commissioners under a local act constructed a reservoir in a township across a stream, upon land purchased by them under the powers of the act, for the purpose of affording a more regular supply of water to the mills upon the stream, and by means thereof cleansing the stream, and thereby promoting the health of the persons residing upon its banks. The water flowed from the reservoir, along the ancient bed of the river, and the result obtained was a more regular supply of water to the mills, and thereby an increased regularity in the motive power, whereby the mills were enabled to continue working at times when, without the reservoir, they would be compelled partially to cease working. None of the mills benefited by the reservoir were situate in the township, but in other townships lower down the stream. The commissioners, under the powers contained in the act, levied rates upon the mills, in order to pay the interest on the money borrowed for constructing the reservoir, and the necessary expenses of its maintenance. The commissioners were rated as occupiers of the land and reservoir, and it was admitted that the assessment would be a fair

and proper assessment on the occupiers of the reservoir if the works constructed and carried on by the commissioners had been a private undertaking of any person or persons who had increased the available supply of water to the different millowners, as was done by the reservoir, and who at pleasure could allow or refuse the millowners the benefit of such increase of water, and could charge them for such supply:—Held, first, that the reservoir was not exempted as property occupied solely for public purposes. *Reg. v. Kentmere*, 17 Q. B. 551; 21 L. J., M. C. 13; 16 Jur. 265.

— **Increase of Water Supply to Millowners.]**

—Held, secondly, that the amount of the rate was correct, because, first, the commissioners, being all millowners, must be considered as representing the whole class to be benefited by the improved supply of water, and in the situation of a water company established for the same purpose; secondly, the purpose to which the land was then applied, and not the manner in which it was used at any former period, must be regarded; and, thirdly, the rateable value of the mills must be estimated at an amount minus the contribution to the assessment paid by each millowner, so that the millowners should not be doubly assessed. *Ib.*

— **Water-pipes extending into several Districts.]**

—A metropolitan parish contained seventeen large districts of building land, for each of which a special act of parliament was passed, and the rating clauses for paving, lighting, &c., differed in language. The N. water company had water-pipes under the streets in all the districts. In one local act, the rating clause specified only "houses, shops, warehouses, cellars, vaults, buildings and tenements." Another specified only "grounds, houses, shops, gardens, vaults and other buildings:—Held, that the words "tenements" and "grounds" must have the widest meaning, and included all land capable of being let at an annual value, and that the N. company was rateable in all these local districts as occupiers of land in respect of their water-pipes. *New River Company v. St. Pancras Vestry*, 45 J. P. 75.

The 6 Geo. 3, c. 70, for better supplying the inhabitants of Bath with water, reciting that there were springs of water in the neighbourhood belonging to the corporation, enacts, that they shall have power and authority to cause the water to be conveyed from such springs to the city, and gives them authority to enter upon and break up the soil of any public highway or waste, and the soil of any private grounds within two miles of the city, and the soil or pavement of any street within the city, in order to drain and collect the water of the springs, and to make reservoirs and to erect conduits, water-houses, and engines, necessary for keeping and for distributing the water, and to lay underground aqueducts and pipes for the same purpose; and it vests the right and property of all these in the corporation:—Held, that in addition to the springs, the corporation was liable to be rated for the reservoirs made by them in the parish of Lyncomb and Widcombe under the act, as for land occupied by them; which reservoirs, by means of aqueducts and pipes laid underground, partly in the same parish, and through the parish of St. James into the parish of St. Peter and St.

Paul, in Bath, for the supply of the city, produced to the corporation a clear annual profit of 600*l.*; but that the corporation was not rateable for the whole of the entire profit in the first-mentioned parish, in which the springs were first collected into the reservoirs; a proportion of such entire profit accruing to them from the underground aqueducts and pipes laid into the soil of the other parishes, in respect of which they were to be considered as the occupiers of land yielding annual profit in those parishes. *Reg. v. Bath (Corporation)*, 14 East, 609.

Where a company was empowered by act of parliament to lay underground, through the streets of a town, main pipes for the conveyance of water, and the inhabitants, with the company's consent, to lay pipes communicating with such main pipes to their houses, paying to the company a rate for such privilege:—Held, that the company was rateable in the parish where the main pipes lay in respect of those pipes, and the rates paid thereon. *Reg. v. Rochdale Waterworks Company*, 1 M. & S. 634. And see *Reg. v. Liverpool*, 8 East, 455, n.

— **Apportionment of Rateable Value and Deductions.]**

—Works of a water company extended into several parishes, and consisted of two portions, one of which, being the several pipes which delivered the water to the consumer, was directly productive of profit; and the other, consisting of reservoirs, buildings, &c., indirectly conducted to such production in some parishes. The company had no works, but service pipes. The rateable value, for the purposes of poor-rates, of the entire works was 30,800*l.*; the rateable value of the reservoirs, buildings, &c., valued as land and buildings deriving additional value for their capacity of being applied to the objects of a water company, 6,500*l.*:—Held, that the rateable value ought to be apportioned among the several parishes in the following manner: the rateable value of the reservoirs, buildings, &c., valued as above to be first deducted from the total rateable value, and distributed among the parishes in which this portion of the works was situate, according to the extent of such works in each parish; and the residue of the rateable value to be apportioned among the parishes containing the service pipes, in the ratio of the net profits produced in each of those parishes. *Reg. v. Mile End Old Town (Overseers, &c.)*, 10 Q. B. 208; 3 New Sess. Cas. 13; 16 L. J., M. C. 184; 11 Jur. 985.

The pipes and reservoirs of a waterworks company were so placed in the several parishes in which they were respectively situate, that the whole together formed one apparatus for the supply of water, in some only of such parishes, to the customers of the company; a part of such apparatus being rateable to the poor-rate in each parish:—Held, that it was not a correct principle, in order to ascertain the rateable value of the apparatus in any one particular parish, to calculate the total rateable value of the whole apparatus in all the parishes, and then divide that value among the several parishes, according to the quantity of land occupied by the apparatus in each of them. *Reg. v. Putney (Overseers)*, 3 El. & El. 108; *S. C., Chelsea Waterworks Company v. Putney (Overseers)*, 29 L. J., M. C. 230; 6 Jur., N. S. 940.

A waterworks company was empowered to construct works and lay mains and pipes through

and under certain highways, roads, &c., and to supply certain parishes with water. The company erected in a parish, H. not being one of those parishes, engine-houses and other works, and laid down a main thence, part of which ran through H., conveying the whole of the water to reservoirs in another parish, from which reservoirs the water was distributed, through other mains and pipes, to the customers of the company in the several parishes named in their acts. The company derived no direct profit in H., and had no freehold or leasehold interest in the soil of the highway:—Held, that the company being in possession of the mains buried in the soil, and therefore, de facto, in beneficial occupation of the part of the soil occupied by the mains, was rateable in respect of them. *Reg. v. West Middlesex Waterworks Company*, 1 El. & El. 716; 28 L. J., M. C. 135; 5 Jur., N. S. 1159.

— **Calculation of Profits.**—Held also, that, as regarded the principle of assessment, the company was to be rated in H. in respect of the plant, engine-houses, buildings, wharves, mains, lands and premises, as for mere land and buildings, with fixtures and machinery attached, and deriving some additional value from their capacity of being applied to such purposes as that of a water company, such additional value being derived from an increase of demand beyond supply, according to the principle regulating exchangeable value, and not by reference to receipts earned in another parish, beyond assuming that they were sufficient to pay for all outgoings, including profits on capital. *Ib.*

— **Direct and Indirect Sources of Profit.**—It may be doubted whether the distinction which has been taken between direct and indirect sources of profit, as applied to the mains and pipes of a water company running through different parishes, is well founded, and more especially in cases where the mains only belong to the company, and not the service-pipes. *Sheffield United Gaslight Company v. Sheffield (Overseers)*, 4 B. & S. 135; 32 L. J., M. C. 169; 9 Jur., N. S. 623; 11 W. R. 1064.

The proper allowance to be made for tenants' profits and interest on capital is entirely a question of fact. *Ib.*

— **Supplemental Valuation List.**—During the first year after a quinquennial valuation list in the metropolis had come into operation, some new houses were connected by means of service pipes with a water company's mains previously existing and assessed in the quinquennial list. Such connexions caused an increase of the company's gross receipts arising from the additional rentals derived from the new houses; but no alteration was made in the mains themselves, the service pipes being the property of the owners or occupiers of the houses:—Held, that the increased rental so derived constituted an alteration of the matters stated in the valuation list, within s. 46 of the Valuation of Property (Metropolis) Act, 1869, and was properly taken into account in a supplemental list made under that section, whereby the rateable value of the company's mains was assessed at a greater amount than it had stood at in the quinquennial list. *Reg. v. New River Company*, 4 Q. B. D. 309; 48 L. J., M. C. 123; 40 L. T. 322; 27 W. R. 785.

15. NAVIGABLE RIVERS.

Easement for the Purpose of River Navigation.]

—Certain persons were authorized under an act to make navigable, clear, cleanse, scour, open, enlarge and straighten a river, dig and cut banks, erect weirs, locks and dams, make new cuts and trenches through lands adjoining which they were to purchase, and make towing-paths over land partly purchased and partly rented by them:—Held, that they were not rateable as occupiers of the river or of the land taken for the purposes of the navigation, because they were not occupiers of it, but had a mere easement in it; but that they were rateable for the new cuts and trenches, and for the weirs, locks and dams erected on their own land. *Rex v. Mersey and Irwell Navigation Company*, 4 M. & R. 84; 9 B. & C. 95. And see *Rex v. Chelsea Waterworks Company*, 5 B. & Ad. 156.

Locks and Cuts in Land.]

—An act authorized certain persons to make and maintain the River Avon navigable, to scour the river, to make new cuts through lands adjoining, and to build locks, first making satisfaction to the owners of lands. The act then appointed commissioners for settling and apportioning such satisfaction, and then empowered the undertakers to take certain tolls. The undertakers made the river navigable, and scoured and cleansed it from time to time, and made a cut and lock for the purposes of the navigation on land purchased by them:—Held, that they were not the occupiers of the River Avon, and rateable in respect of it, as land covered with water, but that they were rateable in respect of the cut and the lock made on their own land. *Rex v. Avon Company*, 4 M. & R. 23; *S. C.*, nom. *Rex v. Thomas*, 9 B. & C. 114.

Cuts and Towing-Paths.]

—By a local act, a company was authorized to make the River Avon navigable from B. to H., and to make any new cuts through the lands adjoining the river; and commissioners and a compensation jury were authorized to settle and assess what satisfaction the landowners should have for their lands made use of by the company, and to adjust what share of such purchase-money every tenant having a particular estate should have; and the order, sentence or decree so made was directed to be made a record of quarter sessions. By a subsequent act, the company was authorized to make a horse towing-path, and further powers were given for the purchase of lands. The company made a new cut and a horse towing-path; and an inquisition of a jury assessed, as a recompense for the value of the land taken for the act, thirty years' purchase. No conveyance was ever made to the company of any land for the cuts or towing-path; but previously to making the latter, the company gave a satisfaction to the respective landowners of a general sum or annual payment, as a recompense for the land taken. The remainder of the land taken by the company for a towing-path, and not used by them, was depastured or otherwise used by the adjoining landowners:—Held, that the company had such an exclusive occupation both of the cuts and towing-path as made them rateable. *Bath River Navigation Company v. Willis*, 3 P. & D. 220; 11 A. & E. 463; 2 Railw. Cas. 7.

Occupation of House by Surveyor.—A person occupying a house as surveyor under the trustees of a navigable river is liable for poor-rates, although by the act regulating the tolls to be taken on the river, such tolls are exempted from being rated, and although the trustees have no beneficial interest in the navigation of the river or the tolls. — *v. Armstrong*, 2 Stark. 543. And see *Mulkin v. Vickerstaff*, 3 B. & A. 89.

Right of Navigation—Liability of Grantee.—The grantee of the right of navigation of a river is rateable in respect of tolls arising from a sluice erected in the parish, though he himself resides elsewhere, and the tolls are collected in another parish. *Re v. Cardington*, Cowp. 581.

Navigation through several Parishes.—Where a navigation runs from A. to B. through several intervening parishes, and the tolls for the whole navigation are collected in those two parishes, they may be assessed in those two parishes for the whole amount, according to the proportion collected in each. *Re v. Aire and Calder Navigation*, 2 T. R. 660.

Where, by a navigation act, the proprietor was entitled to a toll of 4s. per ton for goods carried from A. to B., or from B. to A., and to a proportionable sum for any less distance; and was also enabled to appoint any place of collection:—Held, that the tolls for goods carried the whole voyage from A. to B. were rateable in B., though in fact they were collected in a parish between A. and B. because the tolls become due where the voyage is completed. *Re v. Page*, 4 T. R. 543.

Where the proprietors of an inland navigation, running through fourteen different parishes, were rated to the poor of the fourteenth parish (in which the profits arising from the whole navigation were received) in respect of the whole amount of the profits:—Held, that the rate was too high, and ought to have been apportioned among all the parishes through which the navigation passed. *Re v. Palmer*, 2 D. & R. 793; 1 B. & C. 546.

Where a navigable river passed through several parishes, and dues on tonnage became payable for goods carried along the line of navigation, and landed at a wharf locally situate within a particular parish:—Held, that a rate on the proprietors of those dues, for their whole amount in that parish for the river tonnage, could not be considered as a rate on that part of the river locally situate within such parish, but as a rate on the parts of the river situate as well within that parish as without it; and consequently that it could not be supported. *Re v. Milton*, 3 B. & A. 112.

The owners of mills in a township, in compensation for the loss of water occasioned to them by an adjoining navigation, were allowed, by act of parliament, to take certain tolls at a lock situate on the line of navigation, but in a different township:—Held, that they were not rateable at their mills, in respect of the tolls so taken. *Re v. Aire and Calder Navigation Company*, 3 B. & Ad. 533.

Proportion to Profits.—The proprietors of a river navigation are rateable in a parish through which the navigation passes (though no riverage dues are received in such parish), in proportion to their profits upon the whole line of navigation.

Re v. Portmore (Earl), 2 D. & R. 798; 1 B. & C. 551.

Deductions for Expenses and Tenant's Profits.—The proprietors of a river navigation, formed under an act of parliament, are rateable in every parish through which it passes, in proportion to the profit derived from the navigation in such parish. *Re v. Woking*, 5 N. & M. 395; 4 A. & E. 40; 1 H. & W. 539.

The proprietors of a river navigation running through several parishes were entitled to claim a toll of 4s. The trustees fixed the tolls at 4s. for the whole distance, and at different decreased rates for fixed portions only of the whole distance:—Held, that in calculating the sum at which the proprietors were to be rated in any one parish, the proportion was to be ascertained on a mileage calculation with respect to the whole distance as regards the thorough trade; and on a mileage calculation with respect to the distance gone over as regards the short trade, excluding in the latter case all trade in parts in which the particular parish was not situated. *Ib.*

In calculating the amount of profit, a deduction for the necessary repairs and expenses must be made, the proportion of the particular parish being ascertained where the repairs are equal throughout the whole distance, by a mileage calculation. *Ib.*

So a reasonable sum must be deducted for tenants' profits. *Ib.*

No deduction is to be made in respect of sums payable by the act of parliament, as compensation to persons injured by the navigation, out of the profits of the undertaking; such sums being only in the nature of rent-charges, and not affecting the value of the occupation. *Ib.*

Commissioners of a navigation having borrowed 28,000*l.* on mortgage, and being still in want of funds, agreed to let the navigation and tolls for ninety-nine years, the lessee undertaking to pay the interest of the 28,000*l.* An act was afterwards passed confirming the agreement and empowering the commissioners to lease the navigation and tolls for the remainder of the term to the persons entitled under the former agreement, and enacting that they should pay the interest of the 28,000*l.* yearly to the mortgagees, in default of which the commissioners might require the toll-collector to pay such interest to the mortgagees out of the moneys in his hands:—Held, that the interest paid by the lessees was in substance a rent, and that the rate ought to be calculated upon it, and that the lessees were not occupiers under a beneficial lease, though the interest was only about 1,400*l.* a year, and the annual earnings at the time of making the rate were 3,418*l.* (from which, however, about 1,000*l.* was to be deducted for repairs, &c.), one year's value being no criterion, and there being no proof that the rent was unduly small. *Re v. Chaplin*, 1 B. & Ad. 926.

16. MOORINGS.

Barge Moored to Bed of River and made into a Pier.—A. moored a barge in the Thames between high and low water mark; the moorings were stationary in the bed of the Thames, by which it was moored, and which were in the parish of Greenwich. The barge was connected

by a chain with stairs on the land, the soil of which was not the property or in the occupation of A., and which was at that point a common highway to the Thames. Movable planks were laid from the shore on to the barge, and thence to another barge moored farther out in the Thames, and which always floated. By this means a pier was constructed, which was permanently kept there and used for embarking in steam-boats and landing from them; and A. was remunerated by the parties so using, and he had the sole control of the pier:—Held, that he was rateable to the poor-rate for Greenwich, as an occupier of land in the bed of the river. *Forrest v. Greenwich (Overseers)*, 8 El. & Bl. 890; 27 L. J., M. C. 96; 4 Jur., N. S. 480.

Barge attached to Posts—Movable Chattel.]

—On a navigable river, the bed of which was vested in a corporation, a barge, the property of an individual, was moored by means of two iron rings fixed to the barge and passed loosely and movably round two posts which had been placed in the bed of the river twenty years before for the purpose of being so used, but without the leave and licence of the owners of the soil. The barge could be, but had never actually been, moved:—Held, that he was not rateable in respect of the posts inasmuch as he was not shewn to have been in exclusive possession of them, nor of the barge, it being a movable chattel. *Grant v. Oxford Local Board*, 4 L. R., Q. B. 9; 38 L. J., M. C. 39; 19 L. T. 378; 17 W. R. 76.

Licence to use Moorings—Exclusive Occupation.]—The conservators of the Thames were owners of the soil and bed of the river and of moorings fixed to the soil of the river. W. used the moorings to moor his hulk, as a coal dépôt, under the following document: "We, the conservators of the Thames, grant to W. liberty and licence to fasten, and thenceforth keep fastened, his coal hulk to the moorings placed by the conservators in the river, until either party shall have given to the other one calendar month's notice in writing, in consideration whereof W. agrees to pay towards the expenses of placing and maintaining and repairing the moorings the annual sum of 30l." W. was assessed as occupier of part of the bed of the river:—Held, that the document was not a demise, but only granted a licence to use the moorings, and that W. was therefore not the occupier, nor liable to be rated. *Watkins v. Milton-next-Gravesend (Overseers)*, 3 L. R., Q. B. 350; 37 L. J., M. C. 73; 18 L. T. 601; 16 W. R. 1059.

Derrick always Afloat, and subject to be moved.]—Persons were possessed of a derrick for loading and unloading (but not storing) coals in the Thames, which was moored within a parish under a licence from the conservators, in the following manner, viz. by two single-fluked anchors on the side nearest the shore, and by two stones on the channel side, and by two stream anchors one at the head and the other at the stern. The anchors and stones (which could be hauled on board by the machinery on the derrick) were merely dropped into the river, no force being used for the purpose of fastening them, but only a small quantity of ballast being removed in the bed of the river to enable the stones to lie flat. The derrick was always afloat, and was subject to be moved to any other part

of the river, at the pleasure of the conservators:—Held, that the owners of the derrick were not liable to be rated to the relief of the poor in respect of these moorings. *Cary v. Greenwich (Churchwardens)*, 7 L. R., C. P. 499; 41 L. J., M. C. 142; 27 L. T. 150.

A local act authorized commissioners to make a rate upon all persons occupying or enjoying "any messuage or tenement, land, shop, warehouse or other building, wharf, yard, storehouse, ground, cellar, hereditaments or premises." A steam-boat company occupied the ground floor of premises called the Mill, abutting on the Thames, and constructed a pier or landing-place in connexion therewith. The pier consisted of floating barges, boarded over, and kept in their places by cables fastened to anchors sunk in the bed of the river. The barges were connected by wooden bridges, with a platform resting upon an abutment, and made fast to the wall of the premises occupied by the company. Passengers embarking by the boats passed through the ground floor of the building, where a fare was paid, and proceeded over the platform, bridge and barges, to the boats. The upper part of the mill was occupied by S. The steam-boat company was rated in respect of "tenement, land, landing-place and premises, and the brow or brows, barge or barges, lying upon, fixed to, or connected with the same tenement, land, landing-place or premises, and the casement or casements, anchorage or anchorages, held, used or enjoyed therewith;" and S. was rated for "mill and premises, exclusive of the steam-boat pier:"—Held, that the rate was valid, being laid, not on the floating pier, as distinguished from the land, but upon the landing-place and premises, together with the floating pier, by which the occupation of the land was rendered more valuable. *Reg. v. Leith*, 1 El. & Bl. 121; 21 L. J., M. C. 119; 16 Jur. 522.

Held, also, that the rate on S. excluded the ground floor and landing-place occupied by the company, and therefore the same subject was not rated twice. *Id.*

Derrick fixed in Permanent Way.]—The 20 & 21 Vict. c. cxlvii. (the Thames Conservancy Act), vests in the conservators of the River Thames all the interest of the crown and of the lord mayor and corporation of the city of London in the bed and soil of the river. It does so for the purposes stated in that act, for the execution of which various powers are conferred upon the conservators. The conservators passed a resolution giving permission to C. to lay down moorings, attached to which they might place a derrick hulk, 510 feet from the river wall; the work of laying down these moorings was to be done to the satisfaction of the conservators, and was to remain "on condition that the accommodation be assessed, and the rent paid thereon; and that the hulk be not used for storing coals." The purpose of so mooring the hulk was that of fastening and holding coal vessels, while they were unloading and transferring their cargoes to barges and lighters. The derrick hulk was held in its position by chains and anchors set in large stones, and ballast placed in holes dug in the bed of the river, and the work of so placing the stones and ballast was performed by the conservators, the payment for the work being furnished by C. The conservators reserved to themselves power to remove the hulk at a week's notice. The der-

rick hulk could only be removed by being itself loosened from the chains attached to the stones and ballast; these holdings in the river continuing fixed as before:—Held, that C. was liable to be rated to the relief of the poor of the parish (within which lay that part of the river where the derrick hulk was moored) in respect of the profit derived by him from its employment, as he must be treated as a person in occupation of a part of the soil and bed of the river. *Cory v. Bristol*, 2 App. Cas. 262; 46 L. J., M. C. 273; 36 L. T. 595; 25 W. R. 383. Affirming 1 C. P. D. 54; 45 L. J., M. C. 145; 33 L. T. 624; 24 W. R. 336.

17. PIERS AND HARBOURS.

Occupation by Harbour Commissioners.]—By a local act, commissioners were appointed for improving the harbour of New Shoreham. By s. 26, the property of all the wharves, quays, buildings, . . . and of all works erected in and about the harbour, in pursuance of the act, were vested in the commissioners. By s. 27, the commissioners were required to deepen, cleanse, and enlarge the channel of the harbour and to make new piers, with the necessary wharfing, to confine the channel opposite to and near the intended entrance into the harbour. By s. 83, after the piers had been made, there was to be paid by every person who should import or export any merchandise within the limits of the harbour, certain duties. The commissioners enlarged the channel so as to make a new entrance in the harbour, and built new piers, as authorized, and received duties on all merchandise brought into the harbour:—Held, that the soil in the channel was not vested by the statute in the commissioners, and they were not the occupiers so as to be rateable to the poor; that the soil on which the piers were built was vested in them, and that they were the occupiers of the piers, but their occupation was not so connected with earning the duties as to make them rateable in respect of the piers. *New Shoreham (Commissioners) v. Lancing (Churchwardens)* 5 L. R. Q. B. 489; 39 L. J., M. C. 121; 22 L. T. 434.

Part of Pier beyond Low-water Mark.]—A company received tolls for the use of a pier, which extended from the shore into the sea for several feet beyond low-water mark. The pier was constructed of a wooden deck resting on iron piles driven into the sands, so that the water flowed under it, and no alteration was made in the line of low-water mark:—Held, that the part of the pier beyond low-water mark, being beyond the realm, was not extra-parochial within 31 & 32 Vict. c. 122 (the Poor Law Amendment Act, 1868), s. 27, and as such annexed to any other parish, nor was it an accretion from the sea, and that, therefore, that section did not enable it to be rated. *Blackpool Pier Company v. Fylde Union*, 46 L. J., M. C. 189; 36 L. T. 251.

Where a parish comes down to the bank of a river there is *prima facie* evidence that it extends to the middle of the river. A pier leading from the bank into the river beyond the low-water mark, and consisting of a fixed platform supported on piles within two or three inches from the bank, and a floating barge moored close to but not attached to the platform, is to be held as being within the parish, and therefore rateable. *McCannon v. Sinclair*, 2 El. & El. 53; 28 L. J., M. C. 247; 5 Jur., N. S. 1802.

18. DOCKS AND WHARVES.

Occupation exclusively for Public Purposes—Benefit to particular Section of the Public.]

By local acts, commissioners were empowered to make and maintain docks in the River Tyne, and for that purpose to borrow money upon mortgage of the rates and dues to be levied under the acts; such rates and dues to be applied, first, in making and maintaining the docks; secondly, in paying the interest of the loan; and, lastly, in appropriating yearly a certain amount as a sinking fund for repayment of the principal. It was provided that if, after such appropriations, and before complete payment of the principal, there should remain any surplus, the commissioners should from time to time lower the rates and dues to the amount of such surplus. The commissioners were also empowered, after payment in manner aforesaid, to appropriate yearly a certain amount, the whole not to exceed 10,000*l.*, to be invested as a fund for extraordinary repairs and expenses; and if, after such accumulation, there should be any surplus, the commissioners were empowered to reduce the rates to the annual amount necessary for the maintenance and working of the docks. The docks were completed and used by ships frequenting the River Tyne, and the commissioners received an income of 10,000*l.* per annum from the rates and dues:—Held, that the commissioners were rateable in respect of their occupation of the docks; such occupation not being exclusively for public purposes, but producing a benefit only to a particular section of the public, and there being nothing in the acts expressly excluding, in the event of a surplus, the payment of poor-rates out of the funds in the hands of the commissioners before the rates were reduced. *Tyne Improvement Commissioners v. Chilton (Overseers)*, 1 El. & El. 516; 28 L. J., M. C. 131; 5 Jur., N. S. 865.

Docks were vested in trustees to be kept up by rates levied on vessels using the same; the moneys derived from the rates were to be applied, first, in paying interest on a debt which had been incurred; secondly, in maintaining the docks; and lastly, in reduction of the rates:—Held, that such trustees were beneficial occupiers of such docks within 43 Eliz. c. 2, and were consequently liable to the poor-rate in respect thereof. *Mersey Docks and Harbour Board v. Cameron*, 20 C. B., N. S. 56; 11 H. L. Cas. 443; 35 L. J., M. C. 1; 11 Jur., N. S. 746; 12 L. T. 643; 13 W. R. 1069.

—Shares made Personal Property—Annual Profit.]

Lands purchased by a company, and converted into a dock, according to an act which declares that the shares of the proprietors shall be considered as personal property, are rateable in proportion to the annual profits. *Rex v. Hull Dock Company*, 1 T. R. 219.

In different Parishes—Mode of Assessment.]

A dock company were proprietors of several docks, made at different times and under successive acts of parliament. The docks communicated with each other and with the River Humber, and extended into several parishes. Every vessel paid a single toll which became due on entry into the docks, and was paid then, or on clearance outwards, and the vessel was entitled by such payment to go into any one or more of the docks

at the will of her own master, or under the direction of the company's harbour-master, who had powers for regulating the position of vessels. All the payments, at whatever dock received, were carried to one general account:—Held, that the poor-rate upon so much of the docks as lay in any parish must be assessed, not according to the actual receipt in the parish, but to the proportion which the area of dock within the parish bore to the entire of the docks; for that in such a case an assessment on the acreage principle was unavoidable, though an assessment on the basis of earnings within the parish is preferable where the nature of the case permits it. *Reg. v. Hull Dock Company*, 18 Q. B. 325; 7 Railw. Cas. 536; 21 L. J., M. C. 153; 16 Jur. 543.

Under acts of parliament the docks in different parishes on both sides of the river Mersey were to constitute one estate under one management. Rates were charged to the vessels entering any one of the docks; and a vessel having paid for entering one of the docks, could use any of the docks of the same class on either side of the river, or of a higher class by paying the difference. The docks on the Liverpool side were much more frequented than the docks on the Birkenhead side:—Held, that in rating to the poor-rate the docks on the Liverpool side, they were not to be treated as one system of docks with those on the Birkenhead side; but the earnings and outgoings of each set of docks must be kept distinct, and the Liverpool docks rated according to the net earnings on that side. *Mersey Docks and Harbour Board v. Liverpool (Overseers)*, 7 L. R., Q. B. 643; 41 L. J., M. C. 161; 26 L. T. 868; 20 W. R. 827.

Rateability—Land Covered with Water.—A dock company were owners and occupiers of a dock for the reception of ships, with quays, warehouses, cranes, weighing machines, and other works, and also of railways or tramroads for transporting traffic to and from the docks, and communicating with their warehouses and with other railways. The railways or tramroads were made under the powers of their act, and were free to the public on payment of certain tolls. By the Local Government Act (21 & 22 Vict. c. 98), s. 55, the general district rates shall be made and levied upon the occupier of all such kinds of property as are assessable to the poor-rate, subject to this, among other exceptions, that "the occupier of any land covered with water, or used only as a canal or towing-path for the same, or as a railway constructed under the powers of any act of parliament for public conveyance," is to be assessed at one-fourth only of the net annual value:—Held, first, that the dock was land covered with water, within the exception, and therefore rateable at one-fourth only of the net annual value. *Newport Dock Company v. Newport Board of Health*, or *Reg. v. Newport Dock Company*, 2 B. & S. 708; 31 L. J., M. C. 266; 9 Jur., N.S. 73; 6 L. T. 456.

— **Property other than Land.**—Held, secondly, that the warehouses and other adjuncts to a dock are rateable at the net annual value. *Ib.*

Held, thirdly, that the railways or tramways were constructed for public conveyance, within the exception in 21 & 22 Vict. c. 98, s. 55, and therefore rateable at one-fourth only of the net annual value. *Ib.*

By 3 & 4 Will. 4, c. 90, s. 33, owners and occupiers of houses, buildings, and property (other

than land) rateable to the poor in any parish, are to be rated at "a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated." By s. 34, every court-yard, yard or garden (such garden not being a market garden or nursery ground) shall be included in, and make part of, the assessment to be made on the house, buildings or other property to which they may be respectively attached. The Victoria London Docks cover an area of 165 acres, ninety-five of which form a wet dock, tidal basin and canal, all covered with water; the remaining area consists of jetties which intersect the wet dock and basin, and of warehouses and buildings on the jetties. The whole forms one enclosure, occupied by the dock company, who make different charges for the use of the wet dock and basin, and for the use of the warehouses and buildings. The whole area is lighted and watched at their sole expense. In a watching and lighting rate, imposed under the above act, the company was rated, in respect of the whole area, at a rate in the pound thrice greater than that at which the occupiers of land were rated. On an appeal in respect of the ninety-five acres, from a decision of sessions confirming the rate:—Held, by Lord Campbell, C. J., Wightman and Crompton, J.J., that the company was rateable at a higher rate in respect of the ninety-five acres, for that such acres were "property other than land," and ejusdem generis with houses and buildings; but by Erle, J., that the company was rateable at the lower rate, for that the ninety-five acres were land. *Peto v. West Ham (Overseers)*, 2 El. & Bl. 144; 28 L. J., M. C. 240; 7 W. R. 586.

— **Manufactory and Workshops.**—By a statute for regulating the poor of Southampton, every person who shall let out his house in separate apartments or ready furnished lodgings, or shall let tenements built on the ground appurtenant to his principal dwelling, shall, for the purposes of the act, be deemed to be the occupier thereof. The Southampton Dock Company were the owners, but not occupiers, of the custom-house, a manufactory, and several workshops. The manufactory and workshops were within the inclosure of the company, the custom-house was built on land of the company at a distance:—Held, that these words did not apply to any of the premises in question. *Reg. v. Southampton Dock Company*, 6 Railw. Cas. 428; 14 Q. B. 587; 20 L. J., M. C. 155; 15 Jur. 268.

— **Floating Dock attached to Building Yard.**—M. occupied a shipbuilding yard adjoining a public tidal and navigable river, and opposite to it he had a floating dock for the purpose of repairing ships, which floated at high water and grounded on the bed of the river as the tide fell. To enable the workmen to get to their work, a plank went from the yard to the dock, to which it was fastened by a rope, to prevent it falling, if it should happen to be accidentally pushed off the dock. The dock was moored by four chains to the bed of the river and to the yard; the chains could be easily slackened or cast off by the hand, and this was done every time a vessel was docked or undocked. The harbour-master had power to remove the dock when the convenience of the harbour so required. The dock, when moored, was alternately in the same parish as the yard, and in the respondent parish, the water being the boundary. M. was rated for the building yard, "with floating dock attached," at

an amount which was the aggregate of the separate rateable values of the yard and of the dock. The sessions having affirmed the rate, on the ground that, though the floating dock was not rateable per se, it was so connected with the building-yard as to enhance the value thereof:—Held, that the rateable value of the yard could not be considered as enhanced by reason of the floating dock, which had no necessary connexion with it. *Reg. v. Morrison*, 1 El. & Bl. 150; 22 L. J., M. C. 14; 17 Jur. 485.

— **Use of Sheds not amounting to Exclusive Occupation.**—A. & Co. used certain quay space and sheds appropriated to them by a board of management for ten years, paying the stipulated charges. The sheds, which were constructed on the quay, consisted of a range of quays covered by one roof, and subdivided by partitions reaching to the roof into a store or shed, a transit shed and two open sheds. The store shed was provided with doors and locks, and was used by A. & Co. for holding stores for their ships when in port. The transit shed was situate about the centre of the range of sheds, having open sheds at each end of it. There were sliding doors communicating at each end with the open sheds, and one on each side communicating with the roadway and the dock respectively. This shed was used for the reception of goods liable to duty, but upon which no duty had at the time been paid. Each door of the transit shed had two locks; the key of one lock was kept at the custom-house, and the key of the other by A. & Co.: whenever a vessel was discharging, and at all times during the day, the transit shed was open, and the servants of the board went in at their pleasure, for the purpose of examining the goods therein, or for any other purpose connected with their duties. When the shed contained goods or ship stores belonging to A. & Co., they were watched at night by watchmen employed by them:—Held, that the board had not parted with the occupation of any part of such sheds so as to render A. & Co. rateable in respect of such occupation. *Allan v. Liverpool (Overseers) and Inman v. Kirkdale (Overseers)*, 9 L. R., Q. B. 180; 43 L. J., M. C. 69; 30 L. T. 93; 22 W. R. 330.

— **Warehouses—Separate Rateability.**—The appellants were owners and occupiers of docks, and of warehouses, workshops, &c., connected with their docks, and were rated to the poor-rate separately for each, Nos. 1—8 being the warehouses, &c., No. 9 the docks. They were compelled by statute to keep up the docks; and the working expenses, &c., taken as a whole, exceeded the income, the chief expense being the keeping up the docks and basin No. 9. The premises in the other eight items were each capable of separate beneficial occupation apart from their connexion with the docks; but each was enhanced in value by reason of its proximity to and connexion with the docks:—Held, that the separate rating of items 1—8 was right; for that, as each subject was capable of beneficial occupation, it was therefore rateable, notwithstanding its connexion with the docks, which, as a whole, produced no profit; and that they ought to be rated at the enhanced value, which was what a tenant from year to year would be expected to give for them. *Mersey Docks and Harbour Board v. Birkenhead (Overseers)*, 8 L. R., Q. B. 445; 42 L. J., M. C. 141; 29 L. T. 454; 21 W. R. 913.

Wharves—What are.—One side of a canal basin consisted of the natural ground where particular persons were allowed to land their timber, for which no acknowledgment was paid, but which considerably increased the tonnage dues:—Held, not to be a wharf within the meaning of the Regent's Canal Act, and therefore not liable as such to be rated. *Reg. v. Regent's Canal Company*, 9 D. & R. 763; 7 B. & C. 720.

— **Rateability of Tenants.**—The appellants were in the occupation of two wharves, at a yearly rent, as tenants, under the trustees of the Bute Docks. In respect of goods shipped from or upon the wharves, the appellants paid to the trustees a fixed sum, which by the Dock Act was authorized to be received in respect of all goods landed or loaded upon or from the wharf, in addition to the tonnage rates paid by the ship passing into or out of the dock. No dues were charged on goods brought upon the wharves, and not shipped into the dock:—Held, that the dues were paid in respect of the use of the wharves, that in assessing the wharves to the poor-rate they were to be taken into account in ascertaining the rateable value, and that the appellants were liable to be rated in respect of them. *Reg. v. Dowlais Iron Company*, 10 B. & S. 208.

— **Right to Distrain Warehoused Goods for Rates or Tolls.**—See *Green v. St. Katharine Dock Company*, 19 L. J., Q. B. 53; 13 Jur. 1116.

Deductions—Cost of Collection—Tenant's Profits.—The Mersey Docks and Harbour Board are incorporated by certain acts, under which they hold docks and other property connected with the docks, and they are authorized to levy dock rates and duties from the owners of vessels and goods for the privilege of using the docks, and they are bound to apply the dock rates and all money received by them from the dock property according to the directions of the acts. There are no shareholders, and no person derives any personal advantage or emolument whatsoever from the money received by the corporation, and all the rates are appropriated in payment of all expenses and charges of collecting the rates and the several other purposes specified in the acts, and the residue in repaying money borrowed. The corporation having been rated to the poor-rate:—Held, that the corporation was not entitled, in addition to the cost of collecting the rates, to a deduction for tenants' profits. *Mersey Docks and Harbour Board v. Liverpool*, 9 L. R., Q. B. 84; 43 L. J., M. C. 33; 22 W. R. 184.

— **Tenant's Fixtures.**—Cranes, steam engines, shears and other heavy machinery attached to the freehold and essential to the business, but capable of being detached as easily and with as little injury to the freehold as other fixtures put up for the purpose of the tenant's trade, and usually valued as between incoming and outgoing tenants, are not an allowable deduction. *Allan v. Liverpool (Overseers) and Inman v. Kirkdale (Overseers)*, *supra*.

19. ON FERRIES AND WAY-LEAVES.

Ferry Boats—Tolls and Landing-places.—A company was incorporated, and empowered to establish and maintain a ferry over the public tidal and navigable River Tyne; to take lands

and erect ferry-houses and landing-places on either side of the river, and to receive certain tolls for the passage of the ferry. The landing-places on either side were in the parishes of North and South Shields respectively; but the ferry boats, when working, were always afloat and in the parish of N.; and they varied their course in crossing according to the state of the tide. The tolls (which were the only profit derived by the company from the ferry and landing-places) were collected at the South Shields landing-place. The company having been assessed in the parish of South Shields, as occupiers of a ferry, landing and tolls, at one-half the entire net profit of the tolls; on appeal from that rate:—Held, first, that the tolls could not be directly rated as landed property from their connexion with the landing-places, nor indirectly by laying the rate on the landing-places, and treating the half of the entire net proceeds of the tolls as the direct profit of each landing-place; and, that, therefore, the rate could not be supported. *Reg. v. North and South Shields Ferry Company*, 7 Railw. Cas. 849; 1 El. & Bl. 440; 22 L. J., M. C. 9; 17 Jur. 181.

Held, secondly, that in rating the landing-places, the tolls should not be entirely excluded from consideration; but that the landing-places should be rated as land rendered more valuable by being available for the purpose of earning the tolls. *Id.*

Held, also, that the mileage principle was not applicable, so as to assess a portion of the profits on the two landing-places according to the proportion which their dimensions bore to the length of the transit over the river. *Id.*

Owner in another Parish—Landing-place a Public Highway.]—The owner of a ferry residing in a different parish, but taking the profits of the ferry on the spot by his servants and agents, is not rateable for such tolls in the parish where they are so collected, and where one of the termini of the ferry is situated, and on which shore the ferry-boats are secured by means of a post in the ground; the soil itself at the landing-places being the king's common highway; and the owner of the ferry having no property in or exclusive possession of it. *Williams v. Jones*, 12 East, 346.

Ferry not Real Property within 43 Eliz. c. 2.]—The lessee and occupier of an ancient and exclusive ferry, not being an inhabitant residing within the township in which one of the termini of the ferry is situated, is not liable to be rated there for any share of the tolls of such ferry; for supposing a ferry to be real property, it is not such real property as is mentioned in 43 Eliz. c. 2, the occupancy of which subjects the party to the relief of the poor of the place. And all the cases where parties have been held rateable in respect of the occupancy or receipt of tolls (apart from the question of inhabitancy), have been where they at the same time occupied real visible property connected with such tolls in the place where they were rated. *Reg. v. Nicholson*, 12 East, 330.

Way-Leaves—Liability of Lessee.]—If A. has an exclusive right of using a way-leave over land which he holds in common with B., paying B. a certain sum yearly, and has the privilege of using a way-leave occupied by C., paying him so much

per ton for the goods carried over it, A. is not rateable in respect of either of such way-leaves. *Reg. v. Jolliffe*, 2 T. R. 90.

A. having granted to B. a lease for years of way-leaves (for the purpose of carrying coals), and the liberty of erecting bridges, and levelling hills over certain lands; B. made the waggons, inclosed them, thereby excluding all other persons, erected bridges, and built two houses on the land for his servants:—Held, that B. was liable to be rated for "the ground called the waggon-way." *Reg. v. Bell*, 7 T. R. 598.

20. ON LIGHTHOUSES.

Erected on Shore.]—A lighthouse erected on the shore for conveying light to ships at sea is not rateable in respect of the value of the tolls paid by the shipowners for the benefit so communicated, but simply as a building. *Reg. v. Fowke*, 9 D. & R. 120; 5 B. & C. 814.

— Lease of Land belonging to.]—The commissioners of Irish lights having let a portion of the lands held by them as such to a tenant from year to year at a yearly rent:—Held, that the land so in the occupation of the tenant was not exempt as being land held for public purposes. *Boal v. Buckle*, 16 W. R. 435.

Tolls in different Parishes.]—The tolls of a lighthouse situated in a township, which tolls were collected out of the township, in the several ports at which the vessels passing by the coast afterwards arrived, are not rateable *quâ* tolls in the township. *Reg. v. Tynemouth*, 12 East, 46.

Duties.]—Where a poor-rate was imposed upon a lighthouse, together with the duties payable for the same, and the duties were collected out of the parish:—Held, that these duties did not constitute part of the annual profits of the house or land where the light was placed, and were not rateable. *Reg. v. Coke*, 5 B. & C. 797; 8 D. & R. 666.

21. RAILWAYS.

Mode of Rating—General Principles.]—The amount on which a railway, when the railway company are themselves the carriers, is to be assessed to the poor-rate, is the rent which a lessee would pay, he being supposed capable of deriving from the use of the railway all the profits which accrue to the company from the conveyance of passengers, cattle, and goods, under the powers of their acts, such lessee finding locomotive power, carriages, &c., and paying all expenses incidental to working the railway, free of all usual tenant's rates and taxes, and tithe commutation rent-charge, and making allowance and deductions for the average annual cost of repairs, insurance, and other expenses necessary to maintain the way, its fixtures and appurtenances, in a state to command such rent. *Reg. v. London and South-Western Railway Company*, 2 G. & D. 49; 1 Q. B. 558; 2 Railw. Cas. 629; 6 Jur. 686.

— Railway not Constructed under Act of Parliament.]—A railway constructed without any parliamentary powers, eventually sold, enlarged and used, by act of parliament, for public conveyance, does not come within s. 55 of the Local Government Act, 1858 (21 & 22 Vict. c. 98), as a railway constructed under the powers of any act

of parliament; and is therefore rateable in the full net annual value. *North Eastern Railway Company v. Leadgate Local Board*, 5 L. R., Q. B. 157; 39 L. J., M. C. 65; 22 L. T. 62; 18 W. R. 691.

— **At Lower Rate—Within the term "Land."**—By 3 & 4 Will. 4, c. 90, s. 33, the owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor in any parish shall be rated at and pay a rate in the pound three times greater than that which the owners and occupiers of land shall be rated at for the purposes of this act (watching and lighting):—Held, that a line of railway was land within the meaning of the section; and was therefore only rateable at the lower rate. *Reg. v. Midland Railway Company*, 10 L. R., Q. B. 389; 44 L. J., Q. B. 137; 32 L. T. 753; 23 W. R. 921.

A local lighting act made "all houses, buildings, erections, works, tenements and hereditaments" liable to be rated, and excepted "land:—"—Held, that this exception extended only to land used for the purposes of agriculture or gardening, or any kind of mere vegetation, together with the roads and other matters which are ancillary to those purposes; and that hereditaments in which capital had been invested for habitation, or for purposes of profit from manufacturing or mechanical industry, were liable to be rated; and therefore that a line of railway was liable. *Midland Railway Company v. Chesterfield Lighting (Commissioners)*, 1 Jur., N. S. 797; S. C., nom. *Reg. v. Midland Railway Company*, 4 El. & Bl. 958.

— **Under Local Acts—No express Revocation.**—Certain Local Government Acts appointed Improvement Commissioners for sanitary purposes over a district which lay partly within and partly without the borough of Walsall. The commissioners had power to levy rates to defray the expenses they were bound to incur. The rate on any railway within the commissioners' district was, by a local act of 1848, to be limited to one-fourth of the rateable value of the railway. A part of a line of railway did run through the commissioners' district, and was so rated under the local act up to 1872. By the Public Health Act, 1872, urban authorities were constituted, and the mayor, aldermen, and burgesses of the borough, in town council, became an urban authority for, among others, sanitary purposes in the borough. Both bodies—the commissioners and the town council—were given powers to make rates to defray the expenses incurred by them in the discharge of their respective duties. In the grant to the town council of rating powers nothing was said with regard to any limit of rating upon any particular kind of property. By the Public Health Act, 1875, the town council was invested with powers to assess a rate to defray the expenses incurred for sanitary purposes, and the powers of a local board were transferred to it as the urban authority; and it was provided that expenses incurred by the urban authority, if the council of a borough, were to be defrayed out of the borough fund, but if by the improvement commissioners, were to be defrayed out of the district rate. One section continued the limit of the act of 1848 as to rating railway property. By a local act of 1876 the limits of the borough

were greatly extended, and the mayor, &c., of the borough became the sanitary authority for the extended borough. The act of 1848 was repealed with the exception of certain sections. Among the excepted sections that one which limited the amount of rateability of railways was not mentioned, but nothing was said specifically to put an end to that limited liability:—Held, upon the true construction of the various acts, public and local, that there having been no express revocation of the privilege granted in respect of rating the railway at only one-fourth of its rateable value, a borough rate calculated on its full rateable value could not be maintained. *Walsall (Overseers) v. London and North-Western Railway Company*, 4 App. Cas. 467; 48 L. J., M. C. 336; 41 L. T. 160; 28 W. R. 52.

— **Sheds to Protect Engines.**—A watching and lighting act authorized the commissioners to make a rate upon all persons inhabiting, using, or occupying any houses, shops, mills, sheds or other buildings or tenements within the township:—Held, that sheds erected to protect engines for the more convenient working of a coal mine were rateable, although it was contended that they were exempt as being merely accessorial to the engines. *Brown v. Granville (Lord)*, 3 M. & Scott, 453; 10 Bing. 69.

— **Sidings and Turn-tables.**—By a borough improvement act, authorizing a rate to be levied, it was enacted that the occupiers of any land used only as a canal or towing-path for the same, or as a railway constructed under the powers of any act of parliament, should be rated at one-fourth part only of the net annual value. Sidings and turn-tables, occupying about ten acres of land, were used for loading trucks and carriages with goods, and also as a standing place for laden and unladen carriages, and were necessary for conducting the traffic of the railway:—Held, rateable at one-fourth only of their net annual value. *Midland Railway Company v. Birmingham (Council)*, 13 L. T. 404.

— **Calculation of Profits—Rent.**—A rent, or a sum in the nature of a rent, paid for the occupation of a railway is not necessarily a criterion of its rateable value. The profits and advantages derived on a main line by the occupation of a branch line may be taken into account in estimating the rateable value of the branch, and not the local profits. *South-Eastern Railway Company v. Dorking (Churchwardens and Overseers)*, 3 El. & Bl. 491; 2 C. L. R. 633; 7 Railw. Cas. 877; 23 L. J., M. C. 84; 18 Jur. 672.

On an appeal against a poor-rate, by which the Eastern Counties Railway Company was rated in respect of the Royston and Hitchin line, it appeared that the line had been leased to the Great Northern Railway Company at the rent of 12,000*l.* per annum. An extension of it was subsequently made to Shepreth; and, by an arrangement between the Great Northern Company and the Eastern Counties Company the line was transferred to the Eastern Counties Company at a rent of 16,800*l.* per annum. Taken by itself, the line was worked at a loss, but it was valuable as contributing to the gross earnings of the Eastern Counties Railway, by bringing the traffic of the district on that railway. The sessions found that the Eastern Counties Railway Company were tenants of the Royston

and Hitchin line at a rent of 16,800*l.*, and the quarter sessions therefore held that the annual rent was to be taken as the basis of the rateable value. The question was, whether the rate was properly based on the rent of 16,800*l.* :—Held, that as the sessions by this finding adopted the 16,800*l.* as the basis of the calculation and absolute criterion without regarding the evidence of real value, or the fact of there being profit, they were wrong in point of law, and the order of the sessions was quashed. *Reg. v. Eastern Counties Railway Company*, 7 Railw. Cas. 900, n.; 18 Jur. 679, n.

— **Bringing Traffic to other Lines.**—A railway connected with and rented by another railway in a different parish, cannot be rated at an increased amount, in respect of its contributive value in bringing traffic to the other line, but can only be rated upon its value within the rating parish. *Great Western Railway Company v. Llantrissant*, 4 L. R., Q. B. 354; 38 L. J., M. C. 93; 20 L. T. 364; 17 W. R. 671.

The Ely Valley Railway, the greater part of which was within the rating parish, supplied traffic to the South Wales Railway, which was beyond the parish. The South Wales Railway was the property of the Great Western, which was also the occupier of the Ely Valley at a fixed rent :—Held, that the Great Western could not be rated as the occupier of the Ely Valley Railway at an increased amount in respect of its value as a feeder, and in supplying traffic to other parts of their line. *Ib.*

— **Long Lease of Line—Rent and Annuities.**—The Reigate Railway Company leased their line, which joined the South Eastern Railway Company, at a certain rent, for 1,000 years; and the South Eastern became, under the lease, the occupiers of the line, working it in connexion with their own railway. The Reigate Company was afterwards incorporated with the South Eastern by act of parliament, under which the amalgamated company was to pay to the shareholders of the Reigate Company annuities equivalent to and in lieu of the above rent; and the Reigate line then became part of the South Eastern line. On an appeal against two poor-rates assessed upon the South Eastern as occupiers of so much of the Reigate line as passed through the parish of D. :—Held, that the rent in the one case, and the annuities in the other, were not to be taken as the sole or conclusive criterion of the rateable value. *South Eastern Railway Company v. Dorking (Churchwardens)*, 7 Railw. Cas. 877; 3 El. & Bl. 491; 23 L. J., M. C. 84; 18 Jur. 672.

— **General Earnings and Profits at Particular Stations.**—A railway company maintained at each of the stations and termini on their line a staff of servants and appliances which were employed chiefly for the purposes of the goods traffic, but partly for the accommodation of passengers. They made a gross charge of so much per ton to their customers for goods carried on the line, but from the amount so charged certain sums were deducted and set apart as the earnings of the staff and appliances at each station. To these sums the name of terminal charges was given :—Held, that these terminal charges were to be considered as part of the general earnings of the line, and not of the stations. *Reg. v. Eastern*

Counties Railway Company, 4 B. & S. 58; 32 L. J., M. C. 174; 9 Jur., N. S. 1339; 8 L. T. 419; 11 W. R. 694.

In calculating, therefore, the amount of the gross earnings and expenses of the line in a parish, the terminal charges must be included. *Ib.*

The rateable value of a portion of a railway, consisting of the net annual profits from the traffic upon the portion rated, cannot be increased by any part of the profits earned by the same traffic upon other portions of the line. *Great Eastern Railway Company v. Haughley (Churchwardens)*, 1 L. R., Q. B. 666; 35 L. J., M. C. 229; 12 Jur., N. S. 596; 14 L. T. 548; 14 W. R. 779.

— **Rateable Value of Line in different Parishes.**—A line of railway passed through a parish, and great accessions of traffic took place on another part of the line beyond the parish; in such case the railway company is assessable in the parish only for the earnings in the parish, i. e. the gross yearly earnings in the parish, subject to expenses and deductions fairly applicable to that part of the railway which is in the parish, and the profits on the other parts of the line are not to be taken into account as contributive value enhancing the value in the parish. *Ib.*

Part of a line of railway passed through a district where there were two other competing lines for the carriage of passengers and goods. The gross earnings in the parish, a part of this district, were more than absorbed by the expenses chargeable for the working thereof, plus the deduction allowed by the Parochial Assessment Act; but on the basis of the receipts derived from the enhancement of the traffic on the other parts of the system, the rateable value of the line in the parish was equal to 45 per cent. of the gross receipts :—Held, that the railway company was rightly rated at this amount. *London and North-Western Railway Company v. Irthlingborough (Churchwardens)*, 35 L. T. 327.

The legal principle of rating by ascertaining the value of the land occupied in the parish, after the due allowances, is applicable to all cases where the same party, whether a company or an individual, occupies in different parishes land forming one entire property, though the profits may be earned in different proportions, and with a different rate of outgoings in each. *Reg. v. London, Brighton and South Coast Railway Company*, 15 Q. B. 313; 6 Railw. Cas. 440; 20 L. J., M. C. 124; 15 Jur. 372.

In imposing the rate upon a railway company, the rateable value of the portion of the line occupied in any particular parish is to be deduced from a comparison between the particulars of profit and the outgoings arising in that parish, and not by treating the whole line of railway (trunk and branches) as one entire subject-matter, and the whole rateable value, however constituted, as entire, and then dividing it among the several parishes, according to the distance which the line passes through each. *Ib.*

Any expenses, wherever arising, which the company can shew to be necessary for keeping the hereditament which is the subject of the assessment at the value which is made the measure of such assessment, may properly be taken into consideration, but not the amount at which the company is rated in another parish. *Ib.*

With regard to the rating in a particular parish, the line is to be rated, not in the proportion which the length of the line therein bears

to the whole line, but in the proportion that the receipts in such parish for traffic bear to the receipts throughout the whole line. *Reg. v. London and South-Western Railway Company*, 1 Q. B. 558; 2 Railw. Cas. 692; 6 Jur. 686.

Increase of Earnings in one Parish — Occupation in another.—The Reigate line brought a great deal of additional traffic to the main line of the South Eastern, and that company derived benefit from the Reigate line. If in the market, it might be an object of competition between the South Eastern and other railway companies, the traffic on the main lines of which would be increased by the possession and control of the Reigate line:—Held, by Lord Campbell, O. J., Coleridge, J., and Crompton, J. (Erle, J., dissenting), that these were matters giving additional value to the occupation of the Reigate line in the parish of D., which, though lying in other parishes, ought to be taken into account in rating the line in that parish:—Held, by Erle, J., that the earnings in other parishes, though increased by the occupation of the Reigate line in the parish of D., ought to be rated in those other parishes, and not in D. *South-Eastern Railway Company v. Dorking (Churchwardens)*, *supra*.

— Liability to make good Deficiency in Rates by reason of Lands taken.—The East London Railway Act, 1865 (28 & 29 Vict. c. li.), authorized the making of several small railways, and the taking possession of lands for that purpose. Each of these railways passed through more than one parish. The 128th clause of the act declared, "That if and while the company is possessed under this act of any lands assessed, or liable to be assessed to any sewers rate, consolidated rate, poor rate, police rate, main drainage rate, church rate, or other parochial or ward rate, they shall from time to time, until the railway or the works thereof are completed and assessed, or liable to be assessed, be liable to make good the deficiency in the assessment for such rates by reason of those lands being taken or used for the purposes of the railway or works; and the deficiency shall be computed according to the rental at which those lands with any buildings thereon are now rated." A portion of one of these railways was completely constructed in one parish, and was worked there. Till its completion there, the directors had paid in that parish the deficiency rate as provided in this clause. On its completion there, they claimed that they should be relieved from the deficiency rate:—Held, that the rate was properly a parochial rate, and that, on the completion of that portion of the railway in that parish, the title of the parish officers to claim the deficiency rate there had ceased. *East London Railway v. Whitechurch*, 7 L. R., H. L. 81; 43 L. J., M. C. 159; 30 L. T. 412; 22 W. R. 665. Reversing 7 L. R., Ex. 424; 42 L. J., M. C. 18; 27 L. T. 494; 21 W. R. 28.

By a railway act it was enacted that "while the company is possessed under this act of any lands assessed, or liable to be assessed, to any poor rate," and certain other rates, "they shall from time to time, until the railways or the works are completed and assessed or liable to be assessed, be liable to make good the deficiency in the assessment for such rates by reason of these lands being taken or used for the purposes of the

railway or other works by this act authorized; and the deficiency shall be computed according to the rental at which those lands with any buildings thereon were rated at the time of the passing of this act." The company was empowered under the act to make certain railways and works forming one entire system, and they took and used land in a parish for making a part of the railways and works. The part of the railways and works in the parish were completed and opened for traffic; but other parts of the entire system were not completed. The assessment of the land with the railway and works to the poor rates and other rates in the parish was below the assessment of the land with buildings thereon before the act was passed:—Held, that the company was liable to make good the deficiency in the assessment until the entire system of railways was completed. *Reg. v. Metropolitan District Railway Company*, 6 L. R., Q. B. 698; 40 L. J., M. C. 113.

Effect of Branch Lines.—A railway company had become possessed of a branch line communicating with its main line, on the terms that the shareholders of the company by whom the line was made should become stockholders in the company to an amount calculated at the expense of making the line. This branch line communicated with the lines of three other companies, and the company worked the branch at very low fares, in order to divert the traffic from the other lines on to its own line; the consequence was that the sum actually earned on the branch line was very small. If the branch line was in the market, either of the three other companies would, in consequence of the traffic which it would bring to their line, be willing to acquire it upon the same terms in every respect as those upon which the company held it, and would then work it in a similar manner to that in which it was worked by the company:—Held, in assessing to the poor-rate a part of the branch line passing through the parish, that the fact that three other companies would be willing to pay what was equivalent to a large rent for it was to be taken into account as an element in ascertaining the rent at which it might reasonably be expected to let from year to year. *Reg. v. London and North-Western Railway Company, Kempston Rate*, *In re*, 9 L. R., Q. B. 134; 29 L. T. 910; 22 W. R. 263; *S. C.*, nom. *Reg. v. Bedford Union Assessment Committee*, 43 L. J., M. C. 81.

— Increased Traffic on Main Line.—The rateable value of land in a parish may be increased by its producing a return to the occupiers out of the parish, as where a branch railway occupied by a company owning a main line into which it runs, produces a profit by virtue of the traffic which it causes over such main line. *London and North-Western Railway Company v. Cannon (Churchwardens)*, 9 L. T. 326.

— Right to Consider.—In assessing a branch line of railway, which branch is leased to the owners of a main line into which it runs, the parish authorities are not entitled to take into consideration in the assessment the value of the line to such owners of the main line, in addition to the net profits as derived from the traffic passing through the parish. *Reg. v. Llantrissant*, 4 L. R., Q. B. 354; 38 L. J., M. C. 93; 20 L. T. 364; 17 W. R. 671.

— **Payment made in Lieu of Profits.**—The N. company, being empowered to make a branch line from their railway to join the E. railway, an agreement was entered into by the companies (confirmed by act of parliament), by which it was mutually agreed that the N. company should complete the branch (which was likely to prove beneficial to the E. company), and that whenever, after the opening of the branch, the net earnings of the N. company's whole line should not be sufficient to pay a dividend of 3 per cent. per annum on their share capital, the E. company should pay to them such a sum (not to exceed 3,705*l.*) as would be sufficient to make up that dividend. There were stipulations for the interchange of traffic. The agreement to be in force for ninety-nine years from the opening of the branch. The branch was accordingly completed by the N. company, and worked by them at a loss; and, in a certain year, the net earnings of their whole line falling short of a dividend of 3*l.* per cent., the E. company paid 3,705*l.* under the agreement to make up that dividend.—Held, that this payment of 3,705*l.* ought not to be taken into account in ascertaining the rateable value of the N. company's railways. *Newmarket Railway Company v. St. Andrew-the-Less, Cambridge (Churchwardens)*, 7 Railw. Cas. 858; 3 El. & Bl. 94; 23 L. J., M. C. 76; 18 Jur. 572.

Railways with Running Powers.—Mere running powers enjoyed by one railway company over the line of another do not constitute an occupation, so as to subject the holders of the privilege to rateability. *Midland Railway Company v. Badgworth (Overseers)*, 34 L. J., M. C. 25; 11 Jur., N. S. 14; 11 L. T. 303; 13 W. R. 202.

A line of railway connecting two towns belonged to two companies, each holding a moiety of the line in fee-simple, and enjoying running powers over its entire length. The overseers of a parish through which that portion of the railway belonging to one company passed, having rated the other company:—Held, that the rate was bad. *Ib.*

The principle is not altered by the circumstance that other parties also are carriers on the railway, some providing for themselves locomotive power, carriages, stations and watering-places, and paying tolls only to the company, and others finding carriages only, and hiring power, &c. from the company. *Reg. v. Grand Junction Railway Company*, 4 Q. B. 18; 4 Railw. Cas. 1; D. & M. 237; 13 L. J., M. C. 941; 8 Jur. 508.

— **When no Payments made.**—A railway was constructed from G. to C.; half belonged to the Great Western, and half to the Midland; each company had running powers over the half belonging to the other company, but neither company was liable to pay tolls to the other. The Midland Company's traffic over the railway was much larger and more profitable than that of the Great Western. The Great Western being rightly assessed to the poor-rate of B. as sole occupier of the part of their half of the railway in that parish, the rateable value of this occupation was arrived at by taking the amount of the Great Western's profits in the parish, and adding the sum which the Midland, if they had not had the right of running free, would have had to pay to the Great Western in re-

spect of that part of the railway:—Held, that this was wrong, and that the rateable value of the Great Western's occupation in B. was the amount of their own profits in that parish, enhanced only by the value to them of their right to run free over the Midland Company's half of the railway. *Great Western Railway Company v. Badgworth*, 2 L. R., Q. B. 251; 36 L. J., M. C. 33; 15 W. R. 579.

— **Deduction of Sums received for another Railway.**—By an agreement between two separate railway companies (forming together a continuous line), it was stipulated that the former should be at liberty to convey such of their passengers as had taken tickets for the entire distance, over the line of the latter, paying for each passenger a certain sum by way of toll to the latter company:—Held, that in estimating for the purposes of a poor-rate the gross receipts earned by one railway company, in respect of portions of their line running through different parishes, the company was at liberty to deduct such sums as had been received by them and paid over to the other company in pursuance of the agreement; and that the residue, after such deduction, was the rateable value of the line. *Reg. v. St. Pancras (Vestry)*, 3 B. & S. 810; 32 L. J., M. C. 146; 9 Jur., N. S. 1102; 8 L. T. 273; 11 W. R. 615.

— **Rent for Station let to another Company.**—The Eastern Counties Railway Company, owners of a station at P., in 1848 entered into an agreement with the North-Western Railway Company, by which the latter company was for 999 years to have the joint use of the station for their traffic, they binding themselves to pay for such use of the station according to certain terms stipulated in the agreement. Another railway having been opened, a considerable portion of the traffic of the North-Western line was in consequence abstracted, and the station became of so much less value to the North-Western Railway Company, that the rent which they would be willing to pay for the use of the station would barely amount to a third part of the sum actually paid. Upon appeal against a poor-rate, and a case, which stated that the Eastern Counties Railway Company were to be deemed to be the persons rateable in respect of the whole occupation of the station:—Held, that in estimating the value of the occupation to the hypothetical tenant contemplated by the 6 & 7 Will. 4, c. 96, the continuance of those circumstances which constituted the value to the existing occupiers was to be assumed, and thenceforth the sum of money payable to the appellants by the North-Western Railway Company under the agreement ought to form part of the rateable value of the station. *Reg. v. Fletton (Overseers)*, 3 El. & Bl. 450; 30 L. J., M. C. 89; 3 L. T. 689; 9 W. R. 309.

The Eastern Counties Railway Company were the sole owners of a railway station, and in 1848, by an agreement by deed, the North-Western Railway Company were for 999 years to have exclusive use of part of the station, and the joint use with the Eastern Counties Company of another part, at a certain sum per annum. The occupation of the station afterwards became of much less value to the North-Western Company than the annual sum to be paid by them to the other company under the agreement:—Held,

that the effect of the deed (as regarded the part of the station jointly occupied) was only to give to the North-Western Company the right to the joint occupation, and that the Eastern Counties Company were rateable as the sole occupiers of this part of the station, and that in rating them for such occupation, the sum paid by the North-Western Company must be considered as part of the profits. *Reg. v. Sherard*, 33 L. J., M. C. 5.

— **Payment under Working Agreement.**—

A payment to one railway company by another, under agreement, of such a sum, if any, as may be necessary to make up a certain dividend on the cost of the line, in consideration of the making of a part of it, and of working it for the benefit of the latter company, is not a profit arising out of the occupation of the railway, and is not to be taken into account in assessing its rateable value. *Newmarket Railway Company v. St. Andrew, Cambridge (Overseers)*, 3 El. & Bl. 94; 2 C. L. R. 621; 7 Railw. Cas. 858; 23 L. J., M. C. 76; 18 Jur. 572.

— **Deductions—General Principle—Estimate of Expenses.**—

A company formed a line of railway, of which they were owners. They were also lessees of two branch lines, but were not liable to repair them; by each of these branch lines the company incurred an annual loss, but these lines caused an increase of traffic on the main line. The company had been in the exclusive occupation of these three lines as carriers. In order to ascertain the sum at which the company was to be rated, i.e. the rent which a tenant might be found to give from year to year, the parish officers ascertained the gross receipts of one mile in a parish, where there was no station, and deducted therefrom the expenses of the three lines, under the following heads, viz.:—1. Maintenance of way; 2. Locomotive account; 3. Carrying account; 4. Charges for salaries of superintendents and clerks, advertising, stationery, &c.; 5. Repairs and alterations of stations; 6. Compensation for fire, and other accidents; 7. Government duty on passengers; 8. Rates and taxes of all kinds actually paid (other than the property tax); 9. Direction and office expenses; and also a sum for the annual depreciation of the plant necessary for working the railway. Further allowances were made of a percentage as interest on the first cost of the plant, and as tenants's profits, including profits of trade. The balance was taken to represent the rateable value of one mile in the parish, and was found so to do by the sessions. The stations and buildings on the three lines were rated separately from the railway. The company claimed the following additional deductions:—1. The rateable value of the stations and buildings appurtenant to the three lines, and necessary for their profitable enjoyment; 2. The depreciation and wear and tear of the rails and sleepers on the main line, hitherto defrayed out of the capital; 3. A percentage on the sum expended in forming the company, obtaining the act, and raising the capital; 4. The income tax paid by the company; 5. Additional parochial assessments which might become payable; 6. The annual total loss on the two branch lines:—Held, that a further deduction ought to be made for the stations and buildings, but not on account of any of the other claims made by the company. *Reg. v. Great Western Railway Company*, 2

New Sess. Cas. 205; 6 Q. B. 179; 15 L. J., M. C. 80; 10 Jur. 134.

A railway company is entitled to a deduction from the rateable value, in order to countervail the depreciation which takes place in the value of the permanent way, and to maintain it in a state to command the supposed rent, which is the measure of the assessment; and such deduction is not provided for by a deduction under the head of "working expenses." *Reg. v. London, Brighton and South Coast Railway Company*, 15 Q. B. 313; 6 Railw. Cas. 440; 20 L. J., M. C. 124; 15 Jur. 372.

A company is not disentitled to such deduction because it has not incurred the expense, nor laid by from its receipts any sum to meet it when it should arise, although it ought to set apart the sum which it claims to deduct; and whenever the time comes for actually making the restoration, it will be estopped from claiming more than that deduction. *Id.*

— **Allowance for Depreciation.**—

In estimating the amount of allowance for depreciation of the rolling stock, the proper mode is not to value the stock at the beginning and end of each year, and deduct the difference, but to assume that the stock will last its natural life; in other words, it may be reasonably assumed that the tenancy will continue for several years, and so that the depreciation in that view will be less than if the tenancy was to last only one year. *Great Eastern Company v. Haughley (Churchwardens)*, 1 L. R., Q. B. 666; 35 L. J., M. C. 229; 12 Jur., N. S. 596; 14 L. T. 548; 14 W. R. 779.

— **Annual Repair and Ultimate Renewal.**—

A railway company was assessed for two miles and a half of railway in a parish, being part of a line originally intended to form an independent and entire railway, but purchased by the company and incorporated with their line. This branch was worked by the company as part of their entire railway; but a certain number of engines and carriages was appropriated to it, and a certain number of officers and servants employed exclusively on it. No separate account of receipts and expenditure in respect of it was kept. The branch could be worked as a separate railway under independent management, but that would require a larger movable stock and a greater expenditure. The actual expenses were not in the proportion of the actual gross receipts, either on the branch or throughout the entire railway; nor were such gross receipts or such expenses at one uniform rate per mile throughout the entire railway. The profits of the company were wholly derived from the carriage of passengers and goods; and none but the company's engines and carriages ran on the line. The overseers and the company agreed as to the total gross annual receipts from the whole line, including both trunk and branch, and as to the total gross annual receipts from the two miles and a half. As to the deductions to be made, in order to ascertain the net rateable value of the whole line:—Held, that the company, in addition to deductions for annual repair of rails and framework, and of movable stock, was entitled to be allowed two specific sums for their ultimate renewal and reproduction, where the allowance for annual repairs did not equal in amount the sum of the allowances which the

company claimed under the two heads of "annual repair" and "ultimate renewal." *Reg. v. Great Western Railway Company*, 7 Railw. Cas. 130; 15 Q. B. 1085; 21 L. J., M. C. 84; 16 Jur. 217.

— **Expenses of small Portion of Line.**—In order to ascertain the net rateable value of the two miles and a half, the deductions from the total gross revenue, which constitute the difference between it and the total net rateable value, are to be apportioned on the parochial principle. But this principle does not preclude a consideration of charges and expenses, wherever arising locally, which are necessary for keeping the subject of assessment at the value which is made the measure of that assessment. And when such charges and expenses apply equally to every mile of a railway, it is a convenient and allowable mode to arrive, by a mileage division, at the proportionable part to be assigned to the miles in any particular parish. *Ib.*

— **Division of Expenses on Mileage Principle.**—The company separated the branch from the trunk, except as to a small portion of the general expenses of the entire railway, being those of central superintendence, printing and advertising, and then dividing the expenses of the branch thus separated on the mileage principle:—Held, that such division was not necessarily a departure from the true principle of apportionment; but that, there being nothing to distinguish the branch from the trunk, the mode of ascertaining the rateable value by considering it as a distinct whole was incorrect. *Ib.*

Held, also, incorrect to take the deductions at the same rate for every mile of the railway. *Ib.*

— **Interest on Capital and Tenants' Profits.**—In assessing a railway company in respect of their line of railway, and the stations, buildings and sidings, the percentage amount to be allowed for interest on capital and tenants' profits is to be calculated upon the actual value of the rolling stock at the time when the rate is made, and not upon its cost price. *Reg. v. North Staffordshire Railway Company*, 3 El. & El. 392; 30 L. J., M. C. 68; 7 Jur., N. S. 363; 3 L. T. 554; 9 W. R. 235.

— **Movable Articles.**—A railway company was obliged to provide, in addition to their rolling stock, turn-tables, cranes, weighing machines, stationary steam-engines, lathes, electric telegraph and apparatus, office and station furniture, and gasworks used for supplying the stations with gas:—Held, that the company was entitled to a deduction in respect of such of these articles as were movable, but not in respect of such as were so attached to the freehold as to become part of it; nor in respect of such as though capable of being removed, were yet so far attached as that it was intended that they should remain permanently connected with the railway, or the premises used with it, and remain permanent appendages to it as essential to its working. *Ib.*

— **Floating Capital to provide against Emergencies.**—It was also necessary that the company should have in hand, at command, a sum of money, by way of floating capital, for the purpose of providing surplus stores, to be used in case of accident on the line or other emer-

gency, and partly in paying the wages of servants of the company, and in other current expenses:—Held, that whether the company was entitled to a deduction for interest and tenants' profits, or either of them, upon this floating capital, must depend on whether, on the whole capital employed, a greater delay occurred in realizing the returns than was ordinarily incidental to the employment of capital. *Ib.*

— **Station Buildings and Sidings.**—Held, also, that the deduction to be allowed in respect of stations, buildings and sidings along the line of railway must be calculated on the actual value at which they ought to be assessed, and not on the original cost of construction. *Ib.*

22. TRAMWAYS.

Rateability—Occupation of Road.—A tramway company, formed under the Tramways Act, 1870 (33 & 34 Vict. c. 78), laid down a tramway in a highway, the soil of which was vested in the district board. S. 34 gives the exclusive use to the company of the tramway for carriages with flange wheels or other wheels suitable only to run on the rail. By s. 57 the company is not to acquire any right other than that of user of any road in which their tramways are laid; and by s. 62 nothing in the act is to abridge the right of the public to pass along or across every part of any road in which the tramways are laid with carriages not having flange wheels or wheels suitable only to run on the rail; and by s. 25 the rails must be laid level with the road:—Held, that the company was rateable to the poor-rate in respect of their occupation of the road by their tramways. *Pimlico Tramway Company v. Greenwich Union*, 9 L. R., Q. B. 9; 43 L. J., M. C. 29; 22 W. R. 87.

Mode of Assessment in regard to different Parishes.—In assessing the rateable value of tramways, the annual gross traffic receipts earned over the entire system must be taken as the basis of the estimate of the rent, and the net receipts in each parish as the criterion of the rateable value in each parish. *London Tramways Company v. Lambeth Assessment Committee*, 31 L. T. 319.

When a tramway route begins and ends in the same parish, the net receipts of that route is the value upon which the tramway owners must be rated. *Ib.*

When a tramway route extends through two or more parishes, the fairest practicable mode of apportioning is by dividing the receipts from each distinct service route in proportion to the lineal mileage of such route in each parish respectively. *Ib.*

The general expenses, except horse expenses, allowed proportionately to the number of miles run over by the cars in each parish, upon each of the several distinct service routes therein. *Ib.*

23. TELEGRAPH COMPANIES.

Posts fixed in the Ground—Occupation.—An electric telegraph company, incorporated by statute for transmitting messages between distant places by means of electric currents, laid down along the lines of a railway company an apparatus for that purpose, on terms agreed on between the companies. This apparatus con-

sisted of posts fixed in the ground, with telegraphic wires suspended from post to post, the posts being, however, subject to removal to some other place at the option of the railway company, if their working or position interfered with the operations of the railway:—Held, that the telegraph company was rateable in the parish in which the posts were fixed. *Electric Telegraph Company v. Salford (Overseers)*, 11 Ex. 181; 24 L. J., M. C. 146; 1 Jur., N. S. 733.

Liability of Postmaster-General.—A vestry applied by mandamus to compel the postmaster-general to pay poor-rates upon the rateable value of telegraph posts and wires, as fixed by an assessment committee. The postmaster-general had tendered a smaller amount, proportionately to an assessment fixed by the commissioners of the Treasury, which the vestry had refused:—Held, that by the Telegraph Acts, 1868 (31 & 32 Vict. c. 110) and 1869 (32 & 33 Vict. c. 73), no duty is cast upon the postmaster-general to pay the rates imposed by those acts; and that there is no remedy by mandamus against him to enforce the payment of rates fixed by an assessment committee. *Reg. (or Marylebone Vestry) v. Postmaster-General*, 28 L. T. 337; 21 W. R. 459.

24. MINES AND QUARRIES.

What are Rateable.—Iron mines are not rateable under 43 Eliz. c. 2, s. 1, coal mines being the only mines mentioned in the statute. *Crawshaw v. Morgan*, 5 L. R., H. L. 304; 40 L. J., M. C. 202; 24 L. T. 889; 20 W. R. 554.

Iron mines are not rateable; and being rated conjointly with coal mines, the coal whereof was raised by the owner of the lands for his own use in smelting the iron, an order of sessions confirming such rate generally, without ascertaining the proportion at which each was rated, was quashed. *Reg. v. Cunningham*, 5 East, 478.

The express mention in 43 Eliz. c. 2, s. 1, of coal mines, is a virtual exclusion of all other mines, and consequently other mines are not rateable. *Reg. v. Sedgley*, 2 B. & Ad. 63.

Lead mines are not rateable. *Lead Company v. Richardson*, 3 Burr. 1341; 1 W. Bl. 389; *S. P., Rowls v. Gells*, Cowp. 453; 1 Dougl. 304; and *Talargoeh Mining Company v. St. Asaph, post*, col. 508.

Where, on a question as to the rateability of a freestone work, the sessions in a case called it a quarry, but stated all the facts respecting the mode of working for the opinion of the court, without determining the question whether it was a mine or not, the court sent the case back to be reheard, saying that the question of mine or no mine was a question of pure fact, which the sessions ought to determine. *Reg. v. Dunsford*, 4 N. & M. 349; 2 A. & E. 568; 1 H. & W. 93.

The method of working, and not the nature of the substance obtained, is the criterion to determine the question of mine or no mine, so as to exempt from poor rates. *Ib.*

Lime works are rateable in the hands of the occupier, though there be risk and expense in the working, and the profits are uncertain. *Reg. v. Alderbury (Churchwardens)*, 1 East, 584.

Where limestone was obtained and raised by sinking shafts perpendicularly down to the stratum, which lay forty or fifty yards below the surface of the ground, and the stratum was

worked by roads and gateheads, and the stone raised to the surface by machinery, or carried under ground to a tunnel:—Held, that the property was a limestone mine, and therefore not rateable. *Reg. v. Sedgley*, 2 B. & Ad. 63.

So, where glass-house, pot clay, and fire-brick clay were extracted from the earth by perpendicular shafts, in the same method that is used in coal mines:—Held, that the works were clay mines, and therefore not rateable. *Reg. v. Bretell*, 3 B. & Ad. 424.

The occupier of a manganese mine is not liable to be rated. *Reg. v. Tremayne*, 1 N. & M. 194; 4 B. & Ad. 162.

The occupier of a clay pit is rateable for the same. *Reg. v. Brown*, 8 East, 528.

A slate work (or, as improperly called, a slate mine) is rateable. *Reg. v. Woodland*, 2 East, 164.

Liability as Owner or Occupier.—The lessee under the crown of lead mines is rateable for the profits arising from lot and cope; which are duties paid him by the adventurers, without any risk on his part. *Rowls v. Gells*, Cowp. 451; 1 Dougl. 304.

The lessees, under the lord of the manor, of lot and free share of all calamine raised within the manor, are liable to be rated as occupiers of land in the parish where the manor lies, none of them being resident in the parish. *Reg. v. Baptist Mill Company*, 1 M. & S. 612.

The Duke of Cleveland, being owner of the waste in the township of Middleton, and of the mines and minerals under the same, demised unto a company all the mines, veins, &c., opened or to be opened, together with all houses, &c., thereto belonging, with full power to enter and do all things necessary for working the mines, saving and reserving to himself, his heirs and assigns, full liberty, &c., to enter for the purpose of viewing the same, to have and to hold the same for twenty-one years, yielding and paying, rendering and delivering, during the continuance of the demise, to the duke, one full fifth part, share, and proportion of all the ore won or gotten out of and from the demised premises, well and sufficiently cleansed, dressed, washed, and made merchantable and fit for the smelting mill, at the costs and charges of the company;—Held, that the duke was rateable as an occupier of the ore. *Reg. v. Todd*, 4 P. & D. 335; 12 A. & E. 816; 1 A. & H. 100; 5 Jur. 407.

The Duke of Cornwall being entitled as lord of a manor to tin ore, raised by the bound owners within the manor, which was rendered by them to him in an unmanufactured state, demised this toll:—Held, that the lessee, though not an inhabitant of the parish in which the tin was raised, was rateable to the poor-rate there, as occupier of the tin toll under 43 Eliz. c. 2, s. 1. *Crease v. Sawle*, 2 Q. B. 862; 2 G. & D. 812—Ex. Ch.

The rate being made upon him as occupier of the toll, the court refused to inquire, in an action for levying the rate by distress, whether a part of the rate was or was not for tin toll not in the lessee's occupation, some tin toll appearing to be in his occupation, and the amount being only matter of appeal. *Ib.*

In an action by the galees of iron mines in the Forest of Dean, against the overseers of the parish, for having seized his goods as a distress for a poor rate:—Held, that the galee was

an occupier, and not a mere licensee of the mines, the 24 & 25 Vict. c. 40, s. 1, having enacted that a gale of these mines shall be deemed to confer "an interest of the nature of real estate" on the grantee. *Morgan v. Crawshaw*, 5 L. R., H. L. 304; 40 L. J., M. C. 202; 24 L. T. 889; 20 W. R. 554.

The owners granted for twenty-one years, to certain grantees, full liberty, licence, and power to dig shafts, and work and raise, and make saleable, and sell, the minerals under certain limits, and to erect within the limits such sheds and other buildings as should be necessary for the above purposes. A cost-book mine company was established under the grant, and certain buildings, machinery, tramways, &c., were erected on part of the surface within the limits:—Held, that it was immaterial what title, if any, was conferred by the grant; the partners in the company were, by their servants and agents, the sole occupiers of that part of the surface on which the buildings were erected, and were rateable to the poor-rate in respect of such occupation. *Kitto v. Liskeard Union (Guardians)*, 10 L. R., Q. B. 7; 44 L. J., M. C. 23; 31 L. T. 601; 23 W. R. 72.

A cost-book company, not being incorporated, is a mere partnership; and, consequently, any of the shareholders in the company may be entered upon the rate books. *Ib.*

The lessee of a coal mine is rateable though he derives no profit from the mine. *Rea v. Parrott*, 5 T. R. 593.

— **Reservation of Rent or Ore.**—A landlord and owner of soil not residing within a parish, having granted a licence by indenture for twenty-one years to certain adventurers, to dig for tin and other ore under a close, reserving to himself one-eighth share of the ore, in an improved and merchantable state, and granting to the adventurers the exclusive occupation of the mine for the purpose of procuring the ores, is rateable for the relief of the poor of the parish in which the mine is situate, in respect of such reserved proportion or eighth share; and, in respect thereof, is to be considered as an occupier of the lands by the hand of the adventurers; the reservation operating as an exception out of the demise, and not being in the nature of a rent. *Rea v. St. Austell*, 1 D. & R. 351; 5 B. & A. 693.

Where a rate was imposed upon an owner of the lead ore in certain lead mines, in respect of the duty lead reserved in a lease of the mines, being one-fifth share of the lead to be smelted from the ore raised from the mines:—Held, that this reservation was in the nature of a rent, and therefore not rateable. *Rea v. Pomfret (Earl)*, 5 M. & S. 139.

The trustees under the will of a person seised in fee of two third parts of a manor, subject to certain leases to a company of adventurers of the mines of lead, tin, and copper ore, and other minerals, under the moors, commons, or wastes of the manor, at a rent certain, are not rateable for such rent. *Rea v. Welbank*, 4 M. & S. 222.

A person entitled to toll tin and farm dues (which are certain portions of the tin raised by the adventurers in the tin mines) is liable to be rated in respect thereof. *Rea v. St. Agnes*, 3 T. R. 480.

A lead mine was held under three leases, two of which granted the minerals to the lessees for

the purpose of being worked. Within the land comprised in one of them, the shafts were sunk which communicated with the surface and the underground workings, and ore was gotten from underneath such land, and the royalty or dues were reserved in kind, or at the option of the lessors, in lieu thereof, the full value in money. No ore was got from under the land comprised in the other lease of which the reservation was a dead rent, in addition to a like reservation to the one above mentioned. The lessors were different persons. The minerals comprised in the two leases adjoined one another. The lessees were rated in respect of the engines, machinery, workshops and buildings, and surface of land connected with the mine, and the lessor of the land whereon the shaft was opened and whereunder the minerals were worked was rated for a lead mine, whereof the royalty or dues were reserved wholly in kind:—Held, that the Rating Act, 1874, s. 13, which provided that nothing in that act should apply to a mine of which the royalty or dues were for the time being wholly reserved in kind, applied to this case, and rendered the old law applicable; that the mine as rated was a mine distinct from the holding under the latter lease, and that the reservation of the royalty or dues was wholly in kind, notwithstanding the lessor's option; that the rate therefore was correct. *Van Mining Company v. Llanidloes (Overseers)*, 1 Ex. D. 310; 45 L. J., M. C. 138; 34 L. T. 692.

An owner of the soil granting a lease or let of a manganese mine, reserving a money render per ton of mineral raised, is not rateable as an occupier. *Rea v. Tremayne*, 1 N. & M. 194; 4 B. & Ad. 162.

Landlords not resident within the parish, having leased lead mines, and other minerals, with liberty to the tenants to dig, &c., reserving a certain annual rent, and also certain proportions of the ore which should be raised, are at any rate not assessable to the relief of the poor for such certain rent, no ore being raised; whatever the question might be as to the proportion of ore reserved when in fact any should be raised. *Rea v. Rochester (Bishop)*, 12 East, 353.

— **Mode of Assessment.**—An owner of iron mines rented two acres and a-half of surface land partly over and partly adjoining the mines; he occupied the mines and land together, using the surface for the purpose of working the mines and getting the ore, and he had erected thereon buildings, machinery, workshops, and tramways. The surface land, buildings, &c., without the mines, would be practically valueless:—Held, that he was rateable to the poor-rate in respect of the surface land with the buildings, machinery, workshops, and tramways, although they were occupied in connexion with a non-rateable subject-matter, viz., an iron mine. That the way to ascertain the rateable value was to assume the mines and surface to be in different hands, and then to calculate what rent the occupier of the mine would have to pay for the surface with the buildings erected thereon. *Guest v. Eustacean (Overseers)*, 7 L. R., Q. B. 334; 41 L. J., M. C. 129; 26 L. T. 422; 20 W. R. 332.

The lessee and occupier of a coal mine is rateable for the full annual value of the mine, though increased by improvements, such as the erection of engines made at his own expense. *Rea v. Granville (Lord)*, 4 M. & R. 171; 9 B. & C. 188.

An engine erected and used by the owner and occupier of an iron-stone mine, solely for the purpose of drawing water from the mine, is parcel of the mine itself, and not rateable. *Rea v. Bilston*, 8 D. & R. 734; 5 B. & C. 851.

The owner and occupier of coal mines is rateable at the sum for which the mine would let, subject to outgoings; the lessee of coal mines is rateable for the amount of royalty or rent which he pays; and in neither case is any allowance to be made for money expended on rendering the mines productive. *Rea v. Attwood*, 6 B. & C. 277; 9 D. & R. 328.

— **Actual Profits.**—The occupiers of cement works and also of a chalk pit situated close by were assessed separately as to their works and their pit. There were other equally good chalk pits in the neighbourhood, the chalk from which was used only for ballast and other purposes not so profitable as that of manufacturing cement, for which the occupiers used theirs. They appealed against the assessment of the chalk pit, and the counsel who supported the rate proposed to ask their manager as to the profits they obtained from the chalk, but the quarter sessions refused to admit evidence upon that subject:—Held, that the quarter sessions were right, and that although the convenience and situation of the chalk pit were to be considered in estimating what rent a tenant would reasonably pay, the actual profits derived by the occupiers were not material in forming that estimate. *Reg. v. Aylesford Union*, 26 L. T. 618.

— **Use of a Watercourse.**—A company for the purpose of working the machinery connected with a lead mine, diverted a stream from its natural course, paying the owners for such diversion, and paying certain small sums for the occupation of the land by the watercourse. The watercourse was about a mile and a-half in length, being partly open, partly tunnelled, and for about 350 yards in pipes:—Held, that the company was rateable to the poor-rate in respect of the occupation of the watercourse at the value of the land enhanced by its capability of conveying water; and that it was not exempt from rateability by reason of its connexion with a lead mine, though that is not rateable under 43 Eliz. c. 2. *Talargoch Mining Company v. St. Asaph Union*, 3 L. R., Q. B. 478; 37 L. J., M. C. 149; 18 L. T. 711; 16 W. R. 860; 9 B. & S. 210.

— **What Works included.**—A company occupied a lead mine held under a lease, which comprised land and works in a neighbouring union, the mine and most of the works being out of that union. After the ore was crushed and washed, it was taken by a tramway about half a mile to a smelting house, occupied under the same lease, in the neighbouring union, where the ore was converted into lead for sale. The company was rated under the Rating Act, 1874, s. 7, for their mine in the union at the amount of the whole of the dues payable in respect of the mine under the lease during the previous years. They were separately rated for part of the tramway to, and a chimney from, the smelting house, which were situated in the union; and were also rated by the neighbouring union for the land, works, and smelting house there situated:—Held, that all these crushing, washing and smelting works

were included under the definition in s. 7, as in connexion with and for the purposes of the mine; and that a deduction should be made from the gross dues in respect of the rateable premises out of the union, in order to obtain the rateable value of the mine in the union. *Snailbeach Mine Company v. Forden Guardians*, 35 L. T. 514.

— **When Mine Unproductive.**—Where a coal mine, becoming unproductive, ceases to be worked, the lessee is no longer liable to be rated, although he may be still bound by his covenant to pay the rent reserved to his landlord. Aliter, where the mine is itself productive, although worked at a loss by the lessee, after deducting the proportion of the gross value of the produce reserved to the owner. *Rea v. Bedworth*, 8 East, 387.

A coal company was the owner and occupier of a coal mine which had been drowned out some years back, and was wholly unproductive. They constructed an engine and boilers, together with an engine house and boiler sheds on lands they had taken for that purpose, and also made a railway on part of such lands for conveying coals for the boilers. The whole of the boilers, engines and plant were used only for the purpose of endeavouring to pump out the water from the mine; but since 1870 the water had remained at about the same level, and no coal had as yet been worked:—Held, that though the company was rateable to the relief of the poor for the surface lands they occupied, they were not so rateable for the buildings, boilers, engine and plant, and railway, as these were only part of a valueless colliery, and were not shewn to have any value apart from such colliery. *Tyne Coal Company v. Wallsend Parish Overseers*, 46 L. J., M. C. 185; 35 L. T. 854.

The lessee of a coal mine is rateable though he derives no profit from the mine. *Rea v. Parrott*, 5 T. R. 593.

— **In different Parishes.**—A coal mine lying in several parishes is rateable in each of those parishes, although the adit and the machinery are in one parish only. *Rea v. Foleshill*, 4 N. & M. 360; 2 A. & E. 593; 1 H. & W. 71.

By an inclosure act it was declared, that all the allotments to be set out to the several persons having right of common upon a moor should be deemed to be situate within the same townships and places respectively wherein the land lay in respect of which such allotments should be made; and it was provided that nothing in the act should affect the right of P. to certain coal mines under the moor:—Held, that the first clause affected only those portions of the soil which were allotted to the commissioners, and not the coal mines under those allotments, and therefore, that such coal mines were rateable in the parish in which they were actually situate, as they were before the act passed, though the allotments became rateable elsewhere. *Rea v. Pitt*, 5 B. & Ad. 565.

— **Deduction by Tenant—Covenant to Pay Rates.**—A covenant, in a lease of iron mines, to pay a certain rent "free of all rates, taxes and deductions whatsoever, parliamentary, parochial, or of any other nature," is not a "specific contract to pay the poor-rate, in the event of the abolition of the exemption," of iron mines, within s. 8 of the Rating Act, 1874 (37 & 38 Vict.

c. 54); and the lessee is therefore entitled under that section to deduct half the poor-rate from the rent. *Devonshire (Duke) v. Barrow Haematite Steel Company*, 2 Q. B. D. 286; 46 L. J., Q. B. 435; 36 L. T. 355; 25 W. R. 469—C. A. Affirming 35 L. T. 474; 25 W. R. 60.

A lease of an iron mine, made in 1855 (not being then liable to poor-rate), contained covenants for the payment of certain rents and royalties, and these payments were to be made free and clear of all rates and taxes imposed by parliament or otherwise . . . "free from all deductions whatsoever;" and there was a covenant to pay "all manner of taxes, &c., which now are or which shall at any time hereafter, during the continuance of this demise, be imposed," landlord's property tax excepted. By the Rating Act, 1874 (37 & 38 Vict. c. 54), s. 3, the 43 Eliz. c. 2, was extended to mines "of every kind not mentioned in the recited act;" but s. 8 provided that where the lessee of a mine was, at the commencement of the act, exempt from the payment of poor-rate, which was afterwards made payable, he might deduct one-half from the rent (unless he had specifically contracted to pay such rate in the event of the abolition of the said exemption):—Held, that under this section the tenant here might deduct half of the rate from his rent, for that he had not, within the words of the section, "specifically contracted" to pay such rate. *Chaloner v. Bolokow*, 3 App. Cas. 933; 47 L. J., C. P. 562; 39 L. T. 134; 26 W. R. 541.

25. GAS WORKS.

General Principle.—The profits arising from the sale of gas, manufactured from coal, and conveyed through pipes and trunks under the pavement for the purpose of lighting a town, are not rateable, but the company is only rateable in a sum equal in amount to that for which the premises would let to other persons willing to carry on the same business. *Rea v. Birmingham Gas Light and Coke Company*, 2 D. & R. 735; 1 B. & C. 506.

Rateable Occupation—Pipes.—Fixing pipes in the ground for the conveyance of gas, to light a town, is a rateable occupation of land, and the occupiers are rateable to the extent of the increased value of the land so used, as long as it is applied to the purposes of a pipe-way. *Rea v. Brighton Gas Light and Coke Company*, 8 D. & R. 308; 5 B. & C. 466.

By an act for paving, lighting and watering, the trustees for carrying it into effect were empowered to rate the tenants and occupiers of all the houses, shops, malt-houses, granaries, warehouses, coach-houses, yards, gardens, grounds, stables, cellars, vaults, wharfs and other buildings and hereditaments within certain limits, meadow and pasture excepted:—Held, that this exception shewed the word "hereditaments" to be used not merely with reference to things ejusdem generis with those before enumerated, but in a more extended sense, comprehending land in general; and therefore that a gas-light company was rateable under the act for the ground occupied by their pipes and other apparatus. *Rea v. Shrewsbury (Trustees)*, 3 B. & Ad. 216.

Articles Rateable—Meters Excluded.—A gas company was rated in respect of the following articles:—meters soldered to the leaden

service-pipes on the premises of consumers, but not fixed in any way so as to interfere with their removal; retorts, or instruments for the production of gas, distinct and severable from the foundation or basement floor of the company's premises, but attached to the floor by hardened fire-clay; purifiers, or massive iron vessels standing on a brick base, but not fixed to it, though connected on one side with pipes passing through the soil from the retorts; steam-engines fastened by screw bolts to a stone base, fixed in the soil and capable of being detached by unscrewing the bolts; boilers set in brickwork fixed in the soil; gas-holders, or vessels of plate-iron for storing gas, not fixed in any way, but placed so as to rise and fall in circular tanks, excavated beneath the soil, and easily moved for the purpose of repairs. According to the practice and course of business in letting gas works, the tenant would have to take to and find capital for all the articles above enumerated:—Held, that the retorts, purifiers, steam-engines, boilers, and the movable part of the gas-holders, appeared to be attached to the inheritance, for the permanent improvement of it, and ought to be included in the value of the premises for the purpose of rating, but that the meters must be excluded, as they could not be considered as part of the gas works, and never were so attached to the houses as to lose the character of chattels. *Reg. v. Lee*, 1 L. R., Q. B. 241; 35 L. J., M. C. 105; 12 Jur., N. S. 225; 13 L. T. 704; 14 W. R. 311.

—Fixed Machinery, Pipes and Gas Holders.]—

By a local act, the guardians of a parish were directed to value all houses, tenements and hereditaments within the parish, for the purpose of rating to the relief of the poor. By the customary mode of rating under this act, fixed machinery, erected for the purposes of manufacture, was not rated, nor were buildings containing it rated according to their value as increased by that machinery. A gas company supplying the town with gas, but having their gas manufactory out of the parish, was rated "for their gas-holder and premises in the street, and mains and pipes within the parish." The company had no property in the soil of the streets, under which their mains and pipes were laid, but a mere licence from the commissioners for paving and lighting the town, in whom that property was vested. The gas-holder was valued, for the purpose of the rate, as a warehouse or a building, at what it was worth to let by the year. The mains and pipes, and the land they occupied, were valued by ascertaining the quantity of land through which they were laid, and valuing that land with reference to the value of the adjoining lands, taking into consideration the purposes for which it was used. The mains and pipes were also valued separately, at an annual rental to let, in the same manner as the houses, with an allowance for wear and tear:—Held, that such a rate was bad for inequality, on the ground of omission to rate other property of a similar nature. *Rea v. Birmingham and Staffordshire Gas Light Company*, 1 N. & P. 691; 6 A. & E. 634.

Mode of Assessment.—The works of a gas company are to be rated upon an estimate of the rent which would be given for them by a hypothetical tenant, after proper deductions, even though such principle may not be theoretically

right, and it may be practically impossible to apply it satisfactorily to that kind of property. *Sheffield United Gas Light Company v. Sheffield (Overseers)*, 4 B. & S. 135; 32 L. J., M. C. 169; 9 Jur., N. S. 623; 11 W. R. 1064.

— **Pipes in Several Parishes.**—When the mains and pipes of a gas company are distributed through several parishes, the proper criterion for the assessment of the company to each parish is not the amount of receipts for gas supplied therein, but a proportional part of the rent at which, after deduction for the wear and tear of machinery, the works of the company would let, calculated according to the improved value of the land, from the apparatus and works of the company laid down therein. *Reg. v. Cambridge Gas Light Company*, 3 N. & P. 362; 8 A. & E. 73.

A gas company in a town, which consisted of several parishes, in which were situated numerous colleges, which were extra-parochial, supplied gas in mains and pipes to these colleges, and was rated, therefore, to the parishes in which the colleges were locally situated.—Held, that the rate was bad, the company being rateable in respect, not of its receipts, but of the land occupied. *Id.*

— **Deduction.**—The proper deduction to be made from the rent of a company's works to form the basis of an assessment, is such an annual sum as will be sufficient to replace the works when worn out. *Reg. v. Cambridge Gas Light Company*, 3 N. & P. 262; 8 A. & E. 73.

— **Exemption for "Public Purposes."**—The corporation of Limerick having, under the powers of their special act, purchased the Limerick gas works, manufactured and sold gas; and the surplus profits, after providing for certain charges and expenses, were applied, in pursuance of the provisions of the special act, in reducing the town improvement rate.—Held, that the gas works were not occupied for a "public purpose," and were not, therefore, exempt from being rated. *Limerick (Mayor) v. Commissioner of Valuation*, 6 Ir. R., C. L. 420.

26. STOCK IN TRADE AND PERSONAL PROPERTY.

— **Rateability.**—The 6 & 7 Will. 4, c. 96, did not alter the law as to the rateability of personal property; therefore a poor-rate made after that statute, and omitting stock in trade which yielded a profit in the parish, was liable to be quashed on appeal. *Reg. v. Lumsdaine or Lamsdaine*, 2 P. & D. 219; 10 A. & E. 157; 1 W., W. & H. 587; 3 Jur. 360.

Stock in trade, if the property of the person in possession, and productive, was rateable. *Reg. v. Darlington*, 6 T. R. 468; *S. P., Reg. v. Bridgewater*, 2 P. & D. 586; 10 A. & E. 711.

Notwithstanding it had never been rated in the parish, unless there were some circumstances to take it out of the general rule. *Reg. v. Ambleside*, 16 East, 380.

Silk throwsters, working up in their mills the silk of their employers sent to them for that purpose, were not liable to be rated in that respect, as for their stock in trade. *Reg. v. Sherborne*, 8 East, 537.

— **Fixtures—Tanks and Heavy Articles in a Distillery.**—The premises of a distillery contained

tanks which formed the roofs of rooms and houses, boiling backs and mash tuns, lying on brick piers against the walls, which formed the floors of some of the rooms and were connected by pipes to other houses, reservoirs, and other articles necessary for the process of distilling. They were all heavy, and either unattached, except by the communicating pipes, to the walls or piers upon which they stood, or fastened only by screws for the purpose of being steadied. Each was to be bought and sold as a separate article, and if all were removed the premises might be used for other manufacturing purposes.—Held, that these articles were not fixtures, and could not be properly rated in the assessment of the premises to the poor-rate. *Childley v. West Ham (Churchwardens)*, 32 L. T. 486.

— **Machinery.**—A house and an engine for carding cotton, which are rented as one entire subject and described by the general name of an engine-house, are rateable. *Reg. v. Hogg*, 1 T. R. 721.

The profits of a weighing-machine house are rateable. *Reg. v. St. Nicholas, Gloucester*, 1 T. R. 723, n.

In assessing shipbuilding premises to the poor-rate, the value of machinery attached to the premises is to be taken into consideration in ascertaining their rateable value where such machinery, though some of it may be capable of being removed without injury to itself or the freehold, is essentially necessary to the shipbuilding business to which the premises are devoted, and intended to remain permanently attached to them so long as they are applied to their present purpose. *Laing v. Bishopscarmouth (Overseers)*, 3 Q. B. D. 299; 47 L. J., M. C. 41; 37 L. T. 781; 26 W. R. 351.

— **Ships.**—Where, by a local act, the guardians of the poor of a town were authorized to levy rates "by taxation of every inhabitant, and of all lands, houses, tithes impropriate, appropriation of tithes, and all stock and estates in the town, in equal proportions, according to their respective worths and values:—Held, that all personal property, including shipping, was rateable, whether the owners were or were not resident within the town. *Reg. v. Hull Dock Company*, 5 D. & R. 359; 3 B. & C. 516.

The owners of a coasting vessel were liable to be rated in respect of the profits accruing therefrom, in that parish where they themselves resided, and where the ship was registered, and where her cargoes were usually received and delivered, and her freight paid, and which was the home of the vessel when unemployed, although at the time of making the rate the ship was not actually within the parish. But they were not liable to be rated for a ship which was never locally within the parish, although the profits were there received by the owners. *Reg. v. Shepherd*, 1 B. & A. 109.

— **Household Furniture.**—Household furniture is not rateable. *Reg. v. White*, 4 T. R. 771.

27 WOODS AND WOODLANDS.

— **Saleable Underwoods.**—Saleable underwoods are rateable annually, in proportion to their value, though they should happen not to be cut down more than once in twenty-one years; and their annual value may be estimated according

to the value they may be worth to rent for a lease of the duration of their intended growth. *Reg. v. Mirfield*, 10 East, 219.

Saleable underwood, under 43 Eliz. c. 2, means such shoots from old stools as are capable of reproduction, and of being treated by the wood-owner so as to yield a succession of profits, and the circumstances to determine this question are matters of fact for the sessions. *Reg. v. Narberth (North)*, 1 P. & D. 590; 9 A. & E. 815.

Timber—Exemption of.—If beech is timber by the custom of the country, it is not rateable. *Reg. v. Minchin*, 3 Burr. 1308.

Where fir and larch were planted with oak and ash trees, principally for the purpose of affording a screen or shelter to the latter in their infancy, and were cut from time to time, as such oak and ash required more room to spread, and when once cut did not spring again:—Held, that although when sold they yielded a profit, they were not saleable underwood, as the primary object in planting them was not to derive a profit by sale; and, consequently, not rateable. *Reg. v. Ferrybridge*, 2 D. & R. 634; 1 B. & C. 375.

The test of saleable underwood is not whether the tree is timber, either by the general law or the custom of the country, but whether it is managed in such a way as to produce a renewable profit, though it may not be available for many years. *Fitzhardinge (Lord) v. Prichett*, 2 L. R., Q. B. 135; 36 L. J., M. C. 49; 15 L. T. 502; 15 W. R. 640; 8 B. & S. 216.

Herbage and Prunage.—It is not settled whether the herbage and prunage of a forest are rateable. *Jones v. Maunsell*, 1 Dougl. 302.

Woods—Rateable as Waste Lands.—B. was rated in respect of woods and shooting in his occupation. Appeal against the rate on the ground of its being excessive. According to the Rating Act, 1874, the woods ought to have been rated as if the land was let and occupied in its natural and unimproved state, that is, as mere waste, irrespectively of the value of the right of sporting thereon:—Held, that the objections were valid, and rate accordingly decreased. *Baker v. Bryford (Overseers)*, 33 L. T. 755.

Woodlands were assessed by quarter sessions at their rateable value if occupied in their natural and unimproved state, but it was found as a fact that they might be rendered worth a much larger sum to a tenant from year to year if a certain expenditure was incurred for grubbing up woods, draining, and road-making:—Held, that the quarter sessions were right, and that under the Rating Act, 1874, s. 4, woods were not to be rated on any assumption of their improved value upon alteration into land of a different description. *Westmoreland (Earl) v. Southwick and Oundle*, 36 L. T. 108.

28. RIGHTS CONNECTED WITH LAND.

Incorporeal Hereditaments generally.—An incorporeal hereditament cannot be made rateable by virtue of a local act, except by clear and express words. *Colebrooke v. Tickell*, 4 A. & E. 916; 6 N. & M. 483; 2 H. & W. 23.

Sporting Severed from the Land—The owner

of a tenement with dwelling-house and other buildings, containing about nineteen acres, leased to a person occupying the same, excepting plantations and all timber, and all mines, "and also excepting all manner of game, hares, rabbits and wild fowl, with liberty of hunting, fowling and fishing, over and through the premises at all times during the term":—Held, that this lease reserved to the owner a right of sporting which was severed from the occupation of the land, and therefore rateable within the Rating Act, 1874 (37 & 38 Vict. c. 54), ss. 2 and 6. *Rogers v. St. Germans Union*, 35 L. T. 332.

Under 37 & 38 Vict. c. 54, s. 6, sub-s. 2, where the owner of land lets the right of sporting over part of the land which he retains in his own occupation, the lessee may be rated in respect of the right of sporting. *Kendrick v. Guilsfield (Overseers)*, 5 C. P. D. 41; 49 L. J., M. C. 27; 41 L. T. 624; 28 W. R. 372. See also *Eyton v. Mold (Overseers)*, 6 Q. B. D. 13; 43 L. T. 472; 29 W. R. 122; 45 J. P. 54.

An incorporeal hereditament, as a right of shooting, is not in itself the subject of a poor-rate. It can only be brought into account when it improves and enhances the value of the land to which it belongs. *Hilton and Wakefield v. Bowes (Overseers)*, 1 L. R., Q. B. 359; 35 L. J., M. C. 137; 13 L. T. 512; 14 W. R. 368.

An owner of land who is himself the occupier, but lets the right to take game to another, is assessable in respect of his occupation, as being enhanced in value by the right to take game. *Reg. v. Battle Union*, 2 L. R., Q. B. 8; 36 L. J., M. C. 1; 15 L. T. 180; 15 W. R. 57; 8 B. & S. 12.

Right of Common.—A mere right of common is not rateable; therefore, where certain persons, as burgesses of a town, and occupiers of ancient messuages within it, had a right to turn cattle upon certain lands, at certain periods of the year, to the exclusion of the owners of the soil:—Held, that they had a mere right of common, in respect of which they were not rateable. *Rea v. Churchill*, 6 D. & R. 635; 4 B. & C. 750.

Where a corporation was seised in fee of lands, which by the custom were annually meted out under their control by a leet jury, according to a certain stint, to such of the resident burgesses who chose to stock the same, they paying 19s. 4d. to each of the other burgesses who did not stock:—Held, that the stocking of the lands was rateable. *Reg. v. Watson*, 5 East, 480; 2 Smith, 144. And see *Reg. v. Tewkesbury (Burgesses)*, 13 East, 155; *Reg. v. Sudbury (Mayor)*, 2 D. & R. 651; 1 B. & C. 389.

Where freemen, and the widows of deceased freemen, of a municipal corporation, enjoyed the right of depasturing on an uninclosed moor, of digging turfs, clay, sand, and marl, of cutting whins and furzes, of getting lime-stones and slates from the quarries, and sowing grass-seeds on the moor, according to regulations framed by the corporation, and the corporation had inclosed a part of the common 100 years back, which they still retained in severalty; but it appeared that the rights of the freemen originated in grants of right of common and turbary, and that there was no evidence to shew that any larger right had ever been granted to them, and that a rent of 2s. per annum, which had been reserved on the grant of the right of turbary, was still paid to the lord of the manor:—Held, that the freemen only possessed a right

of common, though with large and unusual enjoyments, and that therefore it was an incorporeal tenement, not rateable. *Reg. v. Alnwick (Chamberlains)*, 1 P. & D. 343; 9 A. & E. 444.

Right of Fishing.—The lessee of all those fishings of the halves and halvendoles, with the appurtenants to the halves due and accustomed within the River Severn, between certain limits within a manor bordering on the river, and of all royal fishes taken between the limits, put and wheel fishing excepted, under an annual rent, is liable to be rated for such fishery. *Reg. v. Ellis*, 1 M. & S. 652.

Land Improved by a Spring.—Land, of which the annual value is improved by a spring rising within it, may be rated at such improved value, although the owners of the land, who are also occupiers, do not receive any of the profits derived from the spring, nor does any part become due in the parish where the land lies. *Reg. v. New River Company*, 1 M. & S. 503.

If one rents a quantity of land, together with a mineral spring thereout arising, at a gross yearly rent, he is rateable in respect of the whole of such rent; though in fact the annual value of the land, independently of the spring, is only in proportion of two to eight of the reserved rents. *Reg. v. Miller, Cowp.* 619.

Profits of a Manor.—Neither quit-rents, nor heriots, nor other casual profits of a manor are rateable. *Reg. v. Vanderwall*, 2 Burr. 991; 1 W. Bl. 212.

29. TITHES, CORN AND COMMUTED RENT-CHARGES.

Rateability.—Tithes are hereditaments within the 6 & 7 Will. 4, c. 96, and a tithe-owner is rateable at their annual value, i. e., at such a sum as the tithes might reasonably be expected to let for from year to year, free of the usual tenant's rates and taxes, and deducting the amount of ecclesiastical dues payable in respect thereof. *Reg. v. Capel*, 4 P. & D. 87; 12 A. & E. 382; 4 Jur. 886.

Tithe Commuted—Corn-rents.—By an inclosure act, allotments were made to the parson, as a compensation for the uninclosed glebe lands of his rectory, and for all rights of common belonging to the rectory; and it was enacted, that the commissioner for inclosure should ascertain the yearly value of all the tithes on the lands to be inclosed, and the ancient inclosed lands, and that the tithes should be deemed equal in value severally to one-fifth, one-seventh and one-eighth of the annual net value of different classes of lands respectively, and a corn-rent be assigned to the parson, equivalent to the annual value of the tithes:—Held, that the parson was rateable in respect of such corn-rent. *Reg. v. Wistow*, 5 A. & E. 250; 6 N. & M. 567; 2 H. & W. 95.

Where the tithes of a parish were extinguished by act of parliament, and in lieu thereof certain annual corn-rents issuing out of the lands in the parish were substituted, payable to the rector quarterly, with a power of distress and sale to enforce payment:—Held, that the money when paid was rateable in the hands of the rector. *Reg. v. Boldero*, 6 D. & R. 557; 4 B. & C. 467.

Rent-Charge.—An act enacted that the tithes of a parish should be held in fee by A.,

who was owner of part of the lands in the parish, and that all A.'s lands in the parish should be charged with an annuity payable to the vicar for the time being, who had previously enjoyed the small tithes, and who, by an agreement recited in the act, was to receive such annuity in lieu of all his vicarial dues:—Held, that the vicar was not rateable for such annuity, as the tithes were not extinguished. *Reg. v. Great Hambleton*, 1 A. & E. 145.

An act of the legislature imposed a rate on lands "and other real estate":—Held, that although these words were large enough to include a rent-charge in lieu of tithes, they would not necessarily do so if it appeared from the general wording of the act that it was not intended to apply to incorporeal rights. *Kerr v. Wilkie*, 6 Jur., N. S. 383; 1 L. T. 501; 8 W. R. 286—H. L.

By an inclosure act it was enacted, that an annual rent of 90*l.* should be vested in the rector, charged upon all the land to be inclosed, and should be paid "free and clear of and from all deductions, defalcations or abatements for or in respect of reprises or outgoings whatsoever," other than such proportion of the land-tax as the annual rent of 90*l.* should be to the yearly value of the lands charged with it. It also enacted, that the annual rent of 90*l.* should be in lieu and satisfaction of, and compensation for, all tithes arising within the fields to be inclosed, and all other tithes and payments to the rector, except in respect of two orchards, and all the houses to which no lands in the common fields belonged:—Held, that the rector was not rateable in respect of the annual rent-charge. *Reg. v. Shaw*, 3 New Sess. Cas. 170; 12 Q. B. 419; 17 L. J., M. C. 137; 12 Jur. 651.

By an inclosure act, reciting that A., as lay impropricator, was entitled to the great, and B., as vicar, to the small tithes; the commissioners were empowered to set out certain lands as the value of and which should be taken as a full satisfaction and compensation for the tithes both great and small, and, out of the lands so to be set out in lieu of tithes, they were to allot thirty acres to B., and all the remainder to A., subject to the payment of a corn-rent (to be ascertained in the usual way), which should, with the thirty acres, in their judgment be a fair compensation for the vicarial tithes and payments in lieu of tithes payable to the vicar, which rent or sum of money should be payable and paid to the vicar and his successors quarterly, clear of all parochial taxes, rates, dues and assessments whatsoever; and it was enacted that the tithes in lieu whereof the thirty acres of land were so directed to be allotted, and such rent was to be paid, should cease and be for ever extinguished:—Held, that the land so allotted to A. in lieu of the vicarial tithes, and so charged with such rent, was liable to be assessed. *Hackett v. Long Bennington (Overseers)*, 16 C. B., N. S. 38; 33 L. J., M. C. 1; 9 L. T. 769; 12 W. R. 433.

Grant by Deed—Security in Land.—A rector of a parish granted to the incumbent (and his successors) of a district formed under 6 & 7 Vict. c. 37; 7 & 8 Vict. c. 94; and 19 & 20 Vict. c. 104, out of several parishes, of which his parish was one, "one clear yearly rent-charge of 150*l.*, to be payable half-yearly, issuing out of and charged upon or being part of the rectory or parsonage, and the glebe lands, tithes or tithe

commutation rent-charge, hereditaments, and all other emoluments to the rectory or parsonage belonging." The deed gave power to the grantee, in case it should be in arrear, to enter upon the rectory and parsonage, glebe lands, hereditaments, or any part thereof, and to distrain, or to receive and take the tithes or rent-charge in lieu of tithes, until satisfaction of such arrears. This power had never been exercised, the money having been regularly paid. The grantee did not reside in the parish:—Held, that he was not rateable to the poor-rate in respect of the annual sum granted by the deed. *Frend v. Tolleshunt Knights*, 1 El. & El. 753; 28 L. J., M. C. 169.

Deductions—Rent-charge on a Tithe Rent-charge.—An incumbent, owner of a tithe rent-charge, who voluntarily endows a district parish formed, for spiritual purposes, out of a part of his own parish, by granting to the minister of such new district parish a rent-charge on the tithe rent-charge, is not entitled to claim a deduction from the total amount of tithe rent-charge in respect of the portion which he has thus granted away. *Lawrence v. Tolleshunt Knights (Overseers)*, 2 B. & S. 533; 31 L. J., M. C. 169; 10 W. R. 620.

The Archbishop of Canterbury, being owner of the impropriate rectory and tithe rent-charge of a parish of H., and of land thereto appertaining, granted, under 29 Car. 2, c. 8, and 1 & 2 Will. 4, c. 45, to the perpetual curate of P. (a separate and distinct parish from H.), an annual rent of 40*l.*, to be charged upon and yearly issuing out of the rectory, tithe rent-charge and land. Subsequently to this grant, the archbishop leased the rectory, tithe rent-charge and land to G., a clergyman, for twenty-one years, G. to pay yearly, during the term, to the archbishop, 9*l.* 13*s.* 4*d.*, and also 6*l.* 16*s.* for redeemed land-tax; and also to the perpetual curate of T. the sum of 40*l.* in augmentation of the revenues of the curacy:—Held, that in assessing G. to the poor-rate of H., as occupier of the tithe rent-charge of H., no allowance was to be made to him in respect of his yearly payment of the 40*l.*, for that the whole of the rent-charge was included in the demise to him, and the 40*l.* was part of the rent paid by him for the occupation of the whole, not so much of the whole withdrawn from his occupation. *Reg. v. Groves*, 2 El. & Bl. 793; 29 L. J., M. C. 179; 6 Jur., N. S. 1014; 8 W. R. 434.

— Money for Queen Anne's Bounty.—In assessing the commutation tithe rent-charge and parsonage-house of a benefice, no deduction is to be allowed in order to ascertain the rateable value, in respect of a sum paid annually by the incumbent to the governors of Queen Anne's Bounty, as interest and part principal of money borrowed by him to rebuild the house, such payment being secured by a mortgage on the profits of the benefice. *Reg. v. Hawkins*, 27 L. J., M. C. 248.

— Stipend to Curate.—Lay impropricators of the tithes of a parish, B., granted a lease of their tithe rent-charge, at a nominal rent, to W., for twenty-one years, if he should so long remain the vicar of the adjoining parish, he covenanting to serve the cure of B., either by himself or a curate. In order to the proper discharge of the duties of the two parishes, it was necessary to employ a curate for B.:—Held, that in assessing

W. to the poor-rate of B., as occupier of the tithe rent-charge, he was not entitled to any deduction in respect of the stipend which he paid the curate. *Wheeler v. Bunnington (Overseers)*, 1 B. & S. 709; 31 L. J., M. C. 57; 8 Jur., N. S. 304; 5 L. T. 345; 10 W. R. 57.

— Benefice of Three Parishes.—The vicar of one benefice composed of three parishes was rated in each parish in respect of his vicarial tithe commutation rent-charge: he received that rent-charge for the three parishes as well as the other profits arising within the same. For one of the parishes he appointed a curate, who resided there and was licensed by the bishop, and received from the vicar an annual stipend for discharging the ecclesiastical duties of it. In another the like arrangement subsisted. The vicar himself performed the duties and resided in the third:—Held, that in ascertaining the rateable value of the tithe commutation rent-charges of the several parishes, he was not entitled to be allowed a deduction in respect of the stipends paid to the curates. *Reg. v. Sherwood*, 2 L. R., Q. B. 503; 36 L. J., M. C. 113; 16 L. T. 663; 15 W. R. 1035; 8 B. & S. 596.

Exemptions.—See sub tit. STATUTORY EXEMPTIONS, *infra*, col. 519.

30. TOLLS.

Rateability of Toll-house — Exemption.—Tolls are not rateable in themselves, but a toll-house is increased by reason of the facilities which it affords for the collection of the tolls. *Williams or Reg. v. Bedminster Union (Assessment Committee)*, 45 L. J., M. C. 117; 34 L. T. 795.

W. was lessee of a toll-house, and of certain tolls levied on passengers over a bridge on the site of an ancient ferry. The value of the tolls was about 800*l.* per annum; the value of the toll-house as a building was 12*l.* A rate was laid generally on the toll-house and tolls, stating the "gross estimated value, 800*l.*," and "rateable value, 700*l.*:"—Held, that although the tolls were not themselves rateable, yet the toll-house was; and in assessing the latter, its value, as enhanced by the facility it afforded for collecting the tolls, was to be taken into account. *Id.*

Canal Tolls.—Canal tolls, per se, are not rateable. *Reg. v. St. Mary's, Leicester*, 6 M. & S. 400.

Tolls of a Lock upon a Canal.—An act having empowered the Duke of Bridgewater to erect a lock upon the Rochdale canal, and to receive at such lock certain rates or tolls upon goods in vessels navigated from that canal into his own, as a compensation for the profits arising to him from certain wharves at Manchester, which were sacrificed for the public benefit in that navigation:—Held, that a poor-rate on his trustees, occupiers of the "Rochdale canal, lock, tunnel, dues or rates" (which dues or rates were only other names for the lock rated therewith), was good. *Reg. v. Macdonald*, 12 East, 324.

Tonnage Dues of a Dock.—By an act the Dock Company at Hull received a grant of land from the crown, and of 15,000*l.* from the revenues of the customs, and were empowered to make a basin or a dock, wharves, &c.; and, in considera-

tion of the expense of making and maintaining the same, dues were made payable to them for every ship or vessel coming into, or going out of, the harbour, basin or docks, within the port of Hull, or unloading or lading any of their cargo within the port. By another act the company was empowered to increase their docks. The port of Hull consisted of the River Hull, or harbour, and of a portion of the River Humber, neither of which was the property of the dock company, and of three docks and a basin, which were the property of the company. All vessels frequenting the port of Hull passed through that portion of the River Humber which is within the port of Hull, paid tonnage duties, and might be divided into five classes: first, those which discharge their cargo in the River Humber without entering the River Hull, basin or docks; secondly, those which discharge their cargo in the River Hull without entering the basin or docks; thirdly, those using the basin without going into the docks; fourthly, those passing through the River Hull into the docks; and fifthly, those passing through the basin into the docks. The tonnage dues were all collected at the custom-house:—Held, that the company was not rateable for their tonnage dues upon the first and second classes, but that they were rateable for the remaining classes. *Reg. v. Hull Dock Company*, 1 New Sess. Cas. 621; 7 Q. B. 2; 14 L. J., M. C. 114; 9 Jur. 442.

Harbour Dues—Not Paid in respect of the Use of Land.]—A borough extended along a part of the shore of the harbour. On the shore, within the borough, were quays and wharves, (1) occupied by, and the property of the corporation; (2) the property of the corporation, occupied by their lessees under an indenture, reserving to the corporation the right to enter and take all dues payable to the corporation, with a covenant by the lessee not to allow the landing or shipping of goods until the dues payable to the corporation should be satisfied; and (3) property of B. The only mode of landing goods in the borough, or shipping them from the borough, was by using one of those three classes of quays or wharves. For all goods so landed or shipped, by means of quays or wharves of any of the three classes, the corporation received, by immemorial usage, the origin of which was not known, dues, sometimes called town dues and quayage, sometimes quayage only:—Held, that it appeared that the dues were not paid in respect of the use of land, but were incorporeal and in gross, and that neither the corporation nor any one to whom the dues were let by the corporation, was rateable in respect of any part of the dues. *Lewis v. Swansea (Overseers)*, 5 El. & Bl. 508; 25 L. J., M. C. 33; 1 Jur., N. S. 1108.

A port began at the bar at the mouth of a river, extended to a bridge, comprehended the whole space of the river from low-water mark on the north side to low-water mark on the south side, and was in five contiguous parishes or townships on both sides, usque ad medium filum aque. The soil and freehold of the port between low-water mark on each side were in the Bishop of Durham, and the party rated held under a lease from the bishop for twenty-one years. Every ship entering the port might have to cast anchor therein, or to be moored to some moorings affixed in the river, or on the shores adjacent. The bishop and his lessees maintained the beacons

and moorings in the river. Before the appointment of the ecclesiastical commissioners, the port was managed by the bishop and his lessees, and by them beacons were set up, mooring buoys, posts and rings were placed and fixed within the port for the use and benefit of ships entering the port, and other works were done for the maintenance of the port, and the use and benefit of the ships resorting thereto. The tolls rated had been paid immemorially to the bishop and his lessees, and were called anchorage and beaconage tolls, being 1s. 2d. for every ship which entered the port:—Held, that as the use of the soil was part of the consideration for the payment of the tolls, the tolls were connected with the occupation and use of the soil, and not being tolls in gross, were rateable. *Reg. v. Durham (Earl)*, 2 El. & Bl. 230; 28 L. J., M. C. 232; 5 Jur., N. S. 1306.

Held, also, that the tolls were rateable in all the townships and parishes in which any part of the port was situate, and into which ships paying the tolls came; and that they ought to be rated upon a calculation of the number of ships paying the tolls, and coming into those parts of the port which were in the townships respectively. *Ib.*

— Dues reserved to Landlord.]—The owners of docks and wharves let the wharves to a railway company. The company was the sole occupier of the wharves, but by the agreement wharfage dues payable on all goods shipped or unshipped at the wharves were reserved to the landlords, and were paid direct to them by the owners or consignees of the goods:—Held, that the railway company, as a sole occupier of the premises, was liable to be assessed to the poor-rate in respect of the full rateable value of the premises, including the wharfage dues, without regard to the amount of benefit which the company itself derived from the occupation. *Reg. v. Rhymney Railway Company*, 4 L. R., Q. B. 276; 38 L. J., M. C. 75; 17 W. R. 530.

Market Tolls.]—Where a local act directed a rate to be levied in respect of messuages, dwelling-houses, warehouses or other buildings, or of any other tenements:—Held, that a rate in respect of market sites, streets, lands and tenements, and the tolls due in respect thereof, was bad. *Re x v. Mosley*, 3 D. & R. 385; 2 B. & C. 227.

The lessee of market tolls in gross not incident to the soil is not rateable in respect of his occupancy. *Re x v. Bell*, 5 M. & S. 221.

— Liability of Owner as Occupier.]—By a paving and lighting act, the tenants and occupiers of all messuages, houses, &c., and other tenements, situate within certain towns respectively, were liable to be rated for the purposes of the act:—Held, however, that the lord of the manor, being owner of the markets kept in the streets of that town, was not liable under the act to be so rated in respect of his occupation thereof and the tolls arising therefrom, as the occupier of a tenement. *Re x v. Mosley*, 3 D. & R. 385; 2 B. & C. 226.

— Distinguished from Stallage.]—Tolls authorized to be taken by an act of parliament in respect of cattle brought into a market for sale which became due as soon as the cattle were

brought into the market-place, and before the cattle were put into a pen or tied up, are mere market tolls, and not in the nature of stallage or tolls taken in respect of the use of the soil, and in assessing the lessee of the market and tolls to the poor-rate in respect of the occupation of the market-place, such tolls cannot be taken into account as enhancing the value of the occupation. *Reg. v. Casswell or Caswell or Wolverhampton (Overseers)*, 7 L. R., Q. B. 328; 41 L. J., M. C. 108; 26 L. T. 574; 20 W. R. 624.

Where an open market is divided under the provision of an act of parliament into parts, each of which is appropriated to a special purpose, such as potato stands, fruit market, and flower stands, and by the act tolls or rents are reserved to the owner of the market from those who use the several divisions of the market, such tolls arise out of a use of the soil, and are in the nature of stallage tolls, so as to be rateable for the relief of the poor. *Bedford (Duke) v. St. Paul, Covent Garden*, 51 L. J., M. C. 41; 45 L. T. 616; 30 W. R. 411; 46 J. P. 581.

— **Tolls on Goods Sold.**—Appellants were rated on the "market-house, with the grounds belonging, used and occupied for the tolls of the markets and fairs." It was admitted that under this description they were in fact rated not only for the market-house, but also for the tolls on merchandise sold in the market, and for payments made to the lord and his lessees for goods not sold but exposed for sale on stalls and otherwise, which payments, from time immemorial, were charged according to the situation of the stalls and other circumstances, according to the discretion of the lord and his lessees; and also for payments made for leave to use temporary theatres and shows. None of the stalls, &c., were in any way affixed to the soil. The lord was owner of the soil of the market. The appellants were lessees for a term of years under the lord:—Held, that the tolls on the goods sold were not the subject of a rate, and that the fact that such tolls were paid in the market-house made no difference; but that the other payments were in the nature of compensation for the use of the soil, and that they and the market-place were properly rated. *Roberts v. Aylesbury (Overseers)*, 1 El. & Bl. 432; 22 L. J., M. C. 1347; 17 Jur. 236.

— **Tolls for Admittance.**—P. was rated as the occupier of tolls, lands, and buildings situated in the Ashford cattle market; and among the gross receipts upon which the valuation was estimated, were items for the sheep, cattle, pigs, and horses admitted into the market during the year at a fixed sum per head. In 1671, Charles II. granted by charter to Lord Strangford, his heirs and assigns, a market to be holden every alternate Tuesday within or near to the town of Ashford, together with the tolls and profits thereof. No evidence was to be found of the actual establishment of a market under this charter; but in 1784 a stock market was established, and for some time afterwards held upon every fourth Tuesday. From 1793 to 1856 a stock and cattle market was held on every alternate Tuesday in the main street of Ashford, the lord of the manor and the inhabitants receiving certain payments for the use of such pens as either of them supplied respectively, but no tolls

appeared to have been levied upon animals sold at the market. After many mesne assignments, in 1856, P.'s lessors, incorporated as a limited company, obtained a conveyance in fee of a piece of land in the manor, and "all the tolls, stallages, dues, profits, or emoluments whatsoever arising from all markets and fairs held in the town of Ashford," except the meat, fish, and vegetable market. In 1874 P. hired from the company, at a fixed annual rent, certain fixed tolls of the cattle market, the lands belonging thereto, and the fairs and other perquisites. The land occupied by the market was fenced in, and kept locked when not used for market or other purposes. Some pens in the market were appropriated to particular owners and salesmen, and other were free for any animals in the market. All animals, however, paid toll for admittance to the market:—Held, that the tolls for admittance to the market were incident to the soil so as to be taken into consideration as increasing the value of the occupation, and were not mere market tolls which could not be rated. *Percy v. Ashford (Union)*, 34 L. T. 579.

— **Deduction for Annual Rent.**—By a local act a company was incorporated and authorized to regulate the market-places belonging to the corporation of Brecon, and to receive all tolls payable therefrom, which were thereby vested in them. They were, however, by another section, to pay to the corporation 210*l.* a year, to be charged on the scheduled tolls, markets and market-places, by the act vested in the company, and to be a first charge on those tolls next after the expense of recovering them. This annual sum was to be devoted by the corporation to the payment of incumbrances incurred by the building of the old market-place. The company, under the authority of the act, constructed new market-places on land vested in them, and collected tolls from the old and new markets:—Held, that the company was not entitled to a deduction of this 210*l.* from the net annual value of their tolls in their assessment to the poor-rate. *Brecon Markets Company v. St. Mary's, Brecon*, 36 L. T. 109.

— **Tolls for Foreign Animals landing at a Market Wharf.**—By the Contagious Diseases (Animals) Act, 1869, ss. 2, 3, 24 and 25, it was provided that the local authority might provide wharves, lairs, sheds, market-houses, and places for the landing, reception, sale, and slaughter of foreign animals, such place to be deemed a market, and might charge for the use of such wharf, &c., such sums as by bye-laws they might appoint. By the Contagious Diseases (Animals) Act, 1878, s. 4, the act of 1869 was repealed, saving all existing acquired rights; but by s. 39 the provisions of ss. 23—25 of that act were practically re-enacted, adding that the said charges should be deemed "tolls." In 1871 the corporation of London, as the local authority, built a market at D. for the reception, &c., of foreign animals. By certain bye-laws, a fixed charge per head for wharfage, lairage, market dues, and charges were levied on all animals landed, such charge becoming due on the animals being landed. These charges included lairage until the animals were slaughtered. No consignee of any animals had any right to put his animals in any particular part of the market. The appellants were rated in respect of

these charges as tolls in respect of the use and occupation of the soil. They appealed against such assessment, and contended that the tolls were only taken in respect of the franchise of the market:—Held, on appeal, that such charges were tolls made in respect of the user and occupation of the soil, and so were rateable. *London (Mayor) v. Greenwich Union*, 48 L. T. 437; 47 J. P. 420.

Turnpike Tolls.—A lessee of toll traverse, and of a toll-house (which he occupies), is not rateable for the tolls, but for the toll-house only. *Rea v. Snowden*, 1 N. & M. 459; 4 B. & Ad. 713.

The 3 Geo. 4, c. 126, s. 51, which exempts all persons from assessment to the poor-rate in respect of tolls or toll-houses, applies to the trustees of the tolls of a road made under a local act, although they are beneficially interested in the receipt of the tolls, and although some of the provisions of the local act are inconsistent with the general act. *Rea v. Great Dover Street Road (Trustees)*, 1 N. & P. 157; 5 A. & E. 692; 2 H. & W. 423.

Of Pier Tolls.—*See ante*, col. 479.

Railway Tolls.—*See ante*, col. 486.

31. OTHER CASES.

Officers' Pay.—The pay of officers in the navy, or of merchants' ships, is not rateable. *Rea v. White*, 4 T. R. 771.

Nor are the salaries of officers of the customs, or of merchants' clerks. *Ib.*

Profits of a Profession.—Nor is an attorney in respect of the profits of his profession. *Rea v. Startiant*, 7 T. R. 60.

Nor a person on account of salary only. *Rea v. Shalfleet*, 4 Burr. 2011.

Money.—Neither is money, whether at interest or not. *Ib.*

Stocks.—Stocks or annuities in the public funds are not rateable. *Rea v. Maddermarket*, 6 East, 182; 2 Smith, 270.

32. STATUTORY EXEMPTIONS.

Rule of Construction.—It is not necessary, in order to create a statutory exemption from poor-rates, that the act should, in express terms, exempt from such particular rates; but it is sufficient, if by fair construction of the words of the act, the exemption clearly appears. *Rea v. Barnby Dun*, 4 N. & M. 436; 2 A. & E. 551; 1 H. & W. 89.

"Free and Clear of all Rates."—By an inclosure act, the tithes of a parish were abolished, and in lieu a yearly money payment by way of compensation (to be calculated with reference to the annual value of the tithes and the price of corn for a certain number of bygone years) directed to be made to the vicar quarterly, "free and clear of all rates, taxes, and deductions whatsoever."—Held, that these latter words exempted the vicar from poor-rates in respect of the money so directed to be paid to him. *Chatfield v. Ruston*, 5 D. & R. 675; 3 B. & C. 863.

A corn-rent given to the rector by an inclosure act in lieu of tithes, payable "free from all taxes

and other deductions whatsoever, except the land-tax," is exempt from payment of poor-rates. *Mitchell v. Fordham*, 9 D. & R. 335; 6 B. & C. 274.

An exemption in a private statute of lands given to charitable purposes "from all public taxes, charges, and assessments whatsoever, civil or military," extends to the poor-rate. *Rea v. Scott*, 3 T. R. 602.

Where a statute empowered the proprietors of a canal to make rates in respect of vessels navigating the same, and expressly exempted such rates from the payment of all taxes, rates, &c.:—Held, that the land occupied by the canal was also thereby exempted. *Rea v. Calder and Hebble Navigation Company*, 1 B. & A. 263.

Houses built on lands, embanked from the Thames, in pursuance of 7 Geo. 3, c. 37, which vests those lands in the owners, "free from all taxes and assessments whatsoever," are not rateable. *Rea v. London Gaslight and Coke Company*, 2 M. & R. 12; 8 B. & C. 54.

Certificate of Exemption.—The certificate of a barrister that a society is entitled to the benefit of 6 & 7 Vict. c. 36, s. 1, although a condition precedent to the claim of exemption, is not conclusive proof of a right thereto. *Rea v. Phillips*, 3 New Sess. Cas. 134; 8 Q. B. 745; 17 L. J., M. C. 83; 12 Jur. 431.

After a society has obtained a certificate of the barrister, and the society is afterwards rated to the poor-rate, the remedy is by appeal to the quarter sessions. *Birmingham (Churchwardens) v. Shaw*, 10 Q. B. 868.

III. PROCEEDINGS.

1. COLLECTION, LEVY AND DISTRESS.

Amount Payable—Fraction of a Farthing.

—When, owing to the mode in which a poor-rate has been made, the assessment is carried out so as to include in the sum demanded the fraction of a farthing, the ratepayer is not bound to pay the whole farthing. *Morton v. Bremner*, 8 C. B., N. S. 791; 29 L. J., M. C. 218; 7 Jur., N. S. 211; 2 L. T. 600.

The owner of several small tenements was assessed to a poor-rate of 4d. in the pound; the exact amount of the assessment on the aggregate of the several rateable values as they appeared on the rate would have been 10s. 11½d. and a fraction of a farthing, instead of which 11s. was entered on the rate. This larger sum was demanded, and not being paid, a warrant was granted and a distress levied for that amount on his goods; on which he brought an action against the persons executing the warrant:—Held, that an action would not lie, as the sum demanded was the sum appearing on the rate, and the objection, if any, was that the party was overrated, for which an appeal was the proper remedy. *Bavin v. Hutchinson*, 31 L. J., M. C. 229; 6 L. T. 504; 10 W. R. 807—Ex. Ch.

Tender.—If a landlord tenders the poor-rate for his tenant the overseers must receive it, and a warrant ought not to be granted to distrain upon the tenant. *Rea v. Conens*, 2 Dougl. 426.

Where, after a rule nisi for a mandamus to justices to issue a distress warrant for a poor-rate had been obtained, a tender of the amount was made by a third party to the overseers and refused:—Held, that it was no ground for dis-

charging the rule. *Rex v. Wilson*, 5 N. & M. 119; 1 H. & W. 507.

If a distress is made for several rates, some of which are leviable and others not, and the party distrained tenders the sum actually due for the rates which are leviable, the distrainers are liable for detention of the goods subsequent to the tender. *Clay v. Rotundo Lying-in Hospital*, 6 Ir. R., C. L. 105.

Certificate in Bankruptcy.—Arrears of poor-rates due from a bankrupt before his bankruptcy are provable under the fiat, and the certificate is a bar to the levying the amount under 43 Eliz. c. 2, by distress and sale of his subsequently-acquired goods. *Wetherell, In re*, 19 L. J., M. C. 115; *S. C.*, nom. *Burwash (Churchwardens), Ex parte*, 1 L., M. & P. 60; 4 New Sess. Cas. 93.

Non-Payment—Offence within 7 Will. 4 & 1 Vict. c. 78—Jurisdiction.—By an act for lighting the parish of B., rates might be imposed on the occupiers of tenements within B.; and it was enacted that the "rates shall be paid by such occupiers, and they are required to pay the same." By a subsequent section, rates not paid might, on proof before a justice for the county of S., be levied by distress. At the time when the local act passed, the parish of B., which is in the county of S., was partly within the borough of B. (in the charter of which is a non-intromittant clause), and partly in the county at large; under the operation of the 2 & 3 Will. 4, c. 64, and 5 & 6 Will. 4, c. 76, the whole parish of B. was included in the borough, which obtained a separate court of quarter sessions:—Held, that the non-payment of rates was an offence within 7 Will. 4 & 1 Vict. c. 78, s. 31; and that the jurisdiction to hear complaints as to such non-payment was transferred by that statute from the justice of the county of S. to the justice of the borough. *Reg. v. Sutcliffe*, 13 Q. B. 833; 3 New Sess. Cas. 634; 18 L. J., Q. B. 301; 13 Jur. 840.

Summons to enforce Demand.—A demand of payment of a poor-rate by a collector, appointed by the overseers and assistant overseer for the purpose of assisting in collecting the poor-rate, is sufficient to entitle the collector to proceed by summons before a magistrate, to enforce payment in the usual mode by distress. *Yeudall v. Craven*, 11 L. T. 368.

Under a local act, power was given to summon for non-payment of rates if parties should neglect to pay for fourteen days after demand in writing. Whilst a rate was due a demand was made, but the date when the rate was made was misdescribed in the demand:—Held, that the misdescription was immaterial. *Reg. v. Streetfield*, 32 L. J., M. C. 236; 11 W. R. 736.

An act required that before any action should be brought to recover certain rates, a demand in writing should be made at the place of abode of the persons charged, or left on the premises charged:—Held, that a demand served on the chairman of a public company at a duly convened meeting was good, or a demand fixed on the premises charged. *Cortis v. Kent Waterworks Company*, 7 B. & C. 314.

Who Entitled to Notice—Trustees.—An act enabling the building of a bridge, and making a rate on landowners for that purpose, enacted

that certain persons by name, and all others deriving 100l. a year out of the lands liable to be affected, should be trustees; and the trustees were to have notice by circular of all meetings; but the interpretation clause said that trustees meant those acting by virtue of the act:—Held, that a person qualified to be a trustee, yet not having been named in the act, nor having acted by virtue of it, was not entitled to require notice. *Kerr v. Wilkie*, 6 Jur., N. S. 383; 1 L. T. 501; 8 W. R. 286—H. L.

Held, also, that where notice of a meeting had been properly given, there was no necessity for notice of its *bonâ fide* adjournment. *Id.*

Publication of Rate—Evidence of.—When proceedings are taken before justices for the non-payment of a highway rate, the mere production of the book purporting to contain the rate is no evidence of the due publication of such rate. *Bird v. Adcock*, 47 L. J., M. C. 123; 26 W. R. 634.

Enforcement of Rates by Distress.—An inclosure act, which empowered commissioners under it to perform certain works, required them to direct by their award "by whom and at whose expense, at what time and in what manner," such works were to be made and thereafter repaired and maintained. The award directed that the works should be repaired, &c., "by means of a rate or an assessment to be levied or recovered by such ways and means as parish rates or assessments are by law recovered within the same parish," viz., by distress:—Held, that an action did not lie to recover the amount of a rate assessed under the award. *Danby v. Watson*, 46 L. J., M. C. 179; 36 L. T. 412; 25 W. R. 464.

When the purpose for which a rate was imposed by a local statute, and leviable by distress, has long fallen into disuse, and is not intended to be renewed, the rate is no longer leviable. *Clay v. Rotundo Lying-in Hospital*, 6 Ir. R., C. L. 105.

A distress made for several rates, some of which are leviable and others not, is not illegal. *Id.*

If a distress is made for several rates, some of which are leviable and others not, and the party distrained tenders the sum actually due for the rates which are leviable, the distrainers are liable for the detention of the goods subsequent to the tender. *Id.*

As long as any one of several purposes for which a rate was imposed is capable of accomplishment, the legal right to levy continues, although the other purposes have ceased to exist. *Id.*

Jurisdiction of Justices.—Under two local acts, by which the rates of a parish were regulated, an appeal was given against any rate to the next quarter sessions, and it was to be enforced by summons before two justices, who were to order the payment, and (if necessary) grant a warrant of distress, if the person summoned "did not prove to them that he was not chargeable with or liable to pay such rate:—Held, that this only gave the justices a power similar to that in enforcing a poor-rate, and that they had no jurisdiction to inquire into the validity of a rate good on the face of it, and that they had no jurisdiction to determine anything in a summary way, within 20 & 21 Vict. c. 43, so as to give them power to state a case under that act. *May, Ex parte*, 2 B. & S. 426; 31 L. J., M. C. 161.

By a local act of 1827 the owners of certain abbey lands in Essex were empowered to make rates in respect of their lands, and to apply them to the repair of the roads, causeways and bridges which they had to maintain. They might enforce rates charged or imposed by virtue of the act by distress warrant upon a defaulter provided he was first summoned to appear before a justice to shew cause for his neglect or refusal to pay such rates. They might make a composition with the neighbouring trustees of roads for the payment of a certain sum of money annually or otherwise for repairing so much of the said roads as were in their district. Any person aggrieved by the rates might appeal to quarter sessions, and justices might amend without quashing the rate. By a local act of 1876 these owners were empowered to pay a large sum of money to a local board for the future repair of the roads in its district: and upon such payment and that of all other liabilities the owners were to be discharged from their duties to repair these roads, and the previous act was to be repealed. A month before the passing of the last act, the owners made a rate for an amount to cover certain liabilities under the act of 1827, and also the money to be paid to the local board; but there was nothing in the rate itself to shew it included this latter sum of money. The demand for payment referred to both the local acts, but did not give the date of the latter. The rate was not appealed against, but justices refused to issue a distress warrant against a defaulter on the ground that the rate was invalid:—Held, that the objection to the rate was not one which the justices could entertain, and that mere excess in amount was, under the circumstances, no ground for refusing a warrant. *Reg. v. Essex (Justices)*, 36 L. T. 554.

The justices at the sessions are the proper judges of the equality of poor-rates. *Reg. v. Aire and Calder Navigation*, 2 T. R. 660.

On an application for a summons for non-payment of a poor-rate, the overseer engaged before the justices to procure evidence of a beneficial occupation. On the hearing, he failed to do so, and the justices, deciding against the validity of the rate on that ground, refused to issue a distress warrant:—Held, that without a further application, after stating that the occupation need not be beneficial, a mandamus could not be granted. *Reg. v. Wilson*, 5 N. & M. 119; 1 H. & W. 507.

—Mandamus—Rate Good on the Face of it.]

—A poor-rate, good on the face of it, had not been appealed against. On an application before justices to issue a distress warrant to enforce payment of the rate, it was made to appear that there were substantial grounds for contending that the rate was retrospective, and therefore bad. The justices refused to issue their warrant. On an application to the court for a rule to command them to issue the warrant:—Held, that the justices were not justified in inquiring whether there was a ground of appeal against the rate, and refusing their warrant on that ground, and the court made the rule absolute. *Reg. v. Kingston-upon-Thames (Justices)*, EL, BL & EL 256; 27 L. J., M. C. 199; 4 Jur., N. S. 758.

If, at the hearing by justices of a summons against A. for non-payment of a poor-rate, it appears that the rate is good on its face and unappealed against, and that A. is actually the

occupier of the rated property in the rated parish, the justices are bound to issue a distress warrant to enforce the rate; and have no jurisdiction to inquire whether A.'s occupation is or is not beneficial, the nature of the occupation being ground only for appeal to the quarter sessions against the rate. *Reg. v. Bradshaw*, 2 EL. & BL 836; 29 L. J., M. C. 176; 6 Jur., N. S. 629; 8 W. R. 435.

—When Bonâ fide Objections taken.]—

The jurisdiction of justices to enforce payment of a rate made for the repayment of money under 5 Geo. 4, c. 36, is the same as with respect to a church-rate; they, therefore, have no power to order payment when the party assessed, and refusing to pay, takes bonâ fide objections before them to the validity and legality of the rate. *Badkin, In re*, 25 L. J., M. C. 126.

—Neglect to Appeal.]—

An appellant against a distress warrant, issued to enforce payment of poor-rates, cannot, under 17 Geo. 2, c. 38, s. 7, avail himself of any objection which he might have urged against the rate itself on appeal to the sessions. Nor will the court grant a mandamus to justices to hear such appeal against the warrant, if the application discloses no grounds of appeal other than the grounds which might have been urged against the rate. *Reg. v. Kent (Justices)*, 16 L. T. 672.

A poor-rate made upon the occupier of the premises used by a literary society, exempt from payment of rates by virtue of 6 & 7 Vict. c. 36, was duly published and allowed, but no appeal was made by the party rated:—Held, that he could not set up the statutory exemption as a ground for refusing to pay the rate, and that the magistrates were bound to issue a warrant to enforce payment of it. *Birmingham (Churchwardens) v. Shaw*, 10 Q. B. 868; 3 New Sess. Cas. 445; 18 L. J., M. C. 89; 13 Jur. 357.

Ratepayers, liable under a local act to the payment of rates in respect of houses and gardens, cannot, when summoned before justices for non-payment, resist the issue of distress warrants, because, at the making of the rate, warehouses and other property, not rateable under the act, were improperly included in the assessment. The proper remedy is by appeal to the sessions, where the error can be corrected, and, if this is not adopted, the rate may be enforced. *Reg. v. Twopeny*, 17 L. T. 266.

An objection that a rate is retrospective is ground of appeal; and, where the party objecting has not appealed, cannot be urged as an objection to a rule calling on justices to shew cause why they should not issue their warrant of distress for the rate. *Reg. v. Streetfield*, 32 L. J., M. C. 236; 11 W. R. 736.

A local act empowered a select vestry, chosen from the inhabitants, to make a rate, and gave power to four justices to issue their warrant to levy the rates by distress. The act gave to any person who should find himself aggrieved by any assessment or distress a right of appeal to the quarter sessions within three months after such distress made. A rate was made by a vestry consisting of thirteen persons, all of whom occupied shops in the parish, but nine of them slept in another parish. On an application to the justices to issue their warrant, it was objected that the rate was invalid, as the vestrymen were not inhabitants, and that the objection might be taken

before the justices as no appeal was given till after distress made:—Held, that the appeal to the quarter sessions was given either before or after distress, and therefore the justices had no jurisdiction to inquire into the validity of the rate. *Wilson v. Sunderland (Churchwardens)*, 13 W. R. 85.

A local act gave power to commissioners to raise money for paving, lighting, and watching a town, by rating and assessing the proprietors of houses according to the value at which the houses were taxed to the poor. It also empowered them to assess and levy a rate on certain proprietors, for the purpose of certain improvements, such rate to be levied and assessed in the same manner as the other rates. In default of payment, a justice was authorized to issue a distress warrant. The act also provided, that, in case any person thought himself aggrieved by any rate or assessment, he might appeal to the commissioners, who were authorized to give relief; and further, that any one who thought himself aggrieved by anything done in pursuance of the act, might appeal to the quarter sessions. The commissioners assessed a proprietor to a rate, levied for the purpose of the improvements, at an annual value above that at which he was assessed to the poor:—Held, that, on his refusing to pay, a justice might be required by mandamus to issue a distress warrant, the proprietor not having appealed. *Re v. Trecothick*, 2 A. & E. 405.

— **Name inserted after Rate made.**—Where a poor-rate was made for a parish, and the name of a party who occupied lands for which he was rated in another parish was inserted after the rate was made, the court refused to grant a mandamus to magistrates to issue a summons and grant a distress warrant for non-payment of the rates. *Re v. Cardiganshire (Justices)*, 1 H. & W. 274.

— **Rates Recoverable by other Means.**—The court will not issue a mandamus to compel magistrates to issue a distress warrant to enforce the payment of poor-rates, where it is doubtful whether the warrant would be legal, and the rates are recoverable by another mode of proceeding. *Re v. Hall*, 4 N. & M. 546; *S. C.*, nom. *Re v. Dyer*, 2 A. & E. 606.

— **Application for Mandamus—Form of.**—Although there are more than two magistrates at petty sessions, all of whom take part in a decision by which the issuing of a distress warrant to levy poor-rates is refused, it is not necessary that, upon application for a mandamus, all who were present and took part in the decision should be included in the rule; but if the court saw that any two had been selected, or that any of the justices so acting had been omitted for any improper purpose, all would be required to be joined. *Reg. v. Ellis*, 2 D., N. S. 361; 12 L. J., Q. B. 20; 7 Jur. 108.

— **Where Magistrate a Trustee.**—Where, upon an application for a mandamus to, justices, to issue their warrant of distress to levy a poor-rate, it appeared that the property in respect of which the rate was sought to be obtained was trust property left by a testator for the purpose of a free school, and that one of the justices refusing to grant his warrant was a trustee of the estate:—Held, that, notwithstanding

ing his character of such trustee, he was liable to a mandamus. *Ib.*

— **Hearing.**—The granting of warrants of distress for a poor-rate by magistrates to churchwardens is a judicial, and not a ministerial act; and they ought first to summon the party, and hear what he has to say in his defence. *Harper v. Carr*, 7 T. R. 270.

— **Power of Justices to delay Execution.**—Justices, in issuing a distress warrant for the recovery of poor-rates, have no power to order that there shall be any delay in the execution of the warrant. *Reg. v. Handley*, 7 Q. B. D. 398.

— **Summary Jurisdiction Act not applying.**—The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), does not affect or apply to proceedings for the recovery of poor-rates and other rates recoverable in the same manner as poor-rates; and a distress warrant in respect of such rates may be issued as before the act. *Reg. v. Price*, 5 Q. B. D. 300; 49 L. J., M. C. 49; 42 L. T. 439; 28 W. R. 615; 44 J. P. 248.

— **Form and Execution of Warrant.**—Before 25 & 26 Vict. c. 82, a warrant of distress was issued for 104*l.* 17*s.*, due for several rates, one of which was quashed, on the ground that the party was not an occupier within the parish where he was rated:—Held, that, as one of the rates was quashed, the warrant was void, and that the precise sum due for poor-rates should have been demanded from him previously to issuing the warrant. *Harrell v. Wink*, 2 Moore, 417; 8 Taunt. 369.

— **Where some Rates Irregular.**—Where some poor-rates had not been duly published on the Sunday following the allowance, according to 17 Geo. 2, c. 3, s. 1, and a warrant of distress issued for a single sum made up of these rates, and of others which were regular:—Held, that the warrant was wholly bad, and that replevin lay for a distress taken under it. *Sibbald v. Roderick*, 11 A. & E. 38; 3 P. & D. 106.

— **Statements in Warrant.**—A warrant of distress for poor-rates need not in terms state that the refusal to pay the rate was proved upon oath; it is enough to state that it was duly proved. *Ormerod v. Chadwick*, 16 M. & W. 367; 2 New Sess. Cas. 697; 16 L. J., M. C. 143; *S. P.*, *Reg. v. Bidwell*, 1 Den. C. C. 222; 2 C. & K. 564; 17 L. J., M. C. 99.

The misrecital in a warrant of distress for poor-rates, of the date of the rate, is not material. *Ib.*
A warrant of distress for a church-rate which does not specify the time at which the distress is to be sold, is bad, and the rescue of a distress taken under such warrant is no criminal offence. *Reg. v. Williams*, 2 C. & K. 1001; 4 New Sess. Cas. 137; 19 L. J., M. C. 126.

A defect in the enumeration of some of the property in a poor-rate is no ground for refusing a mandamus to justices to issue a distress warrant. *Re v. Wilson*, 5 N. & M. 119; 1 H. & W. 507.

— **Against whom Issued.**—A distress warrant may issue against any one of a number of tenants in common refusing to pay the amount of a rate assessed on all of them. *Paynter v. Reg. (in error)*, 10 Q. B. 908; 16 L. J., M. C. 136; 11 Jur. 973—Ex. Ch.

The goods of one churchwarden are liable to be seized under a distress made by order of the other churchwarden and the overseers, for a poor-rate due from him, where the rate has been legally demanded and payment of it refused; but, if such churchwarden has charged himself in his account with the rate as received to apply it to parochial purposes, the justices (who act judicially in such cases), in the exercise of their discretion, may refuse to grant a warrant. *Skingley v. Surridge*, 11 M. & W. 503; 12 L. J., M. C. 122; 7 Jur. 773.

By a local act, the rates directed by that act to be made should and might, on refusal or neglect to pay the same by any person or persons liable thereto, be recovered in such manner as the rates made for the relief of the poor are directed to be recovered; and it was provided, that any person, whether landlord or tenant, who should let out his or her house in separate apartments or ready furnished, to a lodger or lodgers, should be deemed to be the occupier thereof, and might be rated or assessed accordingly, and should be liable to the payment of the sum so rated; and that the goods and chattels of each and every person renting or occupying any separate part or apartment in such house or building, or renting or occupying any ready-furnished house, or any part thereof, should be liable to be distrained and sold for the payment of the said rates:—Held, first, that, under that act, the goods of a lodger were liable to be distrained and sold for poor-rates assessed upon and due from the landlord, under a warrant directing the churchwardens and overseers to take the goods of the landlord. *Peppercorn v. Hofman* or *Hopman*, 9 M. & W. 618; 12 L. J., Ex. 270.

— **By whom Executed.**—The overseer of a township may execute by deputy a warrant directed to him to levy a rate, such an act being purely of a ministerial character. *Walsh v. Southworth*, 6 Ex. 150; 2 L., M. & P. 91; 20 L. J., M. C. 165.

A joint warrant to two persons to distrain for drainage-rates, under an act for draining fens and improving the navigation of a river, may be well executed by one of them. *Lee v. Vessey*, 1 H. & N. 90; 25 L. J., Ex. 271.

Second Distress for same Rates.—A bean-stack of the plaintiff being distrained for rates due from the defendant was afterwards sold by auction, and a valid contract of sale effected, but on the purchaser subsequently proceeding to remove it, he was forcibly prevented by the plaintiff, and never had an opportunity of taking it away. The purchaser not having paid for the stack, a second distress was made for the rates and other things distrained under it:—Held, that such second distress was lawful. *Lee v. Cooke*, 3 H. & N. 203; 27 L. J., Ex. 337—Ex. Ch.

Persons Liable—Administrator.—An administrator is not liable to pay a poor-rate for the intestate; at least he is not distrainable without a summons. *Stevens v. Evans*, 1 W. Bl. 284; 2 Burr. 1152.

— **Servant of Ambassador.**—When a British-born subject employed as first chorister at the Portuguese ambassador's chapel, with a salary, rented and occupied a house, and let part of it

in lodgings, and a distress was levied on his goods for a poor-rate:—Held, that his goods were not protected by 7 Ann. c. 12, even assuming that he was the domestic servant of an ambassador. *Novello v. Toogood*, 2 D. & R. 883; 1 B. & C. 554.

Property Liable.—Money may be distrained as well as goods. *East India Company v. Skinner*, 1 Bott's P. L. 249.

Averia carucae are distrainable. *Hutchins v. Chambers*, 1 Burr. 579; 2 Ld. Ken. 204.

Warrants of Commitment—Adjudication.—A warrant of commitment for non-payment of a poor-rate should shew an adjudication by the same justices before whom the complaint is heard. *Ramsden. In re*, 3 D. & L. 748; 1 B. C. Rep. 133; 2 New Sess. Cas. 427; 15 L. J., M. C. 113; 10 Jur. 879.

— **Nature of.**—A commitment by justices for non-payment of poor-rates is in the nature of civil process, and the proper prison for a person so committed by the justices of Middlesex is the prison in Whitecross-street. *Reg. v. Whitecross-street (Governor)*, 6 B. & S. 371; 10 Cox, C. C. 134; 34 L. J., M. C. 193; 11 Jur., N. S. 970; 12 L. T. 543.

Costs and Charges.—The 43 Eliz. c. 2, s. 4, which gave a remedy for the levying of money assessed for poor-rates, did not extend to costs. *Clark v. Woods*, 2 Ex. 395; 17 L. J., Ex. 189.

— **To whom Payable.**—Under this statute, the party applying for the warrant is the person to whom the costs of such application are to be paid. *Walsh v. Southworth*, 6 Ex. 150; 2 L., M. & P. 91; 20 L. J., M. C. 165.

— **Amount.**—The broker's charges only are the damages to be trebled under 43 Eliz. c. 3, s. 19, in replevin, on a distress made for a poor-rate. *Newman v. Bernard*, 3 M. & Scott, 728; 10 Bing. 274.

On a distress for arrears of a poor-rate, under 50 Geo. 3, c. 45, s. 3:—Held, that, although the warrant made no mention of the costs of the previous summons, the reasonable costs of such summons might be levied under it, and that one shilling was a reasonable sum in that behalf. *Clarke v. Pedley*, 4 M. & Scott, 321.

Remedy for Wrongful Levy.—A distress for a poor-rate for lands not in the occupation of the plaintiff may be replevied, notwithstanding the sessions on an appeal confirmed the rate: for determining that a man may be assessed for what he does not occupy, is an excess of jurisdiction. *Milward v. Cuffin*, 2 W. Bl. 1330.

When one assessment is made in respect of property of which part is occupied and part is not occupied by the person rated, the question can be raised in replevin. *London and North-Western Railway Company v. Buckmaster*, 10 L. R., Q. B. 70; 44 L. J., M. C. 29; 31 L. T. 835; 23 W. R. 160. Affirmed, *ante*, col. 413.

An apothecary, being an inhabitant, was rated in respect of his stock-in-trade:—Held, that being liable to be rated as an inhabitant, his mode of impeaching the validity of the rate was by appeal to the sessions, not by replevin. *Marshall v. Pitman*, 2 M. & Scott, 745; 9 Bing. 595.

Where a party is rated in respect of property

not in his occupation, he is not bound to appeal, but may replevy any distress taken for such poor-rate. *Bristol (Overseers) v. Wait*, 3 N. & M. 359; 1 A. & E. 264.

So, if part of the premises included in the rate is not occupied by him. *Ib.*

But if one distress is taken under a warrant to levy the amount of a rate, void by reason of such non-occupation, and also under a separate warrant to levy another good rate, the validity of such distress cannot be questioned in an action of trespass or replevin. *Ib.*

If more goods are seized than would be a reasonable distress for the good rate, the remedy of the distrainee is an action for an excessive distress. *Ib.*

The Statute of Marlbridge extends to goods distrained for a poor-rate. *Sabourin v. Marshall*, 3 B. & Ad. 440.

— **Trespass.**—If a person rated has any objection to the rate (e. g.) that it is made for six months, he must appeal to the next sessions; and if he does not appeal, he cannot bring trespass against those who distrain on him for non-payment of the rate. *Durrant v. Boys*, 6 T. R. 580.

— **Delay by Reference to Arbitration.**—An assessment committee made a poor-rate upon the property of a waterworks company in excess of the amount which they considered to be the rateable value. The company gave notice of appeal. Both parties then agreed to refer the matter to arbitration, and to be bound by the decision of the umpire. The umpire did not make his award for three years, during which time the company was compulsorily obliged to pay the poor-rate. The umpire made his award and declared that the company was over-rated, and that the overseers should repay to them the sums in excess which they had been obliged to pay under compulsion. The overseers refused to consider the award as valid, and when the next rate was made distrained upon the company under a magistrate's warrant. The company replevied, and afterwards moved that the replevin bond might be delivered up:—Held, that the proceedings of the overseers were against good faith, they having agreed to be bound by the award, and that the replevin bond might be given up at the instance of the company. *Leicester Waterworks Company v. Cropstone (Overseers)*, 44 L. J., M. C. 92; 32 L. T. 567. Compare *London and North-Western Railway Company v. Bedford*, 17 Q. B. 978.

Protection of Overseers and Officers (17 Geo. 2, c. 38, s. 8).—The bailiff of an overseer who distrains for poor-rates upon goods under a distress for rent is not within the protection of the 24 Geo. 2, c. 44, s. 6, which requires a previous demand of the perusal and copy of the warrant. *Whitley v. Roberts*, 1 M'Clel. & Y. 107.

Under a warrant against the goods of A., an overseer took goods already in the hands of the bailiff of A.'s landlord, as a distress for rent:—Held, that he was not protected by 24 Geo. 2, c. 44, s. 6. *Kay v. Grover*, 7 Bing. 312; 3 M. & P. 634; *S. P., Kay v. Grace*, 5 M. & P. 140.

In an action for wrongfully and maliciously taking goods of the value of 600*l.* as a distress under a warrant for 141*l.* for a poor-rate:—Held, that the plaintiff was not bound to demand a copy

of the warrant pursuant to 24 Geo. 2, c. 44, s. 6, before commencing his action, as the overseers had not acted in obedience to the warrant, and no action would have lain against the justices. *Sturch v. Clarke*, 1 N. & M. 671; 4 B. & Ad. 113.

Protection of Justices.—Formerly an action of trespass lay against magistrates for granting a warrant to levy poor-rates, if the party distrained upon had no land in the parish in which the rate was made. *Weaver v. Price*, 3 B. & Ad. 409.

A local act gave power to certain persons to rate for the repair of bridges in the district, and empowered a justice, on demand and refusal to pay such rate, to enforce payment by a distress warrant, to be directed to the collector; and a right of appeal was given against a rate to any person claiming exemption by reason of his lands being "abbey lands," and the decision of the quarter sessions on such appeal was to be final. The plaintiff was rated, and refused to pay, and a justice granted a distress warrant, directed to the collector, who served and executed it. In an action of trespass by the plaintiff against the justice and collector:—Held, that the plaintiff was not confined for his remedy to the appeal to the quarter sessions; that the justice had acted without jurisdiction, and was not protected by 11 & 12 Vict. c. 44; and that the collector, in the circumstances, was to be considered an officer of the law, and protected by 24 Geo. 2, c. 44, s. 6. *Pedley v. Davies*, 10 C. B., N. S. 492; 31 L. J., C. P. 374; 8 Jur., N. S. 263; 5 L. T. 253.

2. INSPECTION OF RATE BOOKS.

Custody of Rate Book—Refusal to Produce—Liability.—An assistant overseer having, by virtue of his office, the poor-rate book in his custody, is liable to a penalty under 6 & 7 Vict. c. 18, s. 16, for refusing to produce it to an inhabitant, when lawfully demanded. *Edwards v. Bennett*, 6 Bing. 230; 3 M. & P. 749; 3 Y. & J. 458; 8 B. & C. 702; 2 M. & R. 482. Affirming 7 B. & C. 586; 1 M. & R. 482.

By a local act for certain incorporated parishes, guardians of the poor were appointed, and were authorized to appoint a clerk, and to make rates; and all poor-rates, and books purporting to be rates, made for the parishes, and all papers relating to the settlement of the poor, were to be delivered by the churchwardens and overseers to the clerk of the guardians for the time being, who was to cause the same to be preserved and filed. The clerk to the guardians paid the casual and out-poor weekly, and transacted some other matters relating to the poor, and had the custody of the books:—Held, that he was not a person liable to the penalty imposed by 17 Geo. 2, c. 3, s. 3, on churchwardens, overseers or other persons authorized to take care of the poor, for not permitting an inhabitant to inspect the rates. *Whitchurch v. Chapman*, 3 B. & Ad. 693.

A rated inhabitant of a parish cannot sue an overseer for the penalty for refusing an inspection of the rate-books, unless he shows that he has been injured by the refusal. *Spenseltry v. Robinson*, 5 D. & R. 572; 3 B. & C. 658.

Proper Demand, what is.—The demand of an inspection must be made at a reasonable time and place; therefore, where the demand was made at a parishioner's own house at eight

o'clock in the evening, and not at the house of the overseer:—Held, that the overseer incurred no penalty by refusing. *Ib.*

A demand to inspect a rate made on the overseer by a rated inhabitant in the presence of his attorney, is a lawful demand; and the refusal to produce the rate upon a lawful demand constitutes the inhabitant a party aggrieved; and a demand to see the rate is sufficiently specific, there being only one rate in esse at the time. *Edwards v. Bennett, supra.*

When a demand to inspect a rate was made upon an overseer on his own premises, not far from his house, and he refused to allow the inspection, but not on the ground that it was inconvenient to go to his house for that purpose:—Held, that this was a reasonable demand within the statute. *Parker v. Edwards*, 7 B. & C. 594; 3 M. & P. 761.

Right to have a Copy.]—The 6 & 7 Will. 4, c. 96, which, by s. 2, prescribes the form in which a poor-rate is to be made, and, by s. 5, empowers persons rated to take copies thereof, and imposes a penalty of 5*l.* for refusal, does not repeal so much of 17 Geo. 2, c. 3, as requires the overseers to give copies of the rate to any inhabitant forthwith upon demand, and subjects them to a penalty of 20*l.* for refusal. *Tennant v. Craston or Creston*, 2 New Sess. Cas. 425; 8 Q. B. 707; 15 L. J., M. C. 105; 10 Jur. 660.

A parishioner is entitled to have, on demand, a copy of the rate forthwith delivered to him, upon paying 6*d.* for every twenty-four names:—Held, that the overseer is entitled to a reasonable time to make the copy. *Spenceley v. Robinson, supra.*

Action for Penalty.]—In a declaration against an overseer for the penalty for refusing inspection of a poor-rate, it is sufficient for the plaintiff to describe himself as an inhabitant of the parish, without stating that he is a rated inhabitant. *Batchelor v. Hodges*, 6 N. & M. 75; 4 A. & E. 592.

To such a declaration it is no plea that the rate, at the time of the demand for inspection, was not a subsisting rate. *Ib.*

Who may Sue.]—A churchwarden or an overseer is not an inhabitant or a parishioner within 17 Geo. 2, c. 3, so as to be entitled to sue a co-churchwarden or overseer for penalties for refusing to permit him to inspect or to give him a copy of a rate. *Wethered v. Calcutt*, 5 Scott, N. R. 409; 4 M. & G. 566; 6 Jur. 487.

Questions for the Jury.]—In an action against an overseer for not giving to an inhabitant a copy of a rate forthwith upon demand and offer of payment, the complaint being, that the overseer had used undue delay:—Held, that it was not the judge's duty to tell the jury, as a direction in point of law on the facts proved, that the copy was or was not given forthwith, but that he was right in leaving it to them to say whether under the circumstances it had or had not been given in reasonable time, and therefore, according to reasonable construction, forthwith. *Tennant v. Bell*, 9 Q. B. 684; 16 L. J., M. C. 31; 10 Jur. 946.

Right to Compel.]—The court cannot compel the officers of a parish to permit the ratepayers

of a parish to take copies or extracts from a book containing all parochial rates and accounts of all moneys received for parochial purposes, but not containing any account of parochial disbursements kept under the directions of a local act, although the parish has adopted the provisions of 1 & 2 Will. 4, c. 60 (the Vestry Act). *Reg. v. St. Marylebone (Vestrymen)*, 6 N. & M. 600; 5 A. & E. 268.

The right of a ratepayer to inspect or take copies from parish accounts is only a private right; and, to entitle him to a mandamus ordering such inspection to be granted, he must shew grounds of a special and public nature in support of his application. *Briggs, Ex parte*, 1 El. & El. 881; 28 L. J., Q. B. 272.

3. APPEAL AGAINST RATES AND RESERVED CASES.

a. When Appeal Lies.

The simple fact of being left out of a poor-rate where no improper motives are shewn for making the omission, is no ground of appeal against the rate. *Reg. v. George*, 1 N. & P. 451; 6 A. & E. 305; W., W. & D. 32; 1 Jur. 39.

A defect in the enumeration of some of the property in a poor-rate is ground of appeal. *Reg. v. Wilson*, 5 N. & M. 119; 1 H. & W. 507.

An objection that a rate is retrospective is ground of appeal. *Reg. v. Stretfield*, 32 L. J., M. C. 236; 11 W. R. 736.

An objection to a rate on account of the uncertainty of specification of the property rated is ground of appeal only, and is not a bar to an action for the rate. *Curtis v. Kent Waterworks Company*, 7 B. & C. 314.

Where an inhabitant is rated for certain stock-in-trade which may not be rateable, his remedy is by appeal to the quarter sessions, not by replevin. *Marshall v. Pitman*, 2 M. & Scott, 745; 9 Bing. 595.

The following order of sessions was removed by certiorari: "Whereas E. L., of &c., in the parish of St. B., in the city of L., has presented his petition and appeal, setting forth, that by a certificate, &c., the barrister did certify that the L. Literary and Scientific Institution was entitled to the benefit of an act passed in the sixth and seventh years of the reign of &c., by which certificate the petitioner, as a parishioner and ratepayer of the parish of St. B., in the city of L., in which parish the institution is situate, conceived himself aggrieved, and appealed against the certificate: now upon hearing the petition and appeal of E. L. against the certificate, in the presence and hearing of all parties concerned, &c., it is ordered that the certificate be annulled."—Held, first, that it was sufficiently alleged that E. L. was a ratepayer; that the allegation that he was a ratepayer was equivalent to an allegation that he was assessed, and therefore he was entitled to appeal against the certificate of the barrister, and that it was not necessary to set out the rate to which he was assessed. *Reg. v. Stacy*, 14 Q. B. 789; 19 L. J., M. C. 177; 14 Jur. 549.

Held, secondly, that the sessions having annulled the certificate because the statute mentioned in it was described as passed in the sixth and seventh years of the reign, the decision could not be reviewed by the court. *Ib.*

Arbitration by Agreement—Breach of Faith.]

—A vestry constituted under 1 & 2 Will. 4, c. 60, but exercising powers under a local act (which gave the vestry all the authorities of a public vestry), made a poor-rate, whereby certain amounts were charged upon a railway company in respect of various properties within the parish. By the local act, a party aggrieved by any assessment might appeal to the vestry at any meeting within one month after demand of the rate, and the vestry might give relief; and the appellant, if not satisfied with the determination, might, within three months after it, appeal to the sessions. The company appealed to the vestry, and by agreement (September 14th, 1850), between the company and the vestry (who authorized their chairman to sign it), the question whether or not the property had been overrated was referred to an arbitrator, who was to have the powers of a court of quarter sessions on appeal; and the company having paid the rate, it was agreed that if the assessment should be reduced, the amount overpaid should be credited to them on account of the next rate; that the award should regulate the assessment to all future rates up to its date; and that all payments on such future rates should be credited to the company in the same manner as the payment already made. Pending the reference, a second rate was made (September 21st, 1850), and a third in March following, both on the same rateable value as the first, and the company paid the second. The parties attended before the arbitrator, and he made his award, assessing the company's properties at reduced values, and fixing the entire rateable value at an amount lower than that in dispute by 573*l*. Taking the total as correct, the company was a creditor, upon the three rates, to the amount of 418*l*., but by an error of figures the total stated in the award exceeded by a few pounds the aggregate of the sums assessable on the several properties according to the arbitrator's finding. The vestry clerk proposed to refer the matter back to the arbitrator. The company objected, but offered to discard the total sum and take the assessment according to the valuations on the several parcels. This was not agreed to, but no proceeding was taken to set the award aside. The vestry, of whom forty had come into office in place of forty who retired, after the making of the award refused to consider it as valid, and distrained upon the company under a magistrate's warrant for the third rate on the original scale of assessment. The company replevied, and afterwards moved the court that proceedings might be stayed and the replevin bond delivered up:—Held, that whether the award was binding on the vestry or not, their proceeding by summons and distress was against good faith, the company having, by their agreement with the vestry, been led into a course of proceeding which had deprived them of an appeal to sessions, and that the proceedings of the company in replevin might be stayed, and their bond given up at their own instance. *London and North-Western Railway Company v. Bedford*, 17 Q. B. 978.

b. To what Court.

Quarter Sessions—"Failed to obtain Relief."]

—A ratepayer, aggrieved by his assessment to the poor-rate, gave notice of objection to the assessment committee, under the Union Assessment

Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), s. 1. The committee, considering that a case then pending in a superior court would govern this case, adjourned their decision. The ratepayer thereupon appealed against the rate to the quarter sessions:—Held, that he had not "failed to obtain relief" from the assessment committee within the above section; and that the quarter sessions had consequently no jurisdiction. *Reg. or Williams v. Bedminster Union*, 1 Q. B. D. 503; 45 L. J., M. C. 117; 34 L. T. 795.

—**Parish under Special Act.**—A metropolitan parish was regulated by a local act, under which a rate for the relief of the poor and other parish purposes was to be made by the vestrymen, and any person aggrieved by the rate was to apply to the guardians for relief, and if dissatisfied with their decision, might then appeal to the quarter sessions, giving notice to the guardians. A valuation list for the parish was made by the overseers and finally settled by the assessment committee under 32 & 33 Vict. c. 67, in which certain property occupied by the appellants was newly assessed, but no notice was given to them by the overseers as required by s. 9. The appellants appealed direct to the quarter sessions, proceeding as in an appeal against a poor-rate under 17 Geo. 2, c. 38:—Held, that the rate was still made under the local act, though the valuation was to be in conformity with the valuation list, under 32 & 33 Vict. c. 67; and that the proceedings not having been in conformity with the local act the quarter sessions had no jurisdiction. *Reg. v. Middlesex (Justices)*, 7 L. R., Q. B. 653; 26 L. T. 902; 20 W. R. 774.

—**County Sessions—Rate in Borough.**—A parish contained a borough, which was not co-extensive with the parish, and which before the Municipal Corporations Act (5 & 6 Will. 4, c. 76), had a quarter sessions with jurisdiction over the whole parish. The borough had not six justices, and therefore the parish had the power of appealing to the county sessions against a rate under 1 Geo. 4, c. 36. The Municipal Corporations Act threw the outlying parts of the parish into the county jurisdiction:—Held, that s. 3 did not take away the power of an inhabitant in the outlying parts of the parish to appeal against a poor-rate to the county sessions, and that the sessions might amend or quash the whole rate. *Reg. v. Bridgewater*, 2 P. & D. 586; 10 A. & E. 711; 3 Jur. 1123.

—**Queen's Bench—Preliminary Questions.**—On an appeal against a poor-rate the sessions granted an application to enter and respite the appeal, subject to a case for the opinion of the Court of Queen's Bench; the reservation at the end of the case being, if the court should be of opinion that the quarter sessions ought not to have granted the application, the entry of the appeal is to be struck out:—Held, that the point being raised on an order which did not finally dispose of the appeal, the court would not entertain the case. *Reg. v. Sutton Coldfield (Overseers)*, 9 L. R., Q. B. 153; 43 L. J., Q. B. 57; 29 L. T. 840; 22 W. R. 324.

—**Appeal from.**—The jurisdiction of the Queen's Bench upon questions relating to the validity of local rates is not purely consultative

but judicial, and the decisions of that court upon such matters are therefore open to appeal. A decision of the Queen's Bench on such a matter, though given in the form of discharging a rule for quashing an order of sessions, is an "Order" within the 19th section of the Judicature Act, 1873, and is therefore subject to appeal. *Walsall (Overseers) v. London and North-Western Railway Company*, 4 App. Cas. 30; 48 L. J., M. C. 65; 39 L. T. 453; 27 W. R. 189. Reversing 3 Q. B. D. 457; 47 L. J., Q. B. 711; 38 L. T. 665; 26 W. R. 705.

Next Sessions—General Rule.—An appeal against a poor-rate to the justices at a special petty sessions, under 6 & 7 Will. 4, c. 96, s. 6, must be either to the next practicable special sessions after the making of the rate, or within a reasonable time. *Reg. v. Lancashire (Justices)* 4 New Sess. Cas. 130; 19 L. J., M. C. 199; 14 Jur. 552; *S. C.*, nom. *Reg. v. Trafford*, 15 Q. B. 200.

An appeal against a poor-rate to the special sessions cannot be made to a later sessions than the second after the publication of the rate. *Reg. v. Hammond*, 4 New Sess. Cas. 316.

Failure to obtain Relief.—Though, under 17 Geo. 2, c. 38, s. 4, an appeal against a poor-rate must be to the next practicable sessions after publication, it is now, by 27 & 28 Vict. c. 39, s. 1, a condition precedent to the right to appeal that the party shall have failed to obtain relief from the assessment committee on the hearing of his objections to the valuation list. *Lawes v. Arlsey (Churchwardens)*, 18 W. R. 293.

Where, therefore, a rate was published on the 30th of May, and notice of objection was given to the assessment committee on the 11th of June, but the committee did not sit to hear the objections till the day of holding the Midsummer quarter sessions:—Held, that an appeal against the rate might be entered and respited at the October sessions. *Ib.*

On August 3rd, a gas company failed to obtain relief against a poor-rate from an assessment committee, and on October 5th they gave notice of appeal to the sessions to be held on October 26th. Meanwhile sessions had been held on September 1st:—Held, as from August 3rd to September 1st there were seven days beyond the twenty-one days requisite for notice under 27 & 28 Vict. c. 39, that the September sessions were the next practicable sessions within 17 Geo. 2, c. 38, s. 4; and that, therefore, the appeal could not be entered at the October sessions. *Liverpool United Gas Light Company v. Everton (Overseers)*, 6 L. R., C. P. 414; 40 L. J., M. C. 104; 23 L. T. 813; 19 W. R. 412.

A poor-rate was made for a parish in a county and published on May 30th. On the 11th of June L. gave notice of objection to the union assessment committee. The committee at its next meeting on the 30th of June refused to grant him relief. The Midsummer Quarter Sessions for the county were held on the same day. L. appealed to the Michaelmas sessions, and the justices allowed the appeal to be entered:—Held, on a motion for a prohibition against L. and the justices to stay all further proceedings in connexion with the appeal, that L. could not be said to have failed to obtain relief from the union assessment committee until June 30th,

when the committee heard his case, and refused to allow his objections. *Reg. v. Biggleswade Union (Guardians)*, 21 L. T. 494.

Held, also, that L. would not have been right in giving notice of appeal to the sessions until he had so failed before the union assessment committee. *Ib.*

Held, also, that as L. was, under the circumstances, prevented by 27 & 28 Vict. c. 39, from appealing to the Midsummer sessions, it was not too late for him to appeal to the Michaelmas sessions. *Ib.*

In London or Middlesex.—An appeal against a poor-rate in London or Middlesex must be made, as in all other counties, to the next (i. e. next practicable) general quarter sessions; though the 17 Geo. 2, c. 38, s. 4, in its terms gives the appeal to the next general or quarter sessions: it appearing from other parts of the act as well as from other acts in *pari materia*, that those terms are used synonymously; and though in the two counties named there are four general as well as four general quarter sessions. *Rex v. London (Justices)*, 15 East, 632.

Claim of Exemption—Appeal within Four Months.—A society obtained a barrister's certificate which was filed, after which an assessment of rates was made under a local act; afterwards notice of the filing was given to the collector of rates, and to the trustees under that act; after which another assessment was made:—Held, that an appeal, made within four calendar months next after the assessment first mentioned, was in time within 6 & 7 Vict. c. 36, s. 6, as being made within four calendar months next after the first assessment after such exemption shall have been claimed by such society. *Reg. v. Pocock*, 8 Q. B. 729; 15 L. J., M. C. 132; 10 Jur. 662.

c. Notice of Appeal.

Necessity of—Action for Excessive Rate.—On the 15th August, 1828, an increased poor-rate was assessed on certain premises, against which an appeal was entered at the October sessions, and respited to the following sessions in January. On the 15th December, 1828, the overseers distrained for the increased rate; but, to prevent a sale, the amount was paid under protest, and the distress relinquished. The rate was subsequently reduced, in consequence of the decision of the court on a case sent up by the justices on the hearing of the appeal. It did not appear that any notice in writing of the appeal had been given to the overseers pursuant to 41 Geo. 3, c. 23, s. 2, before the levy. In an action by the party on whom the increased rate was made, against one of the overseers, at the time of the levy, to recover back the excess above the last effective rate:—Held, that, as no notice of appeal had been given to the overseers, the action could not be maintained. *Priestly v. Watson*, 2 C. & M. 621; 4 Tyr. 916.

One Notice by Several Persons.—Several parties having a joint grievance, such as the omission of persons in the rate who ought to be rated, may join in giving one notice of appeal. *Rex v. Sussex (Justices)*, 15 East, 206.

Entry of Recognizances.—By 6 & 7 Will. 4,

c. 96, s. 6, the decision of the special petty sessions shall be binding unless notice of appeal be given within fourteen days after the decision, and a recognizance be entered into within five days of such notice before some justice of the peace. Where recognizances were duly entered into within five days, and a minute of the recognizances was entered in the minute-book by the clerk of the peace, but the recognizance itself was not then drawn up and signed by a justice of the peace: the court held that the words of the statute were satisfied. *Reg. v. St. Alban's (Justices)*, 1 P. & D. 148; 8 A. & E. 932.

To what Person.]—Where there is an appeal on the ground that some person is omitted who ought to be rated, the justices cannot hear the appeal unless notice of it has been given to the party said to have been improperly omitted. *Re v. Brooke*, 9 B. & C. 915; 4 M. & R. 719.

By a local act the management of the poor of a town was vested in certain persons, who were empowered to make rates, and an appeal was given to the party aggrieved to the town sessions against every such rate; and a further appeal, if necessary, to the county sessions. An appeal against four rates being entered at the January town sessions, four grounds of appeal were specified in the notice; the party being dissatisfied, made a further appeal to the county sessions, and two other grounds of appeal were added; the fourth being that the party was rated in respect of his lands in a higher proportion than all the other inhabitants mentioned in the rate:—Held, that it was not necessary to give notice of appeal to all the inhabitants named in the rate. *Re v. Suffolk (Justices)*, 1 B. & A. 640.

d. Notice of Objections.

Necessity of.]—Under 27 & 28 Vict. c. 39, s. 1, it is a condition precedent to the right of appeal against each and every rate made in conformity with the valuation list, that the appellant should give a notice of objection against the list to the assessment committee; and that notwithstanding an appeal against the next preceding rate by the appellant is pending, and the figures in the valuation list are the same, so far as the appellant is concerned. *Reg. v. Great Western Railway Company*, 4 L. R., Q. B. 323; 38 L. J., M. C. 89; 20 L. T. 481; 17 W. R. 670; 10 B. & S. 318.

Fresh Notice after Rate made.]—An appellant who has given notice of objection to the valuation list, under 27 & 28 Vict. c. 39, s. 1, and failed to obtain relief before a rate is made in conformity with the list, is not bound by the above enactment to give a fresh notice of objection to the list after the rate is made in order to be entitled to appeal. *Reg. v. Wiltshire (Justices)*, 4 Q. B. D. 326; 48 L. J., M. C. 142; 40 L. T. 681.

A valuation list having been duly made in accordance with the provisions of the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), the appellants gave notice of objection to the list. A rate was made in conformity with the list, and subsequently the objection of the appellants was heard by the assessment committee, who made a deduction from the amount at which the property of the appellants was valued, and altered the valuation list accordingly. The rate was then amended in con-

formity with the amended list. The appellants being dissatisfied with the deduction, gave the requisite notice of appeal against the original rate, but did not give to the assessment committee any further notice of objection to the valuation list or any notice of appeal against the rate founded upon it:—Held, that the appellants had done all that was contemplated by the statute, and that it was not a condition precedent to their right of appeal that they should give fresh notice of objection to the amended list, or notice of appeal against the amended rate. *Reg. v. Derbyshire (Justices)*, 25 L. T. 43; 19 W. R. 934.

Contents of Notice.]—The notice required by 27 & 28 Vict. c. 39, s. 1, to be given to the assessment committee, before an appeal to quarter sessions against a rate, must contain all the grounds of appeal, though on some of those grounds the assessment committee may be unable to give relief. *Williams v. Westminster Union*, 30 L. T. 710; 22 W. R. 943.

The court of quarter sessions has no power to quash a rate for a defect not pointed out in the notice of appeal, though apparent on the face of the rate. *Re v. Bromyard*, 2 M. & R. 280; 8 B. & C. 240.

Failure to obtain Relief.]—The 27 & 28 Vict. c. 39, s. 1, makes it in all cases a condition precedent to the right of appeal to the quarter sessions against a poor-rate made in conformity with the valuation list approved of by the assessment committee, that the appellant should have given to the assessment committee notice of the objection against the list, and shall have failed to obtain relief. *Reg. v. Lancashire (Justices)*, 43 L. J., M. C. 116; 29 L. T. 403; 22 W. R. 648. See cases ante, cols. 534, 535.

Service of, on one Overseer.]—In order to entitle a person to be heard before justices at special sessions, under 6 & 7 Will. 4, c. 96, s. 6, against a rate, it is only necessary to prove service of notice of objection on one of the overseers or other persons by whom such rate was made. *Reg. v. Devon (Justices)*, 3 New Sess. Cas. 96.

— To Person omitted from the List.]—Where there is an appeal, on the ground that some person is omitted who ought to be rated, the justices at the sessions cannot hear the appeal, unless notice of the appeal and the ground of it have been given to the party said to have been improperly omitted. *Re v. Brooke*, 9 B. & C. 915; 4 M. & R. 719.

e. Practice at Sessions.

One Appeal against Four Rates—Fresh Grounds of Objection.]—By a local act, the management of the poor of a town was vested in certain persons, who were empowered to make rates, and an appeal was given to the party aggrieved to the town sessions against every such rate; and a further appeal, if required, to the county sessions. An appeal against four rates being entered at the January town sessions, four grounds of appeal were specified in the notice; the party being dissatisfied, made a further appeal to the county sessions, and two other grounds of appeal were added; the fourth being, that the party was

rated in respect of his lands in a higher proportion than all the other inhabitants mentioned in the rate:—Held, first, that one appeal against the four rates was sufficient. *Reg. v. Suffolk (Justices)*, 1 B. & A. 640.

Held, also, that the appellant must, at the county sessions, be confined to the original grounds of appeal at the town sessions. *Ib.*

Divisibility of Appeals.—M. being dissatisfied with his assessment, on the ground that he was overrated, and that other ratepayers, viz. W., T. and P., were underrated, and that he was unequally rated having regard to the ratings of his neighbours, W., T. and P., gave notice to the assessment committee, and to the parties whose assessments were objected to, stating the grounds of such objections, and attended before the assessment committee pursuant to such notice. That body affirmed his rating on its former basis, and thereby refused relief on the first ground, and only made a nominal addition to the assessment of T., and thereupon M. withdrew, and did not proceed with his objections against the assessments of W. and P. The assessment committee having declined to amend the valuation list (except in so far as the nominal increase of T.'s assessment involved alteration), M. appealed to the quarter sessions. At the appeal M. offered to abandon his objection against W., and withdrew, as regarded him (P. did not appear), but claimed his right to prosecute his appeal against the decision of the assessment committee in respect of his own assessment and that of T. The justices, however, held, that the appeal was not divisible, and, therefore, dismissed it altogether:—Held, that they were wrong, and that M., on offering to abandon his objections to the rating of W., should have been allowed to do so, and to proceed with his appeal against the decision of the assessment committee in the cases of himself and T. *Reg. v. Kent (Justices)*, 6 L. R., Q. B. 132; 40 L. J., M. C. 76; 19 W. R. 205.

Power to allow Abandonment of Particular Ground.—The respondents objected, that, in respect of one of the grounds of appeal, it was necessary, under 41 Geo. 3, c. 23, s. 6, that notice of the appeal should have been given to the persons therein named. The appellants denied that the ground of appeal came within that section. The sessions, however, decided that a notice was necessary to be given. The appellants then offered to abandon that ground of appeal, and proceed with others in respect of which no notice at all was required. The sessions refused to permit them to do so, and dismissed the appeal:—Held, that the sessions had power to decide whether they would permit the appellants to abandon that particular ground of appeal and proceed with the others. *Reg. v. Cambridgeshire (Justices)*, 1 L., M. & P. 47; 19 L. J., M. C. 130; 4 New Sess. Cas. 87.

When Amount in Dispute.—Where an appellant disputes before the sessions the quantum of the rate, as well as the rateability of the property for which he is assessed (which was tithe rents and compositions under an inclosure act), it is not enough for the parish officers to shew that he was in receipt of such rents (assuming the property to be rateable), of the probable amount of which, as rated, they gave no evidence. *Reg. v. Topham*, 12 East, 546.

Onus probandi.—On an appeal, on the ground that the appellant was overrated, the practice at the sessions required the appellant to begin by proving his case, which the appellant refused to do; and the appeal was dismissed: the court refused a mandamus to the sessions to rehear the appeal on this objection. *Reg. v. Suffolk (Justices)*, 6 M. & S. 57.

If a party appeals on the ground that he has no rateable property in the parish, the respondents must first establish their case. *Reg. v. Newbury*, 4 T. R. 475.

Property omitted from Rate.—If the ground of appeal is, that certain rateable property has been altogether omitted, the onus does not lie upon the appellant to give the sessions the means of amending the rate, it being the duty of the parish officers to include all rateable property in the rate, and take what means they can to ascertain its value. *Reg. v. Hull Dock Company*, 5 D. & R. 359; 3 B. & C. 516.

Second Rate—Fresh Application for Relief.—When an appeal has been made to the sessions against a rate, after failure to obtain relief from the assessment committee, under 27 & 28 Vict. c. 39, s. 1, it is necessary, before appealing against a second rate, to make a fresh application for relief to the assessment committee, although the list upon which the second rate is made contains precisely the same valuation of the appellant's property as that in the list which has been previously objected to. *Reg. v. Great Western Railway Company*, 4 L. R., Q. B. 323; 38 L. J., M. C. 89; 20 L. T. 481; 17 W. R. 670.

Adjourning and Respiting Appeals.—The 17 Geo. 2, c. 38, s. 4, does not make it imperative on justices to hear and determine an appeal at the sessions next following the publication of the rate, but they may adjourn it to the next sessions. *Reg. v. Wills (Justices)*, 8 B. & C. 380; 2 M. & R. 401.

After an appeal has been respited at the instance of the respondents, the appellant cannot be called upon to prove his notice of appeal. *Reg. v. Hertfordshire (Justices)*, 1 N. & M. 331.

A ground of appeal was, that persons who occupied property in the parish were omitted to be rated. Notice of appeal, addressed to the parish officers and to the other persons, was duly given to the parish officers, but not to the other persons. The respondents objected that proof of such notice was necessary. The appellant then applied to the sessions to adjourn the appeal, which they refused to do, and dismissed it, with costs:—Held, that under 17 Geo. 2, c. 38, s. 4, and 41 Geo. 3, c. 23, s. 6, they were bound to adjourn the appeal to the next sessions. *Reg. v. Eyre*, 6 El. & Bl. 992; 26 L. J., M. C. 14; 2 Jur., N. S. 1207.

Afterwards the appellant served a fresh notice on the parish officers, addressed to them only, containing substantially the same grounds of appeal as the former notice. The sessions dismissed the appeal:—Held, that the fresh notice altered the character of the appeal, and therefore it was too late, and the sessions were right in dismissing it. *Reg. v. Eyre*, 7 El. & Bl. 619; 26 L. J., M. C. 125; 3 Jur., N. S. 912.

A notice, accompanied by grounds of appeal, was served on the parish officers fourteen days before the sessions, stating an intention to enter,

and not to try the appeal, but to petition for a respite to the next following sessions. The respondents gave a counter-notice that they should appear and oppose a respite. The appeal was entered, and motion made that it should be respited, which the respondents opposed; and the sessions, being of opinion that no sufficient ground had been stated for respiting it, called upon the appellant to proceed, and on his declining, dismissed the appeal, with costs:—Held, that it was discretionary with the sessions whether they would permit the appeal to be respited. *Reg. v. Eyre*, 7 El. & Bl. 609; 26 L. J., M. C. 121; 3 Jur., N. S. 910.

Right to abandon Rate on Appeal.]—Although parish officers cannot abandon a poor-rate, after it has been allowed and published, so as to render it no longer a subsisting rate, yet they may so far abandon it as to refuse to incur expense in supporting it on appeal; and they have no right, as matter of law, independently of the discretion of the justices, to have the expense of contesting such an appeal allowed them in their accounts. *Reg. v. Fouch*, 1 G. & D. 585; 2 Q. B. 308.

f. Amending, Quashing, and Reducing Rate.

Power of Amendment.]—On appeal, because particular persons are or particular property is omitted in the rate, the sessions ought not to quash the whole rate, but should amend it in such particular. *Reg. v. Ringwood*, Cowp. 326.

The 41 Geo. 3, c. 23, s. 1, does not give the Court of King's Bench power of amending a poor-rate, as such statute confines the amendment to the quarter sessions. *Reg. v. Milton*, 3 B. & A. 112.

Contents of Rate Book.]—When the subject-matter of a rate is improperly described in a rate-book, the rate is not to be quashed by striking out the name of the person rated, but amended by altering the description of the property rated. *Reg. or Williams v. Westminster Union*, 1 Q. B. D. 503; 45 L. J., M. C. 117; 34 L. T. 795.

Amendment of Rate when Person Overcharged.]—When a person is overcharged, the sessions may relieve him on appeal, and amend the rate, by lessening the sum assessed on him, under 17 Geo. 2, c. 38, s. 6. *Reg. v. Cheshunt*, 2 T. R. 623.

Quashing Rate.]—The court will not quash a poor-rate, unless it is unequal upon the face of it. *Reg. v. Hardy*, Cowp. 579; *S. P.*, *Reg. v. Tomlinson*, 9 B. & C. 163; 4 M. & R. 169.

An order of quarter sessions, made on an appeal against the whole of a poor-rate, and directing the rate to be quashed, is not bad because it does not also order the overseers to make a new rate, under 17 Geo. 2, c. 38, s. 6. *Reg. v. Hampshire (Justices)*, 33 L. J., M. C. 104; 9 L. T. 730; 12 W. R. 441.

Justices, upon appeal from a rate to the quarter sessions, cannot make a new, but only quash the subsisting rate. *Reg. v. St. Andrew's, Holborn*, 3 Burr. 1468.

The court of quarter sessions has no power to quash a rate for a defect not pointed out in the notice of appeal, though apparent on the face of

the rate. *Reg. v. Bromyard*, 2 M. & R. 280; 8 R. & C. 240.

Validity of Order.]—An order of sessions, quashing a rate, upon appeal generally, without assigning any reasons, is good. *Reg. v. Cornwall (Justices)*, 4 Burr. 2102.

Power to reduce Rate.]—Where, by a local act, power is given to two justices to relieve an applicant aggrieved by a poor-rate, they have power to relieve in an individual case, by reducing the amount in which the party was assessed, although the ground upon which they consider him entitled to relief is, that the whole rate is made according to an erroneous principle. *Reg. v. St. James, Westminster*, 4 N. & M. 252; 2 A. & E. 241.

Credit for Excess Payment.]—Under 41 Geo. 3, c. 23, s. 8, if a rate is appealed against, and reduced, but the party rated has, during the appeal, paid on the unreduced assessment, the parish officers may in subsequent rates credit him for the excess paid, without an order of sessions. *Reg. v. Parker*, 7 El. & Bl. 155; 26 L. J., M. C. 199; 3 Jur., N. S. 771.

Payment of Quashed Rate.]—A poor-rate was made in January, and quashed on appeal, but was levied, the amount to be taken as payment on account of the next effective rate on the parish. The next effective rate was made in June; but, the parish being in want of money, it was arranged between the ratepayers generally and the overseers, that the same rate should be levied in full, the payments of the quashed rate being to be allowed in the collection of the next rate; a rate being subsequently made in October, the overseers, being apprehensive that they might be surcharged if they carried out this arrangement, applied for a distress warrant to levy the October rate in full against an occupant of a house, whose predecessor had paid the quashed rate. The justices refused to issue their warrant on a rule to order them so to do:—Held, that the payment of the quashed rate was to be taken as payment on account of the next effective rate, which was that made in June, and could not be taken as payment. *Reg. v. Kingston-on-Thames (Justices)*, El., Bl. & El. 259; 26 L. J., M. C. 199; 4 Jur., N. S. 759.

Recovery of Excess Payment.]—An application for an order, under 41 Geo. 3, c. 23, s. 8, to refund money paid for a poor-rate after it has been reduced on appeal, must be made to the same court of general quarter sessions which heard the appeal, or, at least, to that court which ordered the rate to be lowered. *Reg. v. St. Peter's, York (Justices)*, 4 B. & Ad. 342; 1 N. & M. 108.

g. Costs.

Power to Order and Enforce.]—An order of sessions dismissing an appeal against a poor-rate, and ordering costs to be paid by the appellant to the respondent, was removed into the Queen's Bench, and execution was issued thereon, under 12 & 13 Vict. c. 45, s. 18:—Held, that the order was valid, because s. 18 did not take away the power of awarding costs given by 17 Geo. 2,

c. 38, s. 4, but gave an additional remedy for enforcing the order. *Reg. v. Huntley*, 3 El. & Bl. 172; 2 C. L. R. 246; 23 L. J., M. C. 106; 18 Jur. 745.

If a person gives notice of his intention to appeal, but does not enter his appeal, the sessions cannot award costs to the other party under 17 Geo. 2, c. 38, s. 4. *Rea v. Essex (Justices)*, 8 T. R. 583.

Where an appeal was entered at the Midsummer, and respited until the Michaelmas sessions, and then further respited, at the instance of the appellant, till the Epiphany sessions, four days previously to which the respondents gave notice that they would not oppose the appeal, and it was accordingly allowed without opposition:—Held, that the appellant was entitled to costs as upon an appeal which had been heard and determined, within 17 Geo. 2, c. 38, s. 4. *Rea v. Causton*, 4 D. & R. 445.

Where an appeal is entered, and the appellant does not appear to support his appeal, the sessions have power to hear the appeal, and make an order for the respondent's costs on the appellant. *Rea v. Essex (Justices)*, 1 D. P. C. 539.

On an appeal being entered and abandoned, the respondents are entitled to costs under 17 Geo. 3, c. 38, s. 4, up to the time of abandonment. *Holloway, Ex parte*, 1 D. P. C. 26.

Order for Taxed Costs.—Upon the hearing of an appeal against a poor-rate for a parish within a union, at borough sessions, the recorder decided that the rate should be amended, with costs. The costs were not then taxed; and at the sessions following, the deputy recorder made an order for the amount of the taxed costs, he being at the time a ratepayer within another of the parishes in the same union:—Held, that the order for costs, being a judicial act, was void, on the ground that the deputy recorder was interested in the matter of the appeal. *Reg. v. Cambridge (Recorder)*, 8 El. & Bl. 637; 27 L. J., M. C. 160; 4 Jur., N. S. 334.

When a rate was quashed with costs, and the costs having been subsequently taxed, the order for them was made at an adjourned session:—Held, that the order was good. *Reg. v. Hampshire (Justices)*, 33 L. J., M. C. 104; 9 L. T. 730; 12 W. R. 441.

Against Overseers—Change of Overseers Meanwhile.—A poor-rate was made in September, 1858. An appeal against the rate at the January sessions, in 1859, was adjourned, on the application of the respondents, until the April sessions; and it was ordered that the respondents should pay full costs to that time to the appellants. At the April sessions the respondents did not appear, and the quarter sessions quashed the rate, and, reciting the order of January as to costs, ordered full costs to be paid to the appellants "by the respondents." In December the appellants applied for payment of the costs, and the costs not being paid, in March, 1860, they obtained an order of a judge to remove the order for the purpose of enforcing it. The overseers, who made the rate, and were the respondents in the appeal, went out of office on the 29th March, 1859, and new overseers were appointed. On an application to set aside the order of sessions and the order of the judge, on the ground that the existing overseers were not parties to the appeal, and therefore not liable to

the costs, the court refused the application, both orders being good on the face of them. *Fletton (Overseers), Ex parte*, 2 El. & Bl. 712; 29 L. J., M. C. 205; 6 Jur., N. S. 822; 8 W. R. 432.

Order of Reference—Costs—Jurisdiction.—On an appeal against a poor-rate, the sessions ordered the appeal to be entered and respited, and referred the matter in dispute to an arbitrator under 12 & 13 Vict. c. 45, s. 13, the order of reference being silent as to costs. The appeal was regularly adjourned from sessions to sessions until the arbitrator, having duly heard the parties to the appeal, made his award, whereby he adjudged that the appeal should be dismissed with costs as against the appellants. The Court of Queen's Bench, at the instance of the appellants, directed that the award should be referred back to the arbitrator, and that he should amend that part of it relating to the costs, inasmuch as the order of sessions referring the appeal to his arbitration gave him no jurisdiction over them. The arbitrator, having amended his award accordingly, the sessions ordered the same to be entered as the judgment of the court, but refused to add to their judgment that the appellants should be ordered to pay to the respondents their costs of the appeal:—Held, that the sessions were right in so refusing to add to their judgment; that their duty was ministerial only, and that the award was a judgment, and not merely a report; that the reference was under 12 & 13 Vict. c. 45, s. 13, which did not give to any sessions holden subsequently to that at which the order of reference was made jurisdiction over the costs of the reference. *Reg. v. Middlesex (Justices); West London Extension Railway Company v. Fulham Union (Assessment Committee)*, 24 L. T. 131; 19 W. R. 744.

Costs Payable by Assessment Committee—Action for.—An assessment committee being respondents in an appeal against a poor-rate, an agreement was entered into which was expressed to be made between the appellants and the assessment committee for and on behalf of the guardians, and was signed by the chairman of committee, by which the rateable value of the subject-matter of the rate was referred to arbitration, the costs of the reference and award to be in the discretion of the arbitrators. The award was in favour of the appellants, and directed the "other party" to pay the appellants costs of the reference and the costs of the award:—Held, that an action against the chairman and vice-chairman of the committee would not lie to recover these costs. *Leicester Waterworks Company v. Nuttall*, 4 Q. B. D. 18; 48 L. J., M. C. 41; 39 L. T. 624; 27 W. R. 364.

Award Silent as to Costs.—On an appeal at quarter sessions against a poor-rate, an order, under 12 & 13 Vict. c. 45, s. 13, was made by consent, respiting the appeal, in order that the opinion of the Court of Queen's Bench might be taken to ascertain the principle on which the property should be rated; and when that was ascertained, the matter should be referred to an arbitrator, to certify whether the appellants had been rated properly. The order was silent as to costs, and the case was respited from sessions to sessions. The court having laid down the principle on which the property should be rated, the arbitrator found that the

appellants had not been rated too high :—Held, that a subsequent court of quarter sessions had no power to allow the respondents the costs of the reference and award. *Reg. v. Yorkshire, W. R. (Justices)*, 6 B. & S. 531; 12 Jur., N. S. 162.

Enforcing Order—Validity.—When, upon an appeal to the sessions against a poor-rate, the court, under 12 & 13 Vict. c. 45, s. 5, directs the party against whom it is decided to pay to the other party his costs, such costs are to be recovered in the manner pointed out by 11 & 12 Vict. c. 43, s. 27, and an order of sessions, directing such costs to be paid to the clerk of the peace, to be by him paid over to the party entitled to them, is good. *Gay v. Mathews*, 4 B. & S. 425; 9 Jur., N. S. 716; 8 L. T. 674; 11 W. R. 922—Ex. Ch.

h. Reserved Cases.

Power to State.—The 20 & 21 Vict. c. 43, s. 2, does not apply to the hearing of an appeal against a poor-rate at special sessions, and the magistrates sitting at such sessions have no power to state a case for the opinion of the court upon a point of law raised on such an appeal; but the case should, if necessary, be stated under 12 & 13 Vict. c. 45, s. 11. *Wheeler v. Burmington (Churchwardens)*, 6 Jur., N. S. 698; 8 W. R. 412.

Right to Begin.—According to the practice of the Court of Exchequer, on appeals upon cases stated under 12 & 13 Vict. c. 45, s. 11, the respondent is entitled to begin. *Liverpool Library v. Liverpool (Mayor)*, 5 H. & N. 526.

Jurisdiction of Court.—The court is not precluded, by the sessions stating in the case "that the party rated is the occupier," from examining into the propriety of that conclusion, if the sessions also state all the circumstances of the case, and desire to have the opinion of the court upon the whole. *Rea v. Field*, 5 T. R. 587.

C. COUNTY RATES.

I. JURISDICTION.

Borough and County Justices.—A charter granting jurisdiction to borough justices over a district not within the borough, without words of exclusive jurisdiction, does not exclude the county justices from rating the district to a county rate. *Bates v. Winstanley*, 4 M. & S. 429.

— **In what Cases—New Gaol.**—Under 4 Geo. 4, c. 64, two justices of a town, and county of a town, mentioned in schedule A. to that act, may rate the inhabitants for rebuilding the gaol of such town and county on a new site. *Thompson v. Raikes*, 1 A. & E. 863.

When a presentment has been made as to the propriety of changing the site of a gaol, and the justices in sessions have taken such presentment into consideration, giving the notices required by 4 Geo. 4, c. 64, s. 45, and have resolved that the site ought to be changed, such justices may at their next sessions confirm the resolution, and

contract for building the new gaol, without having given fresh notices. *Ib.*

Under 4 Geo. 4, c. 64, s. 68, the justices of a town and county might have power to raise money on the inhabitants in general for the purposes of building a gaol, though other persons might have been liable at the time of passing the act, and might continue liable to the expense of repairing and maintaining such gaol. *Rea v. Kingston-upon-Hull (Justices)*, 1 A. & E. 880.

II. LIABILITY OF BOROUGH.

Borough meaning County.—A borough was incorporated by royal charter and had a separate commission of the peace, with a non-intromittant clause, and held a separate court of quarter sessions. It had never contributed to or paid the rates for the county at large. Sessions had been regularly held by the borough justices, but the only business done was the presentment of nuisances. Offenders were sent to the county gaol for trial at the assizes or county sessions, and the cost of maintaining such offenders had been sometimes paid by the corporation out of the borough poor-rate :—Held, that the borough fell within the meaning of the word county in 15 & 16 Vict. c. 81, s. 51, and that although no rates in the nature of county rates had been levied in the borough, there was no reason why they should not be levied, and that therefore the borough was not liable to be assessed to the rate for the county at large. *Reg. v. East Looe*, 3 B. & S. 20; 31 L. J., M. C. 245; 6 L. T. 748; 10 W. R. 866.

Borough with Separate Quarter Sessions.—B., an ancient borough, situate in a county, had, as was found in an inquisition in the reign of Edward I., "a gallows, pillory, and tumbrel, pleas of withernam," &c. By a charter of James I., the mayor, burgesses, and recorder should thenceforth be justices of the peace therein, with full power and authority to inquire concerning whatsoever trespasses, misprisions, and other minor offences, which might be inquired into before any justices of the peace in any county, so, nevertheless, that they do not in any manner proceed to the determination of any treason, murder, or felony, or of any other matter touching the loss of life or limb. There were also a grant and confirmation "of the same and similar courts of record, customs, liberties, privileges, franchises, immunities," &c., which the borough had heretofore holden and enjoyed. The borough justices had always held quarter sessions, and tried felonies and misdemeanors to the same extent and in the same manner as the justices of the county, and the latter justices had never interfered in any manner within the limits of the borough, which also maintained its own police :—Held, that the borough, in the absence of a non-intromittant clause, the existence of which could not, under the circumstances, be inferred, was liable to be assessed to the county rate, under 15 & 16 Vict. c. 81, and also to the police rate. *Were v. Devon (Clerk of the Peace)*, 6 B. & S. 7; 34 L. J., M. C. 47; 11 Jur., N. S. 322; 11 L. T. 626; 13 W. R. 313.

Under 5 & 6 Will. 4, c. 76, ss. 112, 117, when a borough, which before that statute was contributory to the county rate, is incorporated, and receives the grant of a separate court of quarter

sessions, it remains contributory to the county rate as to all expenses, except the costs in regard to prisoners tried at the county assizes; it being provided by s. 113, that it shall pay all the costs in regard to prisoners committed from it for trial there. *Reg. v. Hilton*, 13 Jur. 1093. See 12 & 13 Vict. c. 82.

Under 5 & 6 Will. 4, c. 76, s. 117, a borough having a separate court of quarter sessions is not exempt from contributing a proportion of the money expended by the county in the purchase of a gaol pursuant to the provision of a particular statute. *Birmingham (Mayor) v. Reg. (in error)*, 10 Q. B. 116; 18 L. J., M. C. 176—Ex. Ch.

Parishes partly Within and partly Without Borough.]—The 15 & 16 Vict. c. 81, ss. 32, 34 and 35, which provide for the collection of the county rate in parishes situate partly within boroughs and partly without, apply only to boroughs "not subject to contribute to the county rate;" and therefore, where a parish is situate partly within a borough which contributes to the county rate, a separate rate towards the expenses of the county police cannot be made upon the part without the borough, though the part within it is governed by a local act, under which police constables are appointed and paid. *Reg. v. Huddersfield (Overseers)*, 1 B. & S. 961; 31 L. J., M. C. 131; 8 Jur., N. S. 697; 10 W. R. 351.

— Main Roads.]—By a local act, passed in 1874, the limits of the borough of Middlesborough were extended, and all lands, &c., within the extended area, and all persons in respect of the same, were exempted "from all county rates, save only in respect of the purposes for which any county rates are now leviable within the existing borough;" and the act further provided that the urban sanitary authority should be liable to the maintenance and repair of all streets and roads being public highways within the extended area, and that the inhabitants should not, in respect of any lands, &c., within that area, be liable to any payment in respect of the making or repairing of any highway beyond the limits thereof. At the time of the passing of the act general county rates were leviable within the existing borough for all purposes for which general county rates could be levied in any part of the riding, but those purposes did not include the maintenance of any main or other roads outside the limits of the borough. By s. 13 of the Highways and Locomotives (Amendment) Act, 1878, any road which has ceased to be a turnpike road in manner described by the act, shall be deemed to be a "main road," and one half of the expense incurred by the highway authority in the maintenance of such road shall, as to every part thereof within any highway area, be contributed out of the county rate:—Held, that the provisions of the local act did not exempt the inhabitants of the extended area of the borough from liability to pay county rates, under s. 13 of the Highways and Locomotives (Amendment) Act, 1878, in respect of the maintenance of main roads outside the limits of the extended area. *Middlesborough Overseers v. Yorkshire Justices*, 11 Q. B. D. 490; 32 W. R. 152.

— Highways.]—By a local act, power was given to the mayor, aldermen and burgesses to

make and levy "a highway rate upon the occupiers of all messuages, houses, &c., lands, tenements and hereditaments within the borough, when sewered and otherwise completed, and such of the present and future streets as shall from time to time be declared public highways as aforesaid, and the main sewers under the same." The borough consisted of a part of one of the four divisions of the parish of Ashton-under-Lyne, and the whole of another of such divisions, the latter being subdivided into two districts; and before the passing of the act each of such districts separately maintained its own highways and had its own surveyor. The greater part of one district was a county district. After the passing of the act, the mayor, &c., acting as surveyor, laid a rate on each rateable property within each of the districts exclusively for the repair of such highways within them as had not been sewered, drained, levelled, paved, flagged, and otherwise completed, to the satisfaction of the mayor, &c.:—Held, that under the local act, taken in connexion with 10 & 11 Vict. c. 34, ss. 48, 49, the mayor, aldermen and burgesses of the borough were empowered to make two general rates within the borough, one for the repair of the urban streets within the local act, and the other for the repair of the usual ways not within that act, and therefore that the rate was bad. *Reg. v. Slater*, 18 Q. B. 898; 21 L. J., M. C. 185; 16 Jur. 992.

Highway Rates.]—See WAY.

III. PERSONS AND PROPERTY LIABLE.

County Gaol.]—By local acts, improvement commissioners were appointed to act in and for a town in a county, and were authorized to levy annually within the town, for the purposes of the act, a certain rate upon all gaols situated within the town. A subsequent local act, after reciting that it was expedient that the county should be relieved and exonerated from any taxes in respect of any of the gaols of the county, enacted that: "no rate, tax or assessment whatsoever, parliamentary or parochial, should be raised, assessed, or levied on, or be payable by, the county for or on account of the gaols, or any or either of them:"—Held, that this latter act exempted a county gaol, situated in the town, from assessment to the annual rate leviable by the improvement commissioners. *Reg. v. Kent (Justices)*, 2 El. & El. 911; 29 L. J., M. C. 191; 6 Jur., N. S. 894.

By an act, passed for the purpose of keeping the streets of a town in repair and lighted, a sum was to be assessed upon all halls, gaols, churchyards, &c., within the town, "for every yard running measure of the length in front of such halls, gaols," &c.:—Held, that, notwithstanding the 4 Geo. 4, c. 64, s. 48, the county gaol was liable to the payment of the rate, and that every part of the building which abutted on a public street was to be included in the measurement. *Beds (Justices) v. Bedford (Commissioners)*, 7 Ex. 658; 21 L. J., M. C. 224.

— Unoccupied Houses.]—By 15 & 16 Vict. c. 81, s. 2, the basis or standard for the county rate is to be founded and prepared according to the full and fair annual value of the property rateable to the relief of the poor in every parish

within the county:—Held, that unoccupied houses capable of being rated were to be included in the valuation. *Reg. v. Hammersmith*, 7 W. R. 524.

—**Tenants in Ancient Demesne.**—The exemption of tenants in ancient demesne from parliamentary taxes and tallages is limited to taxes granted by parliament to the crown, and does not extend to local taxation levied under the authority of an act of parliament upon and for the benefit of particular portions of the community. Tenants in ancient demesne are not therefore, as such, exempt from payment of county rates. *Reg. v. Aylesford*, 2 El. & El. 538; 29 L. J., M. C. 83; 6 Jur., N. S. 297.

—**Mode of Assessment—Parish traversed by Canal.**—A local act enacted that a canal company should be rated to all parliamentary and parochial taxes and assessments for its lands and buildings, in the same proportion as other lands and buildings lying near should be rated, and as the lands and buildings of the company would be rateable if they were the property of individuals in their natural capacity:—Held, that a parish in Buckinghamshire was to be assessed to the county rate on an estimate in which the company's lands and buildings were assessed, as directed by the statute. *Reg. v. Aylesbury-with-Walton*, 9 Q. B. 261; 4 Railw. Cas. 315.

—**Equality of Rates.**—Where before 12 Geo. 2, c. 29, the county rates had been assessed upon the entire district or place of Hartishead with Clifton; but the two townships of H. and C. separately maintained their own poor, and were used to contribute towards the county rates in certain fixed proportions between themselves; yet, as that statute only establishes the accustomed proportions of contributions to the county rates as between the entire districts which were before assessed to such rates within the limits of the respective counties, and does not meddle with the proportions which had been used to be observed as between the subdivisions of those districts, this case was held to fall within the third section, which provides, that, where there is no poor-rate in the parish, township or place assessed to the county rates (by which must be understood no entire poor-rate co-extensive with the place or district assessed to the county rates), the county rates shall be raised by the petty constables in such manner as by law the poor-rate is to be assessed and levied, that is, by an equal rate on all the inhabitants. *Reg. v. Yorkshire, W. R. (Justices)*, 12 East, 117. And see *Reg. v. Austen*, D. & R., N. P. C. 24.

IV. PURPOSE OF RATES.

—**Legal Proceedings.**—If a fine is imposed on a county, which the justices at the sessions think illegal, they may order the treasurer to defray the expenses of litigating the question out of the county stock. *Reg. v. Essex*, 4 T. R. 591.

But they cannot order the costs of a prosecution for a misdemeanor carried on under the direction of magistrates to be allowed out of the county rates. *Reg. v. Yorkshire, W. R. (Justices)*, 7 T. R. 377.

—**Repayment of Loans.**—An order of sessions for assessing and levying a specific sum of money to enable a county treasurer to repay persons who had advanced money for county purposes on the credit of the county rates is bad on the face of it, inasmuch as it is a rate to reimburse, which the sessions have no authority to make. *Reg. v. Flintshire (Justices)*, 5 B. & A. 761; 1 D. & R. 470; *S. P. Reg. v. Flintshire (Justices)*, 2 D. & R. 843.

—**Damages for Riot—Exemption.**—By a local act for raising 21,000*l.* to pay the damages recovered of a hundred, for the partial destruction of Nottingham Castle by rioters, the justices of the peace for the county were empowered to borrow the required sum by mortgage, or a sale of annuities secured on the proportion of the county rate chargeable on the inhabitants of the hundred. By s. 5, the justices were required to charge the proportion of the county rate to be raised upon the inhabitants of the hundred not only with the interest of the money borrowed, but also with the payment of such further sum as should ensure the payment of the sum borrowed within seven years, or with the payment of such annuities for the like period, as should be agreed to be paid or granted in respect of any part of the money so borrowed; and such sums should be assessed and recovered on the hundred in such manner as county rates are directed to be assessed and recovered; and should be paid and applied under the direction of the justices in discharge of the interest, and so many of the principal sums secured, or of such annuities, as such money would extend to discharge in each year, until the whole of the money should be paid. The 8th section provided a method for each parish to exempt itself from the operation of the act, by paying its quota in the first instance, and for that purpose directed the justices, after ascertaining the amount to be borrowed, to specify and declare the sum to be paid or contributed by each parish as the quota or share of the whole sum so ascertained; and also to appoint a day on or before which the churchwardens or overseers of any such parish, desirous of paying the full amount of its quota, might pay the same to the person appointed as receiver under the act; and upon payment such parish should be discharged from all future payments relating to the integral sum whereof such quota should have been so paid; and from the interest, and from any expenses, &c. And s. 9 enabled the churchwardens and overseers to raise the sum required as the quota of such parish, by loan on the security of their parochial rates, to be repaid within seven years. In pursuance of s. 8, the justices fixed the quota of each parish in the hundred. Four availed themselves of the option of paying their quota. The parish of R., and thirty more, did not; and the justices raised the required sum, after allowing for these payments, by granting annuities of 3,600*l.* per annum, for seven years:—Held, that the effect of ss. 8 and 9 was to exempt from the operation of s. 5 those parishes only who paid their ascertained quota; that the annuities granted by the justices to pay the remainder were to be secured upon the portion of the county rate raised upon the hundred, with the exception of those parishes which had paid; and that the county rate, with those exceptions, was liable in the aggregate to the incumbrance, which was to be raised, in addition

to the ordinary county rate, by order of the justices, in the same way in all respects as the other county rate is levied. *Walker v. Sherwin*, 9 M. & W. 266.

New Shire Hall.—An act for building a new shire hall for a county enacted, that when the hall should be completed, it should be for ever insured, supported and maintained at the expense of the county and town, in the proportions following: that one-tenth part of the charges should be paid by the borough, and the remainder by the inhabitants of the county; that it should be lawful for the county justices to order the hall to be insured, supported, maintained and repaired as they should think fit, and that they should and might order the expenses of the insurance and repairs to be paid in the proportion before mentioned. After the completion of the hall, 1,000*l.* was, in pursuance of the act, and of an order of county justices, expended in insuring and supporting the hall, and a tenth part thereof ordered to be paid by the borough, and the remainder by the inhabitants of the county. Subsequently, a further sum of 28*l.* 2*s.* was ordered by the county justices to be laid out in repairing the hall, and a tenth part of that sum was ordered to be paid by the borough, and the remainder by the inhabitants of the county:—Held, first, that the borough was bound to pay the proportion of the 1,000*l.* actually expended, although the borough had not been summoned to oppose the order of justices, nor had any notice that it was to be made. *Hinckley v. Stafford (Mayor)*, 6 Ex. 279; 20 L. J., Ex. 171.

Held, secondly, that the borough was bound to pay the proportion of the 28*l.* 2*s.*, although that sum had not been expended before action. *Ib.*

V. COUNTY TREASURER.

Security for Office.—The 12 Geo. 2, c. 29, s. 6, does not make the giving the security a condition precedent to a person's becoming treasurer, or being responsible or accountable to the justices, but the appointment is complete without such security being given. *Rea v. Patteson*, 4 B. & Ad. 9; 1 N. & M. 612.

The condition of a bond, after reciting that the obligor had been nominated treasurer and receiver of the rates and assessments made for the county, upon giving security to the clerk of the peace for the due and faithful execution of the trusts reposed in him according to 12 Geo. 2, c. 29, was, that the obligor should, when he was thereto required by the justices of the peace assembled at quarter sessions, or the major part of them, or by any committee of the magistrates duly appointed for that purpose, by any order of the court of quarter sessions now made or hereafter to be made, well and truly account for all sums of money received by him by reason or on account of his office; and also should faithfully perform all the trusts reposed in him by virtue of the appointment:—Held, that, by the condition of this bond, the county treasurer was bound to account for moneys received by him in discharge of duties imposed by the act of parliament passed subsequently to 12 Geo. 2, c. 29. *Farr v. Hollis*, 9 B. & C. 315.

Payments by—Allowance of.—Where a sum of money not legally payable out of county rates

was paid by a county treasurer under an order of two justices, made under colour of rules sanctioned by the sessions, authorizing them to draw on the treasurer:—Held, that the sessions properly disallowed such payment, and that an order of a subsequent sessions, rescinding the previous order and allowing the payment, was bad on several grounds. *Reg. v. Sanders*, 2 C. L. R. 1689; 3 El. & Bl. 763; 24 L. J., M. C. 45; 1 Jur., N. S. 86.

Liability to make Payments—Police Expenses—Metropolitan District.—Under 27 Geo. 2, c. 3; 10 Geo. 4, c. 44; 2 & 3 Vict. c. 47, and 11 & 12 Vict. c. 42, if a prisoner is committed for trial for felony to a county gaol for an offence committed in the county within the metropolitan police district, the committal being by a county magistrate within such county and district, and the warrant is delivered to a metropolitan police constable, a county magistrate may order repayment by the county treasurer to the metropolitan police constable of the expenses incurred by him in conveying the prisoner to the gaol, the prisoner himself having no funds available for that purpose; and the county treasurer is liable to an action if he refuses to pay under such order. *Leverick v. Mercer*, 14 Q. B. 759; 22 L. J., M. C. 81.

So in the case of a committal for misdemeanor. *Ib.*

So in the case of summary conviction and sentence of fine and imprisonment in default of payment, and committal upon such default by order, under 11 & 12 Vict. c. 43, s. 23. *Ib.*

So in the case of a remand on a charge of felony or misdemeanor, whether the prisoner is ultimately committed for trial or not. *Ib.*

So where the warrant of commitment is directed only to the keeper of the county gaol. *Ib.*

So where the magistrate who issues the warrant is a police magistrate sitting in a metropolitan police court under 10 Geo. 4, c. 44, and 2 & 3 Vict. c. 71. *Ib.*

So where the magistrate who makes the order on the treasurer is such a police magistrate. *Ib.*

So where there is no express direction of the warrant. *Ib.*

So where the committal is for a refusal to enter into recognizances to appear at sessions, and to keep the peace in the meantime. *Ib.*

So where the committal is for further examination on a charge of felony or misdemeanor, but the prisoner is afterwards summarily convicted of misdemeanor. *Ib.*

—When Constable not entitled.—But where a prisoner is remanded for examination and the keeper of the gaol delivers such prisoner to a constable to be conveyed before the magistrates, the constable is not entitled to be remunerated from the county rate for the expense of such conveyance. Though he would be so entitled if he conveyed him before the magistrate, by order of the magistrate. *Ib.*

VI. PROCEEDINGS.

1. BEFORE THE ASSESSMENT COMMITTEE.

Conduct of Business.—All business relating to the assessment, application, and management of the county rate, must be transacted by the justices in open court; but no ratepayer, or per-

son not being a member of the court, is entitled in any way to interfere with the exercise of the jurisdiction of the justices, in respect of such assessment. *Rex v. Nottingham (Justices)*, 5 N. & M. 160; 3 A. & E. 600; 1 H. & W. 318.

Power to Summon Witnesses.—Under 15 & 16 Vict. c. 81, s. 7, the committee has power to summon and examine private persons, and to require them to produce any documents in their possession which are necessary to enable the committee to ascertain the value of the property. *Dickson v. Doubleday*, 3 El. & Bl. 501; 30 L. J., M. C. 99; 7 Jur., N. S. 705; 3 L. T. 663; 9 W. R. 272.

2. PRODUCTION AND INSPECTION OF ACCOUNTS.

Mandamus for.—A mandamus will not go to inspect the accounts relating to county rates, on an application made to the court of quarter sessions for the inspection, whilst the court was in actual discussion upon the accounts. *Rex v. Nottingham (Justices)*, 5 N. & M. 160; 3 A. & E. 500; 1 H. & W. 318.

A mandamus was granted, commanding the justices and clerk of the peace of a borough to permit the attorney, on behalf of several persons who contributed to the county rates, to inspect and take copies of the last two rates made by the justices, and all orders made for the expenditure of the same, and the several orders of sessions made thereon, and other proceedings and documents relating thereto. *Rex v. Leicester (Justices)*, 7 D. & R. 370; 4 B. & C. 891.

But before such writ can be obtained, an application for such inspection must be made to the justices assembled at quarter sessions. *Ib.*

Who Entitled to.—The ratepayers of a county have neither at common law nor by statute any right to inspect and copy the bills of charges of county officers, when they are deposited with the clerk of the peace among the county records, in pursuance of 12 Geo. 2, c. 29, s. 8. The right of inspection is confined to the justices of the peace for the county. *Rex v. Staffordshire (Justices)*, 1 N. & P. 260; 6 A. & E. 84.

3. APPEAL.

Time for.—An appeal against a county rate might be made at any time under 55 Geo. 3, c. 51, s. 14, though the rate was made under a prior local act, which required the appeal to be made within a certain time. *Rex v. Buckinghamshire (Justices)*, 7 B. & C. 3; 9 D. & R. 777.

Notice of.—It is not necessary in a notice of appeal against a county rate to specify the grounds of appeal; but, if the appellant states in his notice, as causes of appeal, matters which are not so, the court of quarter sessions ought to adjourn the appeal, if they think the respondents have been misled, or, otherwise, to hear it. *Rex v. Westmoreland (Justices)*, 10 B. & C. 226.

Grounds for.—It is no ground of appeal against a county rate, that individuals in one parish are rated in a higher proportion than in another. *Ib.*

In an appeal against a county rate, the party appealing must, in his notice of appeal, state that he is aggrieved, or state that from which it follows of necessity that he is so; and where a notice of appeal against such a rate stated, as the ground of appeal, that the county rate was unequal and defective, inasmuch as the appellant parish was charged and assessed in the rate at a higher proportion of the pound sterling, according to the fair annual value of the rateable property, than the respondent parish; and the sessions, upon the hearing of the appeal, received the evidence of surveyors as to the annual value of the rateable property of both parishes, and amended the rate by altering the assessment according to the annual value of the two parishes according to the evidence so taken, but leaving the statement of the annual value of the two to remain as before:—Held, that the sessions were not warranted by the notice of appeal in so amending the rate. *Rex v. Blackawton*, 10 B. & C. 792.

Rate in Fixed Proportions—Right of Appeal.—A power of appeal was given by 55 Geo. 3, c. 51, s. 14, against a county rate made in fixed proportions, and invariably adopted for a series of years. *Rex v. York (Justices)*, 2 B. & C. 771.

Power to Vary.—The sessions have no power to vary the proportion in which the county rate has usually been assessed on the several parishes. *Rex v. St. Paul's, Covent Garden, Cald.* 158.

D. OTHER RATES.

Highways.—See WAY.

Metropolitan.—See METROPOLIS.

Coal Dues.—See COALS.

Sanitary.—See HEALTH.

Water.—See WATER.

RATIFICATION.

When Impossible.—An act which is illegal and void is incapable of ratification. *Brook v. Hook*, 6 L. R., Ex. 89; 40 L. J., Ex. 50; 24 L. T. 34; 19 W. R. 506.

A forged instrument cannot be ratified by the person whose name is forged, and he cannot adopt it so as to make himself liable thereon. *Ib.*

There can be no ratification of an invalid transaction where the person performing the supposed act of ratification has been kept, by the conduct of the party in whose favour it is made, unaware of the invalidity of the first transaction, and has not, at the time of the supposed ratification, the means of forming an in-

dependent judgment. *Savery v. King*, 5 H. L. Cas. 627.

By Principal of Acts of Agent.]—*See* COMPANY—PRINCIPAL AND AGENT.

By Infant.]—*See* INFANT.

RECEIPT.

I. EFFECT OF, IN EVIDENCE.—*See* EVIDENCE.

II. STAMPING.—*See* REVENUE.

RECEIVER.

I. APPOINTMENT AND DUTY.—*See* PRACTICE.

II. OF STOLEN PROPERTY.—*See* CRIMINAL LAW.

III. IN WINDING UP.—*See* COMPANY.

RECITALS.

See DEED AND BOND.

RECOGNIZANCE.

I. IN CRIMINAL PROCEEDINGS.—*See* CRIMINAL LAW.

II. IN OTHER MATTERS.—*See* BAIL.

RECORDER.

See CORPORATION.

RECTOR.

See ECCLESIASTICAL LAW.

REFERENCE.

See ARBITRATION AND AWARD.

REFORMATORIES.

See SCHOOLS.

REFRESHERS.

See COSTS.

REFRESHMENT HOUSES.

See INTOXICATING LIQUORS.

REGISTRATION.

1. REGISTER OF BIRTHS, DEATHS, AND MARRIAGES.

Appointment of Registrar.—The acting in the office is *primâ facie* evidence of the appointment as registrar of births and deaths, under 6 & 7 Will. 4, c. 86. *Reg. v. Price*, 3 P. & D. 421; 11 A. & E. 727; 4 Jur. 291.

The appointment of a person who is registrar of births, deaths, and marriages, as overseer of the poor, is not void, and in order to render it so, the overseer must appeal to the sessions under 43 Eliz. c. 2, s. 6. *Reg. v. Chester (Justices)*, 4 Jur. 484.

In every case of vacancy of the office of superintendent registrar of births, deaths and marriages in any union, the power of filling up the vacancy is, by 6 & 7 Will. 4, c. 86, given to the guardians; and the clerk to the guardians has no right to claim the appointment except in the case of the first appointment after the act first came into operation. *Reg. v. Acason*, 2 B. & S. 795; 31 L. J., Q. B. 227; 8 Jur., N. S. 841; 6 L. T. 535; 10 W. R. 691.

Duties of.—The superintendent registrar has no power to grant his certificate pursuant to 6 & 7 Will. 4, c. 86, s. 7, in cases where it is proposed that the marriage shall take place out of his district, and without licence. *Brady, Ex parte*, 8 D. P. C. 332; 4 Jur. 269.

The court will not direct a registrar of births and deaths to erase the registry of the birth of a child, though facts are deposed to shew that the child was supposititious, and the entry a fraud, and though the application is made by a party having a pecuniary interest in defeating the fraud. *Stanford, Ex parte*, 1 Q. B. 886; 1 G. & D. 428; 9 D. P. C. 927.

Evidence of Births, &c.]—See EVIDENCE.

Marriages.]—See HUSBAND AND WIFE.

2. OTHER CASES.

Of Title Deeds to Land.]—See DEED AND BOND.

Of Bills of Sale.]—See BILLS OF SALE.

Of Copyright.]—See COPYRIGHT.

Of Patents.]—See PATENT.

Of Trade Marks.]—See TRADE MARK.

Of Voters.]—See ELECTION LAW.

Of Ships, and of Agreements for Sale of Ships.]—See SHIPPING.

Of Stocks and Shares.]—See COMPANY.

Of Judgments.]—See JUDGMENT.

RELEASE.

1. *What Amounts to.*
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 - b. *In other Cases, 560.*
2. *Construction and Operation.*
 - a. *Recitals, 562.*
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9. *Composition Deeds.—See BANKRUPTCY.*
10. *Of Sureties.—See PRINCIPAL AND SURETY.*

1. WHAT AMOUNTS TO.

a. Covenant not to Sue.

For Limited Time.]—A covenant not to sue upon a simple contract debt for a limited time is not pleadable in bar of an action for such debt. *Thimbleby v. Barron*, 3 M. & W. 210.

Parties.]—A covenant not to sue one of two joint debtors, does not operate as a release to the other. *Hutton v. Eyre*, 6 Taunt. 289; 1 Marsh. 603.

If the obligee of a bond covenants not to sue one of two joint and several obligors, and if he does, that the deed of covenant may be pleaded in bar, he may still sue the other obligor. *Dean v. Newhall*, 8 T. R. 168.

In an action for a partnership debt a covenant not to sue entered into by one of two of the partners cannot be set up as a release. *Walmsbury v. Cooper*, 3 P. & D. 149; 11 A. & E. 216.

—Principal and Surety.]—A declaration stated that an action had been commenced by the public officer of a banking co-partnership

against T. for the recovery of the amount of a bill of exchange drawn by him upon and accepted by the defendant for 1,250*l.*; that while the action was pending, it was agreed between the company, T. and the defendant, that the action should be settled as follows: 250*l.* and 500*l.* by the promissory notes of T., and 500*l.* by the defendant's promissory note at twelve months, the defendant consenting to the company appropriating the securities held by them to the payment of such balance, and the defendant agreeing to give them a power to sell the properties mentioned in the securities, the company to forego all interest on receiving the three notes, and to guarantee to give up the bill sued on and the 1,000*l.* bill received on account of the said bill. The declaration averred that the company had performed all things on their part to be performed, and had always been ready and willing to settle the action. Breach, that the defendant did not nor would give the company the promissory note for 500*l.* nor the power of sale. Plea, that the defendant entered into the agreement jointly with M., B. & J., and that after breach of the agreement by an indenture made between the nominal plaintiffs in this action (one of whom was the public officer of the company) of the first part, the directors of the company of the second part, the defendant, M., B. and J. of the third part, and T. of the fourth part, the public officer on behalf of the company did remise, release and for ever discharge M., B. and J. of and from the action, and all actions and suits, causes of action and debts whatsoever without the consent of the defendant, and thereby released the defendant from the same:—Held, that the indenture set out in the plea did not operate as a release, but only as a covenant not to sue. *Henderson v. Stobart*, 5 Ex. 99; 19 L. J., Ex. 135.

A. and B. entered into a joint and several bond, conditioned for payment of moneys due by B. to a bank. After the making of the bond, the bank, without the privity or consent of B., executed a deed, whereby the bank released B. from all actions, &c., with a proviso that nothing therein contained was to extend to prevent the bank from suing any other person than B., who might be liable to make good to the bank any money due from B., or as being jointly or severally bound with B. in any bond, &c., as if the deed had not been executed, it being understood and agreed, that as regards any such suits, the deed should not operate or be pleaded in bar or as a release:—Held, first, that this deed operated only as a covenant not to sue B., and not as a release. *Price v. Barker*, 4 El. & Bl. 760; 3 C. L. R. 927; 24 L. J., Q. B. 130; 1 Jur., N. S. 775.

Held, secondly, that A. was not discharged by the execution of the deed without his consent; the effect of a covenant not to sue the principal debtor qualified by a reserve of the remedies against a surety being to allow the surety to retain all his remedies over against the principal, and the covenant not to sue operating only so far as the rights of the surety may not be affected. *Id.*

By a mortgage deed the debtor covenanted to pay principal and interest, and a surety covenanted to pay the interest in default. The debtor afterwards, by deed, assigned his property to a trustee on trust to sell and divide the proceeds amongst his creditors; the creditors releasing the debtor from the debts due to them

respectively ; but there was a proviso in the deed that nothing therein should affect any right or remedy which any creditor might have against any other person in respect of any debt due by the debtor :—Held, that this deed only amounted to a covenant not to sue the debtor, and that the surety was not released, but that the surety could pay off the principal to the creditor and recover the amount from the debtor. *Green v. Wynn*, 4 L. R., Ch. 204 ; 38 L. J., Ch. 220 ; 20 L. T. 131 ; 17 W. R. 385.

To an action for goods sold and delivered, the defendant pleaded that the causes of action accrued to the plaintiffs against himself and A., B. and C. jointly, and not otherwise, and not separately against the defendant, and that he and A., B. and C. were jointly liable in respect of the causes of action, and not otherwise ; and that the plaintiffs by deed released A., B. and C. from the causes of action. Replication, that this deed was a deed of assignment by A., B. and C. of their estate and effects for the benefit of their creditors, and contained words purporting, if considered without reference to any other part of the deed, to release as in the plea pleaded, but that, in another and earlier part of the deed, it was agreed and declared in the words following, that is to say, "that it shall be lawful for the creditors to execute these presents without prejudice to any mortgage, lien, or security which they may have for their debts, or any part thereof, or to any claim against any surety or sureties, or any other person or persons who may be liable for the payment thereof ;" and that all the creditors who executed the deed, executed the same without prejudice, as aforesaid ; and so the plaintiffs say that the defendant was not released, as in and by the plea is supposed :—Held, that, taking the plea and replication together, the deed appeared to amount only to a covenant not to sue A., B. and C., and not to a release ; and consequently that the liability of the defendant, whether joint only, or joint and several, was not thereby discharged. *Willis v. De Castro*, 4 C. B., N. S. 216 ; 27 L. J., C. P. 243.

And see PRINCIPAL AND SURETY.

Parol Expression of Intention.]—A. was entitled to a bond into which B. had entered to secure payment of a sum of money. B. was about to marry, and A. being informed of that fact, told him, "I will not distress you about the bond ; I have given it up ; I shall never enforce it ;" but on being requested to give up the bond, she said, "No, I will be trusted, but he may rely on my word." B. married. A. afterwards married, and her husband and herself put the bond in suit. B. filed a bill in equity to restrain their proceedings, alleging that he had married on the faith of the promises made by B. :—Held, that he was not entitled to an injunction, for that what passed between the parties was neither a legal contract nor a misrepresentation of facts, but only an expression of an intention, the performance of which could not be enforced. *Jorden v. Money*, 5 H. L. Cas. 185 ; 23 L. J., Ch. 865.

Effect on Assignee of Bond.]—A covenant not to sue upon a bond during the life of the obligor ; and that if any person, to whom the obligee should assign the bond, should recover the principal, the obligee would pay the obligor during his life interest on the amount re-

covered, is no bar to an action by the assignee of the bond in the name of the obligee. *Morley v. Freer*, 6 Bing. 547 ; 4 M. & P. 305.

Consideration.]—At the time of executing a bond to secure a sum of money, the obligors procured a letter from the obligee, stating his intention not to call in the money within a specified period, if the interest was regularly paid :—Held, to be a binding undertaking. *Norton v. Wood*, 1 Russ. & Mylne, 178.

A., being indebted to B., entered into an agreement, not under seal, for the repayment of the money, B. to hold a policy on A.'s life as security. B. died, and her executors reckoned the debt among her assets, and paid probate and legacy duty upon it. Communications took place between the debtor and the executors on the one hand, and the executors and residuary legatees on the other hand, as to not enforcing the debt upon payment by the debtor of the probate and legacy duty thereon. The debtor did in fact pay such duties, and the executors withdrew their claim on the policy, but neither was the agreement surrendered to A. nor cancelled, nor was any release of his debt executed :—Held, that the communications amounted to an agreement to release the debt, and that the payment of the duties was a sufficient consideration. *Taylor v. Mannors*, 1 L. R., Ch. 48 ; 35 L. J., Ch. 128 ; 11 Jur., N. S. 986 ; 13 L. T. 388 ; 14 W. R. 154.

b. In other Cases.

By Appointment as Executor.]—B. borrowed 1,100*l.* from his step-mother, who lived in his house, paying 212*l.* 10*s.* a quarter for board ; and it was agreed that the debt should be paid off by a deduction of 100*l.* from each quarter's payment. Deductions of this amount were made for two quarters, but on the third quarter-day the creditor refused to make any further deduction, and paid the full amount of 212*l.* 10*s.*, and continued down to the time of her death (which took place more than four years afterwards) to pay to B. the like quarterly sum. B. was appointed sole executor of his step-mother, and proved the will :—Held, that the debt was gone ; first, because the appointment of B. as executor released the debt at law, and any claim in equity was rebutted by evidence of a continuing intention on the part of testatrix to give ; and secondly, because the intention of the testatrix to give B. the 900*l.* was completed by nine quarterly payments of 212*l.* 10*s.* each. *Strong v. Bird*, 18 L. R., Eq. 315 ; 43 L. J., Ch. 814 ; 30 L. T. 745 ; 22 W. R. 788.

Reservation in Lease.]—By a deed of even date with a lease, the lessor covenanted that the lessee should retain part of each year's rent until satisfaction of a debt due from the lessor to the lessee :—Held, that though the covenant might be pleaded at law as a release pro tanto of the rent, this was only to avoid circuity of action, and the covenant was not for all purposes a release. *Ledger v. Stanton*, 2 Johns. & H. 687.

An indenture of lease was made on the 28th of January, 1832, for a term of ninety-one years, reserving a rent, and containing a covenant by the lessee to execute specified improvements upon the demised premises on or before the 1st of May, 1834, or pay an additional rent. The

original rent was regularly paid, and receipts given for it; but the improvements, as specified in the covenant, were never made, while other and more expensive improvements were executed to the probable knowledge of the lessors; and the additional rent was never demanded or paid. In an action in 1869 to recover twelve and a half years' arrears of the additional rent:—Held, that it was not misdirection to instruct the jury, upon the issues raised, that they were at liberty, upon the facts, to presume that a release of the covenant had been executed. *Tennent v. Neil*, 5 Ir. R., C. L. 418—Ex. Ch.

A jury may be instructed that they are at liberty, upon evidence of long-continued non-observance, to presume a release of a covenant, where, consistently with the evidence, the release to be presumed might have been executed before the accrual of the breach complained of. *Id.*

Acknowledgment in Deed.—An acknowledgment in a deed by a vendor that the purchase-money has been paid, and that the vendor is therewith fully satisfied, amounts to a release. *Faucus v. Porter*, 3 C. & K. 309.

Action for dividends sold and assigned. At the trial it appeared that the plaintiff agreed to sell to the defendant certain dividends for 175*l.*, but after the bargain was made, it was found that an order of the Court of Chancery was necessary before the dividends could be received by the defendant, and a dispute having arisen as to which party was to pay the costs of obtaining this order, it was agreed that the deed of transfer should be executed, and the question of costs referred to two solicitors. The deed was accordingly executed, and 125*l.* paid to the plaintiff. The deed, however, stated, that the whole purchase-money was paid, and contained a release in the usual way:—Held, that the plaintiff could not recover the remainder of the purchase-money, as the debt only accrued upon the execution of the deed, and at the same time the debt was released. *Baker v. Heard*, 5 Ex. 959; 20 L. J., Ex. 444.

Compromise of Action.—In an action for entering the plaintiff's close, and carrying away hay, the defendants pleaded, that the trespasses were committed by them jointly with C., and that afterwards certain disputes were pending between C. and the plaintiff, concerning claims of C. against the plaintiff, in respect of the farm occupied by him under the plaintiff, and concerning claims by the plaintiff against C. in respect of the causes of action in the declaration mentioned; and that the plaintiff agreed to release C. from all claims, and did accordingly relinquish all claims against him in respect of the causes of action:—Held, that this plea was sustained by proof of an agreement, whereby in consideration that C. (who had been tenant of a farm under the plaintiff, and had held over the same, under colour of a claim for improvements) acknowledged that he had no claim against the plaintiff, the plaintiff "relinquished all claims against C. for mesne profits and rent, or for holding over," the action being substantially an action for mesne profits. *Hay v. Moorhouse*, 8 Scott, 156; 6 Bing. N. C. 52.

Assignment of Remedies.—To an action by indorsees against an indorser of a bill of ex-

change, he pleaded a deed of release, alleged to have been executed by the plaintiffs and other creditors of one Crokot, a prior indorser. The deed appeared to have been executed by the plaintiffs alone, and was in form a mere assignment by the plaintiffs to one Souter, of the debt due to them from Crokot, putting Souter in their place with regard to the remedy against Crokot on the bill, the consideration for such assignment being 2*s.* 6*d.* in the pound on the amount of the debt:—Held, that this deed did not sustain the plea. *Houlditch v. Cauty*, 6 Scott, 209.

2. CONSTRUCTION AND OPERATION.

a. Recitals.

Restraint by.—General words in a release are to be limited and restrained by the particular words in the recitals. *Boyes v. Bluck*, 13 C. B. 563; 22 L. J., C. P. 173.

The defendant having given the plaintiff a promissory note for 40*l.*, in consideration that he would withdraw an execution from the premises of the former, the plaintiff executed a general release of all suits, which, after reciting the agreement to withdraw the execution, &c., proceeded to state, "that in pursuance of the agreement, and in consideration of the said sum of 40*l.*, being now so paid, as hereinbefore is mentioned, &c.:"—Held, in an action on a promissory note which had been dishonoured, that the release was no bar to the suit, as the general words were qualified by the recital, which stated only an agreement to pay, and not an actual payment of the 40*l.* *Lambourne v. Cork*, 1 D. & R. 211; S. C., nom. *Lampon v. Corke*, 5 B. & A. 606.

In an action on a covenant by S. against J. and another, a release was pleaded, which began by reciting "that various disputes were subsisting between S. and J., and actions had been brought by them against each other, which were still depending, and that it had been agreed between them, that, in order to put an end thereto, J. should pay S. 150*l.*, and each should execute a release to the other of all actions, causes of action, and claims brought by him, or which he had against the other;" and then proceeded in the usual general words to release all actions, &c., whatsoever:—Held, that the effect of the general words was confined by the recital to actions then commenced, and in which S. was the party on one side, and J. on the other, and that it could not be pleaded to an action brought by S. against J. and others jointly; and that parol evidence was admissible to shew, that, at the time of executing the release, there were mutual actions depending between S. and J. for other causes than that of the present suit, and for such causes only. *Simons v. Johnson*, 3 B. & Ad. 175.

A release, though unlimited in its terms, held, from the recitals and context, to operate only as to a particular sum mentioned in the recitals. *Lindo v. Lindo*, 1 Beav. 496.

A release contained in a deed, which recited that the defendant stood indebted to his creditors in the several sums set to their respective names, and that they had agreed to take from the defendant 15*s.* in the pound upon the whole of their respective debts, whereby the creditors, in consideration of 15*s.* in the pound paid to them before executing the release, each and every of them did release the defendant from all manner

of actions, debts, claims, and demands in law and equity, which they or any or either had against him, or thereafter could, should, or might have, by reason of any thing, from the beginning of the world to the date of the release, was held to release nothing but the respective debts, and all actions and demands touching them; for the general words of release have reference to the particular recital, and shall be governed by it. *Payler v. Homersham*, 4 M. & S. 423.

Therefore, where to an action by the plaintiffs on the defendant's bond, the defendant pleaded this release:—Held, that the plaintiffs, in their replication, might plead that the bond was given by the defendant with others, as a security for the repayment of bills drawn upon them by the defendant, and for moneys advanced to him, and that the sum set against their names in the release was due to them from the defendant on the day of the release on his own account, and the moneys intended to be secured by the bond, although part was due at the time of executing the release, were not, nor was any part included or meant by them or by the defendant to be included in the sum set against their names or in the release. *Ib.*

See also DEED AND BOND.

b. Extending to what Matters.

Unexpected Accession of Property not included.—In consideration of certain payments by an executrix, persons interested in the estate gave a release of all claims on the estate to the executrix. It was afterwards discovered that property in which the testator was entitled to a share had during his life been sold at an under-value. The executrix instituted and succeeded in a suit to set the sale aside, and recovered a large sum of money as part of the testator's estate:—Held, that this money was not included in the release, and that the persons who gave the release were entitled to share in the money so recovered as part of his estate. *Hawkins v. Jackson* (2 Mac. & G. 372) distinguished. *Turner v. Turner*; *Hall v. Turner*, 14 Ch. D. 829; 42 L. T. 495; 28 W. R. 859; 44 J. P. 734.

By a deed, reciting that all the testator's assets save a small sum retained to meet contingencies, and some doubtful debts, had been received by the executrix and applied in payment of debts, and that there remained only a sum sufficient to pay part of the legacies, the legatees, in consideration of the sums paid on account of these legacies, released the executrix from all claims which they then had, or thereafter might have, against her as executrix, or against the residuary estate:—Held, that the deed did not operate to release the right of the legatees to be paid out of further assets which afterwards came, unexpectedly, to the hands of the executrix. *Lowe v. Lowe*, 8 Ir. R., Eq. 327.

Purpose and Intent.—A release must be construed according to the particular purpose and intent for which it was made: as, where A. and B., being in partnership, and in insolvent circumstances, A. alone gave a general release by deed to the plaintiffs, to whom himself and B. were jointly indebted, with provisions that it should not operate to release or prejudice any demands which the plaintiff had against B., either separately or as a partner with A., on the joint effects of A. & B., or either of them,

and that they might commence an action either against A. jointly with B., or A. separately, for the purpose of enabling the plaintiffs to recover payment from the joint estate of A. and B., or from B.'s separate effects; and the plaintiffs brought an action for money paid against both, and A. pleaded the release, on which the plaintiffs set it out in their replication, and averred that the action was prosecuted against both, for the purpose of enabling the plaintiffs to enforce payment from A. and B., either from their joint estate, or separate estate of B.:—Held, that the action was authorized by the deed. *Solly v. Forbes*, 4 Moore, 448; 2 B. & B. 38.

Where the words of a release, executed according to the directions of an award, might extend to matter the parties did not intend the arbitrators to adjudicate upon, and on which they did not adjudicate, the generality of the words will be restrained by the intention of the parties. *Upton v. Upton*, 1 D. P. C. 400.

Though a release is general in its terms, the court will limit its operation to matters contemplated by the parties at the time of its execution. *Lyall v. Edwards*, 6 H. & N. 337; 30 L. J., Ex. 193.

General words in a release are limited to those matters which were specially in the contemplation of the parties when the release was given. *London and South Western Railway Company v. Blackmore*, 4 L. R., H. L. 610; 39 L. J., Ch. 713; 23 L. T. 604.

A release, general in its terms, limited so as not to include a particular debt unknown to exist at the time of its execution and not intended to be released. *Moore v. Weston*, 25 L. T. 542.

In an action by the plaintiff against the defendant for alleged breaches of covenants contained in their deed of partnership, and for fraud alleged to have been committed by the defendant in obtaining a deed of dissolution thereof; it appeared that as regards the breaches the plaintiff had, by the deed of dissolution, in consideration of the defendant having given up the whole of the partnership assets to the plaintiff, released the defendant from all matters and things whatever touching or concerning the joint trade, without prejudice nevertheless to the covenants and agreements in the deed of dissolution contained:—Held, that as the release could not be separated from the rest of the deed of dissolution, and as the plaintiff had not disaffirmed, and was not in a condition to disaffirm or rescind the contract, of which the release formed part, the same was binding upon him. *Urquhart v. Macpherson*, 3 App. Cas. 831.

What Debts.—To an action for 337l. 1s. 10d. the defendant pleaded a release generally, to which the plaintiff replied non est factum. The facts were, that the defendant being indebted to the plaintiff in 337l. 1s. 10d., and the plaintiff being indebted to the defendant in 142l. 9s. 7d., an arrangement was made by which the defendant was to be released on payment of 10s. in the pound to his creditors by a third party. Accordingly, a composition deed was executed by the plaintiff and the other creditors, which recited that the defendant was indebted to the several creditors, parties thereto, in the sums set opposite to their names; and such creditors, in consideration of the covenant to pay them 10s. in the pound on the amount of their debts, released the defendant from all debts

then owing to them by the defendant. When the deed was executed by the plaintiff, a blank was left for the sum to be set opposite to his name. This blank was subsequently filled up, without his knowledge or authority, by inserting in it the full amount of 337*l.* 1*s.* 10*d.* due from the defendant to the plaintiff. The jury found that it was the intention of the parties that the deed should operate only on the balance due by the defendant to the plaintiff, after setting off the cross debt due by the plaintiff to the defendant:—Held, that the effect of the deed was to release the balance only, and not the whole debt of the 337*l.* 1*s.* 10*d.*, and that the issue on non est factum ought to be found for the plaintiff. *Fazakerly v. McKnight*, 6 El. & Bl. 795; 26 L. J., Q. B. 30; 2 Jur. N. S. 1020.

A release can only operate on an existing debt or liability. *Ashton v. Freestun*, 2 M. & G. 1; *S. P.*, *Hartley v. Manton*, 5 Q. B. 247.

Judgment Debt.—A debt of record may be discharged by a release under seal. *Barker v. St. Quintin*, 12 M. & W. 441; 1 D. & L. 542; 13 L. J., Ex. 144.

Evidence to Explain.—A., the mother of B., having entered into a bond on his behalf for 1,000*l.*, B. executed an indemnity bond of the same date, viz. 26th April, 1800, in the sum of 2,000*l.* conditioned for the payment of 1,000*l.* three months after her decease. On the 9th February, 1801, A. made a codicil to her will, by which she relinquished two debts due from him, one of 1,000*l.* and one of 500*l.*, and desired him to be punctual in indemnifying her estate against the 1,000*l.* bond of the 26th April. Three days after the execution of this codicil, A. executed a release to B., in which, after mentioning a sum of 500*l.*, for which she had his bond, and two sums of 480*l.* and 300*l.* due to her from B., for which she had receipts, expressed that she had agreed to release B. from those sums, "and of and from all or any other sum or sums of money, claims, and demands thereby secured, or intended to be secured, and all other sum or sums of money, claim, and demand whatsoever;" and released him accordingly from those sums, and all claim on account of those sums, "or for or on account of any other matter, cause, or thing whatsoever:"—Held, first, that this release did not extend to the indemnity bond; and, secondly, that no intrinsic evidence could be admitted to explain the intentions of A. as to the release. *Butcher v. Butcher*, 1 N. R. 113. See *Simons v. Johnson*, ante, col. 562.

Mistake as to Amount.—To an action for recovery of interest due to the plaintiff, on the sale by him to the defendant of a policy of insurance on life, he pleaded that, by indenture between plaintiff and defendant, the plaintiff released, exonerated, and discharged the defendant of and from all claim and demand whatsoever for, upon, or in respect of the purchase of the policy; and all moneys due to the plaintiff in respect thereof. It appeared that the policy was sold subject to a condition that the purchaser should pay down a deposit of 20*l.* per cent., and sign an agreement for payment of the remainder on the 8th of June, 1835; but should the completion of the purchase be delayed, the purchaser was to pay interest on the balance of the purchase-money, at 5*l.* per cent. per annum,

from that day until the purchase was completed. The defendant did not complete the purchase till January, 1836, when he paid the purchase-money in full, with interest from the 8th of June; and an assignment of the policy, duly executed by the plaintiff, containing a release in the terms stated in the plea, and having a receipt for the whole purchase-money indorsed, was handed to the defendant. It was afterwards discovered that the plaintiff's attorney, on that occasion, under-calculated the interest by 34*l.*:—Held, that the release was a bar to an action for that sum. *Harding v. Hambler*, 3 M. & W. 279; 1 H. & H. 48; 2 Jur. 305.

Mistake as to Effect—Signature in what Character.—Declaration on a guarantee by the defendant for payment of goods supplied by the plaintiffs to J. Plea, that after J. became indebted to the plaintiffs, J. being also indebted to other persons, by deed between J. of the first part, E. and B. (one of the plaintiffs), trustees, for themselves and the rest of the creditors, of the second part, and the several other persons whose names and seals were thereunto subscribed and set, being creditors of J. of the third part, after reciting that J. was indebted to the parties thereto of the second and third parts, in the several sums set opposite to their names in the schedule thereunder written, which he was unable to pay in full, it was witnessed, that J. assigned all his estate and effects to the trustees, to pay rateably and without preference to themselves and their partners, and the parties thereto of the third part, the sums set opposite their names in the schedule, and in consideration of the assignment, the several creditors, parties thereto of the second and third parts, released J. from all debts which they or their partners might have against J. up to the date thereof. Replication, that B. executed the deed in his character of trustee, and not in his character of creditor, and that he did so merely for the purpose of declaring the trusts of the deed, and not with any intention of releasing the debt, that he did not sign or seal the schedule, nor was the debt of the plaintiffs contained therein, and that if the deed operated in law as a release, it was executed by mistake, and in ignorance that such would be its legal effect:—Held, first, that the release being general in its terms, the execution of the deed by B. operated as an extinguishment of the debt due to the plaintiffs. *Tvede v. Johnson*, 11 Ex. 840.

Held, secondly, that the facts disclosed by the replication, did not afford any answer to the plea on equitable grounds. *Ib.*

Action on Security after Debt Released.—A., the pursor of a mine, in order to carry it on, raised money by the deposit of a promissory note made in his favour by seven of the shareholders, and which two other shareholders had refused to sign, and applied the money so raised in paying the workmen. At a subsequent meeting of the shareholders and creditors, an assignment of the mine, in order to sell it, and pay the debts, was resolved upon, and A. then claimed to be admitted as a creditor "for money which he had raised on note of hand to pay the workmen." A deed of assignment was accordingly executed, to which all the adventurers were parties of the first part, and the several persons whose names were thereunto subscribed, "as

creditors of the several other persons therein described of the first part as adventurers, for supplies to, and debts incurred by, them for or in respect of the mine, to the amounts set opposite their respective names," of the second part. This deed, after reciting that the shareholders had in the prosecution of the mine incurred debts thereon with the persons parties thereto of the second part, contained a conveyance in trust for those creditors, and a provision that no action should be brought by any of the persons parties thereto of the second part against all, any, or either of the persons parties thereto of the first part, for the recovery of any debts due or owing upon the mine, or in anywise relative thereto; and that, if any such action was brought the deed might be pleaded as a release. A. executed the deed, the amount of the note and interest thereon being placed against his name. To an action by A. upon the note against the seven persons who signed it, they pleaded the deed as a release, averring that A. signed it as a creditor of the parties thereto of the first part, in respect of the causes of action in the declaration, which allegation was traversed by the replication:—Held, that A. must be held to have signed the deed in respect of his claim for the advance of money raised upon the note and applied for the use of the mine, and not in respect of his claim upon the note itself, which therefore was not released, and that consequently the plea was not proved. *Lanyon v. Darcy*, 11 M. & W. 218; 12 L. J., Ex. 200.

If A. gives B., without consideration, a promissory note, to be negotiated by B. as a security for money, and the indorsee for a valuable consideration, without notice, releases B. from the note, and all claim and demand touching the matters in respect of which the maker's promises were made, this does not so extinguish the consideration of the note, but the indorsee may still recover against the maker. *Curstains v. Rolleston*, 5 Taunt. 551; 2 Marsh. 207.

To an action on a joint and several promissory note against one of the makers he pleaded a release. The replication set out the release, which was contained in a deed of assignment to a trustee for the benefit of creditors, made prior to the Bankruptcy Act of 1861, wherein was contained a recital that the debtor was indebted to his several creditors in the sums set opposite to their names in the schedule thereunder written, and it averred that the note declared on was not, nor was it intended to be, included in the sum set opposite to the plaintiff's name in the schedule, or in the release, and that no payment on account of the note had ever been made to the plaintiff under the deed:—Held, notwithstanding, that the effect of the deed was to release the note declared on. *Wigns v. Pickwick*, 14 L. T. 521.

Conditional or Absolute.—The estate of an intestate was divided between the persons claiming to be creditors *pari passu*, and they executed a release to the administratrix from all claims. A creditor executed the deed in respect of a particular debt, which was stated. Afterwards he made a further claim against the estate of the administratrix, who had charged it with the payment of the intestate's debts:—Held, that it was barred by the release. *Bisset v. Burgess*, 23 Beav. 278; 26 L. J., Ch. 697; 2 Jur., N. S. 1221.

A release of a debt "in like manner as if the debtor had obtained a discharge in bankruptcy" is an absolute release, which, if given without the surety's consent, discharges the surety. *Cragoe or Cragoe v. Jones*, 8 L. R., Ex. 81; 42 L. J., Ex. 68; 28 L. T. 36; 21 W. R. 408.

A release reserving rights against a surety must be such that the surety's right to sue the debtor, if he pays the debt, is retained. *Id.*

Subsequent Condition.—There may be a good release with a condition subsequent. *Newington v. Levy*, 5 L. R., C. P. 607; 39 L. J., C. P. 334; 23 L. T. 70; 18 W. R. 1198. Affirmed, 6 L. R., C. P. 180; 40 L. J., C. P. 29; 23 L. T. 595; 19 W. R. 473—Ex. Ch.

Therefore a plea of a composition deed executed according to the Bankruptcy Act, 1861, in which the creditors released the debtor from their respective debts, is a valid answer to an action for any such debt, although the release is made subject to be avoided by non-payment of the composition on a subsequent day. *Id.*

Where such deed is made after action, and the plea therefore is to the further maintenance, the plaintiff may reply that the release had become avoided by non-payment of the composition, after the plea has been pleaded. *Id.*

A release from suits may be made subject to a condition subsequent, so that if such condition subsequent is not complied with, the release will be void, and the suits may proceed. *Hall v. Levy*, 10 L. R., C. P. 154; 44 L. J., C. P. 89; 31 L. T. 727; 23 W. R. 393.

As to Strangers.—A deed *inter partes* cannot operate as a release to strangers; therefore, a charterparty between A. and B. in consideration of a former charterparty between A. and C., which former charterparty in consideration of the freight B. was to pay, was thereby declared null and void, A. agreeing to cancel the first in consideration of the second, and C. being thereby acquitted of all claims which A. might have against him in virtue of the first charterparty, does not operate as a release from A. to C. of the first charterparty. *Storer v. Gordon*, 3 M. & S. 308.

Void or Voidable.—A deed of inspectorship and composition made between a debtor and his creditors in Great Britain contained a covenant that in a certain event the debtor would, if required by the inspector, assign all his property to the inspector for the benefit of the creditors; that upon such assignment the inspector should give a certificate that the debtor had so assigned, and that thereupon the debtor should be released from his debts. The deed contained a proviso that it should "cease, determine, and be void" if all the creditors in Great Britain to a certain amount did not execute it within six months from its date. The debtor was duly required by the inspector to execute an assignment, and did so, and received a certificate:—Held, that the deed was not void, but voidable only; that the release constituted a good defence against a creditor who had executed the deed, and who, having had notice that all the creditors had not signed the deed, had endeavoured to obtain payment of a dividend out of the property assigned to the inspector. *Dunn v. Wyman*, 51 L. J., Q. B. 623.

Semble, the proviso was inserted in the deed

for the benefit of the debtor, and a creditor who had executed could not take advantage of it. *Ib.*

c. Joint or Separate Claims.

Co-Debtors.—M. & H. who were partners, were jointly liable to G. on a bill of exchange accepted by them for goods sold to them by him. They dissolved partnership, and after their acceptance had been dishonoured, H. filed a petition for liquidation by arrangement, and a composition was accepted by his creditors and duly paid; B., to whom G. had indorsed the bill, proving under the liquidation, and receiving the composition. G. himself afterwards filed a petition for liquidation by arrangement, and a composition was agreed to and paid, the trustee being authorized by the creditors to transfer to G. the debts which were set forth in a schedule annexed, but which did not include the liability of M. in respect of the acceptances given by him and H.; the reason for such omission being that B. was at that time the holder of the bill, and the debt was considered by the trustee of G.'s estate of no value, and not from any intention of reserving to the trustee any right in respect of it. The bill was afterwards given by B. to G., and in an action against G. by M. for a debt due to him separately, G. set off what was due to him on the acceptance of M. & H.:—Held, that the discharge of H. under the liquidation by composition under the Bankruptcy Act, 1869, did not release M., but left him liable to G., who, whether the right to sue for it was legally in him or in his trustee in trust for him, might maintain an equitable plea of set-off. *McGrath v. Gray*, and *Gray v. McGrath*, 9 L. R., C. P. 216; 43 L. J., C. P. 63; 30 L. T. 16; 22 W. R. 409.

Joint Debtors.—A bank proved in the liquidation of A. for a debt of 5,600*l.*, which they claimed from him, and afterwards sued for the same debt S., who had given them a guarantee of 1,000*l.* on behalf of A., and whom they alleged to have been a partner with A. S. denied the partnership, and ultimately a compromise was entered into between him and the bank, by which the bank was to receive 2,800*l.* in satisfaction of their claim against him and against another person who had given another guarantee on behalf of A. The guarantee of S. was given up to him, with a receipt indorsed upon it by the bank, expressed to be for 1,000*l.*, "in payment and discharge of the within guarantee, and also of all claims against him in reference to or in connexion with" A.'s firm:—Held, that assuming S. to have been a partner with A., this receipt did not operate as a release of S., and consequently that the bank was entitled to maintain their proof. *Good, Ex parte, Armitage, In re*, 5 Ch. D. 46; 46 L. J., Bk. 65; 36 L. T. 338; 25 W. R. 422—C. A.

The rule that a release of one joint debtor operates to release the other is founded upon the fact that the second would, if he was sued by the creditor, have a right to enforce contribution from the first. The rule, therefore, does not apply to a release of a merely ostensible partner, between whom and the person with whom he has held himself out to be a partner, no such right of contribution exists. *S. C.*, 5 Ch. D. 46; 46 L. J., Bk. 65; 35 L. T. 554; 25 W. R. 83.

A release to one of two joint acceptors enures to discharge both. *Rez v. Bayley*, 1 C. & P. 435.

Where three persons entered into a joint bond, and it did not appear either on the bond or by the condition, that two of them were sureties for the other:—Held, that a release given by the obligee to the representative of one of the deceased obligors was no answer to an action against the surviving obligors. *Ashbee v. Pidduck*, 1 M. & W. 564.

Where Separate Debts.—A testator bequeathed all debts and sums of money which should at the time of his death be due to him by B., unto B., his executors, administrators, and assigns, for his and their own use and benefit, and he directed his trustees to deliver up to B., his executors, administrators, or assigns, all securities which he should at the time of his death hold for such debts and sums of money, and also, when required by B., his executors, administrators, or assigns, to execute to him or them a release from all such debts and sums of money. At the date of the will and of the testator's death, B. owed the testator a debt of 50*l.*, and he and his partner owed the testator 2,600*l.*; which the latter had lent to the firm, and for which B. and his partner had given the testator their joint and several promissory notes. B. and his partner having filed a liquidation petition, the executors claimed to prove in the liquidation for the 2,600*l.*:—Held, that as there was a separate debt due from B. to which the release could apply, it could not be extended to the partnership debt, and that the executors' proof must be admitted. *Kirk, Ex parte, Bennett and Glave, In re*, 5 Ch. D. 800; 46 L. J., Bk. 101; 36 L. T. 431; 25 W. R. 598—C. A.

The defendant and N. gave the plaintiff their joint and several promissory note to secure a separate debt due from each of them. The plaintiff afterwards executed a deed of release to N.:—Held, that although this release discharged both as to the note, it did not enure to the discharge of the separate debt of the defendant. *Cocks v. Nash*, 4 M. & Scott, 162; 9 Bing. 341.

To an action by a banking company, on a guarantee given by the defendant to secure advances made by the company to M., M. and B., carrying on business under the name of M. & Co., the defendant pleaded, that by deed between M., M., L. and B., of the first part, W., H. and O., of the second part, and the several persons or partnership firms who should execute the deed being creditors of M., M., L. and B., of the third part, H. being a member and partner in the banking company, released M., M., L. and B. from all actions, debts, &c. The defendant, in support of his plea, gave in evidence a composition deed made between M., M., L. and B., of the first part, W., H. and O., of the second part, and the several persons or partnership firms being creditors of M., M., L. and B., who should have executed or who should execute the composition deed, of the third part. The deed, after reciting that M., M., L. and B. were indebted to W., H. and O., and to the several parties to the deed of the third part, and being unable to pay their debts, had conveyed all their property to W., H. and O., in trust for payment of their debts, stated, that in consideration thereof, each of the creditors parties to the deed of the second and third parts, did for themselves, their heirs, executors, &c., and partners, release M., M., L. and

B. from all actions, debts, demands, &c. At the date of this release, a separate debt of 2*l.* 15*s.* was due from M. to H., and H., at the date of the release, was a shareholder in the banking company. H. executed the deed in his own name:—Held, that the plea was not proved, the release from M., M., L. and B. not including the debt due from M. & Co. to the banking company, but applying only to debts due to such partnership firms as should execute the deed of the third part. *Bain v. Cooper*, 9 M. & W. 701; 11 L. J., Ex. 325.

An action was brought by the plaintiff against the defendant to recover the rent of property which had originally belonged to R. A claim being made by the executors of M. (the father of the plaintiff) to the rent, an issue under the Interpleader Act was directed (in which the executors were plaintiffs, and the present plaintiff defendant), to try the right to the rent. A verdict was obtained by the executors, and a deed was subsequently executed by the plaintiff, of the first part, the children of M., of the second part, and the executors, of the third part, whereby, after various recitals, in none of which any reference was made to the issue, the plaintiff released the parties of the second and third parts from all costs incurred by them, and all claims and demands in respect of certain transactions therein mentioned; but there was a proviso in the release, that it should not extend to or affect, or in any manner prejudice, the rights or title which the plaintiff claimed in the estate or effects of R., or any costs, charges or expenses incurred by the plaintiff in relation thereto. The parties of the second and third parts, in turn, also released the plaintiff from all costs, charges or expenses which they, or either of them, might have incurred in and about all the matters therein particularly mentioned, and also of and from all claims and demands which the parties of the second and third parts might have or claim against the plaintiff on account of any transaction which might have taken place between them or any or either of them:—Held, that the costs of the interpleader issue were not included in the release given to the plaintiff; that the release extended only to joint claims which the parties of the second and third parts had against the plaintiff, and not to a claim which those of the third part alone had against him. *Major v. Salisbury*, 2 D. & L. 763; 14 L. J., Q. B. 118; 9 Jur. 623.

Reservation of Rights.—When a release is given to one of two partners, with a proviso that it shall not prejudice the claims of the releasor against the other partner, it only operates in favour of the partner to whom it is given. *Solly v. Forbes*, 2 B. & B. 38; 4 Moore, 448.

A release to one of two sureties who had entered into a joint and several covenant to pay an annuity, in default of payment by the grantor, was accompanied by a proviso, that such release should not prejudice the right of the grantee to enforce its payment against the grantor and the other surety, or either of them:—Held, that the proviso restrained the operation of the release, and that the liability of the co-surety was not affected by such release. *Thompson v. Lack*, 3 C. B. 540; 16 L. J., C. P. 75; *S. P., Kearsley v. Cole*, 16 M. & W. 128; 16 L. J., Ex. 115.

— **Parol Evidence.**—To a declaration

against a maker of a note, he pleaded, that the note was a joint and several note of his and A., and that A. had been released. Replication, that A. had been so released at the defendant's request, and that the defendant, in consideration of such release at his request, ratified the promise in the declaration, and promised that he would remain liable on the note, as if there had been no such release:—Held, that the replication, setting up a parol contract to avoid the release, was bad. *Brooks v. Stuart*, 1 P. & D. 615; 9 A. & E. 854.

3. WHO CAN RELEASE.

Nominal Parties.—Where a lessor, with the permission of a bailiff, who had made for her a distress for rent, commenced in the bailiff's name an action against the sheriff for taking insufficient pledges, and the bailiff afterwards, without the lessor's privity, released the sheriff, the court set aside the release, and a plea thereof puis darrein continuance. *Hickey v. Burt*, 7 Taunt. 48.

If a person who is sued by a landlord, in the name of his tenant, procures a release from the nominal plaintiff, the court will order the release to be delivered up, and permit the landlord to proceed. *Payne v. Rogers*, 1 Dougl. 407.

Co-Contractors — Fraud.—Where there are several plaintiffs, and one fraudulently gives a release to prejudice the real plaintiff, and that release is pleaded, the court will set aside that plea, and order the release given to be delivered up to be cancelled. *Barker v. Richardson*, 1 Y. & J. 362.

If one of two plaintiffs releases a defendant after action without the consent of the other, the court will not set aside such release, unless fraud is clearly established. *Arton v. Booth*, 4 Moore, 192.

To induce the court, on a summary application to set aside a plea of a release by one of two co-plaintiffs, it must be clearly shown that the release had been obtained by fraud between the releasor and the defendant. *Crook v. Stephens*, 7 Scott, 848; 5 Bing. N. C. 688; *S. P., Wild v. Williams*, 6 M. & W. 490.

Fraud upon the releasor is not a ground for setting aside the plea, since that may be replied. *Id.*

Upon a very strong case of fraud, not otherwise, the court will control the legal power of a co-plaintiff to release puis darrein continuance. *Jones v. Herbert*, 7 Taunt. 421.

To a plea that the plaintiff had released one of two joint obligors, the plaintiff replied that the release was given with an undertaking on the part of the other obligor, that the release should not operate in his discharge:—Held ill. *Cocks v. Nash*, 9 Bing. 341; 4 M. & Scott, 162. See *Brookes v. Stuart*, 1 P. & D. 615; 9 A. & E. 854.

Assignees.—Where one of several assignees of a bankrupt releases the cause of action, and the release is pleaded, the court will set aside the plea, suspicion being thrown on the defendant's conduct in the transaction, the co-plaintiffs indemnifying the plaintiff, who had given the release, against costs. *Johnson v. Holdsworth*, 4 D. P. C. 63.

Where a release by the obligee of a bond was pleaded to an action by his assignee against the

obligor in the name of the obligee:—Held, that the special circumstances under which the release was given, and that it was obtained by fraud, might be replied to avoid the release. *Craig v. D'Aeth*, 7 T. R. 670, b; 1 B. & P. 448, n.

Executors.—Where an action was brought by two as executors, the court refused to set aside a plea of release given by one. *Anon.*, 1 Chit. 391, n.

And where an action was brought by two out of four executors, and the two who were not joined in the action released puis darrein continuance, the court refused to set aside the plea, the plaintiff having failed to make out a case of fraud. *Herbert v. Pigott*, 2 C. & M. 384; 4 Tyr. 285; 2 D. P. C. 392.

Where husband and wife lived separately under a deed, by which he stipulated that she should enjoy as her separate property all effects, &c. which she might acquire, and that he would not do any act to impede the operation of that deed; and the wife having as executrix commenced an action on a promissory note against the defendant, in the names of her husband and herself, and the husband released the debt, which release was pleaded puis darrein continuance: the court ordered such plea to be taken off the record, and the release to be given up to be cancelled. *Innell v. Newman*, 4 B. & A. 419.

Partners.—A declaration on a policy of insurance on goods on board a ship, at the suit of D. W. and A. W., alleged that the policy was made by them as well in their own name as for and in the name of every other person to whom the same did appertain; and it averred that Z. and the plaintiff A. W., or one of them, were or was, then and thenceforth until the loss, interested in the goods. The defendant pleaded a release by D. W. for himself and his partner A. W.:—Held, that the plea was a good answer to the action. *Wilkinson v. Lindo*, 7 M. & W. 81.

Where two plaintiffs (as partners) instructed their attorney to proceed to trial in an action brought by them against the defendant for misrepresentation as to their solvency, and a few days before the trial, one of them gave a release to the defendant, without the knowledge of or communication with such attorney, the court refused to interfere. *Furnival v. Weston*, 7 Moore, 356.

A partner sued in equity for a money demand, alleged by his bill that his co-partner had released the debt, which was still due to the partnership:—Held, that the release created such a difficulty in suing at law for the debt, that the bill was not demurrable for want of equity. *Piercy v. Fynney*, 12 L. R., Eq. 69; 40 L. J., Ch. 404; 19 W. R. 710.

In an action for a partnership debt, a covenant not to sue entered into by one only of the partners cannot be set up as a release. *Walmesley v. Cooper*, 3 P. & D. 149; 11 A. & E. 216.

Trustees.—A plea puis darrein continuance of a release by one of several plaintiffs was set aside without costs, on the terms of an indemnity being given to the plaintiff who had released the action, although the consent of such plaintiff had not been obtained before the action was brought, it appearing that no consideration had been given for the release, and that the

plaintiffs sued as trustees for the creditors of an insolvent person. *Mountstephen v. Brooke*, 1 Chit. 390.

A general release given by a trustee, in fraud of his trust, is void: where, therefore, a testator bequeathed premises to a trustee, to receive the rents for the benefit of his children, and gave him power to demise the same for a term, which he did, and received the rents, but did not apply them to the purposes of the trust; on which a bill in equity was filed against him, by one of the parties beneficially interested under the will, and a receiver was appointed, who sued the lessees in the name of the trustee for nonpayment of rent, and they pleaded a release, executed to them by the trustee pending the suit, the court ordered the plea to be set aside, and the release to be delivered up to be cancelled. *Manning v. Cox*, 7 Moore, 617.

Pauper Litigants.—A plaintiff suing in formâ pauperis may execute a release of the cause of action to the defendant without the consent or knowledge of his attorney, if it is done bonâ fide with a view to settle the action, and not from any intention to deprive the attorney of his costs. *Jones v. Bonner*, 5 D. & L. 718; 2 Ex. 230; 17 L. J., Ex. 343.

4. CONTRACTS TO GIVE.

Extent of.—The defendant agreed to pay to the plaintiff within two months 1,500*l.*, and, in consideration thereof, the plaintiff agreed to deliver up all securities in his possession, under which he claimed any debt against the estate of W. deceased, to execute a general release of all claims on the estate of W. for matters between the plaintiff and W. to the day of his decease, and between the trustees and representative of W. to the date of the agreement, except 600*l.*, and interest due on a bond given by W., which the defendant agreed to pay to the person entitled thereto. In an action, stating mutual promises to perform the agreement, the plaintiff averred that he was ready and willing to deliver up all securities under which he claimed any debt against the estate of W., and to execute a general release of all claims on the estate of W. for matters between the plaintiff and W., to the day of his decease, and assigned for breach nonpayment of the 1,500*l.* and 600*l.*, or either of them:—Held, that the release described in the declaration was not co-extensive with that agreed to be given, and that this defect would not be cured by a verdict; but that in this case it appeared that the payment of the money was intended to precede the release, and, therefore, the averment was not necessary, and the declaration well enough. *Smith v. Woodhouse*, 2 N. R. 233—Ex. Ch.

A declaration, after reciting that defendant was possessed, for the residue of a term of years, of a messuage and premises, and of fixtures annexed to the premises, averred, that the plaintiff agreed with the defendant to purchase of him the residue of the term in the messuage and premises, with the appurtenances and the fixtures; and the defendant agreed to give up possession of the messuage, with the appurtenances and the fixtures, on a certain day. The declaration averred, that the plaintiff tendered to the defendant, for execution, an instrument, which contained a recital that the plaintiff had lately

contracted with the defendant, for the sale to him of the residue of the term granted to him by P. in the message or tenements and hereditaments, with their appurtenances, and also all and singular the fixtures belonging to the message or tenements and hereditaments, for a certain sum, the receipt of which was thereby acknowledged:—Held, that as the agreement between the parties was for the assignment of the fixtures only, which belonged to the defendant, the recital in the instrument tendered was too large, and, therefore, that it was not such an one as the defendant was bound to execute. *Manning v. Bailey*, 2 Ex. 45; 18 L. J., Ex. 77.

Consideration—Effect of Execution.]—A defendant signed an instrument, addressed to the plaintiff, in the following terms:—"In consideration of your having, by indenture, agreed to accept payment of the debt owing to you by A., by the following instalments, (that is to say,) 10s. in the pound on the 18th of August next, I promise to guarantee the payment of the instalments:" and delivered it to the plaintiff in exchange for an indenture executed by the plaintiff.—Held, that the true construction of the instrument was, that the defendant made his promise in consideration that the plaintiff would execute an indenture, and release A.: and consequently, that the execution of the instrument was not an admission by the defendant that the plaintiff had released A., and furnished no evidence in support of an issue taken on an allegation in the declaration, that the plaintiff had released A. *King v. Cole*, 2 Ex. 628; 17 L. J., Ex. 283.

Condition Precedent.]—A declaration recited an agreement in writing, by which defendant agreed to permit plaintiff to occupy certain lands until the 29th of September, 1843, the plaintiff paying therefor on that day, as he thereby agreed to do, 30l. as rent for the same, and then to deliver up the premises to the defendant in good repair, and meantime to cultivate the same in a husbandlike manner; and that, upon the plaintiff quitting the premises, paying the rent, and observing the other stipulations, and releasing the defendant from all claims under the will of G., as also releasing to the defendant all the lands devised by G., which the plaintiff agreed to do, the defendant should pay to the plaintiff 200l., with interest from the 29th September, 1842. It was agreed that all releases required by the defendant should be prepared by his attorney. Averment, that the plaintiff was ready and willing to deliver up the premises, and to pay the rent, and to release the defendant (as agreed on). Breach, that although the 29th September elapsed, and although a reasonable time elapsed between that day and the commencement of the action for the payment of the 200l., and although no release was prepared by the defendant's attorney before that day, non-payment of the 200l. by the defendant. Plea, that the plaintiff was not ready and willing to deliver up the premises:—Held, that the acts to be done by the plaintiff were not conditions precedent to nor independent of, but concurrent with, the payment of the 200l. by the defendant; that it was therefore sufficient for the plaintiff to aver his readiness and willingness to do them, without alleging performance; but that this averment was necessary, and, therefore, that the plea was good, as raising a material issue. *Giles*

v. Giles, 9 Q. B. 164; 15 L. J., Q. B. 387; 11 Jur. 83.

Another plea, that the plaintiff was not ready and willing to release the defendant:—Held, that as the release was to be prepared by the defendant's attorney, and it was averred that no such release was prepared, the plaintiff's readiness to execute it was immaterial; and the plea was therefore bad, as raising an immaterial issue. *Id.*

5. OBTAINED BY FRAUD.

Voidable.]—In an action for injuries arising from a railway accident, it was pleaded that the plaintiff had, upon payment of a certain sum, released the company from all further claim. He replied that such release had been obtained by fraudulent misrepresentation of facts, and of the legal effect of the deed of release:—Held, that the fraudulent misrepresentation alleged invalidated the deed. *Hirschfeld v. London, Brighton, and South Coast Railway Company*, 2 Q. B. D. 1; 46 L. J., Q. B. 1; 35 L. T. 473.

Evidence of Fraud.]—In an action in a county court by executors, the defendant having shewn that the action was brought by one executor without the concurrence of his co-executor, put in a release which had been given to him the day before the trial by the non-concurring executor. The judge refused to allow the plaintiff's counsel to examine the executor, who had executed the release, as to the circumstances under which he had executed it, for the purpose of eliciting from him whether it had been fraudulently obtained:—Held, that the judge was wrong in so refusing, and that such examination ought to have been allowed. *Robinson v. Vernon (Lord)*, 7 C. B., N. S. 231; 29 L. J., C. P. 135; 6 Jur., N. S. 610.

On the morning of the trial of a plaint, in a county court, at the suit of several parties the clerk of the defendant's attorney went to one of the plaintiffs, an illiterate person, and obtained his mark to a peculiarly worded release. The judge, observing that the release was evidently a trick, gave judgment for the plaintiff:—Held, that the circumstances under which the release was obtained offered some evidence of fraud, so as to justify the judge in declining to give effect to it. *Sargent v. Wedlake*, 11 C. B. 732; 15 Jur. 1134.

To support a replication of fraud to a plea of release of the debt, for which an action is brought, there must be evidence that the contents of the deed were misrepresented to the plaintiff, or that fraudulent misrepresentations were made to him to induce him to execute it. But if he merely lent his name for a collateral purpose, as to enforce contribution from a shareholder, and the action was not instituted for his benefit, and he did not instruct nor retain the attorney who brought it, such evidence will be no evidence to support the replication of fraud to a plea of the release. *Richards v. Turner*, 1 F. & F. 1. See also *ante*, col. 572.

6. PLEADING AND EVIDENCE.

Evidence—Presumption.]—If, in an action on a covenant for arrears of an annuity, the defendant pleads a release, lost by time and accident, and, to induce the jury to presume a release,

shews that the annuity was not paid for seventeen years, and that the plaintiff had borrowed money of the grantor of the annuity and regularly paid him interest, without setting off the annuity; the jury ought not to find for the defendant, unless they are satisfied that there is fair ground for supposing that at some particular period, during the seventeen years, the plaintiff actually executed a release of the annuity; and to rebut the presumption of such release, the jury may look at the situation of the parties, and take into their consideration the circumstances of the plaintiff being a near relative of the grantor of the annuity, having large expectations from him, and of the grantor being a very old man, peremptory with his relatives, and very exact and attentive to his pecuniary concerns, and therefore not very likely to leave the annuity deed in the hands of the plaintiff, if it had never been intended that it should be enforced. *Bigg v. Roberts*, 3 C. & P. 43.

A jury may be instructed that they are at liberty, upon evidence of long-continued non-observance, to presume a release of a covenant, where, consistently with the evidence, the release to be presumed might have been executed before the accrual of the breach complained of. *Tennent v. Neil*, 5 Ir. R., C. L. 418—Ex. Ch.

— **Secondary.**—The entries in the bill of costs of a deceased attorney are good secondary evidence of the execution of mutual releases. *Sheffington v. Whitehurst*, 3 Y. & C. 1.

Pleading.—A plea of release, which does not answer all that it professes to do, being bad in part, is bad in the whole. *St. Germain (Earl) v. Willan*, 3 D. & R. 441; 2 B. & C. 216.

In an action by payee against acceptor of a bill of exchange, he pleaded, that, before the bill became due, and whilst the plaintiff was the holder, and before action, the plaintiff released the bill, without alleging that the release was after the acceptance.—Held, that the plea was bad for not averring that the release was after the acceptance. *Ashton v. Freeston*, 2 Scott, N. R. 273; 2 M. & G. 1.

Action by indorsee against the maker of a promissory note. Plea, that the promise was a joint and several one, by the defendant and A., to whom one of the plaintiffs executed a release under seal. Replication, that the release was executed at the request of the defendant, who afterwards and while the note was unpaid, in consideration of such release, ratified his promise, and promised to remain liable to the plaintiffs for the amount of the note.—Held, bad, because it set up a parol exception to a release under seal. *Brooks v. Stuart*, 9 A. & E. 854; 1 P. & D. 615.

Where a declaration was for goods sold and delivered, and for money due on an account stated, and the defendant pleaded that by a deed the plaintiff released the defendant, to which the plaintiff replied non est factum.—Held, that, under this issue, the plaintiff was not entitled to shew that the cause of action accrued subsequently to the date of the release, but should have made it the subject of a new assignment. *Jubb v. Ellis*, 3 D. & L. 346; 15 L. J., Q. B. 94; 9 Jur. 1057.

To an action to recover the amount of several bills of exchange and promissory notes, the de-

fendant pleaded a general release by deed, which on being set out, appeared to be a composition deed, by which the plaintiff and other creditors of the defendant released him from all liability in respect of their demands, on condition of his agreeing to pay 11s. in the pound, by promissory notes, payable at periods therein specified; and the deed contained a proviso, that, in the event of any default in the payment of any of those notes, the composition and release should be void. The plaintiff having replied, that default had been made in payment of one of the notes, the defendant rejoined, that before any default was made, the plaintiff accepted a fresh note, at a longer date, in lieu and satisfaction of the former.—Held, that this rejoinder was a departure from the plea. *Nevill v. Boyle*, 2 D., N. S. 747; 11 M. & W. 26; 12 L. J., Ex. 220; 7 Jur. 132.

To a declaration on a promissory note, the defendant pleaded that the note was the joint and several note of himself and G.; that the plaintiff, by deed-poll, without the defendant's consent, released G. from the note and all actions, and thereby also released the defendant from the same. Replication, non est factum.—Held, that as the plea did not set out the deed, the replication put in issue the execution of such a deed as released the defendant; and that a deed of release executed by the plaintiff and other creditors of G., containing an express clause that the release to G. should not operate to discharge any one jointly liable with G. on securities to the creditors, did not release the defendant; and that, therefore, the plaintiff was entitled to the verdict on this issue. *North v. Wakefield*, 13 Q. B. 636; 18 L. J., Q. B. 214; 13 Jur. 731.

In an action on a bond, the defendant pleaded, that after executing the bond, an agreement was made by and between the plaintiff and the defendant and divers others persons, and sealed with the plaintiff's seal; and that it was agreed, by the agreement, that the agreement might be pleaded by the defendant in bar to all demands and proceedings with respect to the alleged claim on the bond.—Held, that the plea ought to have set out so much of the deed as operated as a release, and to have expressly averred that the deed did so operate; and that, therefore, the plea was bad in substance. *Wilson v. Braddyll*, 9 Ex. 718; 23 L. J., Ex. 227.

A plea of a release pleaded puis darrein continuance after a demurrer and joinder in demurrer, operates as a retraxit of the demurrer. *Solomon v. Graham*, 24 L. J., Q. B. 332; 1 Jur., N. S. 1070.

Action by a shipowner, upon a charterparty, for non-payment of freight by the charterer. Pleas: a discharge before breach, payment, and a release after the cause of action accrued. Replication, that before action accrued, and before release or discharge or payment, all the right, title and interest of the plaintiff in the ship, and in the charterparty, was assigned to S., and became, and were vested in him, of which the defendant had notice before the release or discharge, or payment; that the plaintiff released and discharged the defendant, and made the payment without the authority, knowledge or consent of S.; that the release and discharge was given by the plaintiff to the defendant, and obtained by the defendant from the plaintiff, and the payment made fraudulently, and with the intent to defraud S. from recovering in respect of the causes of action, and that the action was brought

by S. in the name of the plaintiff on behalf of S.; that the plaintiff had no interest in the action, and that it had been commenced and carried on for the sole use and benefit, and at the sole expense and costs of S.:—Held, a good replication on equitable grounds. *De Pothier v. De Mattos*, El., Bl. & El. 461; 27 L. J., Q. B. 260.

REMOVAL.

I. OF PAUPERS.—See POOR LAW.

II. FROM OFFICES.—See QUO WARRANTO.

RENT.

See LANDLORD AND TENANT.

RENT-CHARGE.

Grant and Creation.—Lands were mortgaged in fee-simple to B., A. being owner in fee of the equity of redemption. By indenture of lease and release, dated the 24th and 25th October, 1838, to which A., B., C. and D. were parties, B. conveyed, and A. granted and confirmed, the lands, to have and to hold to D., his heirs and assigns to the use of D., his heirs and assigns for ever, subject to a proviso for redemption by A. and his heirs, on payment of 5,000*l.* and interest; and that if default should be made in payment and interest, and after six months' notice in writing had been given by D., his heirs and assigns, to A. to pay, and payment not being made, it should be lawful for D., his heirs and assigns, to make sale of the lands. There was a proviso for quiet enjoyment by A. until default. Also, in the event of D., his heirs or assigns, or any other person or persons claiming, or to claim, by, from, under, or in trust for them, under or by virtue of any power therein contained, entering into or otherwise becoming possessed of the lands, it was expressly agreed and declared, between and by the parties to the deed, that immediately after the lands should have been so entered into by D., his heirs or assigns, or any other person claiming as aforesaid, the same should thenceforth for ever be, and the same were thenceforth, subjected and charged with payment to A., his heirs and assigns, of the annual sum of 40*l.*, and the same should thenceforth be recoverable, by distress or otherwise, upon and out of the lands, in such and the same way as rents of the like amount might be recovered upon a demise for years. B. and A. executed this conveyance; D. did not. Default was made in payment. D. entered into possession for the purpose of executing his power of sale, and by indenture conveyed the lands to E. for 5,500*l.*, subject to the annual sum of 40*l.* E. afterwards entered into possession, and paid the annual sum, and afterwards conveyed the lands in fee-simple to the plaintiff, subject to the pay-

ment of the 40*l.* a year, but so far only as the same might be legally chargeable upon or affect the lands. Afterwards the rent became vested in the defendant. The plaintiff omitted to pay the rent, and a distress was made by the defendant upon his goods:—Held, first, that the charge of the rent was not well reserved as a rent, because the reservation was in favour of a person not vested with a legal estate in the lands. *Gilbertson v. Richards*, 5 H. & N. 453; 29 L. J., Ex. 213; 6 Jur., N. S. 672—Ex. Ch.

Held, secondly, that at common law there was not a good creation of a rent-charge, for want of the execution, by the releasee in fee, of the indenture of 1838. *Ib.*

Held, thirdly, that there was a good creation of a rent-charge by way of use, under the statute. *Ib.*

Held, fourthly, that the declaration of a use, notwithstanding it came after the limitations of the estate to D. and his heirs and assigns, to the use of D., his heirs and assigns, was not objectionable, as being a use upon a use. *Ib.*

Held, fifthly, that, assuming that the rent might arise at any period, however distant, still the limitation was not void, on the ground of its tending to a perpetuity. *Ib.*

— **By Virtue of Statute of Uses.**—Though the grantee of a rent-charge under a grant at common law is not entitled to be registered before he has been in the actual receipt of the rent (since until then he has only a possession in law, and not the actual possession required by 2 Will. 4, c. 45, s. 26), it is otherwise where the rent-charge is by a conveyance operating under the Statute of Uses (27 Hen. 8, c. 10, s. 1); for then the person, to whose use the rent-charge is so limited, is, by virtue of the Statute of Uses, at once in actual possession, and he may be entitled to be registered if the rent is of sufficient value, though he has not received any part of it. *Heelis v. Blain*, 18 C. B., N. S. 90; 34 L. J., C. P. 88; 11 Jur., N. S. 18. See also preceding case.

Owner taking Possession of—Lien for Money Spent on Repairs.—The plaintiff was entitled to a rent-charge created by a deed of 1778, which contained a power on non-payment to enter upon the premises charged, and receive the rents until satisfaction of all arrears of the rent-charge, "together with all such costs, charges, and expenses as should be laid out and expended by him, or occasioned by reason of the non-payment thereof." In 1844, the rent-charge being in arrear, and the property so dilapidated as to be unproductive, the plaintiff entered into possession and expended money in repairs:—Held, that he had no lien on the land for the moneys so expended, whether the defendant, the owner of a subsequent rent-charge, had notice of such repairs and had acquiesced in the making thereof or not, and that the remedy of the plaintiff, if any, was at law, and depended on the construction of the deed of 1778. *Hooper v. Cooke*, 25 L. J., Ch. 467; 2 Jur., N. S. 527—L. J.

Right of Voting—Actual Possession.—A grant of a rent-charge to A., B. and C., and their heirs, to hold to them and their heirs and assigns for ever as tenants in common and in equal shares:—Held, that this was no statute use, but that the grantees were in, at the common law, as tenants in common, and not as joint tenants;

consequently, that until rent had been paid there was no "actual possession" within 2 Will. 4, c. 45, s. 26. *Webster v. Ashton-under-Lyne (Overseers)*, *Orme's case*, 8 L. R., C. P. 281; 42 L. J., C. P. 38; 27 L. T. 652; 21 W. R. 171; 2 Hopw. & C. 60.

A cestui que use of a rent-charge under a deed which created it, is by force of the Statute of Uses (27 Hen. 8, c. 10) in actual possession thereof, within 2 Will. 4, c. 45, immediately on the execution of the deed, although no portion of the rent is received. Aliter, where the grant operates wholly at common law. *Webster v. Ashton-under-Lyne (Overseers)*, *Hadfield's case*, 8 L. R., C. P. 306; 42 L. J., C. P. 146; 28 L. T. 901; 21 W. R. 637; 2 Hopw. & C. 89.

— **As Freeholder.**—The freeholder of hereditaments in which there existed a term of 1,000 years at a ground-rent created a rent-charge in fee out of the hereditaments exceeding forty shillings, but less than the ground-rent:—Held, that the grantee of the rent-charge was a freeholder within 10 Hen. 6, c. 2, and entitled to the franchise. *Davson v. Robins*, 2 C. P. D. 38; 46 L. J., C. P. 62; 35 L. T. 599; 25 W. R. 212; 2 Hopw. & C. 317.

Recovery of Arrears.—When land near Manchester was subject to a chief rent, which, owing to the land being unproductive, had not been paid for more than twenty years, the court, in a suit for that purpose by the persons entitled to the chief rent, ordered the sale of the land for the payment of all the arrears of the rent. *Horton v. Hall*, 17 L. R., Eq. 437; 22 W. R. 391.

An action of debt for arrears of a rent-charge upon land in Australia is not maintainable in this country. *Whitaker v. Forbes*, 10 L. R., C. P. 583; 44 L. J., C. P. 332; 33 L. T. 258. Affirmed, 1 C. P. D. 51; 45 L. J., C. P. 140; 33 L. T. 582; 24 W. R. 241—C. A.

Therefore, when the executor of the grantee of a rent-charge on lands situate in Australia, sued in England the devisee of the lands in debt for its non-payment:—Held, that the action was maintainable in that form, but that it was a local action (there being no privity of contract between the parties), and ought to be brought in Australia; and a plea alleging that the lands were situate in Australia is a good plea in answer to a declaration in this country in debt for non-payment of the rent-charge by the devisee to the executor. *Id.*

Since the abolition of real actions by 3 & 4 Will. 4, c. 27, s. 36, an action of debt will lie for the recovery of a rent-charge in fee. *Thomas v. Sylvester*, 8 L. R., Q. B. 368; 42 L. J., Q. B. 237; 29 L. T. 290; 21 W. R. 912.

A declaration alleging that the plaintiff being seised in fee of certain messuages, granted them by indenture to C., subject to the payment to the plaintiff, his heirs and assigns, of a rent-charge, and C. covenanted to pay the rent-charge, and that afterwards all the estate of C. vested in the defendant who did not pay the rent-charge, is good; for the reason why an action of debt would not formerly lie for a rent-charge in fee was, that there was a higher remedy by real action; but that higher remedy having been abolished by 3 & 4 Will. 4, c. 27, s. 36, the present remedy by action of debt is maintainable. *Id.*

An action for debt lies for the recovery of

arrears of an annuity charged upon land against the assignee of part of such land; and it makes no difference whether the annuity was created by deed or will. *Booth v. Smith*, 47 J. P. 759.

Rateability of.—An act for the commutation of tithes in the Isle of Man (1839) provided that there shall be paid annually, in lieu of tithes, a certain aggregate sum, to be apportioned by way of rent-charge amongst those entitled thereto. An act to provide an asylum for lunatics and insane persons, after directing a valuation "at their net annual value, of all lands and all real estate," provided that "as soon as the valuation is complete" the Tynwald Court shall lay a rate on the proprietors of all lands and real estate according to valuation:—Held, that a rent-charge under the act of 1839 was not liable to be included in such valuation, or rateable under the act of 1860. *Ingram v. Drinkwater*, 44 L. J., P. C. 83; 32 L. T. 746.

Glebe Lands—Drainage and Improvement Company—Order by Inclosure Commissioners for Payment of Arrears—Sale of Lands.—A rent-charge for a certain period of time, in arrear, charged by an order made by the Inclosure Commissioners upon the inheritance of glebe lands of a rectory, under the provisions of the General Land Drainage and Improvement Company's Act of 1849 (12 & 13 Vict. c. xci.), was, under the provisions of the same act, ordered to be raised by a sale of the glebe lands. In an action by the owners of a rent-charge, in arrear, charged on glebe lands, for a declaration that they were entitled under the order made by the Inclosure Commissioners to a charge on the lands for the sums due and to become due of the rent-charge, and asking for a sale of the lands, the ecclesiastical commissioners were made defendants:—Held, on demurrer, that they were not necessary parties. *Scottish Widows' Fund v. Craig*, 20 Ch. D. 208; 51 L. J., Ch. 363; 30 W. R. 463.

Sale of Lands under Compulsory Powers in Consideration of.—When lands are sold to a railway company in consideration of rent-charge the parties may agree for its being secured by a power of entry; and a conveyance made upon such an agreement, whereby the land was conveyed to uses that the grantor should take the rent-charge, and if it fell into arrear should enter until satisfaction, was held to entitle him to leave to enter against a receiver of the undertaking appointed by the court. *Forster v. Manchester and Milford Railway Company*, 49 L. J., Ch. 454.

Extinguishment.—A rent-charge is extinguished by a devise to the grantee of part of the land out of which the rent-charge issues, notwithstanding the devise is expressly made over and above the rent-charge. *Dennett v. Pass*, 1 Bing. N. C. 388; 1 Scott, 218.

When an Action for Debt Lies.—A testator devised lands in fee, after the determination of certain life estates, to A., B. and C., as tenants in common, subject to and charged with the payment of 200*l.*, which he thereby bequeathed to, and to be equally divided among, the children of his niece. A. and B., during the life of one of the tenants for life, granted their reversion in two undivided third parts of the lands to mort-

gages for 500 years:—Held, that an action of debt could not be maintained against the termors for a share of the 200*l.* so bequeathed. *Braithwaite v. Skinner*, 5 M. & W. 313; 3 Jur. 1054.

— **For Recovery of Arrears.**—*See ante*, col. 581.

— **Replevin—Avowry for.**—*See post*, col. 589.

REPLEVIN.

I. WHEN MAINTAINABLE.

II. PLEADINGS AND PROCEEDINGS IN SUPERIOR COURT.

1. *Declaration*, 585.
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—*See* COUNTY COURT.
9. *Removal from County Court*.—*See* COUNTY COURT.

III. REPLEVIN BOND.—*See* COUNTY COURT.

I. WHEN MAINTAINABLE.

For Goods wrongfully taken.—Replevin lies in all cases where the goods of a party have been wrongfully taken, and he is desirous of getting them again; and, consequently, it may be brought to recover goods seized in execution, or under a distress warrant issued by a justice of the peace in a case where he has no jurisdiction. *George v. Chambers*, 2 D., N. S. 783; 11 M. & W. 149; 7 Jur. 836.

But it is not maintainable unless there has been a taking of the goods out of the possession of the owner. *Mennie v. Blake*, 6 El. & Bl. 842; 25 L. J., Q. B. 399; 2 Jur., N. S. 953.

F., being in possession of the plaintiff's goods, not as his servant, but as bailee with a special property, delivered them to the defendant with intent to give him a lien against the plaintiff; and the defendant peaceably and bona fide took possession with this intention, but had no lien, and had no right to detain the goods, as against the plaintiff. The plaintiff demanded the goods, and, being refused, brought replevin:—Held, that there had been no taking changing the possession; and that though the plaintiff could have recovered in trover, or detinue, replevin did not lie. *Ib.*

Replevin lies only where goods are unlawfully taken, not where they are simply detained by a party to whom they have been delivered upon a contract. *Galloway v. Bird*, 12 Moore, 547; 4 Bing. 299.

It lies in every case of an alleged wrongful taking of goods. *Allen v. Sharp*, 2 Ex. 352; 17 L. J., Ex. 209.

So where goods have been unlawfully taken, though not as a distress, and therefore when H.

and B. were sued in replevin for taking a horse under a claim of property by A., who alleged that the horse had been stolen from him, and B. had acted in the transaction only as a constable:—Held, that the action was maintainable. *Mellor v. Leather*, 1 El. & Bl. 619; 22 L. J., M. C. 76; 17 Jur. 709.

On Distress.—It lay at common law for a wrongful detention of goods taken under a lawful distress. *Erane v. Elliott*, 6 N. & M. 606; 5 A. & E. 142; 2 H. & W. 231.

Replevin is maintainable against a person who improperly issues a warrant under which another's goods are distrained. *Jones v. Johnson*, 5 Ex. 862; 20 L. J., M. C. 11.

The 24 Geo. 2, c. 44, s. 6, as to previous demand of the warrant, and the 2 & 3 Vict. c. 93, s. 8, and the 1 & 2 Will. 4, c. 41, s. 19, as to notice of action, do not apply to replevin. *Gay v. Mathews, infra.*

Where a magistrate has competent jurisdiction, and adjudges, and, on refusal to pay, issues a warrant of distress and sale, the goods taken under it are not repleviable. *Wilson v. Weller*, 1 B. & B. 57; 3 Moore, 294. And see *Wootton v. Hurrey*, 6 East, 75; and *Rex v. Hoseason*, 14 East, 605.

A person having brought replevin for goods levied under a warrant of distress for an assessment made by a special sessions under the Highways Act (13 Geo. 3, c. 78), s. 47, on the ground of the premises for which he was assessed being situate without the township which was liable to repair the road, the court refused to set aside the proceedings. *Fenton v. Boyle*, 2 N. R. 399; 1 Taunt. 344.

Replevin may be maintained for goods distrained under a warrant from commissioners authorized by act of parliament to levy rates for specific local purposes, with power of distress. *Att.-Gen. v. Brown*, 1 Swans. 304.

— **For Rent.**—If a landlord distrains for more rent than is due, the tenant's course is to tender the amount really due, and if the landlord refuses to accept that sum, to replevy the goods and try the disputed question of amount in replevin. *Glyn v. Thomas*, 11 Ex. 870; 25 L. J., Ex. 125; 2 Jur., N. S. 378—Ex. Ch.; *S. P., French v. Phillips*, 1 H. & N. 564; 26 L. J., Ex. 82; 2 Jur., N. S. 1169—Ex. Ch.

Neither the removal of a distress for rent from the demised premises after five days, nor an appraisalment of the distress, takes away the tenant's right to replevy. *Jacob v. King*, 5 Taunt. 451; 1 Marsh. 135.

If the goods remain unsold, the tenant may replevy after five days. *Anon.*, 1 Chit. 196.

— **For Poor Rates.**—When a party is rated in respect of property not in his occupation, he is not bound to appeal, but may replevy any distress for such poor-rate. *Bristol (Overseers) v. Wait*, 3 N. & M. 359; 1 A. & E. 264.

But when a party is liable to be rated, his mode of impeaching the validity of the rate is by appeal, and not by replevin. *Marshall v. Pitman*, 2 M. & Scott, 745; 9 Bing. 595.

Replevin lies for goods improperly taken for poor-rates, even though an appeal against the poor-rate has been disallowed by a court of quarter sessions, acting within its jurisdiction. *Rhymney Railway Company v. Price*, 16 L. T. 394.

In replevin on a distress for a poor-rate under 43 Eliz. c. 3, the treble damages given to the defendant by s. 19 are thrice the amount of the damages found by the jury. *Newman v. Barnard*, 3 M. & Scott, 738; 10 Bing. 274.

The court refused to stay the proceedings on a judgment of non pros. in such an action, on payment of the single amount of the rate, thrice the charges of the levy, and the costs. *Id.*

Semble, that where any one is rated for premises in his occupation, and for others which are not, the whole rate is a nullity, and an action of replevin is maintainable. *London and North-Western Railway Company v. Buckmaster*, 10 L. R., Q. B. 70; 44 L. J., M. C. 29; 31 L. T. 835; 23 W. R. 160.

It lies in the case of goods taken under a warrant of distress issued by a justice to enforce payment of the costs ordered on an appeal against a poor-rate, under 12 & 13 Vict. c. 45, s. 5, and 11 & 12 Vict. c. 43, s. 27. *Gay v. Mathews*, 32 L. J., M. C. 58; 7 L. T. 504; 11 W. R. 89. Affirmed, 4 B. & S. 425; 32 L. J., M. C. 58; 9 Jur., N. S. 716; 8 L. T. 674; 11 W. R. 922—Ex. Ch.

II. PLEADINGS AND PROCEEDINGS IN SUPERIOR COURT.

1. DECLARATION.

Sufficiency of.—In a declaration for taking goods, the description, number, and value of them should be stated with certainty. *Pope v. Tilman*, 1 Moore, 386; 7 Taunt. 642.

Where a declaration does not sufficiently specify the goods and chattels, and the place in which they are taken, the defect is cured by an avowry, justifying the taking of the said goods and chattels in the said place, even though the avowry is a bad plea. *Banks v. Angell*, 3 N. & P. 94; 7 A. & E. 843; 2 Jur. 657.

A declaration as follows: "A. B. sues C. D. for that the defendant, on land in the occupation of the plaintiff, in the parish, &c., called &c., took the goods of the plaintiff (that is to say), six wheat-ricks, and unjustly detained the same against sureties and pledges until, &c., whereby he has sustained damage, and he claims, 100l.," is a declaration in replevin. *Gay v. Matthews*, 4 B. & S. 425; 32 L. J., M. C. 58; 9 Jur., N. S. 716; 8 L. T. 674; 11 W. R. 922—Ex. Ch.

In an action for selling goods which had been replevied, the declaration ought to contain an averment that the defendant knew that the goods had been replevied. *Mounsey v. Dawson*, 1 N. & P. 763; W., W. & D. 283; 6 A. & E. 752.

Venue.—The venue may be laid either where the goods were originally taken, or in any other county in which they were in the defendant's custody. *Walton v. Kersop*, 2 Wils. 354.

Joinder of Wife.—A declaration by J. S. and his wife, without shewing any cause for joining the wife, is bad on demurrer. *Serres v. Dodd*, 2 N. R. 405.

Time to Declare.—After a rule for time to declare, the court will not set that rule aside, and compel the plaintiff to declare sooner in replevin than in another action. *Craven v. Vavasour (Lady)*, 5 Taunt. 35.

2. STAYING PROCEEDINGS.

When.—The court will not stay proceedings unless upon payment of the rent in arrear, together with all costs, though the arrears were tendered before replevin, with costs up to that time. *Hopkins v. Skrole*, 1 B. & P. 382.

Nor upon payment of costs, on the application of the defendant. *Hodgkinson v. Snidson*, 3 B. & P. 603.

Proceedings stayed after cognizance and plea in bar, upon payment of costs of the action and distress, by replevying, and delivering up the replevin bond to be cancelled, there being no special damage. *Banks v. Brand*, 3 M. & S. 525.

In replevin on a distress for a poor-rate under 43 Eliz. c. 3, the court refused to stay proceedings on a judgment of non pros. on payment of the single amount of the rate, thrice the charges of the levy, and the costs. *Newman v. Barnard*, 3 M. & Scott, 738; 10 Bing. 274.

3. AVOWRIES AND COGNIZANCES.

Assignment of Reason or Cause.—A man may profess to distrain for one cause, and may avow for another, if a good one; and where avowries (admitted by a plea in bar to be true) shewed that a defendant had a good cause for distraining as he had done, it was immaterial that he had, when distraining, assigned an invalid reason for the distress. *Phillips v. Whitsea*, 2 El. & El. 804; 29 L. J., Q. B. 164; 6 Jur., N. S. 727; 2 L. T. 278; 8 W. R. 494.

Who may Avow or make Cognizance—Executors.—Where a distress was made by the command and in the name of a landlord, but he died before the distress was actually made:—Held, that the bailiff might make cognizance as the bailiff of his executrix, under 32 Hen. 8, c. 37, s. 1, who ratified the distress, although before probate. *Whitehead v. Taylor*, 2 P. & D. 367; 10 A. & E. 210.

In replevin for taking the plaintiff's goods, the defendant made cognizance as bailiff of an executrix, for arrears of rent incurred in the lifetime of the testator:—Held, that such avowry need not set out the title of the testator, nor shew that the executrix was entitled to distrain under 32 Hen. 8, c. 37, s. 1; and that, at all events, it could not be objected to after verdict. *Martin v. Burton*, 3 Moore, 608; 1 B. & B. 279.

An avowry by executors of F., that the plaintiff for all the time during which the rent was accruing due, and thence until and at the time when &c., and until and at the death of F., held the place in which &c. as tenant to F. in his lifetime, under a demise made to him at a yearly rent, payable quarterly, and because two years' rent due from the plaintiff to F. in his lifetime remained unpaid to him or his executors, and because the plaintiff remained in possession of the place in which &c. from the death of F. till the time when &c. the executors of F. well avowed the taking:—Held, that such avowry was sufficient within 11 Geo. 2, c. 19, s. 22, and 32 Hen. 8, c. 37, s. 1, and might be supported. *Staniford v. Sinclair*, 9 Moore, 376; 2 Bing. 193.

Administrators.—In replevin for taking the plaintiff's goods, the defendant avowed under 32 Hen. 8, c. 37, as administratrix of A.

gages for 500 years :—Held, that an action of debt could not be maintained against the termors for a share of the 200l. so bequeathed. *Braithwaite v. Skinner*, 5 M. & W. 313 ; 3 Jur. 1054.

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III. REPLEVIN BOND.—*See COUNTY COURT.*

I. WHEN MAINTAINABLE.

For Goods wrongfully taken.—Replevin lies in all cases where the goods of a party have been wrongfully taken, and he is desirous of getting them again ; and, consequently, it may be brought to recover goods seized in execution, or under a distress warrant issued by a justice of the peace in a case where he has no jurisdiction. *George v. Chambers*, 2 D., N. S. 783 ; 11 M. & W. 149 ; 7 Jur. 836.

But it is not maintainable unless there has been a taking of the goods out of the possession of the owner. *Mennie v. Blake*, 6 El. & Bl. 842 ; 25 L. J., Q. B. 399 ; 2 Jur., N. S. 953.

F., being in possession of the plaintiff's goods, not as his servant, but as bailee with a special property, delivered them to the defendant with intent to give him a lien against the plaintiff ; and the defendant peaceably and bona fide took possession with this intention, but had no lien, and had no right to detain the goods, as against the plaintiff. The plaintiff demanded the goods, and, being refused, brought replevin :—Held, that there had been no taking changing the possession ; and that though the plaintiff could have recovered in trover, or detinue, replevin did not lie. *Id.*

Replevin lies only where goods are unlawfully taken, not where they are simply detained by a party to whom they have been delivered upon a contract. *Galloway v. Bird*, 12 Moore, 547 ; 4 Bing. 299.

It lies in every case of an alleged wrongful taking of goods. *Allen v. Sharp*, 2 Ex. 352 ; 17 L. J., Ex. 209.

So where goods have been unlawfully taken, though not as a distress, and therefore when H.

and B. were sued in replevin for taking a horse under a claim of property by A., who alleged that the horse had been stolen from him, and B. had acted in the transaction only as a constable :—Held, that the action was maintainable. *Mellor v. Leather*, 1 El. & Bl. 619 ; 22 L. J., M. C. 76 ; 17 Jur. 709.

On Distress.—It lay at common law for a wrongful detention of goods taken under a lawful distress. *Erans v. Elliott*, 6 N. & M. 606 ; 5 A. & E. 142 ; 2 H. & W. 231.

Replevin is maintainable against a person who improperly issues a warrant under which another's goods are distrained. *Jones v. Johnson*, 5 Ex. 862 ; 20 L. J., M. C. 11.

The 24 Geo. 2, c. 44, s. 6, as to previous demand of the warrant, and the 2 & 3 Vict. c. 93, s. 8, and the 1 & 2 Will. 4, c. 41, s. 19, as to notice of action, do not apply to replevin. *Gay v. Mathews*, *infra*.

Where a magistrate has competent jurisdiction, and adjudges, and, on refusal to pay, issues a warrant of distress and sale, the goods taken under it are not repleviable. *Wilson v. Weller*, 1 B. & B. 57 ; 3 Moore, 294. And see *Wootton v. Harvey*, 6 East, 75 ; and *Rex v. Hoxeason*, 14 East, 605.

A person having brought replevin for goods levied under a warrant of distress for an assessment made by a special sessions under the Highways Act (13 Geo. 3, c. 78), s. 47, on the ground of the premises for which he was assessed being situate without the township which was liable to repair the road, the court refused to set aside the proceedings. *Fenton v. Boyle*, 2 N. R. 399 ; 1 Taunt. 344.

Replevin may be maintained for goods distrained under a warrant from commissioners authorized by act of parliament to levy rates for specific local purposes, with power of distress. *Att.-Gen. v. Brown*, 1 Swans. 304.

— **For Rent.**—If a landlord distrains for more rent than is due, the tenant's course is to tender the amount really due, and if the landlord refuses to accept that sum, to replevy the goods and try the disputed question of amount in replevin. *Glyn v. Thomas*, 11 Ex. 870 ; 25 L. J., Ex. 125 ; 2 Jur., N. S. 378—Ex. Ch. ; *S. P.*, *French v. Phillips*, 1 H. & N. 564 ; 26 L. J., Ex. 82 ; 2 Jur., N. S. 1169—Ex. Ch.

Neither the removal of a distress for rent from the demised premises after five days, nor an appraisal of the distress, takes away the tenant's right to replevy. *Jacob v. King*, 5 Taunt. 451 ; 1 Marsh. 135.

If the goods remain unsold, the tenant may replevy after five days. *Anon.*, 1 Chit. 196.

— **For Poor Rates.**—When a party is rated in respect of property not in his occupation, he is not bound to appeal, but may replevy any distress for such poor-rate. *Bristol (Overseers) v. Wait*, 3 N. & M. 359 ; 1 A. & E. 264.

But when a party is liable to be rated, his mode of impeaching the validity of the rate is by appeal, and not by replevin. *Marshall v. Pitman*, 2 M. & Scott, 745 ; 9 Bing. 595.

Replevin lies for goods improperly taken for poor-rates, even though an appeal against the poor-rate has been disallowed by a court of quarter sessions, acting within its jurisdiction. *Rhymney Railway Company v. Price*, 16 L. T. 394.

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In replevin on a distress for a poor-rate under 43 Eliz. c. 3, the treble damages given to the defendant by s. 19 are thrice the amount of the damages found by the jury. *Neuman v. Barnard*, 3 M. & Scott, 738; 10 Bing. 274.

The court refused to stay the proceedings on a judgment of non pros. in such an action, on payment of the single amount of the rate, thrice the charges of the levy, and the costs. *Id.*

Semble, that where any one is rated for premises in his occupation, and for others which are not, the whole rate is a nullity, and an action of replevin is maintainable. *London and North-Western Railway Company v. Buckmaster*, 10 L. R., Q. B. 70; 44 L. J., M. C. 29; 31 L. T. 835; 23 W. R. 160.

It lies in the case of goods taken under a warrant of distress issued by a justice to enforce payment of the costs ordered on an appeal against a poor-rate, under 12 & 13 Vict. c. 45, s. 5, and 11 & 12 Vict. c. 43, s. 27. *Gay v. Matthews*, 32 L. J., M. C. 58; 7 L. T. 504; 11 W. R. 89. Affirmed, 4 B. & S. 425; 32 L. J., M. C. 58; 9 Jur., N. S. 716; 8 L. T. 674; 11 W. R. 922—Ex. Ch.

II. PLEADINGS AND PROCEEDINGS IN SUPERIOR COURT.

1. DECLARATION.

Sufficiency of.]—In a declaration for taking goods, the description, number, and value of them should be stated with certainty. *Pope v. Tilman*, 1 Moore, 386; 7 Taunt. 642.

Where a declaration does not sufficiently specify the goods and chattels, and the place in which they are taken, the defect is cured by an avowry, justifying the taking of the said goods and chattels in the said place, even though the avowry is a bad plea. *Banks v. Angell*, 3 N. & P. 94; 7 A. & E. 843; 2 Jur. 657.

A declaration as follows: "A. B. sues C. D. for that the defendant, on land in the occupation of the plaintiff, in the parish, &c., called &c., took the goods of the plaintiff (that is to say), six wheat-ricks, and unjustly detained the same against sureties and pledges until, &c., whereby he has sustained damage, and he claims, 100l.," is a declaration in replevin. *Gay v. Matthews*, 4 B. & S. 425; 32 L. J., M. C. 58; 9 Jur., N. S. 716; 8 L. T. 674; 11 W. R. 922—Ex. Ch.

In an action for selling goods which had been replevied, the declaration ought to contain an averment that the defendant knew that the goods had been replevied. *Mounsey v. Dawson*, 1 N. & P. 763; 7 W. & D. 283; 6 A. & E. 752.

Venue.]—The venue may be laid either where the goods were originally taken, or in any other county in which they were in the defendant's custody. *Walton v. Kersop*, 2 Wils. 354.

Order of Wife.]—A declaration by J. S. and his wife, without shewing any cause for joining the wife, is bad on demurrer. *Serres v. Dodd*, 2 B. 405.

Time to Declare.]—After a rule for time to declare, the court will not set that rule aside, and compel the plaintiff to declare sooner in replevin than in another action. *Craven v. Vavasour Lady*, 5 Taunt. 35.

2. STAYING PROCEEDINGS.

When.]—The court will not stay proceedings unless upon payment of the rent in arrear, together with all costs, though the arrears were tendered before replevin, with costs up to that time. *Hopkins v. Shrofe*, 1 B. & P. 382.

Nor upon payment of costs, on the application of the defendant. *Hodgkinson v. Snibson*, 3 B. & P. 603.

Proceedings stayed after cognizance and plea in bar, upon payment of costs of the action and distress, by replevying, and delivering up the replevin bond to be cancelled, there being no special damage. *Banks v. Brand*, 3 M. & S. 525.

In replevin on a distress for a poor-rate under 43 Eliz. c. 3, the court refused to stay proceedings on a judgment of non pros. on payment of the single amount of the rate, thrice the charges of the levy, and the costs. *Neuman v. Barnard*, 3 M. & Scott, 738; 10 Bing. 274.

3. AVOWRIES AND COGNIZANCES.

Assignment of Reason or Cause.]—A man may profess to distrain for one cause, and may avow for another, if a good one; and where avowries (admitted by a plea in bar to be true) shewed that a defendant had a good cause for distraining as he had done, it was immaterial that he had, when distraining, assigned an invalid reason for the distress. *Phillips v. Whitsed*, 2 El. & El. 804; 29 L. J., Q. B. 164; 6 Jur., N. S. 727; 2 L. T. 278; 8 W. R. 494.

Who may Avow or make Cognizance—Executors.]—Where a distress was made by the command and in the name of a landlord, but he died before the distress was actually made:—Held, that the bailiff might make cognizance as the bailiff of his executrix, under 32 Hen. 8, c. 37, s. 1, who ratified the distress, although before probate. *Whitehead v. Taylor*, 2 P. & D. 367; 10 A. & E. 210.

In replevin for taking the plaintiff's goods, the defendant made cognizance as bailiff of an executrix, for arrears of rent incurred in the lifetime of the testator:—Held, that such avowry need not set out the title of the testator, nor shew that the executrix was entitled to distrain under 32 Hen. 8, c. 37, s. 1; and that, at all events, it could not be objected to after verdict. *Martin v. Burton*, 3 Moore, 608; 1 B. & B. 279.

An avowry by executors of F., that the plaintiff for all the time during which the rent was accruing due, and thence until and at the time when &c., and until and at the death of F., held the place in which &c. as tenant to F. in his lifetime, under a demise made to him at a yearly rent, payable quarterly, and because two years' rent due from the plaintiff to F. in his lifetime remained unpaid to him or his executors, and because the plaintiff remained in possession of the place in which &c. from the death of F. till the time when &c. the executors of F. well avowed the taking:—Held, that such avowry was sufficient within 11 Geo. 2, c. 19, s. 22, and 32 Hen. 8, c. 37, s. 1, and might be supported. *Stanford v. Sinclair*, 9 Moore, 376; 2 Bing. 193.

Administrators.]—In replevin for taking the plaintiff's goods, the defendant avowed under 32 Hen. 8, c. 37, as administratrix of A.

who was seised in fee; that B. held the premises as tenant to him by virtue of a demise made to him at and under a certain yearly rent; and that because a sum for rent was due to A., at the time of his death, from B., and still in arrear to the defendant, she, as administratrix, well avowed the taking of the goods in the premises, in which &c. the same being charged with the payment of rent to A., and continuing in possession of the plaintiff as tenant to B.; it appearing that B. was possessed of the premises by virtue of a lease for twenty-one years, it was objected, that the defendant was not entitled to distrain under the statute, and that the avowry was bad; but the court held, that as the tenancy did not appear to be for years, and that as it was unnecessary for the defendant to shew how the plaintiff became entitled to or held the premises, the avowry was sufficient. *Meriton v. Gilbee*, 2 Moore, 48; 8 Taunt. 159.

Joint-Tenants and Tenants in Common.]

—An avowry by one of several co-heirs in gavelkind, in his own right, with a cognizance as bailiff of the other co-heirs, is sufficient, without averring an authority to distrain from the other co-heirs. *Leigh v. Shepherd*, 5 Moore, 297; 2 B. & B. 465.

One tenant in common cannot avow alone for taking cattle damage feasant, but he ought also to make cognizance as bailiff of his companion. *Culley v. Spearman*, 2 H. Bl. 386.

—**Husband and Wife.**—A husband may avow in his own name for rent due in right of his wife. *Gravenor v. Woodhouse*, 9 Moore, 148; 2 Bing. 71.

An avowry for a rent-charge devised to A., the wife of B., may be made by B. and A. in the right of A. *Wynne v. Wynne*, 2 Scott, N. R. 278; 2 M. & G. 8; 4 Jur. 1114.

So, although the rent-charge issues out of a term of years. *Id.*

A wife had, at the time of her marriage, the equity of redemption of land, which was then settled to her separate use. She was permitted to enjoy the property; and she and her husband (or he in her name), let it, she receiving the rents until she died. The husband then distrained upon the tenant for rent subsequently accruing:—Held, that it was not lawful for him to do so, and that he was liable in replevin. *Howe v. Scarrott*, 4 H. & N. 723; 28 L. J., Ex. 325.

Form and Sufficiency of.—In an avowry on 21 Hen. 8, c. 19, the defendant must allege in the avowry that he is seised of the lands in which &c. *Banks v. Angell*, 3 N. & P. 94; 7 A. & E. 843; 2 Jur. 657.

In an avowry on 11 Geo. 2, c. 19, the defendant must shew a privity existing between himself and the tenant on the land; and it is not sufficient to state that certain persons unknown are tenants to the defendant, under a demise by A. to W., the unexpired term of which had vested in these persons unknown. *Id.*

When a defendant avowed that certain persons, to the tenants unknown, held the close in which &c., as tenants to the defendant, under a demise from A. to W., for a term unexpired; and that the interest of W. in the term had come to the said persons unknown; and that the rent was in arrear to the defendant:—Held, that the

avowry was not good under either of the above statutes, or under both of them taken together. *Id.*

It is not necessary to aver that the rent still remains due. *Clarke v. Davies*, 2 Marsh. 386; 7 Taunt. 72.

It is not necessary that an avowry for rent should allege in precise terms that the plaintiff was tenant to the avowant; if the fact of the tenancy can be collected from the whole of the avowry, it is sufficient. *Innes v. Colquhoun*, 5 M. & P. 63; 7 Bing. 265.

Although a landlord may avow generally for rent in arrear, yet the terms of the contract under which the tenant holds must be truly stated in the avowry. *Philpott v. Dobbinson*, 3 M. & P. 320; 6 Bing. 104.

In a cognizance by a bailiff, for double rent, under 11 Geo. 2, c. 19, s. 18, the terms of the tenancy and of the notice to quit should be so shewn, that the tenant's power to determine the tenancy by notice to his landlord for that purpose, and the sufficiency, in law, of the notice actually given, may appear. *Humblestone or Humblestone v. Dubois*, 10 M. & W. 765; 2 D., N. S. 506; 12 L. J., Ex. 98.

An avowry at common law for rent due before, but distrained for after, the determination of a lease by notice to quit, is not good. *Williams v. Stiven*, 9 Q. B. 14; 15 L. J., Q. B. 321; 10 Jur. 804.

In replevin against an assignee of the reversion of part of the premises demised, the defendant may avow at common law, stating the facts specially, and leaving the apportionment of the rent to be made by the jury; or he may avow in the general form given by 11 Geo. 2, c. 19, s. 22, as upon a holding at a certain rent. And if he avows under the statute, for the entire rent, or with a deduction from the entire rent greater or less than the proportion properly belonging to his interest in the reversion, the judge may direct the avowry to be amended, either by converting it into an avowry at common law, or leaving it as an avowry under the statute, by describing the rent in conformity with the proportionate value of the respective parcels or parts into which the reversion has been divided. *Roberts v. Snell*, 1 M. & G. 577.

An avowry that Henry 8. being seised in fee of a shop, in which, &c., granted it by letters-patent to W. in tail male, at an annual rent. Averments tracing the relation to Charles 2. That Charles 2. by letters-patent, professing to act under 22 Car. 2, c. 6, s. 1, conveyed the rent, "so far as aforesaid reserved," without the reversion in the shop, to trustees and their heirs, for ever, and that they conveyed it to the defendants and their successors for ever, whereupon the defendants became seised as of fee in the rent:—Held, that it was sufficient to aver in the avowry, that the rent reserved became due and in arrear, without an express averment of the continuance of the estate tail. *Semble, contra*, by the Exchequer Chamber. *Vigers v. St. Paul's (Dean and Chapter)*, 14 Q. B. 909; 18 L. J., Q. B. 97; 13 Jur. 256; in Exchequer Chamber, 14 Q. B. 920; 19 L. J., Q. B. 84; 14 Jur. 1017.

Held, that the avowry was bad, on general demurrer, for not expressly averring attornment by the terre-tenant to the grant by the trustees; or that such grant was made after the 4 Ann. c. 16, and the defect was not supplied by an averment that the rent had been paid, not saying to whom, and not saying that the payment was in the life

of the grantor, nor by an averment following the statement of the grant by the trustees, "whereupon and whereby" the grantees became and were seised of the rent, and an averment that the rent was due and in arrear to them. *Id.*—Ex. Ch.

If a defendant pleaded by way of justification of the taking, that he was possessed of a messuage with common appurtenant, and that the plaintiff's cattle were damage feasant on the common, and concluded in bar without praying a return, it seems that such a plea was bad before 15 & 16 Vict. c. 76, s. 67. *Hawkins v. Eckles*, 2 B. & P. 359.

Seemingly, that a plaintiff will not be allowed to reply to a cognizance by traversing the facts of the tenancy, and the rent being in arrear, and also the authority to distrain as bailiff. *Trent v. Hunt*, 9 Ex. 14; 22 L. J., Ex. 318; 17 Jur. 899.

Where a defendant avowed for rent due and in arrear at Martinmas, "to wit, the 23rd November:"—Held, Martinmas must be taken to mean new Martinmas, and the subsequent words, "to wit, the 23rd November," being surplusage, could not be taken to explain that old Martinmas was intended. *Smith v. Walton*, 1 M. & Scott, 380.

Allegation of Title.—In avowries, the commencement of particular estates must be shewn; as that such a one was seised in fee and demised, that the estate out of which it was derived may appear sufficient to support it; because the seisin in fee may be traversed, and any of the mesne assignments are traversible. *Dally v. Silby*, 1 Bro. P. C. 525.

An avowry or a cognizance for rent admits the property of the goods in the plaintiff; but if the plaintiff's plea subsequently shews the property of the goods to be in another, the plaintiff cannot maintain the action. *Clarke v. Davies*, 7 Taunt. 72; 2 Marsh. 386.

A defendant avowed for rent in arrear from M., and also claimed the goods as being the property of himself and another as assignees of M., against whom a commission of bankruptcy had issued. A verdict having been taken on the whole record, the court directed it to be entered for the plaintiff on the issue taken on the title of the assignees, on the ground that the defendant could not be permitted on the same record to claim the goods as a distress for rent, and also to set up the title of the assignees. *Emery v. Mucklow*, 4 M. & Scott, 263.

For Rent-charges.—There can be no avowry for a rent-charge upon land payable to one who has no reversion. *Pluck v. Digges*, 2 Dow & Clark, 180.

In an avowry for taking goods as a distress for arrears of a rent-charge, granted by A., an averment that he was seised in fee at the time of the grant does not necessarily imply that the land was not then under lease. But if a plaintiff in replevin, being no party to the grant, wishes to prove that he is tenant under a demise made before the grant, he must plead that fact specially. *Johnson v. Faulkner*, 2 Q. B. 925; 2 G. & D. 184.

A rent-charge is devised to A., so long as her conduct and behaviour shall be discreet, and meet with the approbation of S. The discretion of the conduct and behaviour of A., and the approbation of S., are conditions subsequent, compliance with which need not be averred in a plea alleging the continuance of the rent-

charge. *Wynne v. Wynne*, 2 Scott, N. B. 278; 2 M. & G. 8; 4 Jur. 1114.

For Damage feasant.—Replevin of cattle taken in A. The defendant avowed the taking in A. under a demise of premises of which B. was parcel, and because the cattle were damage feasant in B. he took them and drove them through A. in his way to the pound:—Held, to be well pleaded. *Abercrombie v. Parkhurst*, 2 B. & P. 480. See *Hargrave v. Shewin*, 9 D. & R. 20; 6 B. & C. 34.

An avowry, that the defendants were owners and occupiers of certain messuages, prescribing for common in the locus in quo, and avowing damage feasant, is a prescription. *English v. Burnell*, 2 Wils. 258.

To an avowry for damage feasant in a certain close, and a taking of the cattle there and driving them along a road to impound them, plea in bar that the road was not parcel of the close; the avowry held good, and the plea bad. *Maltravers v. Fossett*, 3 Wils. 295.

A., having the exclusive right to dig stone in a certain close, avowed distraining the cattle of B., who had the exclusive right of pasture there, as damage feasant, for having broken the stones: B. pleaded that there was no fence to keep them off, nor did A. otherwise guard or protect the stones: A. replied that he was not bound to fence:—Held, that the replication was bad. *Churchill v. Evans*, 1 Taunt. 529.

4. PLEAS.

Nil habuit in tenementis and Payment.—Nil habuit in tenementis is no plea in bar to an avowry under 11 Geo. 2, c. 19, s. 22. *Sullivan v. Stradling*, 2 Wils. 208.

A plea to an avowry for a distress for rent in arrear, "that before the lessors had anything in the premises, and before they (claiming title under a pretended agreement between them and A.), demised them to the lessee, A. had mortgaged them in fee to B.; that the mortgage being forfeited, and notice of the forfeiture being given to the lessee, and he having been required to attorn, did attorn to B., when he distrained for the rent, which the lessee paid him to prevent the goods from being sold under the distress:—Held, that such plea amounted in substance merely to a plea of nil habuit in tenementis. *Alchorne v. Gomme*, 9 Moore, 180; 2 Bing. 54.

To an avowry of a distress for rent, the plaintiff pleaded, that before defendant had any interest in the premises they were mortgaged in fee; that the mortgagor remained in possession, and demised to the defendant; that the defendant, the mortgage-money being still due, demised to the plaintiff; that afterwards, the mortgage-money being still due and interest thereon, and 14*l.* avowed for by the defendant being also in arrear, the mortgagee gave notice to the plaintiff to pay the 14*l.* to him instead of to the defendant, and threatened, in case of non-payment, to put the law in force, and was then about to put the law in force, wherefore the plaintiff necessarily paid that sum to the mortgagee, and so the said sum was not in arrear:—Held, that the plea was good, being a plea of payment, and not of nil habuit in tenemento; that it was not bad for setting out the circumstances of the payment. *Johnson v. Jones*, 1 P. & D. 651; 9 A. & E. 809.

A plaintiff may, in bar to an avowry for rent, plead a compulsory payment to the ground landlord or other incumbrancer having claims paramount to those of the immediate landlord making the distress. *Jones v. Morris*, 3 Ex. 742; 18 L. J., Ex. 477.

Non cepit.—Non cepit does not put the plaintiff to proof of property. *Dover v. Rawlings*, 2 M. & Rob. 544.

Under non cepit, a defendant, under 5 & 6 Will. 4, c. 76, ss. 76, 133, may shew that he was a constable appointed for a borough, and took the goods within the county wherein the borough is situate, but without the borough, on a charge that they had been stolen. *Mellor v. Leather*, 1 El. & Bl. 619; 22 L. J., M. C. 76; 17 Jur. 709.

Non tennit and Riens in arriere.—Eviction by the superior landlord may be given in evidence under non tennit. *Hopcroft v. Keys*, 2 M. & Scott, 760; 9 Bing. 613.

Where a statute of limitations extinguishes the right, and does not merely bar the remedy, the defence, under such statute, need not be pleaded specially, and therefore, in replevin, evidence of the lapse of twenty years, under 3 & 4 Will. 4, c. 27, ss. 2, 3, 34, since the last payment of rent, may be given under a plea in bar of non tennit. *De Beauvoir v. Owen*, 5 Ex. 166; 19 L. J., Ex. 177—Ex. Ch.

Proof of payment of rent to the avowant is *prima facie* evidence that he is the owner of the land; but where the plaintiff did not originally receive the possession of the land from the avowant, it is competent to the plaintiff to rebut the title of the avowant by shewing that he paid rent under circumstances which did not entitle the avowant to the rent; and such evidence may be given on the issue of non tennit. *Rogers v. Pitcher*, 6 Taunt. 202; 1 Marsh. 541.

Avowry for a quarter's rent in arrear. The defendant was mortgagor in possession, having mortgaged to H. in 1834. The defendant, in 1838, demised the premises to the plaintiff, at an annual rent, payable quarterly, and in 1840 he gave H. an authority to receive the rent of the premises, described as occupied by the plaintiff, and belonging to the defendant. H. communicated this authority to the plaintiff, and gave him notice not to pay rent to the defendant, but to H. The plaintiff accordingly paid several quarters' rent to H.; but, shortly before Michaelmas, 1841, when the quarter's rent mentioned in the avowry became due, the defendant gave notice to the plaintiff not to pay it to H., but to the defendant. The plaintiff paid to neither, and the defendant distrained. At that time a small arrear of interest was due from the defendant to H. under the mortgage:—Held, first, that the authority and payments of rent effected no change in the tenancy, and that the issue on non tennit must be found for the defendant. *Wheeler v. Branscombe*, 5 Q. B. 373; D. & M. 406; 13 L. J., Q. B. 83.

Held, secondly, that the issue on riens in arriere must also be found for the defendant, since, if the facts proved amounted to a defence, they ought to have been made the subject of a special plea. *Id.*

To an avowry for rent a plea in bar of payment to a ground landlord or other incumbrancer amounts to a plea of riens in arriere, and should

be so pleaded. *Jones v. Morris*, 3 Ex. 742; 18 L. J., Ex. 477.

Under the issue of riens in arriere, the plaintiff cannot controvert the holding as claimed by the defendant in his avowry. *Hill v. Wright*, 2 Esp. 669.

Infancy.—A plaintiff may plead in bar to an avowry or a cognizance, that he did not hold as tenant, and that there was nothing in arrear, with a plea of infancy. *Wilson v. Ames*, 1 Marsh. 74; 5 Taunt. 340.

Other Pleas.—In replevin upon a distress for rent, a plea in bar, that the defendant pulled down a summer-house, whereby the plaintiff was deprived of the use thereof, without saying that he was expelled or put out of the same, was held insufficient; being a mere trespass, but no eviction. *Hunt v. Cope*, Cowp. 242.

Replevin for taking the plaintiff's goods and chattels; to wit, a lime-kiln; avowry for rent; a plea in bar that the lime-kiln was affixed to the freehold, is bad, because a departure from the declaration. *Niblet v. Smith*, 4 T. R. 504.

Replevin for taking and detaining cattle. Avowry for rent in arrear. Plea, that, after the taking and before the impounding, the plaintiff tendered the rent and expenses. On special demurrer, for that the plea did not go to the taking, but only to the detaining:—Held, a good plea, the tortious detention being a taking. *Evans v. Elliot*, 5 A. & E. 142; 6 N. & M. 606; 2 H. & W. 231.

A defendant having made cognizance for rent service as bailiff of A., B. and C., who were lawfully possessed of a manor of which the locus in quo was parcel, and holden at a certain rent; the plaintiff replied, that A., B. and C. were not seised in their demesne as of fee of the manor:—Held, bad. *Bulpit v. Clarke*, 1 N. R. 56.

In replevin for taking a stranger's cattle for rent in arrear, a plea, that the cattle were not levant and couchant in the close, in which, &c., is bad, for not shewing the circumstances under which the cattle came upon the close, so as to entitle them to be privileged from distress. *Jones v. Powell*, 8 D. & R. 416; 5 B. & C. 647.

In replevin for taking three steers, the defendant first made cognizance as bailiff of a lord of a manor, that the locus in quo was a common within it, and that the jurors at a court-leet made a regulation or bye-law, that no person should keep any steer on the common, after two years old, under the penalty of 20s. a head for each of such cattle; and that by another custom, if the sum directed to be paid by way of penalty for a breach of such regulation was refused, a distress might be levied; that as the steers, being more than two years old, were depasturing on the common, he took them in the name of a distress; and, secondly, that he distrained them damage feasant. The plaintiff pleaded to the second cognizance, that he was entitled to right of common, as being seised in fee of a messuage; and that he turned the steers in question, being less than two years old, to wit, one year old, on the common to depasture:—Held, that the first cognizance was bad, as it did not state that the distress was taken for the penalty, or that the plaintiff refused to pay the same. *Cleaves v. Stevens*, 2 Moore, 464.

Held, also, that the plea to the second cognizance was bad, as it did not state that the steers

were less than two years old when they were distrained. *Ib.*

An avowry was made in respect of a right of common claimed by a corporation, under a grant from De Vesce. The plaintiff pleaded that the corporation had been accustomed to appoint a reasonable number of herds, for superintending the common and beasts on it; and also to appoint, for the pains of each herd, a reasonable and proper number of stints of each such herd to be depastured upon the common:—Held, sufficient after verdict. *Elliott v. Hardy*, 3 Bing. 61.

Avowry for rent in arrear, that the plaintiffs held the premises in which &c. as tenants to A. Plea, that A. demised the premises to the plaintiffs for all the residue of his interest in the same, and that A. had not any reversionary interest in the same. The defendant replied—a power of distress given to A. by the award of an arbitrator to whom certain disputes, and all matters in difference between him and the plaintiffs, had been referred. The plaintiffs rejoined that it was not referred to the arbitrator, whether A. should have a power of distress:—Held, that the plea was good, and that the replication was bad, in not averring that the arbitrator had authority to confer a power of distress, or that the right to distress was one of the matters in difference. *Pascoe v. Pascoe*, 3 Bing. N. C. 898; 5 Scott, 117; 3 Hodges, 188.

Where the claim of a plaintiff was founded on a custom to demise a right of common appurtenant without deed, and he pleaded a custom to demise the right of common generally, and a demise according to the custom:—Held, that, even supposing such a custom to be good, the plea was bad on the face of it, without alleging a custom to demise without deed, in lieu thereof. *Lathbury v. Arnold*, 8 Moore, 72; 1 Bing. 217.

Payment of Money into Court.—A plaintiff may pay the rent into court, for which the defendant avows. *Vernon v. Wynne*, 1 H. Bl. 24.

A defendant may pay money into court as to a part of a distress, and avow as to the residue. *Lambert v. Hepworth*, 2 G. & D. 112; 2 Q. B. 729; 11 L. J., Q. B. 85.

Default in delivering Statement of Defence—Action on Replevin Bond—Judgment.—If, in an action on a replevin bond, the plaintiff, instead of claiming damages, claims the amount for which the bond is given, and becomes entitled to judgment by default, his proper course is to enter final judgment under Ord. XXIX. r. 2, and not interlocutory judgment under r. 4 of that order. *Dix v. Groom*, 5 Ex. D. 91; 49 L. J., Ex. 430; 28 W. R. 370.

5. EVIDENCE.

Of Title.—Letters of a party under whom a plaintiff in replevin does not claim, are inadmissible to affect the title of the latter. *Halford v. Dillon*, 4 Moore, 381; 2 B. & B. 12. And see *Betham v. Benson*, Gow, 45.

Where a defendant made cognizance for two years and a quarter's rent in arrear; and alleged that for a long time, viz. for two years and a quarter, ending at Christmas, 1803, the plaintiff held and enjoyed the premises as tenant thereof to A., by virtue of a certain demise, &c.: to which the plaintiff pleaded in bar, that he did

not hold and enjoy the premises as tenant to A. by virtue of the supposed demise; it is sufficient to entitle the defendant to a verdict on such issue, if he proves that the plaintiff held of A. from the 23rd of December, 1801, and to recover for two years' rent. *Forty v. Imber*, 6 East, 434; 2 Smith, 548.

Where A. had paid rent to B., the agent of C. and D., and the property for which the rent was paid was subsequently conveyed to C. and E., and A. still paid the rent to B., but was not informed by the latter of the change, and B. paid over the rent to C. and E.:—Held, that the payment so made was some evidence of the title of C. and E. to the property, and that under such circumstances there was no necessity (in replevin by A. against parties claiming under C. and E.) for the proof of the conveyance to C. and E. *Hitchins v. Thompson*, 5 Ex. 50; 19 L. J., Ex. 146.

Of Amount of Rent due.—An avowry for an increased rent on a demise for every acre of the land which should be converted into tillage, is supported by a lease for a term of years, with a covenant to pay the increased rent for every acre which should be so converted "during a part of the term," (ex. gr.) for the last three years, by 11 Geo. 2, c. 19, s. 22. *Roulston v. Clarke*, 2 H. Bl. 563.

Avowry for rent due on a demise at 40l. per annum. The plaintiff held under a lease, reserving 40l. per annum in the body, but before it was executed the following words were added, between which and the body of the lease the signatures were written, "The allowance of the road to the Six Bells' Yard to be made as usual." It had been usual for the lessor to allow the lessee 5l. per annum for so much annually paid by the lessee to a third party for the use of such road to the premises:—Held, that this did not reduce the reservation to 35l. per annum, so as to entitle the plaintiff to a verdict on non tennit. *Davies v. Stacey*, 12 A. & E. 506; 4 P. & D. 157.

An avowry stated a demise for two years, ending on the 29th September, 1842. On the trial, an attornment in writing, dated the 14th October, 1842, was given in evidence, by which the plaintiff and others attorned tenants to the defendant for such parts of the premises as were in their respective occupation, and agreed to pay the rents set opposite to their respective names. Opposite the defendant's name was written, "Rent 55l., from Michaelmas, 1840:—"—Held, that the avowry was supported by the evidence. *Gladman v. Plumer*, 15 L. J., Q. B. 79; 10 Jur. 109.

An avowry stated that the plaintiff held premises of the defendant at a certain rent, to wit, the yearly rent of 80l.; and because a large sum, to wit, 80l. of the rent for a certain time, to wit, one year ending on the 29th September, A.D. 1851, was due and in arrear; and then justified the distress for rent in arrear:—Held, that the date in the avowry was material, and therefore that the avowry was not supported by proof of some rent being due and in arrear for a former year. *Roskrugs v. Caddy*, 7 Ex. 840; 22 L. J., Ex. 16.

Of Demand.—Where to a cognizance for rent the landlord pleaded in bar a tender, and the defendant replied a subsequent demand and refusal to himself:—Held, that the issue was not proved

by a demand by his agent. *Pimm v. Greville*, 6 Esp. 95.

Of Tender.]—Aowry for rent for two years and a half. Pleas, tender and non tennit. On the trial a holding from Michaelmas old style, and a tender after old Michaelmas, being proved :—Held, that proof of a tender by the plaintiff of the amount of rent due in support of the first plea was not evidence for the defendant of the holding, as stated in the aowry, nothing being said by the plaintiff at the time of the tender about the terms of the holding, or the time when the rent had become due. *Knight v. McDouall*, 12 A. & E. 438 ; 4 P. & D. 168.

What a Variance.]—A plea to an aowry stated that only 16l. was due for the rent, and then pleaded a tender of that sum ; the proof was that only 16l. 16s. was tendered :—Held, a variance, though only the latter sum was proved to be due for rent. *John v. Jenkins*, 3 Tyr. 170 ; 1 C. & M. 227.

A defendant avowed for rent in arrear for a dwelling-house with the appurtenances, and it appeared that the plaintiff merely occupied the upper part of the house, and that the shop and yard were in the occupation of other tenants :—Held, to be no variance. *Page v. Chuck*, 10 Moore, 264.

In replevin for illegally distraining plaintiff's growing corn in four closes, the defendant avowed the distress for rent in arrear, averring that plaintiff held the closes at and under a certain yearly rent ; to which the plaintiff pleaded that he did not hold in manner and form as alleged. Upon proof that the plaintiff held the four closes and two others at the rent stated in the aowry :—Held, no variance. *Hargrave v. Shewin*, 9 D. & R. 20 ; 6 B. & C. 34.

If a defendant avows on the contract for 110l. rent, and proves a demise at 15s. an acre, amounting to 111l., it is a variance. *Brown v. Sayce*, 4 Taunt. 320.

6. TRIAL.

Right to Begin.]—A defendant made cognizance as bailiff of A. for rent in arrear. The plaintiff pleaded that the distress was not made within twenty years next after the right to distress accrued. The defendant replied, that the distress was made within twenty years next after the right to distress accrued :—Held, that the plaintiff should begin, inasmuch as the affirmative was involved in his plea. *Collier v. Clerk*, 5 Q. B. 467 ; 9 Jur. 158.

A defendant avowed the taking as a distress for an annuity. The plaintiff pleaded that no memorial of the annuity was enrolled. Replication, that a memorial of the date of the indenture, and of the names of the parties and witnesses, and of the parties by whom the annuity was to be beneficially received, and of the consideration was enrolled. Rejoinder, that the memorial did not truly state the names of the persons by whom the annuity was to be received, and the considerations ; but was untrue in this, that B. was not the only person by whom the annuity was to be beneficially received. Surrejoinder, that the memorial did truly state the name of the persons by whom the annuity was to be beneficially received, and the considerations :—Held, that the defendant must begin.

Hogarth v. Penny, 1 C. & K. 608 ; 14 M. & W. 494 ; 14 L. J., Ex. 345.

Where a defendant pleads property in a third person, and issue is taken thereon, he is entitled to begin. *Colstone v. Hescolbs*, 1 M. & Rob. 301.

If a defendant avows for rent arrear, and the plaintiff replies *riens in arriere*, he must begin. *Cooper v. Egginton*, 8 C. & P. 748.

If there is any affirmative issue on the plaintiff, he is entitled to begin. *Curtis v. Wheeler*, 4 C. & P. 196 ; M. & M. 493. *James v. Salter*, 1 M. & Rob. 501.

There was a cognizance for rent in arrear. To this there were two pleas, the one stating that an agreement had been entered into between the landlord and tenant, and that the tenant was subsequently induced by the landlord to enter into another agreement ; which second agreement was the demise in the cognizance mentioned ; and this latter agreement had been abandoned by mutual consent before any rent became due. The other plea was similar, except that it averred that the tenant was induced to enter into the second agreement by fraud. Replication to the one, denying the abandonment ; and to the other, denying the fraud :—Held, that the plaintiff had the right to begin. *Williams v. Thomas*, 4 C. & P. 234.

New Trial.]—The rule that a new trial will not be granted for either party, when the sum given or recovered is under 20l., does not apply in replevin. *Edgson v. Cardwell*, 8 L. R., C. P. 647 ; 28 L. T. 819.

7. VERDICT, JUDGMENT AND COSTS.

Verdict.]—On an aowry, or a justification of a taking as a distress for the whole rent, a jury may find a verdict for the sum due upon an apportionment. *Neale v. Mackenzie*, 1 Gale, 119 ; 1 M. & W. 747.

Judgment—Finality of.]—A judgment "that the defendants have a return of the cattle, and recover their damages and costs assessed by the jury," is good either as a judgment at common law, though the return is not adjudged irreplevisable, or as a judgment under 21 Hen. 8, c. 19, s. 3, which entitles the defendants to damages and costs. *Ganmon v. Jones*, 4 T. R. 509.

If a defendant obtains judgment of non pros. for a return, and a certain amount for costs, the judgment is not final until taxation ; but would be final if it had been for a return only. *Wright v. Lewis*, 9 D. P. C. 183 ; 1 W. P. C. 42 ; 4 Jur. 1112.

An aowry stated that the plaintiff held and enjoyed the locus in quo as tenant to the defendants under a demise made by them to him, upon and subject to the following rents, provisions, conditions and stipulations, viz., that the plaintiff should not, during the tenancy, sell any hay, produced on the premises, off the premises, under a penalty of 2s. 6d. per yard of the hay so sold, to be recovered by distress as for rent in arrear, and that the plaintiff, during the tenancy, sold 800 yards of hay, contrary to the terms of the demise, by reason whereof a certain sum, at the rate of 2s. 6d. per yard, became due and recoverable by distress. Verdict, that the plaintiff held and enjoyed the premises upon the terms alleged, and that the value of the distress was 99l. and the arrears were 54l. Judgment, under 17 Car. 2,

c. 7, s. 2, that the defendant do recover 54l. and costs. It was admitted, that if the 2s. 6d. per yard was a penalty, the judgment given under 17 Car. 2, c. 7, was erroneous; and on error to the Exchequer Chamber:—Held, that as the legal operation of the demise was to create a penalty recoverable by distress as for rent, but not a rent, the judgment given under the statute of Charles could not stand, the distress not being for a rent. *Pollitt v. Forrest*, 11 Q. B. 949, 962; 17 L. J., Q. B. 291; 12 Jur. 560—Ex. Ch.

— **Moving for.**—A defendant in replevin was not entitled to move for judgment as in case of a nonsuit. *Shortridge v. Hiern*, 5 T. R. 400.

— **Effect of.**—Judgment for the plaintiff in replevin is a bar to an action for damages for the same taking of the goods in respect of which the replevin was brought. *Gibbs v. Cruikshank*, 8 L. R., C. P. 454; 42 L. J., C. P. 273; 28 L. T. 735; 21 W. R. 734.

— **Writ of Inquiry after.**—Where judgment is given on demurrer for an avowant, fifteen days' notice of executing the writ of inquiry should be given to the plaintiff, as in the case of nonsuit on the 17 Car. 2, c. 7, s. 2. *Burton v. Hirkey*, 1 Marsh. 444; 6 Taunt. 57.

Where there was a nonsuit and retorno habendo awarded:—Held, that the avowant might execute a writ of inquiry after a writ of second deliverance. *Cooper v. Sherbrooke*, 2 Wils. 116.

A writ of inquiry was granted after a defective verdict in replevin of a distress for a poor-rate. *Dewell v. Marshall*, 3 Wils. 442; 2 W. Bl. 921.

Death of Plaintiff before Avowry.—Where a plaintiff dies after declaration, and before avowry, no retorno habendo can be issued. *Cutfield v. Corney*, 2 Wils. 83.

Costs.—The 5 & 6 Will. 4, c. 76, s. 133, which enacts, that in all actions against any person for anything done in pursuance of the act, if judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, does not apply to actions of replevin brought against magistrates to try the validity of a distress for borough rates. *Jones v. Johnson*, 2 L., M. & P. 177; 6 Ex. 133; 20 L. J., M. C. 169.

The 6 & 7 Will. 4, c. 71, s. 83, which empowers the owner of a tithe rent-charge to distrain for arrears, and "otherwise to act and demean himself in relation thereto as any landlord may for arrears of rent," does not entitle him to the full costs substituted by 5 & 6 Vict. c. 97, s. 2, for the double costs given by 11 Geo. 2, c. 19, s. 22, in replevin. *Newnham v. Bever*, 7 D. & L. 253; 8 C. B. 560.

The 17 Car. 2, c. 7, s. 3, applies to a rent-charge as well as to a rent-service; and the term "full costs" in the statute means ordinary costs, as between party and party. *Jamieson v. Trevelyan*, 10 Ex. 748; 24 L. J., Ex. 74; 1 Jur., N. S. 334.

A defendant avowed for a rent-charge under a will, and the record was taken down for trial by both parties. The defendant succeeded, and his damages, &c., were assessed under 21 Hen. 8,

c. 19, s. 3:—Held, first, that the defendant was entitled to the costs of his record. *Id.*

Held, secondly, that he was not entitled to the costs of the distress incurred before plaint. *Id.*

REPUTED OWNERSHIP.

See BANKRUPTCY.

RESCUE OF PRISONERS.

See CRIMINAL LAW.

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I. TAXES AND DUTIES.

1. INCOME TAX.

a. Property and Persons Liable.

Residence in Great Britain.—A statute imposing a duty on the property of persons residing in Great Britain, applies to persons residing there for any length of time, however short, although they may at the same time have a more permanent residence elsewhere. *Att.-Gen. v. Coote*, 4 Price, 183.

— **When Temporary.**—An exemption of persons coming to reside "for some temporary purpose only, and not with any view or intent of establishing a residence therein, and who shall not have actually resided in Great Britain for the period of six successive calendar months," does not include a person taking a house in London and furnishing and residing in it for a less period than six months at any one time, and who then goes elsewhere with his establishment, and resides for the remainder of the year there, leaving behind him some one merely to take care of the house. *Id.*

Annuity received in England.—The Bengal Civil Service Annuity Fund was composed of moneys subscribed by the civil servants of the East India Company, and of moneys contributed by the company, and was invested in India, and managed there by a committee. By an arrangement with the East India Company, the annuitants had the option either of receiving their annuities in India from the managers, or of being paid at the East India House in London, the company in the latter case being provided out of the fund with moneys for the purpose of making the payments. A retired civil servant, residing in France, having elected to be paid his annuity in London, received a certificate from the managers in India that he was qualified as an annuitant, and that he was "entitled to demand and receive from the East India Company in London the annuity, by quarterly instalments." The certificate was filed at the East India House, and the annuitant was paid there by a cheque or warrant for each instalment, directed to the cashiers of the Bank of England, and signed by the company:—Held, that the annuitant was not liable, under 5 & 6 Vict. c. 35, to pay income-tax in respect of his annuity. *Udny v. East India Company*, 13 C. B. 733; 22 L. J., C. P. 260; 17 Jur. 107.

Profits made Abroad upon English Purchases.]

—A firm of merchants, resident and carrying on their principal business at New York, had a partner resident in England, for the purpose of buying goods here, and shipping them for New York, where a profit was realized and received on the resale of them at an advanced price. None of the profits of the partnership were received in England, and no money was received in England except in remittances to the resident partner from the house in New York:—Held, that the resident partner was not bound to return

to the commissioners of the income-tax the amount of profits realized by the firm in America by the resale of the goods purchased here; and that the firm, being resident abroad, and not exercising their trade within the United Kingdom, could not be liable to be taxed on those profits. *Sulley v. Att.-Gen. (in error)*, 5 H. & N. 711; 6 Jur., N. S. 1018; 8 W. R. 472—Ex. Ch.

Company Registered in England—Trading Abroad.]—A company registered in England, under the Companies Acts, 1862 and 1867, carried on the business of sulphur miners, manufacturers or merchants in Italy. It had directors and shareholders both in England and abroad. The company, so far as its affairs in the United Kingdom were concerned, was managed by a board of directors holding meetings at the London registered office of the company. All the operations connected with the manufacture and sale of sulphur were under the practical management of members of the board resident in Italy, and were exclusively carried on in that country where the profits were earned, but the Italian members were in constant correspondence with their co-directors resident in France and England, who met at the office aforesaid. All the original books of the company and its moneys were kept in Italy, but transcripts of the books and the dividends required for the English shareholders were sent to London. These dividends were the only part of the profits remitted to this country:—Held, that the company was residing within the United Kingdom within 16 & 17 Vict. c. 34, s. 2, Sched. D., and liable to pay income-tax upon the whole of its profits, and not merely on such portion as was remitted to England for distribution among the English shareholders. *Cesena Sulphur Company v. Nicholson*, 1 Ex. D. 428; 45 L. J., Ex. 821; 35 L. T. 275; 25 W. R. 71.

A company was registered in England under the Companies Acts, 1862 and 1867. It had a registered address, directors and shareholders in England, but the whole of its property and the majority of shareholders were in India. The business of the company was the purchase, manufacture, and sale of jute. The materials were bought, wrought, and sold, the books kept, and the gains and profits of the company exclusively made in India under the management of a resident director appointed by and subject to the control of a board of directors in England. Such proportion only of the profits as became payable to the English shareholders was, from time to time, remitted to the directors in England, who thereupon called meetings of those shareholders at the place registered as the address of the company, but which was, in fact, a private office lent for the purpose by one of the directors. At these meetings a dividend was declared that was distributed amongst the shareholders living in England:—Held, that the company was "residing within the United Kingdom," and therefore, under the provisions of the 5 & 6 Vict. c. 35, s. 1, 5 & 6 Vict. c. 80, s. 2, and 16 & 17 Vict. c. 34, s. 2, liable to make a return of the whole annual profits of its business, and chargeable to the income-tax thereon, and not merely in respect of such part of the profits as was remitted to England. *Calcutta Jute Mills Company v. Nicholson*, 1 Ex. D. 428; 45 L. J., Ex. 821; 35 L. T. 275; 26 W. R. 71.

A corporation is not a partnership, nor are

the shareholders in a joint-stock company partners; and a company cannot be divided into two portions, the English and the foreign, and income-tax be assessed only upon the profits accruing or belonging to the shareholders residing in England. *Id.*

An English company carrying on their business in Alexandria where their gains and profits were earned were held to be properly assessed to the income-tax in respect of the whole of the profits of the concern, without any deduction on account of the interest on the debenture bonds of the company paid to the holders of such bonds in Alexandria; there being nothing in ss. 102 and 159 of the Income Tax Act (5 & 6 Vict. c. 35), to limit r. 4 in s. 100, which states that "no deduction shall be made on account of any annual interest or any annuity or other annual payment payable out of such profits or gains." *Alexandria Water Company v. Musgrave*, 11 Q. B. D. 174; 52 L. J., Q. B. 349; 49 L. T. 287; 32 W. R. 146—C. A.

A company, established and incorporated by act of parliament in England, but carrying on its business entirely abroad, is accessible to income-tax upon the whole of the annual profits of its business, whether such profits are or not remitted to this country, or are or not distributed as dividends amongst its shareholders resident in England or abroad, or are applied to some other legitimate purposes of the company abroad. *Imperial Continental Gas Association v. Nicholson*, 37 L. T. 717.

A co-partnership association, established to supply foreign cities and towns with gas, and incorporated by act of parliament in England, had offices in London, where the directors met and the business of the company was transacted, and whence all the orders emanated. They possessed interests, of various natures and tenures, in gasworks in France and other continental countries, the profits of which arose wholly in those countries, and in such of them as had a tax equivalent to an income-tax, those profits were there assessed to such tax. The entire profits of the company arose and accrued abroad, and, in making their return to the income-tax in England, the company admitted their liability to the tax upon the amount of profits as from "foreign possessions" actually remitted in this country and applicable to the payment of dividends to their shareholders, whether resident here or abroad, but denied their liability in respect of their profits ultra such remittance, and which were never transmitted to England, or applied in payment of dividends, but were retained abroad and applied in liquidation of other legitimate engagements of the company abroad. The special commissioners assessed the company in respect of the whole of their profits, including the last-mentioned portion of them, and upon appeal therefrom it was, on a case stated for the court:—Held, first, that the company, though a foreign undertaking in a continental country, yet, being a joint-stock company, incorporated and resident in England, were in the position of a person residing in the United Kingdom, and were therefore taxable under the first case of Schedule D (s. 100) of 5 & 6 Vict. c. 35, and Schedule D of 16 & 17 Vict. c. 34, in respect of the whole of the profits arising from their business abroad, including not only the portion remitted to England and applied in payment of dividends to shareholders resident there or

abroad, but also the portion retained and applied to the other purposes of the company abroad. *Ib.*

— **Gasworks.**—The provisions of s. 60, Schedule A, r. 3, of 5 & 6 Vict. c. 35, which treat gasworks as property, relate exclusively to gasworks in this country, and do not include or relate to gasworks on the continent, and such last-mentioned works are not foreign possessions within s. 100, Schedule D, r. 5. *Ib.*

Foreign Corporation—Residing in United Kingdom.—The Imperial Ottoman Bank was a corporation created by Turkish law. Its seat was fixed, by the concession and the statutes which constituted it, at Constantinople, with power to establish branches and agencies at other places. It was the state bank of Turkey, where it was a bank of issue, and was charged with the collection of the revenue, and with certain operations relating to the currency, and with the payment of interest on the public debt, and received from the state a subsidy on account of the public business transacted by it. On its creation it took over and continued to carry on the business of an English bank in London; and since its creation in 1863, the annual meetings of shareholders had always been held, and dividends declared, in London, though by its statutes the annual meetings might be held at any place which the committee of management might fix:—Held, that the bank was not liable to be assessed to income-tax in respect of its whole profits as a "person residing within the United Kingdom" under 16 & 17 Vict. c. 34, first clause of schedule D, to s. 2, but was liable only in respect of the profits arising from its business carried on in England under clause 2 of the schedule. *Att.-Gen. v. Alexander*, 10 L. R., Ex. 20; 44 L. J., Ex. 3; 31 L. T. 694; 23 W. R. 255.

— **Dividends intrusted to Agents for Payment.**—A foreign company carrying on business and earning profits abroad, had an agency in London which conducted a branch and earned profits. The dividends of the company were payable at the option of the shareholders abroad or by the London agency. In a particular year the London agency earned an amount of profits which enabled them to pay all the dividends demanded of them in that year without requiring or obtaining any remittance from the company abroad. The London agency were assessed to income-tax under Schedule D on the profits earned in the United Kingdom on an average of the three preceding years, the amount on which they were so assessed being less than the amount actually earned by them in that year. They further made a return under 16 & 17 Vict. c. 34, s. 10, that no interest, dividends or other annual payments payable out of or in respect of the stock, funds or shares of the company had been intrusted to them for payment in the United Kingdom, and appealed against an assessment of the commissioners whereby they were assessed in respect of the dividends paid by them:—Held, that the London agency were intrusted with the payment of dividends in the United Kingdom, within the meaning of 16 & 17 Vict. c. 34, s. 10, and that they were liable to be assessed on the full amount of the dividends they so paid in the year, but that since the dividends were payable out of the general earnings of the company, consisting of profits made partly in the United

Kingdom and partly elsewhere, and the London agency had already been assessed to income-tax on the former under Schedule D, they ought not to be further assessed under 16 & 17 Vict. c. 34, s. 10, and pay income-tax in respect of that portion of the dividends which represented profits arising out of the United Kingdom. *Gilbertson v. Ferguson*, 7 Q. B. D. 562; 46 L. T. 10—C. A. Affirming 5 Ex. D. 57.

Foreign Telegraph Company.—The appellants, a foreign company, domiciled in Copenhagen, had three marine cables in connexion with Aberdeen and Newcastle, communicating with the telegraph lines of the post-office in the United Kingdom. They had also work-rooms with clerks in London, Newcastle, and Aberdeen. Messages from this country were forwarded over the lines of the post-office and the cables of the appellants to Denmark, and thence by their wires and the wires of foreign governments to Russia, China, Japan, and India. The total charges paid for transmitting such messages were collected by the post-office, and, after deducting their dues, the balance handed to the appellants, who retained the amount due to them for the transmission of messages over their cables and lines, and paid the residue to the various governments and companies respectively entitled to it. No profits were made by the appellants from the transmission of messages over the land lines in the United Kingdom:—Held, that the appellants must be taken to exercise a trade in the United Kingdom under 16 & 17 Vict. c. 34, s. 2, Sched. D, and that they were chargeable to income-tax on the balance of profits or gains from the receipts in this country from the transmission of messages. *Erichsen v. Last*, 8 Q. B. D. 414; 51 L. J., Q. B. 86; 45 L. T. 703; 30 W. R. 301; 46 J. P. 357—C. A. Affirming 7 Q. B. D. 12; 50 L. J., Q. B. 570; 45 L. T. 285; 46 J. P. 182.

Profits of Corporation—Appropriation by Statute.—A corporation was constituted for the management of the Mersey Dock estate by an act which provided that the moneys to be received by them from their dock dues and other sources of revenue should be applied in payment of expenses, interest upon debts, construction of works and management of the estate; and that the surplus should be applied to a sinking fund for the extinguishment of the principal of the debts; and that after such extinguishment the rates should be reduced; and that except as aforesaid the moneys should not be applied for any other purpose whatsoever; and that nothing should affect their liability to parochial or local rates:—Held, that under the Income Tax Acts the corporation was liable to income-tax in respect of the surplus though applicable to the above-named purposes only. *Mersey Docks v. Lucas*, 8 App. Cas. 891; 53 L. J., Q. B. 4; 32 W. R. 34—H. L. (E.). Affirming 51 L. J., Q. B. 114; 46 J. P. 388—C. A.

— **Tolls.**—Commissioners empowered by an act of parliament to levy a duty on every ton of coal, culm, &c., landed on the beach at, or brought into and consumed within the town of Brighton, for the purpose of erecting and maintaining groynes against the inroads of the sea, were by a later act authorized to form from these coal dues, and from other rates they were then also empowered to levy, a common fund for the purposes of lighting, watching, &c., as well as for

the maintenance of groynes:—Held, that these dues were property or profits within the meaning of the Income Tax Act, and that they were chargeable with income-tax accordingly. *Att.-Gen. v. Black*, 6 L. R., Ex. 78; 40 L. J., Ex. 89; 24 L. T. 370; 19 W. R. 416. Affirmed on appeal, 6 L. R., Ex. 308; 40 L. J., Ex. 194; 25 L. T. 207; 19 W. R. 1114—Ex. Ch.

The profits of the corporation of London derived from renewal fines, markets and metages are subject to income-tax; and deductions in respect of expenditure for the maintenance of the corporation establishment cannot be made. *Att.-Gen. v. Scott*, 28 L. T. 302; 21 W. R. 265.

Assize Courts—Police Stations.—The justices of a county, in the due exercise of statutory powers, erected assize courts with the usual rooms and offices, and a county police station with the usual offices and accommodation for constables living there, and for prisoners. The land on which they were built was conveyed under 21 & 22 Vict. c. 92, to the clerk of the peace to hold to him and his successors for ever upon trust for the public uses or purposes of the county. The courts, police station, offices, and rooms formed one block of buildings, and were used for the administration of justice, and for police and public purposes. Parts of the building were also used for holding county and committee meetings, and various other occasional purposes, but no rent or profit was received or made in respect of the buildings, or any part of them:—Held, that the income-tax was not payable in respect of the buildings under Schedules A or B of the Income Tax Acts. *Coomber v. Berks (Justices)*, 10 Q. B. D. 267; 52 L. J., Q. B. 81; 47 L. T. 687; 31 W. R. 356; 47 J. P. 164—C. A. Affirmed in H. L., 9 App. Cas. 61; 53 L. J., Q. B. 239. See also *Bent v. Roberts*, post, col. 625.

Trading Vessels.—The ownership of trading vessels let to freight was a trade or concern in the nature of trade, within 48 Geo. 3. *Att.-Gen. v. Borrodaile*, 1 Price, 148.

The ship's husband or managing part-owner is bound to make a joint return of the aggregate profits of the concern to the property-tax. *Ib.*

b. Mode of Assessment.

Colliery—Exhaustion of Pits.—A colliery company bought freehold and leasehold coal mines, and raised some of the coal and sold it. At the end of the first year's working, the mines, by reason of the coal gotten during the year, were worth 10,424*l.* less than the price for which they were bought. The company, being assessed to the income-tax under Schedule D in respect of the profits of their business as colliery proprietors for that year, claimed to deduct 10,424*l.* for exhausted capital:—Held, first, that by virtue of 29 & 30 Vict. c. 36, s. 8, the mines were assessable under Schedule D of 5 & 6 Vict. c. 35, s. 100, and not under Schedule A. *Knowles v. McAdam*, 3 Ex. D. 23; 47 L. J., Ex. 139; 37 L. T. 795; 26 W. R. 114.

Held, secondly, that in estimating "the full amount of the balance of the profits or gains" of the business under r. 1 of Schedule D, the deduction ought to be made, and that it was not one of the deductions forbidden by r. 3 of Schedule D, or by s. 159. *Ib.*

—Exhaustion of Pits—Deductions from Gross Profits.—A tenant of minerals, though he may be under a constant vanishing expense in sinking new pits as the old ones become exhausted, is not entitled, in computing the profits for assessment of income-tax, to deduct from the gross profits a sum estimated as representing the amount of capital expended in making bores and sinking pits, which have been exhausted by the year's working. See Lord Penzance's opinion as to the method of taxation intended by the legislature to be applicable to mines. *Knowles v. McAdam* (3 Ex. D. 23) held wrongly decided. *Coltress Iron Company v. Black*, 6 App. Cas. 315; 51 L. J., Q. B. 626; 45 L. T. 145; 29 W. R. 717; 46 J. P. 20—H. L. (Sc.).

—Diminution of Profits from Extraordinary Depression of Trade—"Specific Cause."—A partnership, after working certain coal mines for more than five years, was on the 21st of December, 1875, incorporated as a limited company, and sold to the company the assets, subject to the liabilities, of the partnership. The partners became holders of all the shares in the limited company according to their interests. After the 3rd of August, 1876, changes took place in the shareholders. The company, being assessed by the Income Tax Commissioners to the income-tax under 5 & 6 Vict. c. 35, Schedule D, for the year ending the 5th of April, 1877, on an average of the five preceding years, appealed, and contended that they were only liable to pay on a computation for one year on the average of the profits from the 21st of December, 1875, the date of the incorporation. The commissioners stated a case in which they found that "the profits and gains of the appellants' business had fallen short since the 21st of December, 1875, from the following specific causes, viz., the extraordinary depression in the iron and coal trades whereby the appellants were unable to sell either so large a quantity of their coals as they had formerly been enabled to do, or to obtain anything like so good a price for such coals." Figures shewing that the annual profits had fallen short by one-half were set out:—Held, that Schedule A, No. 4 rules, clause 6, which prescribes that if it shall appear that the account required by the rules "cannot be made out by reason of the possession or interest of the party to be charged thereon having commenced within the time for which the account is directed to be made out, the profits of one year shall be estimated in proportion to the profits received within the time elapsed since the commencement of such possession of interest," did not apply—That the business was a "trade . . . adventure or concern," within Schedule D, rule 1, of the rules for ascertaining the duties to be charged in respect thereof, and was not within the terms of the proviso "set up and commenced" within the period of three years—That the company was a new association carrying on an old concern; and had "succeeded" to it within clause 4 of the third set of rules of Schedule D, but that, since such succession, the profits had fallen short from a "specific cause" within the exception in that clause—And that the rule of the sixth case in Schedule D applied, and under it the computation should be made "on the amount of the full value of the profits and gains received annually," i.e., for the current year. *Ryhope Coal Com-*

pany v. Fyrr, 7 Q. B. D. 485; 45 L. T. 404; 30 W. R. 87.

Deductions for Depreciation of Buildings, Plant, and Machinery.—A company carrying on business as ironfounders set apart, in accordance with their articles of association, a sum of money from their net profits for depreciation of buildings, fixed plant, and machinery, and claimed in making a return under Schedule D. of their annual profits or gains to deduct this amount:—Held, that such a deduction was contrary to 5 & 6 Vict. c. 35, s. 100, Case I. r. 3, as the amount set aside was in effect an addition to capital. *Forder v. Handyside and Company*, 1 Ex. D. 233; 45 L. J., Ex. 809; 35 L. T. 62; 24 W. R. 764.

— **Prospective Losses.**—In making a return of its profits for assessment to income-tax under Sched. D. of the 5 & 6 Vict. c. 35, a fire insurance company is not permitted by the act to credit itself with, or to claim a deduction for, a portion, calculated by the company at 33 per cent., or one-third of the amount of premiums received during the given year, as the unearned or unexhausted portion of such premiums, although in respect of such portion the company remains liable to losses which may occur in the ensuing year. The fair and proper mode of ascertaining the amount of net profits for the purposes of the act (it being impossible to ascertain it with such strictly mathematical accuracy as to do perfect and absolute justice) is to take on the one side the whole receipts and on the other the whole expenditure and disbursements for the given year, the balance remaining being, for the time at least, net profits on which the tax should be assessed. This being done year by year, there is an absolute balancing of accounts; and if any wrong is done by losses afterwards occurring in respect of premiums on which, as profits, income tax has been assessed and paid, that will be taken into consideration in the ensuing year. *Imperial Fire Insurance Company v. Wilson*, 35 L. T. 271.

Balance of Profits and Gains by deducting for exhausted Capital.—The appellants, a firm of brewers, in order to increase the sale of their beer and so to increase their profits, purchased the leases of public-houses, which they let to tenants, who covenanted to buy of them all the beer to be sold in such houses. The appellants, besides covenanting to pay fixed rents for the terms of years reserved by the leases, were obliged, in some instances, to pay premiums for such leases. They claimed in arriving, for the purpose of the income tax, at the balance of profits and gains of their trade, to be entitled each year to an allowance in respect of a portion of the amount so paid by them as premiums, on the ground that such allowance represented a portion of their capital exhausted during the year in earning profits:—Held, that the appellants were not entitled to any allowance in respect of the premiums. *Watney v. Musgrave*, 5 Ex. D. 241; 49 L. J., Ex. 493; 42 L. T. 690; 28 W. R. 491; 44 J. P. 268.

The tax imposed by s. 4 of New Brunswick Act, 31 Vict. c. 36, upon "income" is leviable in respect of the balance of gain over loss made in the fiscal year, and where no such balance of gain has been made there is no income or fund

which is capable of being assessed. There is nothing in the said section or in the context which should induce a construction of the word "income," when applied to the income of a commercial business for a year, otherwise than its natural and commonly-accepted sense, as the balance of gain over loss. *Lawless v. Sullivan*, 6 App. Cas. 373; 50 L. J., P. C. 33; 44 L. T. 897; 29 W. R. 917—P. C.

— **Of a Corporation.**—The profits of the corporation of London derived from renewal fines, markets and metages are subject to income tax; and deductions in respect of expenditure for the maintenance of the corporation establishment cannot be made. The proper principle of deduction in such cases is to take each item of profit separately, and deduct therefrom the cost of earning that item. *Att.-Gen. v. Scott*, 28 L. T. 302; 21 W. R. 265.

Slate Quarry, Assessed as Quarry or Mine.—Slate was obtained from the side of a hill by underground workings carried on through levels:—Held, that the works were to be assessed as a quarry under rule 1 of No. 3 of Schedule A of 5 & 6 Vict. c. 35, s. 60, and not as a mine under rule 2 of that enactment. *Jones v. Cwmorthen Slate Company*, 5 Ex. D. 93; 49 L. J., Ex. 110; 41 L. T. 575; 28 W. R. 237; 44 J. P. 168.

Railway Companies' Servants.—A railway company is not liable to be assessed under Schedule E of the 5 & 6 Vict. c. 35, 16 & 17 Vict. c. 34, and 23 Vict. c. 14, in respect of engine-drivers, porters, and labourers, whether employed by them at annual salaries or at weekly wages amounting to 100l. a year; but such servants are assessable under Schedule D. *Att.-Gen. v. Lancashire and Yorkshire Railway Company*, 2 H. & C. 792; 33 L. J., Ex. 163; 10 Jur., N. S. 705; 10 L. T. 95; 13 W. R. 8.

Schedule E extends only to offices or employments under corporations, which are of a public nature. *Id.*

c. Right to Deduct.

Annuities "without Deduction."—When a testator directs an annuity to be paid out of his personal estate "without any deduction whatever," the income-tax is payable by the annuitant. *Abadom v. Abadom*, 24 Beav. 243; 33 L. J., Ch. 593; 10 Jur., N. S. 505; 10 L. T. 53.

A testator, in 1854, directed his trustees to pay to his widow during her life the annual sum of 500l., "free from legacy duty and other deductions":—Held, that the annuity was subject to income-tax, to be paid out of the annuity itself. *Sadler v. Richards*, 4 Kay & J. 302.

A testator gave three annuities; the first "free from income or property tax, or any other deduction," the second "free from all deductions," the third "free from deductions":—Held, that all the annuities were free from income-tax. *Turner v. Mulmeur*, 1 Johns. & H. 334.

But when a testator directs his trustees out of the rents and profits of his estates to keep insured and to repair all the messuages, buildings and erections upon the hereditaments previously limited, for his wife for life during the continu-

ance of her interest therein, and also during the same period to pay and defray all taxes parliamentary, parochial and otherwise, affecting the same hereditaments or any of them, the trustees are bound to pay the property and income tax. *Loratt v. Leeds (Duchess)*, 2 Drew. & Sm. 62; 31 L. J., Ch. 503; 6 L. T. 307; 10 W. R. 397.

A. B., in 1846, gave to his wife annuities or clear yearly sums for her life, "free from all deductions in respect of any present or future taxes, charges, assessments, or impositions, or other matter, cause, or thing whatsoever," and directed the trustees to appropriate and invest a sufficient part of his personal estate as a fund for the purpose of paying them. The trustees, acting upon the advice of counsel, deducted from all the payments to the widow the income-tax:—Held, that the widow was entitled to be paid the annuities in full, free from any deduction; and also entitled to be paid all the sums which had been deducted. *Lorat (Lord) v. Leeds (Duchess)* (2 Dr. & Sm. 62) followed. *Bannerman's Estate, In re, Bannerman v. Young*, 21 Ch. D. 105; 51 L. J., Ch. 449.

A testator by his will bequeathed his residuary estate to trustees upon trusts for sale and conversion, and out of the income to pay to his wife for life such an annual sum of money as together with the dividends and annual produce of the sum of 10,000*l.*, to which she would be entitled by virtue of the settlement made previous to his marriage with her, should produce to her a clear annual income of 1,500*l.* The will also contained a declaration that no deduction should be made from any legacies given by the will, or to be given by any codicil thereto, "for the legacy tax or any other matter, cause, or thing whatsoever." By an order made in 1861, the annuity was directed to be paid half-yearly "until the further order of the court" out of certain specified funds, free of all deductions except income-tax:—Held, that the question whether income-tax ought properly to be deducted was *res judicata*, the order of 1861 being final as to the rights of parties, and temporary only as to the time and mode of payment of the annuity. *Pearreth v. Marriott*, 22 Ch. D. 182; 52 L. J., Ch. 221; 48 L. T. 170; 31 W. R. 68—C. A. Reversing 51 L. J., Ch. 821; 46 L. T. 800; 30 W. R. 884.

But, *semble*, that the income-tax was properly deducted. *Id.*

Rent-charges.—The 5 & 6 Vict. c. 35, s. 103, which renders void all contracts to pay rent-charges without allowing the owner of the land to deduct the income-tax, does not extend to rent-charges granted by will; and if a testator by his will grants a rent-charge to be paid free of income-tax, the annuitant is entitled to have the full amount paid without deduction of the tax. *Feeling v. Taylor*, 3 B. & S. 217; 32 L. J., Q. B. 41; 9 Jur., N. S. 44; 7 L. T. 429; 11 W. R. 70.

By a marriage settlement executed in 1807, lands were conveyed, subject to "an annuity or clear yearly sum of 100*l.* freed and clear and without any deduction or abatement whatsoever in respect of any taxes or impositions then already or which should thereafter be taxed, charged, assessed or imposed upon the premises or upon the annuity by authority of parliament or otherwise howsoever:—Held, that the par-

ties paying the annuity were entitled to deduct income-tax under 5 & 6 Vict. c. 35, ss. 73, 103, and that the annuitant refusing to permit the deduction was liable to the penalty under s. 103. *Att.-Gen. v. Shield*, 3 H. & N. 834; 28 L. J., Ex. 49.

On an information against an annuitant for refusing to allow the tenants of premises on which the annuity was charged, the income-tax, to be deducted out of their rent:—Held, liable for the acts of the attorney to whom the tenant had been referred; and the question held to be, not whether the deduction was in terms refused, but whether it was in fact allowed. *Reg. v. Sheil*, 1 F. & F. 204.

Instalments of Purchase-money.—F. being seised in fee of one moiety of certain mines, sold her share for 45,000*l.*, payable, 3,385*l.* down, and the residue by half-yearly instalments of 768*l.* 11*s.* 8*d.* during a period of thirty years:—Held, first, that the purchaser was not empowered, by 16 & 17 Vict. c. 34, s. 40, to deduct income tax from the instalments. *Foley v. Fletcher*, 3 H. & N. 769; 28 L. J., Ex. 100; 5 Jur., N. S. 342.

Held, secondly, that the instalments were not chargeable with income tax under the words "annuities or other annual profits and gains," in Schedule D of 16 & 17 Vict. c. 34, or under the words "annual payments, payable as a personal debt or obligation by virtue of any contract," in 5 & 6 Vict. c. 35, s. 102, such instalments being the payments of a debt, and not being profits and gains, and therefore not within the purview of the acts. *Id.*

By deed, A., in consideration of 1,380*l.*, to be paid by instalments, granted and sold to B. a mine of coal for a term of fifty years, and he covenanted with A. to pay him 150*l.* on the execution of the deed, and 150*l.* per year after that time, whether a quantity of coal equal to that amount, at and after the rate of 100*l.* per Lancashire acre, should be got out of the mine in the same year or not; and when in any year so many coals should be got out of the mine as would, at the rate of 100*l.* for every Lancashire acre of coal, amount to more than 150*l.* per year, then that he would pay for every Lancashire acre of coals 100*l.*, and so on in proportion for every greater or less quantity than an acre, until 1,380*l.* should be paid (it being the intent of the parties that A. should not, until that sum was paid, receive less than 150*l.* per year), the same yearly rents to be paid half-yearly, on the 24th of June and the 24th of December in each year. B., who had never worked the mine, claimed to deduct from a half-yearly instalment a sum paid by him for income tax:—Held, that the instalment of 150*l.* per year was not rent within 5 & 6 Vict. c. 35, s. 60; and that, assuming it to be an annual payment within s. 102, A., and not B., was liable to be assessed to the income tax. *Taylor v. Evans*, 1 H. & N. 101; 25 L. J., Ex. 269.

Brick Rent.—On a demise of land for a term of years, with power to the lessee to dig brick-earth, and make and sell bricks, paying yearly 17*l.* 10*s.* for surface-rent, and 100*l.* for royalty or brick-rent, clear of all deductions, except landlord's property or income tax, and also paying 2*s.* in respect of every 1,000 bricks above the first million, clear of all deductions, except as

aforesaid :—Held, that under the 5 & 6 Vict. c. 35, income tax was payable by the lessor in respect of all three species of rent, and was properly assessable on the lessee, who might deduct the amount from the rent. *Edmonds v. Eastwood*, 2 H. & N. 811; 27 L. J., Ex. 209.

Interest.—When a fund is assigned to trustees to pay a fixed sum annually to creditors pro rata, with interest till payment, the assignor is entitled to deduct income tax on the payments in respect of interest. *Crane v. Kilpin*, 6 L. R., Eq. 334; 37 L. J., Ch. 913; 18 L. T. 350.

A purchaser, liable to pay interest on his purchase-money, may deduct income tax from such interest. *Bebb v. Bunney*, 1 Kay & J. 216.

The words "yearly interest" in 16 & 17 Vict. c. 34, s. 40, mean not only interest accruing de anno in annum, but any interest at a fixed rate per cent. per annum, though accruing de die in diem. *Ib.*

—**Bills of Exchange.**—In paying a creditor, who has proved in an administration suit in equity upon a bill of exchange, income tax is deducted from the interest. *Dinning v. Henderson*, 3 De G. & S. 702; 19 L. J., Ch. 273; 14 Jur. 1038.

Mortgage.—Though in dealings between merchants, in discounting bills and the like, and in loans made for short periods, the income tax is not deducted, yet in a mortgage transaction the mortgagor is entitled to deduct it. *Mosse v. Salt*, 32 Beav. 269.

When Deduction Omitted.—A debtor, making payments to his creditor from time to time for interest, without deducting property tax, will not be allowed, upon finally settling the debt, to deduct the amount of back payments in respect of such tax from the balance of the debt due at the time of settlement. *Turner, Ex parte*, 11 L. T. 352; 13 W. R. 104.

2. LAND TAX.

a. Property Liable to.

Waterworks Company—Pipes and Mains.—A waterworks company is not liable to pay land tax in respect of the land through or on which, by a parliamentary power, it is entitled to lay and does lay its mains and pipes for the conveyance of water, such a power being only in the nature of an easement, and therefore not making the company "holders of lands or of an hereditament," within the Land Tax Acts. *Chelsea Waterworks v. Bowley*, 17 Q. B. 358; 20 L. J., Q. B. 520; 15 Jur. 1129.

Bridge Tolls.—By 38 Geo. 3, c. 5, for granting a land tax for 1798, it was enacted that all manors, messuages, lands, tenements, tolls, &c., and all hereditaments of whatever nature or kind soever they be, situate, lying, and being and happening, or arising, should be charged to the land tax. By 38 Geo. 3, c. 60, for making the land tax perpetual, it was enacted, that the sums charged by 38 Geo. 3, c. 5, in respect of the manors, lands, tenements and hereditaments in the act mentioned, should be raised for ever. An act incorporating a bridge company authorized

the company to take tolls, and enacted that the shares of the proprietors should be personal estate, and not in the nature of real property :—Held, that the company was liable under 38 Geo. 3, c. 60, to be rated to the land tax in respect of their tolls, as being a tenement and hereditament within the true meaning of that act. *Vauxhall Bridge Company v. Sawyer*, 6 Ex. 504; 20 L. J., Ex. 304.

Bridge tolls, which do not arise from the mere user of land, but are granted to a bridge company, as a franchise, by act of parliament, are an hereditament of themselves, and liable to be assessed as tolls to the land tax, by virtue of 38 Geo. 3, c. 5, s. 4. *Charing Cross Bridge Company v. Mitchell*, 4 El. & Bl. 549; 24 L. J., Q. B. 249; 1 Jur., N. S. 608—Ex. Ch.

The fact that the land tax on the land on which the abutments are built has been redeemed does not relieve the company from the liability to be assessed for the tolls. *Ib.*

By a bridge act, the bridge and roads "shall not be charged or chargeable with any parochial rates or assessments whatsoever for or in respect of the tolls :"—Held, that the exemption was confined to the rates and assessments laid upon the parish for local purposes, and did not extend to the land tax. *Waterloo Bridge Company v. Cull*, 1 El. & El. 213; 28 L. J., Q. B. 70; 5 Jur., N. S. 464. Affirmed, 1 El. & El. 213; 29 L. J., Q. B. 10; 5 Jur., N. S. 1288—Ex. Ch.

The land on the north side of the river was redeemed from land tax before it was conveyed to the bridge company :—Held, that such redemption was immaterial, as the tolls were a separate tenement. *Ib.*

Royal Exchange.—The corporation of the Royal Exchange Assurance Company in London is liable to be assessed to the land tax, in its corporate capacity as a corporation. *Exchange Assurance Company v. Vaughan*, 1 Burr. 155; 1 Ld. Ken. 320.

Exemption—Hospitals.—Taxing acts must be construed strictly. And where therefore land which, in 4 Will. & M., being employed for charitable purposes, as the site of an almshouse or hospital, was on that account declared by a statute then passed (4 Will. & M. c. 1) to be exempt from the land tax at that time imposed—and the like words of exemption were used in 38 Geo. 3, c. 5, the fact that other land had since been applied to the same charitable purposes, and the original land had been, by order of the Court of Chancery, directed to be held by the trustees of the charity to their own use, freed from its charitable trusts, did not, without more, render it liable, even in the hands of a tenant, to the taxation from which it had been previously exempt. *Coe v. Rabbits*, 3 App. Cas. 473; 47 L. J., Q. B. 385; 38 L. T. 430; 26 W. R. 483. Affirming 3 Q. B. D. 307; 46 L. J., Q. B. 498; 36 L. T. 455; 25 W. R. 594.

—**Residence in a Hospital.**—A house within the limits of a hospital, appropriated to an officer of the hospital for the time being, is not assessable. *Harrison v. Bulcock*, 1 H. Bl. 68.

The proviso in 38 Geo. 3, c. 5, s. 25, exempting hospitals from land tax, applies only to hospitals and sites of hospitals founded before the passing of the 38 Geo. 3, c. 60, the act by which the former act was made perpetual. *Colchester*

(*Lord*) v. *Kewney*, 1 L. R., Ex. 308; 35 L. J., Ex. 204; 12 Jur., N. S. 743; 14 L. T. 888; 14 W. R. 994; 4 H. & C. 445. Affirmed, 2 L. R., Ex. 253; 36 L. J., Ex. 172; 16 L. T. 463; 15 W. R. 930—Ex. Ch.

— **Crown Property.**—An asylum for the maintenance and education of children of soldiers who have fallen in active service, built, endowed, and entirely maintained out of a fund subscribed by the public, and administered by commissioners appointed by the crown, is not exempted, *qua* crown property, from paying the land tax. *Ib.*

Land previously chargeable with land tax is not exempted by becoming crown property. *Ib.*

The king's dockyards are not assessable. *Att.-Gen. v. Hill*, 2 M. & W. 160.

— **Lands Exempt before Statute.**—Houses built on lands embanked from the Thames, in pursuance of 7 Geo. 3, c. 37, which vests those lands in the owners free from taxes, were not liable to be assessed to the general land tax imposed by 27 Geo. 3, c. 5, though such act is conceived in general terms, and is subsequent in point of time to the act creating the exemption. *Williams v. Pritchard*, 4 T. R. 2. And see *Perrichard v. Heywood*, 8 T. R. 468.

— **Colleges.**—Buildings of a college in one of the universities taken into and made part of the college between the passing of the first Land Tax Act and the act which made that tax perpetual, are exempted. *All Souls' College v. Cantar*, 3 B. & P. 635.

But where a college, soon after the passing of the first Land Tax Act, purchased land of a parish under a private act, which provided that the college should pay all taxes which the premises then were, or should thereafter be, subject to:—Held, that the lands purchased were not exempted. *Ib.*

On **Exchange of Lands.**—Upon an exchange of lands under 6 & 7 Will. 4, c. 115 (which contains a clause assimilating the tenure and quality of lands exchanged and allotted to that of the lands in respect of which the allotment or exchange is made), the statute does not transfer a liability to land-tax from one property exchanged to the other. *Cooch v. Walden*, 46 L. J., Ch. 639.

b. Redemption.

Effect of.—When a manor has once been charged with land tax, and the tax once redeemed, no subsequent inclosure of the waste lands will render the manor liable to re-assessment. *Hodgson v. Pearson*, 31 L. T. 679.

Surplus stock purchased under 42 Geo. 3, c. 116, s. 100, for the redemption of the land tax, cannot be applied to permanent improvement of the lands in respect of which the land tax was redeemed. *Nether Stowey Vicarage, In re*, 17 L. R., Eq. 156; 29 L. T. 604; 22 W. R. 180.

Sale of Land for Purpose—Minerals not Passing.—The 39 Geo. 3, c. 21, s. 12, in effect provides that upon sales of lands by ecclesiastical corporations for redemption of land tax,

the minerals shall not pass by the conveyance of the lands, but shall be always absolutely excepted or reserved to such ecclesiastical corporations. A conveyance of prebendal land, executed under this statute in 1799, contained a general exception of minerals, but purported to except out of such exception the clay under twenty perches of the land:—Held, that the exception out of the exception was not rendered effectual by 57 Geo. 3, c. 100, s. 25, for that act was intended to remedy defects in the mode of conveyance, and not in the subject-matter conveyed, and that the property in the clay under the twenty perches did not pass by the deed of 1799. *Whidborne v. Ecclesiastical Commissioners for England*, 7 Ch. D. 376; 47 L. J., Ch. 129; 47 L. T. 346.

Held, also, that, on the evidence, the grantees of the surface were entitled to support as against the grantees of the clay. *Ib.*

— **Growing Timber.**—Where a tenant for life, without impeachment for waste, makes an absolute sale and conveyance of land under 42 Geo. 3, c. 116, s. 51, for the purpose of redeeming the land tax on other property, the growing timber, though not mentioned in the conveyance, passes with the land; and the price of it, as well as that of the land, must be paid into the Bank of England, although the price of the land without the timber makes up the sum for which the land tax is to be redeemed. *Doe d. Blewitt v. Phillips*, 4 P. & D. 562; 1 Q. B. 84.

By **Incumbent—Interest on Purchase-Money.**—The representatives of a deceased incumbent of a rectory who has, out of his own estate, redeemed the land tax prior to 1799, are entitled to recover from the succeeding incumbent the interest of the purchase-money, at the rate of 3l. per cent. on such purchase-money. *Kilderbee or Kilderbere v. Ambrose*, 10 Ex. 454; 24 L. J., Ex. 49.

Consolidation of Charge.—A person having a partial interest, redeemed the land tax on three several tenements, by one contract and at one price:—Held, that the three charges were not consolidated so as to give him one aggregate charge on all tenements, but he acquired three separate charges on the three several tenements. *Cox v. Corenton*, 31 Beav. 378; 8 Jur. 1142.

Rent-charge in lieu of.—An equitable tenant in fee contracted to purchase a rent-charge in lieu of land tax redeemed, which was charged upon the estates of which he was so tenant for life in fee, and the rent-charge was conveyed to trustees of the estates. Subsequently, he contracted to sell the estates free from any incumbrances:—Held, first, that the land tax was entirely extinguished. *Bulkeley v. Hope*, 1 Kay & J. 482; 24 L. J., Ch. 356; 1 Jur., N. S. 864.

Held, secondly, that the rent-charge in lieu thereof was merged in the inheritance, and, consequently, that the purchaser was entitled to hold the estates free from such charge. *Ib.*

Right to Pay off Tenant for Life.—Under 42 Geo. 3, c. 116, a remainderman in possession can compel the representatives of the tenant of a previous particular estate, who has redeemed the land tax, to receive the consideration money

for such redemption, with all arrears of interest, so as to free the land from the charge and payment of the interest to which it was subject, for the benefit of such tenant. *Cousins v. Harris*, 12 Q. B. 726; 17 L. J., Q. B. 273; 12 Jur. 835.

By Crown—During Lease.—A. agreed with B. to grant him the lease of a house (to be built), when it was complete, finished, and fit for habitation. B. being constantly on the premises during the building, took possession, and then made various objections on the ground that the house was not complete, finished, and fit for habitation. A. claimed 3*l.* per annum additional rent, on the ground that the crown, since the contract, had redeemed the land tax which A. was liable to pay:—Held that s. 120 of 42 Geo. 3; c. 116, did not apply. *Faulkner v. Llewellyn*, 9 L. T. 251; 11 W. R. 1055. Affirmed, 9 L. T. 557; 12 W. R. 193.

Bequest to Married Woman—Mortgage by Husband.—Land tax having been redeemed, was bequeathed to a married woman. Afterwards the husband, having registered his marriage in the land tax office in the manner required by 38 Geo. 3, c. 60, s. 78, mortgaged the land tax in the form of assignment which is prescribed by the act, he covenanting to pay the mortgage debt, and reserving the equity of redemption to himself alone. The wife survived:—Held, that the husband acquired an absolute power of disposition over it. *Pigott v. Pigott*, 4 L. R., Eq. 549; 37 L. J., Ch. 116; 16 L. T. 766.

Reservation in Lease.—In a lease of lands belonging to a bishop in right of his see, granted after 42 Geo. 3, c. 116, the land tax having been redeemed by such bishop with money raised pursuant to the act, such redeemed land tax must, in addition to the ancient and accustomed rent, be expressly reserved and made payable during the term granted by the lease; and, therefore, a lease of such lands granted by a bishop, in which the redeemed land tax was not so reserved and made payable, is voidable by the successor. *Doe d. Rochester (Bishop) v. Bridges*, 1 B. & Ad. 847.

New River Company.—By a charter of King James I. the governor and company of the New River were incorporated, and the New River, cut, and stream granted to them in fee. The shares of the proprietors have been held to be real estate. By 38 Geo. 3, c. 5, the county of Hertford is to contribute 41,508*l.* 10*s.* 9*d.*, and the city of London, 123,399*l.* 6*s.* 7*d.* towards the land tax. By s. 4, all the lands, tenements, and hereditaments whatsoever, lying within the respective districts into which Great Britain was apportioned, and all persons, bodies politic and corporate, having any lands, are to be equally charged with a pound rate towards the sum imposed upon such respective districts. By s. 57, all and any persons having shares in the New River, are to be assessed by the commissioners for the city of London, and the tax is to be paid by the governor or the treasurer or receiver, to such person as the commissioners should appoint. From time to time various shareholders redeemed the land tax on their shares. The New River commences in Hertfordshire, and runs for three miles through a parish in that county. The

river, as it existed in 1798, has never been redeemed from land tax except as aforesaid. The company has since that time purchased land in Hertfordshire, the land tax on the whole of which, with the exception of two roods and ten perches, has been redeemed. On part of the land so purchased, the land tax of which had been redeemed, there are two wells, from the sale of the water of which the company derives a profit:—Held, first, that no other land tax is payable upon the property of the New River Company as it existed in 1798, than that imposed by s. 57, and consequently that the river is not taxable in Hertfordshire. *New River Company v. Hertford (Land Tax Commissioners)*, 2 H. & N. 129; 26 L. J., Ex. 281.

Held, secondly, that, as to the property since purchased, the land tax of which had not been redeemed, such property continues to be taxable in Hertfordshire. *1b.*

Held, thirdly, that the company is not liable to be assessed to the land tax in respect of the springs, inasmuch as the redemption of the land tax on the land on which the wells stand, relieved the land and all its natural productions from any further tax, though possibly at the time of such redemption it might not have been known that such springs existed. *1b.*

Sale by Hospital—Expenses of Sale.—A corporation, intitled "the Wardein and Poore of the Hospitall of the Holy Trinity in C., of the foundation of J. W., archbishop of C.," by deed, sealed with their common seal, in which they described themselves as "The warden and poor of the hospital of the Holy Trinity in C.," omitting the name of their founder, sold part of their estate for 50*l.*, paid in discharge of the costs of the sales made by them for the redemption of their land tax:—Held, that the application of the 50*l.* to defray the expenses of the sale of the corporation's other estates was a valid payment within 39 Geo. 3, c. 6, s. 36. *Croydon Hospital v. Farley*, 2 Marsh. 174; 6 Taunt. 467.

Proof of Redemption.—The proper evidence to shew that the land tax has been redeemed is the certificate of the commissioners or a copy of the register. *Buchanan v. Poppleton*, 4 C. B., N. S. 20; 27 L. J., C. P. 210; 4 Jur., N. S. 414.

If there is a discrepancy between the contract for and the certificate of redemption on the one hand, and the schedule to such contract and certificate and the duplicate assessment on the other, the contract and certificate is to be deemed the true description, in the absence of affirmative evidence to the contrary, which evidence it lies upon the land tax commissioners to produce. *Hodgson v. Pearson*, 31 L. T. 679.

c. Contracts between Landlord and Tenant.

[Compare Cases LANDLORD AND TENANT (Covenants).]

Words of Contract—Net Rent.—A net rent is a sum to be paid to the landlord clear of all deductions; and if a party agrees to take a lease at a net rent, he cannot object that the lease contains a covenant for him to pay the land tax and sewers rate. *Bennett v. Womack*, 3 C. & P. 96; 1 M. & R. 624; 7 B. & C. 627.

— **All Taxes.**—A tenant verbally agreeing "to pay all taxes," is bound to pay the land tax, although not specifically mentioned. *Amfield v. White*, R. & M. 246.

— **All Outgoings.**—Agreement between a landlord and tenant for a lease of a farm for a term of years, at a yearly rent, "free of all outgoings":—Held, that the word "outgoings" included the land tax and tithe commutation rent-charge. *Parish v. Sleeman*, 1 De G., F. & J., 326; 29 L. J., Ch. 96; 6 Jur., N. S. 385; 8 W. R. 166.

— **Without Deduction.**—On a grant of a fee-farm rent, "without any deduction, default, or abatement for or in any respect whatsoever," the grantee is entitled to receive the full rent without deducting the land tax. *Bradbury v. Wright*, 2 Dougl. 624.

— **Parliamentary Tax.**—The land tax is a parliamentary tax, within the meaning of an agreement to pay rent and all taxes, parliamentary and parochial. *Manning v. Lunn*, 2 C. & K. 13.

A lessee covenanted "to pay all parliamentary, parochial and other taxes, tithes and assessments, then or thereafter to be issuing out of all or any of the demised premises, or chargeable upon the landlords or tenants thereof for the time being, in respect thereof":—Held, that a rent-charge imposed on the premises in lieu of the land tax, which had been purchased by a former tenant of the premises, under 42 Geo. 3, c. 116, was a parliamentary tax or assessment, within the meaning of the covenant. *Christ's Hospital (Governors) v. Harrild*, 2 M. & G. 703; 3 Scott, N. R. 126.

— **Assessment by Sewers Commissioners.**—By a memorandum of agreement marsh lands were demised to a tenant, subject to a condition that he should pay all outgoings whatsoever, rates, taxes, scots, &c., whether parochial or parliamentary, which then were or should be thereafter charged or chargeable upon or on account of the marsh lands, the then present land tax only excepted:—Held, that an extraordinary assessment, made by commissioners of sewers, upon the lands for a work of permanent benefit to the land, was within the meaning of the agreement. *Waller v. Andrews*, 3 M. & W. 312; 1 H. & H. 87.

— **Improvement of Estate.**—Under a covenant in a building lease by the tenant to pay all the taxes, except the land tax, the landlord is only to pay the old land tax, and not the additional land tax occasioned by the improvement of the estate. *Hyde v. Hill*, 3 T. R. 377. And see *Rez v. Scot*, 3 T. R. 602.

A. demised land to B. upon a building lease, at the yearly rent of 60*l.* clear of all rates and assessments, the sewers rate and land tax excepted, with the usual covenant for payment of rent. B. having by building on the land increased its rateable value to 300*l.* per annum:—Held, that he was only entitled to deduct the sewers rate and land tax upon the original rent, and not in respect of the improved value. *Smith v. Humble*, 15 C. B. 321. See also *Watson v. Home*, 7 B. & C. 285; 1 M. & R. 191.

Time.—A tenant having paid land-tax and

paving rates for six successive years, without claiming any deduction from his landlord for these payments when he paid his rent:—Held, that such deduction should be made from the rent of the current year, and that the tenant could not claim it from his landlord at any subsequent period. *Andrew v. Hancock*, 3 Moore, 278; 1 B. & B. 37; *S. P.*, *Stubbs v. Parsons*, 3 B. & A. 516.

Where the tenant of premises under a lease, which contained no reservation as to the payment of land tax, claimed a deduction for such tax, which was refused by the landlord, who afterwards distrained, and was paid the whole rent, and the tenant afterwards paid his full rent for five successive years, without claiming to deduct such tax:—Held, that such acquiescence was equivalent to a dereliction of his claim in the first instance; and that he could not recover back any of the sums so paid by him for land tax, on the ground of their being involuntary payments. *Spragg v. Hammond*, 4 Moore, 431; 2 B. & B. 59.

Amount.—Where a landlord covenants to pay the land-tax, the lessee is not entitled to deduct for more than would be assessed on the amount of his rent, although he may have actually paid more. *Whitfield v. Brandwood*, 2 Stark. 440.

A landlord who covenants to pay the land tax, and save the tenant harmless, will discharge his covenant if he pays the tax according to the rent which he receives, although the premises may be taxed at a higher rate. *Yea v. Leman*, 1 Wils. 21.

Redemption—Deduction on Fee-Farm Rent.—A fee-farm rent belonging to the crown was in pursuance of 22 Car. 2, c. 6, and 22 and 23 Car. 2, c. 24, vested in trustees for sale. The owners of the land, out of which it was payable, redeemed the land tax chargeable on it:—Held, that they were notwithstanding entitled to deduct 4*s.* in the pound out of the rent, under 38 Geo. 3, c. 5, ss. 30, 31, which enact, that all receivers of fee-farm rents due to any person claiming by any grant or purchase from or under the crown, by virtue of the 22 & 23 Car. 2, shall allow 4*s.* for every pound of the rents to the party paying the same, the effect of 38 Geo. 3, c. 60, and 42 Geo. 3, c. 116, being to perpetuate those sections. *Moody v. Wells (Dean and Chapter)*, 1 H. & N. 40; 25 L. J., Ex. 273.

— **Right to Charge for.**—Where an owner of a house, in consideration of a premium, demised it at one-third of its annual value, and afterwards redeemed the land tax:—Held, that he was entitled to receive from the tenant an annual payment equal to two-thirds of the land tax so redeemed. *Ward v. Const*, 10 B. & C. 634; 5 M. & R. 402.

d. Assessment and Recovery.

Legality of Distress.—A rate of one-tenth of a penny in the pound on the rateable property in a parish was sufficient to raise the quota which the parish was liable to contribute to the land tax; but, in order to avoid the difficulty and inconvenience of collecting such small sums as would, under that rate, have been collected, amounting in many cases to no more, or

even less, than a penny, the assessors assessed the parish at the rate of one penny in the pound, thereby realizing an amount which, after deducting the quota payable by the parish to the tax, left a large surplus, and it was the intention of the commissioners that such surplus should be collected yearly for four years, and be applied at the end of each year, under 24 & 25 Vict. c. 91, so as in four years' time wholly to extinguish the land tax chargeable on the parish. Due notice of a meeting of commissioners to hear appeals from persons aggrieved by being overrated by the assessors was given, but no ratepayer appealed. Upon the plaintiff refusing to pay the penny rate assessed on a leasehold house belonging to and occupied by him, the collector, acting under a warrant of distress signed by the defendant and another commissioner, seized a piece of furniture of the plaintiff's on the premises, whereupon the plaintiff brought an action in the county court against the defendant for an illegal distress, in which judgment was given, with damages, in the plaintiff's favour; but on appeal by the defendant, it was held that the distress warrant, and the proceedings thereunder, being perfectly regular, the case came within and was concluded by *Patchett v. Bancroft* (7 T. R. 367), and that the plaintiff could not go behind the warrant, which justified the persons executing it; and that, the quota being established, the rate assessed not being appealed against must be considered as the rate payable under the judgment of the commissioners, and the plaintiff, if he objected to the amount, should have appealed to them under the provisions of 38 Geo. 3, c. 5, by which their decision was made final and conclusive. *Simpkin v. Robinson*, 45 L. T. 221.

— **Presence of a Constable.**—The presence of a constable is necessary at the breaking open of the outer door of a house previously to a seizure of goods for land tax, under 38 Geo. 3, c. 5, s. 17, and the necessity of such presence is not confined to the breaking open of a box or chest within the house. *Flass v. Racine*, 4 M. & W. 419; 7 D. P. C. 53; 8 C. & P. 699.

— **Assessment in Wrong Parish.**—Where a party has been returned in the schedule of the collector of land tax for a particular parish, under 43 Geo. 3, c. 141, as in default for a sum assessed upon him for land tax in that parish; and the schedule having been duly certified to the Court of Exchequer, a *levari facias* was issued, under which such sum was levied on his goods, and paid into the receipt of the Exchequer, the court cannot afterwards set aside the writ, on the ground that the party has been assessed in the wrong parish. *Glatton Land Tax, In re*, 4 M. & W. 570; 1 H. & H. 430.

— **Arrears.**—Commissioners under an act of parliament, directing them, yearly and every year, to rate, charge, tax, and assess certain lands for a certain number of years, having omitted to make any rate or assessment for several years, at length made an assessment for one year, and added to it the arrears of the past years, and levied for the assessments so made, including such arrears:—Held, that no arrears could be due for the years respecting which no assessment had been made, and that the distress was therefore bad. *Newton v. Young*, 1 N. R. 187.

— **Ownership and Occupation.**—In an assessment to the land tax, the rectorial and vicarial tithes were assessed together, as in the ownership and occupation of C., when, in point of fact, he was owner of the vicarial, and occupier only of the rectorial tithes:—Held, that such assessment was bad, and a distress levied under it illegal. *Charleton v. Alway, infra*.

The distress was made for a past half-year; there was consequently due an assessment on the vicarial tithes for the current half-year:—Held, that the collector could not justify the distress, by applying the sum which was in excess to this claim, no demand on the current half-year having been made. *Id.*

— **Transfer to other Districts.**—Two properties in one parish had been assessed to the land tax, from the time of the earliest schedule in existence, as part of the district or place, in which was comprised the next adjoining parish, these two properties, and a third property which had been reputed to be extra-parochial. The only lands in this district liable to land tax since 1806 had been those belonging to these three properties. In 1873 the two first-mentioned properties were transferred to and assessed in the parish in which they were situated, under 4 & 5 Will. 4, c. 60, s. 1; and upon appeal by the owner of the third property the land tax commissioners affirmed the transfer:—Held, that the usage established under such circumstances ought to be sustained, and that the transfer and new assessment must be set aside under 38 Geo. 3, c. 5, ss. 36, 53. *Reg. v. Land Tax Commissioners*, 36 L. T. 374.

— **On Redemption by Invalid Sale.**—See *Warner v. Potchett, infra*.

— **Action for Wrongful Distress.**—The judgment of the commissioners of land tax on appeal is conclusive in an action brought against the officer for levying under a warrant of distress. *Patchett v. Bancroft*, 7 T. R. 367.

An action of trespass lies for a distress made under a bad assessment, notwithstanding the power of appeal to the commissioners given by 38 Geo. 3, c. 5, to parties aggrieved by being overrated. *Charleton v. Alway*, 11 A. & E. 993; 3 P. & D. 818; 9 L. J., Q. B. 237.

e. Commissioners.

— **Duty and Powers of.**—The court will grant a summary application against commissioners of land tax to compel a due assessment of the land tax. *Att.-General v. Land Tax (Commissioners)*, 12 Price, 647.

But the court has no jurisdiction to order commissioners to cause the proportion charged upon a division to be equally assessed. *Holborn Land Tax Assessment, In re*, 5 Ex. 548.

The 1 & 2 Vict. c. 58, s. 2, which enabled the Court of Exchequer, on application by an owner or occupier of lands, to call upon commissioners of land tax to appear and maintain or relinquish their assessments in cases where such person has been rated twice for the same land, applies only to cases in which two separate and distinct bodies of commissioners, acting for different districts, have both assessed the same land, each claiming it to be within their district or division, and not to a case where the land has been rated

twice by the same body of commissioners. In the latter case the remedy is by appeal under 38 Geo. 3, c. 5, s. 21. *Glatton Land Tax, In re*, 6 M. & W. 689.

The commissioners acting under 38 Geo. 3, c. 5, are bound to assess the amount chargeable on the division for which they act, according to the real value of the assessable property for the year; and they are not justified in retaining an assessment which has been in use many years, and after changes in the value of property, merely because making a new estimate would be difficult, and require expenses for which they do not possess funds. *Reg. v. Land Tax (Commissioners)*, 16 Q. B. 381; *S. C.*, nom. *Pym, Ex parte*, 20 L. J., Q. B. 211: 15 Jur. 190.

But the court would not grant a mandamus calling on the commissioners to meet and make an equal assessment for the year, according to the best of their judgment and discretion, on a suggestion that they had made their assessment on an old and disproportionate estimate, though requested by an inhabitant of the division paying land tax, to reduce the assessment on his district to an equal pound rate; the commissioners deposing in answer to the rule nisi for a mandamus that they had made the assessment for the year, and according to the best of their judgment. *Id.*

The duty of the commissioners in causing the districts within their divisions to be assessed to the land tax, is regulated not by 38 Geo. 3, c. 5, s. 8, but by 38 Geo. 3, c. 60, re-enacted by 42 Geo. 3, c. 116. *Reg. v. Land Tax (Commissioners)*, 2 El. & Bl. 694; 22 L. J., Q. B. 386; 18 Jur. 285.

These latter statutes create a fixed quota to be raised from the land in each district (parish or place) within the division, subject to redemption, such fixed quota being that which was laid upon the land in the district in the assessment for 1798, under 38 Geo. 3, c. 5. *Id.*

Approval of Sales.]—A prebendary agreed by writing, in consideration of 3l. per cent. stock (the amount necessary for redeeming the land tax), to convey to a lessee then in possession a part of the reversion in the prebendal estate, such part to be set out and valued by A., and approved by the king's commissioners. The lessee furnished the sum required for purchasing the stock, and the prebendary concluded the necessary contract with the land tax commissioners, transferred the stock into the names of the commissioners for reducing the national debt, and had the contracts duly registered; the land was also set out and valued; but the lessee refused to sign the necessary memorial for the purpose of obtaining the approbation of the king's commissioners pursuant to 42 Geo. 3, c. 116, s. 76. The prebendary afterwards distrained upon an under-tenant of the land for the amount of the redeemed land tax as additional rent:—Held, that there had been no valid sale of land for want of the assent of the commissioners, because, in order to comply with the provisions of s. 69, the prebendary ought to have sold, not only the fee simple of the lands demised, but also the rents, services, and other profits:—Held, also, that he had no right by s. 88 to distrain until the precise quantity of land and the portion of reserved rent to be sold were ascertained by the commissioners. *Warner v. Pultchett*, 3 B. & Ad. 921.

The rector and lord of a manor, by one grant, demised for three lives, at one aggregate holding, and at one undivided rent, three ancient tenements, originally held of the manor under distinct grants and at distinct rents. The same rector afterwards disposed of the reversion in fee, under 42 Geo. 3, c. 116:—Held, that though the grant for lives might be void unless sanctioned by a special custom in the manor, yet the purchaser of the reversion had a good title, the sale being approved of by the land-tax commissioners. *Doe d. Strickland v. Woodward*, 1 Ex. 273; 17 L. J., Ex. 1.

Who may act.]—The marshal of the King's Bench may act as a commissioner of the land tax under the qualification of his office. *Stone v. Ashton*, 3 Burr. 1287.

3. INHABITED HOUSE DUTY.

a. Houses Let in different Tenements.

Part used for Business and Part occupied by Landlord.]—By 41 Vict. c. 15, s. 13, where any house being one property is divided into and let in different tenements, and any of such tenements are occupied solely for the purpose of any trade or business or of any profession or calling, by which the occupier seeks a livelihood or profit, or are unoccupied, inhabited house duty is to be assessed as if the house comprised only the tenements other than those so occupied as aforesaid, or unoccupied; and a house or tenement occupied solely as aforesaid is exempt, although a servant or other person may dwell in such house or tenement for the protection thereof. A house had one entrance into the street, and the rooms in it opened on a hall, passages, and staircase, common to all the tenants. Some of the rooms on the ground floor were occupied by the landlords, the appellants, as offices, and the remainder, and the rooms on the first floor, were let to tenants who occupied them as offices. The rooms on the second floor were occupied partly by tenants who resided there, and the remainder by a caretaker and his wife, who acted as servants to the residents, and cleaned the several portions occupied by the appellants as offices or let off. The appellants claimed relief from being assessed on the portions used as offices:—Held, that the portions so used were not exempt, as the exemption applies to houses let in separate and distinct tenements each complete in itself, and not to rooms in a house. *Yorkshire Fire Insurance Company v. Clayton*, 8 Q. B. D. 421; 51 L. J., Q. B. 82; 45 L. T. 697; 30 W. R. 174—C. A.

Tenements Structurally Severed.]—The statute 41 Vict. c. 15, s. 13, sub-s. 1, provides that, where any house being one property shall be divided into and let in different tenements, and any of such tenements are occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, or are unoccupied, the person chargeable as occupier of the house shall be at liberty to give notice in writing at any time during the year of assessment to the surveyor of taxes stating therein the facts, and after the receipt of such notice by the surveyor, the commissioners acting in the execution of the acts relating to the inhabited house duties shall, upon

proof of the facts to their satisfaction, grant relief from the amount of duty charged in the assessment, so as to confine the same to the duty on the value according to which the house should, in their opinion, have been assessed if it had been a house comprising only the tenements other than such as are occupied as aforesaid or are unoccupied:—Held, that the provisions of the subsection only apply in cases where the house is divided into different tenements structurally severed from each other, as, for instance, in the case of flats and sets of chambers. *Chapman v. Royal Bank of Scotland*, 7 Q. B. D. 136; 50 L. J., Q. B. 670; 45 L. T. 215; 30 W. R. 81; 46 J. P. 38.

Where a part of the ground floor and a basement of a building was severed from the rest of the building by a party-wall, and had its own separate entrance, there being no communication between it and the rest of the building, and the part so separated was used wholly for the purposes of a bank:—Held, that such part of the premises constituted a separate house, and being used solely for business purposes was exempt from inhabited house duty. *Id.*

Semble, per Hawkins, J.:—That, when a house is substantially within the words of the subsection above referred to as being a house structurally divided into and let in different tenements, the mere fact, that the landlord occupied one of such tenements, forming a small portion of the whole, would not disentitle him to the relief given by the sub-section. *Id.*

Blocks of Buildings.—Certain blocks of buildings, each having a street entrance and one internal staircase, were structurally divided into different suites of rooms distinct from each other. A porter living in the basement had the care of the street door, which was locked at night, and he also had access to the rooms. Each suite of rooms had a door opening on to the staircase common to all. Some of the suites of rooms were let to tenants as offices for business purposes. A few were let as residences. Some were untenanted:—Held, that the duty was properly charged upon the blocks as houses, under r. 6 of 48 Geo. 3, c. 55, Sched. B., and not upon the separate suites of rooms as distinct properties under r. 14. *Att.-Gen. v. Mutual Tontine Westminster Chambers Association*, 1 Ex. D. 469; 45 L. J., Ex. 886; 35 L. T. 224; 24 W. R. 996—C. A. Affirming 10 L. R., Ex. 305; 44 L. J., Ex. 146; 33 L. T. 180; 24 W. R. 9.

Each block had not been inserted in the valuation list as one hereditament. But each suite of rooms was charged therein as a separate hereditament:—Held, that for the purpose of the house duty it was not necessary within the Valuation (Metropolis) Act, 1869, s. 76, to make a separate valuation of each block by reason of its not being separately valued in the valuation list, and that the house duty on each block was rightly charged at the aggregate of the sums at which its component tenements were estimated in the valuation list. *Id.*

b. Houses Occupied for Purposes of Trade.

What are.]—Premises occupied for the purpose of carrying on the business of a telegraph company held to be premises occupied for the purposes of trade within 32 & 33 Vict. c. 14, s. 11, and exempt from inhabited house duty.

Chartered Mercantile Bank of India, London and China v. Wilson, 3 Ex. D. 108; 47 L. J., Ex. 153; 38 L. T. 254; 26 W. R. 265.

The premises known as Weaver's Hall, in the city of London, were occupied by accountants, solicitors and scriveners, merchants, a wine shipper, and a shorthand writer, all of whom used their respective rooms as offices, and by the housekeeper and his family who resided in the top storey rent free. The premises having been assessed to the inhabited house duty, the commissioners discharged the assessment on the ground that the premises were entitled to the exemption granted by 32 & 33 Vict. c. 14, s. 11, since the greater portion of them was occupied for the purposes of trade:—Held, that the premises were not exempt on that ground. *Rusby v. Newson*, 10 L. R., Ex. 322; 44 L. J., Ex. 143; 33 L. T. 19; 23 W. R. 632.

Held, also, by Bramwell and Cleasby, BB., that in assessing the premises no abatement could be made, under 32 & 33 Vict. c. 14, s. 11, in respect of those parts which were occupied for the purposes of trade only. *Id.*

For Professional Purposes.]—By 57 Geo. 3, c. 25, s. 1, houses occupied for the purposes of trade, and in which no caretaker sleeps at night, are made exempt from assessment to inhabited house duty. By 5 Geo. 4, c. 44, s. 4, this exemption is extended to houses occupied for professional purposes in which no caretaker sleeps at night. By 32 & 33 Vict. c. 14, s. 11, any tenement or part of a tenement occupied as a house for the purposes of trade only is made exempt, even though a servant or other person may dwell therein for the protection thereof:—Held, that the exemption given by 32 & 33 Vict. c. 14, s. 11, does not extend to houses occupied for professional purposes; and that, therefore, a house partly occupied for professional purposes and in which a caretaker sleeps at night, is liable to assessment. *Keene v. Dashwood*, 36 L. T. 215.

Lunatic Asylum.]—The medical superintendent of a lunatic asylum was appointed under 16 & 17 Vict. c. 97, s. 55, which enacted that he should be resident in such asylum. He lived in a detached house, separated from the main buildings of the asylum by walls, but within the boundary of the asylum, and having ready access to the main buildings through gates in the walls. The house was specially built and occupied as the residence of the medical superintendent, was suitable for the purpose, and did not contain more accommodation than was reasonably necessary for himself and family. Case 4 of the exemptions in 48 Geo. 3, c. 55, Sched. B., exempts from inhabited house duty "any hospital, charity school, or house provided for the reception or relief of poor persons." The main buildings of the asylum were admitted to be within the exemption:—Held, that the medical superintendent's house was a part of the asylum, and therefore within the exemption. *Jepson v. Gribble*, 1 Ex. D. 151; 45 L. J., Ex. 502; 34 L. T. 493; 24 W. R. 460.

Police Station.]—A superintendent of police lived with his family in a house within the boundary of a police station which included other buildings used for the purposes of the police district. There was a yard to the house, and a wall which divided his premises from the

remainder of the police station, to which a door in the wall afforded access. The front entrance of the house faced the street. He kept the keys of the house, which he had himself furnished, and for the use of which a deduction was made from his salary. He was compelled to live in the house, as that was necessary for the discharge of his official duties; the house was liable to be used for such purposes connected with the police force as the chief constable might direct; and he was liable to be removed from station to station at any time:—Held, that he had not such an occupation of the house as to render him liable to pay income tax or inhabited house duty in respect of it. *Bent v. Roberts*, 3 Ex. D. 66; 47 L. J., Ex. 112; 37 L. T. 673; 26 W. R. 128.

Dwelling-house.—*Semble*, that a building occupied by a bank and a telegraph company in such a way that all the ground floor and basement, except the telegraph company's entrance hall, and the basement under it, were the bank's, and the upper floors the telegraph company's, but there being doors between the telegraph company's entrance hall and the bank's lobby, which were open during banking hours to give a second access to the telegraph company's premises, and a caretaker living on the third floor to protect the entire building, is a dwelling-house within the Inhabited House Duty Acts. *Chartered Mercantile Bank of India, London and China v. Wilson*, 3 Ex. D. 108; 47 L. J., Ex. 153; 38 L. T. 254; 26 W. R. 265.

Club and Auctioneer's Office.—A building was used part of it as a club and the remainder as an auctioneer's office. It was only occupied during the day, and no person slept there:—Held, that it was not an inhabited dwelling-house so as to be liable to inhabited house duty under 14 & 15 Vict. c. 36. *Riley v. Read*, 4 Ex. D. 100; 48 L. J., Ex. 437; 27 W. R. 414.

c. Houses Occupied by Servants.

Caretaker—Clerk.—The respondent was a hop-merchant, and was possessed of certain houses having an internal communication throughout, and used for the purposes of his trade. K. lived in the houses in order to take care of them, but he was a clerk in the respondent's employ at a salary of 150*l.* a year, and he resided in the houses together with his wife, children, and servant:—Held, that K. was not "a servant or other person" within the meaning of 32 & 33 Vict. c. 14, s. 11, and that the respondent was not exempt from inhabited house duty in respect of the houses. *Yewens v. Noakes*, 6 Q. B. D. 530; 50 L. J., Q. B. 132; 44 L. T. 128; 28 W. R. 562; 45 J. P. 468—C. A. See now 44 Vict. c. 12, s. 24.

Clerk used solely as Caretaker.—The appellants, the City Bank, occupied and used as a bank and for the purpose of carrying on their business as bankers therein, the ground floor and basement of a building, which had a separate entrance from the street, and no internal communication with the rest of the building, from which it was structurally separated. The only persons dwelling on the premises at night were two persons, namely, a porter, in the service of

the appellants, and a man named Smith, a clerk in their employ, who dwelt therein for the protection of the property. There were also two watchmen employed to patrol the premises at night, but who had no room there. The custody of the keys of the premises was committed by the appellants to Smith, whose duty it was to see that the premises were safely locked up and secured every night, he occupying one small room only, and such residence being merely for the protection of the bank. Upon these facts, the commissioners having held the appellants liable to inhabited house duty upon the above premises, it was, on appeal therefrom:—Held, that the man Smith, though called a "clerk," dwelt on the premises as a caretaker only and solely for the purpose of protecting the same, and therefore the case fell within the exemption contained in sub-s. 2 of s. 13 of 41 & 42 Vict. c. 15; and the appellants were not liable to the duty. *Yewens v. Noakes* (*supra*) discussed and distinguished. *City Bank v. Last*, 47 L. T. 254. See 44 Vict. c. 12, s. 24.

Clerk—Family.—The appellant, a banker, was the owner of premises which he occupied and used as a bank, and for the purpose of carrying on his business as a banker therein. The premises comprised three coal cellars and strong room underground, a front and back sitting-room, with a kitchen and scullery on the ground floor, a front sitting-room and two bedrooms on the first floor, and five bedrooms on the second floor. One coal cellar and the strong room, the front and back ground floor room, and the front sitting-room on the first floor, were used by the appellant for the purpose of his bank. The kitchen and scullery, one bedroom on the first floor, and two on the second floor, were occupied by one Somerford, who dwelt therein for the protection of the bank (the rest of the cellars and rooms being unused), and his family, viz., his wife and a son and daughter, both of age, and the son being occupied in the county court office, dwelt therewith him, Somerford himself being in the employ of appellant as a clerk at a salary of 100*l.* a year, which included the services of himself and family in taking down and putting up the bank shutters, cleaning the offices, lighting the fires, and answering the door. The commissioners having, upon these facts, confirmed the assessment of the appellant to the inhabited house duty in respect of his occupation of the above-mentioned premises, it was, on appeal therefrom:—Held, that the case came precisely within the judgment of the Court of Appeal in *Yewens v. Noakes* (*supra*), and that the respondent was liable to the duty to which he had been assessed, and did not come within the exemption in s. 13, sub-s. 2 of 41 Vict. c. 15. *Wootton v. Rolfe*, 47 L. T. 252.

Cashier.—The respondents, wholesale clothiers, were possessed of premises the whole of which were used as warehouses and counting-houses, except a sitting-room and bed-room on the top storey occupied by their cashier, who had a salary of 200*l.* a year, and who slept on the premises solely as caretaker and for their protection, this being considered as part of his duty:—Held, that the Income Tax Commissioners were warranted in finding that the cashier was "a servant or other person" within 41 Vict. c. 15, s. 13, part 2, and that the pre-

misers were accordingly exempt from house duty. *Yewens v. Noakes* (*supra*) explained. *Rolfe v. Hyde*, 6 Q. B. D. 673; 50 L. J., Q. B. 481; 44 L. T. 775; 45 J. P. 632.

d. Occupation for Less than a Year.

Notice to Commissioners.]—The commissioners are not entitled under 43 Geo. 3, c. 161, s. 15, to discharge persons charged for houses under s. 10, on the ground of their not having been occupied during the whole year, unless notice in writing has been given to the assessor, of such houses not having been occupied. *Colyton, In re*, 8 Price, 117.

4. PROPERTY TAX.

a. Property Chargeable.

Lodgings Let for Portion of a Year.]—Houses let as lodgings in places of public resort, and which are so occupied by the various families hiring them for the season (much less than half a year at a time), and are, during the remainder of the year, left wholly unoccupied, are chargeable to the assessed taxes for the entire year. *Sollett and Glass's case*, 8 Price, 123, n.

A person keeping a house for the purpose of being let as a ready-furnished lodging-house, is chargeable for a whole year's duty, although it is unoccupied and unfurnished for one entire quarter. *Wright's case*, 8 Price, 125, n.

And persons letting houses furnished, as lodging-houses, for a part of the year, not being at any time occupied for more than six months successively, and paying three-quarters of a year's assessed taxes, are still liable to the charge for the other quarter; and the commissioners have no power to make any abatement in the assessment, although, during the quarter for which such abatement is claimed, the houses had not been opened. *Skinner's case*, 8 Price, 124, n.

And the owner of a house, occupied by him till the 26th June, is chargeable with the assessed taxes for the remainder of the year; that is, till the succeeding 5th April; although he quitted possession on the 26th of June, and ceased to occupy the house afterwards. *Price's case*, 8 Price, 122, n.

Unoccupied House.]—It seems that houses left unoccupied by the owner during part of the year, where the furniture is not taken away, are liable to the duties for the whole year. *Colyton, In re*, 8 Price, 117.

Annuity.]—A testator gave to his wife an annuity or clear yearly rent-charge, clear of all taxes and deductions:—Held, that the annuity was subject to property tax. *Wall v. Wall*, 15 Sim. 513; 16 L. J., Ch. 305; 11 Jur. 403.

Jointure.]—By an ante-nuptial settlement executed before the passing of the Property Tax Act, lands were appointed to the use that the intended wife might, after the intended husband's death, receive a jointure rent-charge in lieu of dower out of any lands to which the husband was or might become entitled, without any deduction in respect of any tax then already or thereafter to be imposed on the jointure or on the jointress in respect thereof:—Held, that the jointress was not as a purchaser for value or

otherwise exempt from property tax. *Floyer v. Bankes*, 3 De G., J. & S. 306.

b. Covenants in Respect of.

Validity of.]—A covenant in an annuity deed made prior to 46 Geo. 3, c. 65, s. 115, former Property Tax Act (which statute had a retrospective operation), whereby the grantor of the annuity covenanted to pay the same without any deduction whatever out of the same, or any part thereof, for or in respect of the then present or any then future property tax, is void in respect of its obligation on the grantor not to deduct the property tax, but not in respect of the payment of the annuity, subject to such deduction. *Readshaw v. Balders*, 4 Taunt. 57; *S. P., Fuller v. Abbott*, 4 Taunt. 105.

A. having covenanted in a deed to pay B. 300*l.* at the end of a twelvemonth, and in the meantime and until payment to pay interest for it at 5*l.* per cent., it is no answer to an action for the 300*l.*, and interest accrued thereon, to plead that by the same deed it was covenanted that he should pay the property tax payable for and in respect of the 300*l.*; for the plea does not shew that the covenant for the payment of the property tax attached on the interest payable for the 300*l.* principal, and the covenants as there exhibited appeared to be independent, and therefore, though the latter should be void by 46 Geo. 3, c. 65, s. 115, avoiding all contracts, covenants, &c., in full, without allowing the deduction of the tax as directed by the act, yet that would not avoid the other independent covenant in the deed for the payment of the 300*l.* and interest. *Wigg v. Shuttleworth*, 13 East, 87; *S. P., Howe v. Syngé*, 15 East, 440.

Between Landlord and Tenant.]—An agreement that, if the tenant will continue to pay his rent in full without any deduction in respect of landlord's property tax paid by him, the landlord will repay to the tenant all sums which he has paid or shall pay for the landlord's property tax, is not invalid as being contrary to the provisions of 5 & 6 Vict. c. 35. *Lamb v. Brewster*, 4 Q. B. D. 220, 607; 48 L. J., Q. B. 277, 421; 40 L. T. 457, 537; 27 W. R. 395, 478.—C. A.

Where a tenant of premises under a lease, and at a rent payable half-yearly, agreed to pay all taxes except the landlord's property tax, which the landlord agreed to allow, and the tenant agreed to lay out 20*l.* in repairs, which the landlord also agreed to allow, but afterwards distrained for half a year's rent, and sold to the whole amount, without allowing either for repairs or for property tax, which he knew the tenant had paid to the collector:—Held, that the tenant might recover in respect of the property tax, but not in respect of the repairs, in an action for money had and received against the landlord. *Graham v. Tatc*, 1 M. & S. 609.

A lease rendering rent clear of landlord's property tax is good as a lease rendering the same rent subject to a deduction thereof of the property tax. *Tinckler v. Prentice*, 4 Taunt. 549.

A distinct covenant in a lease, whereby the tenant bound himself to pay the property tax, and all other taxes imposed on the premises, or on the landlord in respect thereof, though void and illegal by 46 Geo. 3, c. 65, s. 115, did not avoid a separate covenant in the lease for pay-

ment of rent clear of all parliamentary taxes generally; for such general words were to be understood of such taxes as the tenant might lawfully engage to defray. *Gaskell v. King*, 11 East, 165.

A. in 1807 (when 46 Geo. 3, c. 65, was in force), leased premises to B., at a rent of 340*l.*, with a proviso that the rent should be reduced to 330*l.* in the event of "the tax called income tax" becoming repealed, annihilated, or suspended at any time during the continuance of the demise; such reduced rent to continue to be paid only so long as the income tax should remain repealed and not payable:—Held, that the rent which had so become reduced on the expiration of the old income tax, was restored to the original amount on the passing of the 5 & 6 Vict. c. 35, there being nothing in s. 73 to render the covenant illegal. *Colbron v. Travers*, 12 C. B., N. S. 181; 31 L. J., C. P. 257; 8 Jur., N. S. 1105; 6 L. T. 287; 10 W. R. 603.

Deductions—Amount.—A tenant has a right to deduct from his rent the property tax assessed upon and paid by him in respect of his landlord, although the landlord is not, in fact, liable to be assessed, and has before the payment claimed exemption, and that exemption has been subsequently allowed. *Suatman v. Ambler*, 8 Ex. 72; 24 L. J., Ex. 185.

A tenant was not entitled to deduct from the rent paid to his landlord more property tax than is assessed on the premises under schedule (A.) of 46 Geo. 3, c. 65, although the property tax assessed under both schedules (A.) and (B.) did not amount to two shillings in the pound on the rent; and the assessment, not the collector's receipt, was the criterion how much the tenant might deduct. *Gabell v. Shevell*, 5 Taunt. 81.

— Payment to Outgoing Tenant.—A succeeding tenant who came in at Michaelmas (at which time a quarter's rent was due), and received from the former tenant a receipt for a year's property tax, also due at Michaelmas:—Held, entitled to deduct the amount, upon the landlord's distraining for half a year's rent at Christmas. *Clennell v. Read*, 2 Marsh. 371; 7 Taunt. 50.

Omission to Deduct.—Where a tenant pays property tax assessed on the premises, and omits to deduct it in his next payment of rent, he cannot afterwards recover the amount as money paid to the use of the landlord. *Cumming v. Bedborough*, 15 M. & W. 438.

An occupier of lands having, during a course of twelve years, paid to the collector of taxes the landlord's property tax, and the full rent as it became due to the landlord, without claiming any deduction on account of the tax so paid:—Held, that the occupier could not recover from the landlord any part of the property tax so paid. *Denby v. Moore*, 1 B. & A. 123. And see *Andrew v. Hancock*, 3 Moore, 278; 1 B. & B. 37.

Action for Rent—Pleading.—In an action for rent, the tenant may plead as to part that he has paid the landlord's property tax to that amount, in respect of the rent due to the plaintiff claimed by the declaration, after he has in fact paid the tax. *Tinckler v. Prentice*, 4 Taunt. 549.

It is not enough to plead that the defendant

was on the premises at and a short time before sunset on the rent-day, ready to pay, without averring that he was there long enough before sunset to have counted the money. *Ib.*

— Payment under 5 & 6 Vict. c. 35.—To an action on a covenant for rent due under a deed of demise, the defendant pleaded as to 2*l.* 0*s.* 10*d.*, that, on the 5th April, 1843, before any part of the rent became due, 2*l.* 0*s.* 10*d.*, being at the rate of 7*d.* for every 20*s.* of the annual value, was duly, and according to the form of the statute, assessed on the premises in respect of the property thereof, for the year ensuing; that, on the 28th August, 1844, the defendant, then being occupier and tenant, paid to C., then being collector, the 2*l.* 0*s.* 10*d.*; and that the defendant had never made any payment on account of the rent since the payment of the 2*l.* 0*s.* 10*d.*:—Held, that the plea sufficiently shewed that the assessment was made under 5 & 6 Vict. c. 35, and that it answered that part of the demand to which it was pleaded. *Franklin v. Carter*, 1 C. B. 750; 3 D. & L. 213; 14 L. J., C. P. 241; 9 Jur. 874.

— Paid before Action.—Where the tenant has paid the property tax before action, he has a right to deduct it at the trial. *Baker v. Davis*, 3 Camp. 474.

But the property tax will not be deducted at Nisi Prius from the rent due, where it has not been paid. *Povook v. Eustace*, 2 Camp. 181.

Proof of Payment.—To enable a tenant to deduct such tax, he need not produce the assessment, but it is sufficient to produce the payments to the collector. *Phillips v. Beer*, 4 Camp. 266.

c. Assessment and Recovery.

Assessment.—An assessment under 43 Geo. 3, c. 99, and 43 Geo. 3, c. 161, is final and conclusive, unless appealed against in the manner prescribed by 43 Geo. 3, c. 99, s. 24. *Allen v. Sharpe*, 2 Ex. 352; 17 L. J., Ex. 209.

Information or Scire facias.—Arrears of assessed taxes cannot be recovered by information in the nature of a popular action of debt, under 43 Geo. 3, c. 99, s. 45, and 5 & 6 Will. 4, c. 20, s. 13, inasmuch as the latter section provides that the amount "shall be recovered from the person and persons making default of payment thereof, as a debt upon record to the king's majesty." The proceedings ought to be by scire facias, or extent, or information upon the record itself. *Att.-Gen. v. Sewell*, 4 M. & W. 77; 6 D. P. C. 673; 6 C. & P. 376; 1 H. & H. 262.

Previous Demand.—The demand required by 43 Geo. 3, c. 99, s. 33, previously to a distress being levied for assessed taxes, need not be made in writing, nor personally on the party from whom they are due; it is sufficient if a demand has in fact been made, and there has been a refusal on the ground of inability to pay, or for any other cause. *Rex v. Ford*, 4 N. & M. 451; 2 A. & E. 588; 1 H. & W. 46.

It is not essential that the demand to which the refusal applies, should have specified the precise amount claimed, if the debtor understood what the amount was, and did not object to it. *Ib.*

Presence of Constable.]—A collector of taxes has no right to take a constable or other person with him into the house of a party, of whom he is about to demand the payment of arrears of taxes, and to levy a distress for such arrears if necessary, unless he has reasonable ground for apprehending that an assault will be committed on him, or that the distress will be resisted. *Rez v. Clarke*, 4 N. & M. 671; 3 A. & E. 287; 1 H. & W. 252.

Where, however, a collector, unwarrantably, but without any objection being made, introduced B., a constable, into the house of D., a person from whom he demanded taxes, and afterwards, reasonable ground to apprehend violence arising, the collector introduced C., another constable, upon whom D. committed an assault, it is no answer to an indictment against D. for the assault on C. in the execution of his duty, that the collector had wrongfully introduced B. *Ib.*

A collector demanded taxes due from D., the owner of a house, and intimated, in case of non-payment, he should distrain; upon which D. threatened A. with personal violence, but ultimately promised to send the amount on a certain day. This promise not being performed, A. went again to D.'s house, and demanded the taxes of D. D. left the room in which A. was, and fastened the outer door:—Held, that A. was justified in unfastening the door and introducing constables. *Ib.*

Held, also, that, upon D.'s returning into the room, after the introduction of the constables, accompanied with a number of men, and commanding C., one of the constables whom he knew to be such, to leave the house, it was the duty of C. and the other constables to remain. *Ib.*

Warrant.]—A collector of taxes may distrain without having his warrant with him. *Ib.*

Time for Payment.]—By 11 & 12 Vict. c. 90, no person is entitled to be registered as a voter, unless on or before the 20th July he shall have paid all assessed taxes which have become payable by him previously to the 5th January preceding. By 43 Geo. 3, c. 161, s. 23, the assessed taxes are payable, and are to be paid, quarterly, on the 20th July, the 20th September, the 20th December, and the 20th March. By 48 Geo. 3, c. 141, s. 1, the collectors are directed to collect the assessed taxes in equal moieties within twenty-one days after the 10th October and 5th April; but with a proviso that nothing therein contained shall be construed to alter the time when the duties are made payable by the previous acts. A quarter's house tax due from a householder on the 20th December was not demanded till the 11th April following, and he did not pay it before the 20th July:—Held, that the quarter's assessed taxes which, by 43 Geo. 3, c. 161, s. 23, become payable on the 20th December, are taxes which, in the language of the 11 & 12 Vict. c. 90, have become payable before the succeeding 5th January, although no demand for payment has been previously made. *Ford v. Smedley*, 2 Lutw. Reg. Cas. 203; 12 C. B. 622; 22 L. J., C. P. 35; 16 Jur. 1159.

5. SUCCESSION DUTY. .

a. Interests and Property Liable.

Succession after 1853—Interest before.]—A party is liable to duty in respect of property to

which he has succeeded after the act of 16 & 17 Vict. c. 51 came into operation, although he became entitled to it, in immediate expectancy, on the death of a person dying before the passing of the act. *Att.-Gen. v. Middleton (Lord)*, 3 H. & N. 125; 27 L. J., Ex. 229.

The second section applies not merely to cases where the title accrues at death, but also to cases where the title has accrued before the act, but is made an interest in possession at once, or after an interval on a death occurring after the act. *Att.-Gen. v. Gell*, 3 H. & C. 615; 34 L. J., Ex. 145; 11 Jur., N. S. 566; 12 L. T. 461; 13 W. R. 900.

Children and Grandchildren.]—A testator bequeathed to trustees 5,000*l.* in trust, to invest the same, and pay the dividends to his daughter during her life, and upon further trust after her death for her children, equally to be divided amongst them. The testator died in 1803, at which time no duty was payable on legacies to children or grandchildren. His daughter died after the act came into operation:—Held, first, that the interest of the grandchildren in the property bequeathed to them was a succession, within the meaning of that act. *Att.-Gen. v. Fitzjohn*, 2 H. & N. 465; 27 L. J., Ex. 79.

Held, secondly, that it was not within the exemption of s. 18, since that applied only to express exemptions by former acts, and consequently that succession duty was chargeable. *Ib.*

Reversioners.]—A testator, who died before the 19th May, 1853, devised a reversion, in respect of which he would not have been liable to succession duty, if it had vested in possession in his lifetime after that date:—Held, that he thereby created a new succession which was not exempt from duty under s. 15 of 16 & 17 Vict. c. 51. *Att.-Gen. v. Gardner*, 1 H. & C. 639; 32 L. J., Ex. 84; 9 Jur., N. S. 281; 7 L. T. 682; 11 W. R. 378.

Remainderman.]—The property of a remainderman whose estate vested upon his birth, before the act came into operation, but did not fall into possession until the death of the tenant for life, which took place after the act came into operation, but before it received the royal assent, was liable to succession duty. *Wilcox v. Smith*, 4 Drew. 40; 26 L. J., Ch. 596; 3 Jur., N. S. 604.

A testator devised property to A. for life, after her husband's death; remainder to the child of A., if any; remainder over to P. for life, with power of appointment to his children, and in default to his second son; the rents and profits, during the joint lives of A. and her husband, were to accumulate, and at the end of twenty-one years were, if A. and her husband were both alive, to go to the person who would have been entitled to the corpus if A. and her husband had died without leaving children of A. The twenty-one years expired in 1863, and P. died previously, leaving a second son, who so became entitled to the accumulations:—Held, that he was liable to succession duty, by reason of the death of P., as having become entitled to property upon the death of a person dying after the time appointed for the commencement of the act. *Att.-Gen. v. Gell*, 3 H. & C. 615; 34 L. J., Ex. 145; 11 Jur., N. S. 566; 12 L. T. 461; 13 W. R. 900.

—**Appointments.**—The 4th section of 16 & 17 Vict. c. 51, does not restrict the operation of the duty as regards appointments to cases where the powers are created by wills taking effect, or by settlements made after the commencement of the act. *Lovelace, In re*, 4 De G. & J. 340; 28 L. J., Ch. 489; 5 Jur., N. S. 694.

Interest in Possession.—When an apparent heir died without taking possession, without making up a title, without drawing rent, and without incurring representation:—Held, that the case did not come within the meaning of the 16 & 17 Vict. c. 51, and that succession duty was not demandable by the crown. *Lord v. Stevenson*, 1 L. R., H. L. Sc. Cas. 411.

The "beneficial interest" must be regarded as an interest to which the successor has become entitled in possession. *Ib.*

It must not be a mere apparenay. *Ib.*

Dower.—A testator gave his lands unto trustees, for the benefit of his children on their attaining twenty-one, and authorized his trustees to sell such of his lands as they might see fit, and to invest the moneys in any way which might appear unto them best, and to pay such sums as they might think right for the maintenance and education of the children:—Held, that succession duty was payable on the dower to which the widow was entitled out of a portion of the estate. *Harding v. Harding*, 7 Jur., N. S. 906.

Devise to "Heir or Co-Heiresses at Law."—A testator died in 1850, having devised his real estates to trustees to accumulate the rents for twenty-one years, and then to convey and assure the estates and accumulations to the person or persons who should then answer the description of his "heir or co-heiresses at law." He died a bachelor, leaving an heir-at-law who died in 1865. Four co-heiresses of the testator succeeded to the property in 1871:—Held, that succession duty was payable. *Ring v. Jarman*, 14 L. R., Eq. 357; 41 L. J., Ch. 535; 26 L. T. 690; 20 W. R. 744.

Purchase of Reversion—Tenant for Life.—A testatrix by will, made in 1839, devised real property to one for life, and after his death to a remainderman in fee, and died in 1841. The remainderman, a cousin of the testatrix, died in 1870, having previously sold his reversion in fee to a corporation. The tenant for life died in 1872:—Held, first, that the corporation, upon the death of the tenant for life, was a successor within the Succession Duty Act, 1853, ss. 2, 27, and was liable to pay succession duty upon the full value. *Solicitor-General v. Law Reversionary Interest Society*, 8 L. R., Ex. 233; 42 L. J., Ex. 146; 28 L. T. 769.

Held, secondly, that if necessary the court would have decided the death of the remainderman to be immaterial, and the rate of duty to be the same as would have been payable by him if he had survived the tenant for life without selling, but that at all events the crown had made out a *prima facie* case to duty at that rate, since the crown need not prove the death of the remainderman, nor who was his heir; and that if events had happened by which the duty would be less, the corporation must prove them. *Ib.*

Interest Transmitted before Enjoyment.—

When an interest in personal property has been transmitted before it has ripened into enjoyment, it matters not whether the person originally entitled died before or after the commencement of the Succession Duty Act, only one duty is payable on any succession to such property, whether such duty be legacy or succession duty. If the duty is succession duty and the interest has passed through more than one successor, then under s. 14 the duty payable shall be the highest that would have been paid by any of such successors. If the duty be legacy duty, then under s. 18, no succession duty of any kind is payable. *Att.-Gen. v. Littledale*, 5 L. R., H. L. 290; 40 L. J., Ex. 241; 24 L. T. 921; 20 W. R. 473. Affirming 5 L. R., Ex. 275; 39 L. J., Ex. 207; 23 L. T. 192; 18 W. R. 1036.

The successor from whom duty is payable is the person who, on the happening of the death, eventually becomes beneficially entitled in possession; that which was conferred upon any previous successor was only an expectant interest, not a succession. The interest of an executor, not being beneficial, is not a succession within s. 2, or within s. 15; for s. 15 imposes no new duty, only a duty in substitution for that imposed by s. 2. *Ib.*

Fund Payable to Life Insurance Office.—A subscriber to the Customs Annuity and Benevolent Fund, established by 56 Geo. 3, c. 73, constituting a fund in the nature of an insurance fund, out of which a sum becomes payable on the death of a subscriber, according to rules made under the authority of the act, under which one-third goes to the widow of the subscriber, and the remainder to his children, relatives, or appointees, other than relatives, nominated with the consent of the directors,—appointed part of the fund to which he would be entitled on his death to the trustees of a life insurance society by way of mortgage. The subscriber's family disputed the validity of the appointment, but it having been decided to be valid, succession duty was claimed by the crown at the rate of 10 per cent.:—Held, that the part of the fund which was payable to the life insurance office was not liable to succession duty. *Maclean, In re*, 19 L. R., Eq. 274; 44 L. J., Ch. 145; 31 L. T. 632; 23 W. R. 206.

Insurance Policy effected by Customs Officer.—Succession duty is payable on money due to an appointee of a policy of insurance effected by an officer of customs under an act of parliament, although his power of appointment is not unqualified, and the fund does not exclusively arise from the payments of the subscribers, and the whole is under the regulation of the act. *Att.-Gen. v. Aday*, 1 H. & C. 266; 31 L. J., Ex. 9; 8 Jur., N. S. 798; 6 L. T. 756.

Advowsons Extinguished by Irish Church Act.—At the passing of the Irish Church Act, 1869, several advowsons were vested in the defendant, who applied for and obtained compensation in respect of them:—Held, that the advowsons had not been disposed of by the defendant, but had been taken from him and extinguished by the Church Act, and that, therefore, succession duty was not chargeable on the amount of compensation received in respect of them. *Att.-Gen. v. Leconfield (Lord)*, 2 Ir. L. R. 290.

Foreign Domicil — Legacies.]—Succession duty is not payable on legacies given by the will of a person domiciled in a foreign country. *Wallace v. Att.-Gen.*, 1 L. R., Ch. 1; 35 L. J., Ch. 124.

The act applies to a succession under a British settlement to British property vested in British trustees, and falling under the jurisdiction of a British court, although the persons entitled are aliens domiciled abroad. *Lovelace, In re*, 4 De G. & J. 341; 28 L. J., Ch. 489; 5 Jur., N. S. 694.

The word "property" in s. 2 of the Succession Duty Act, 1853, includes foreign movable property—as, for instance, funds or shares of a foreign government or trading corporation—comprised in a British settlement, vested in trustees subject to British jurisdiction, and recoverable by action in a British court. *Cigala, In re*, 7 Ch. D. 361; 47 L. J., Ch. 166; 38 L. T. 439.

The mere fact of a person beneficially entitled under a settlement being a foreigner is not sufficient to exempt him from payment of succession duty. *Ib.*

— English Settlement.]—By an English settlement executed in England on the marriage, in 1838, of an English lady with a domiciled Italian, the lady assigned property belonging to her, consisting of French rentes, shares in the Bank of France, and English government securities, to four trustees, of whom one was an Italian, and the other three were English, upon trusts, after the death of the survivor of the husband and wife, for the children of the marriage. The settlement contained provisions usually inserted in English settlements, including a power for the trustees to reinvest in British or French securities. From the date of the marriage until their deaths the husband and wife resided in Italy. The Italian trustee having died, an English trustee was appointed in his place. The husband survived the wife and died in 1877, leaving two children, the only issue of the marriage, the several trust funds being then in the names of four English trustees. Both the children being domiciled Italians, the question arose whether, under the Succession Duty Act, 1853, duty was payable on their succession to their father in respect of the French rentes and bank shares:—Held, that succession duty was payable, inasmuch as the settlement was a British settlement, the trustees of persons having the legal ownership were subject to British jurisdiction, and the forum for deciding any claim by the children in respect of the trust funds was a British court. *Ib.*

C. was domiciled in Portugal, but on a visit to this country made his will in the English form, and appointed executors, some of whom resided in England. He desired his executors to collect his property, which was in Portugal, to convert it into cash, pay certain legacies, and invest the residue in the English 3 per cents, to appropriate what they should think necessary to pay a life annuity of 50*l.* to his sister, on the termination of which the appropriated fund was to revert to and form part of his residuary estate, and be divided (like the rest) among his three children. The executors exactly performed the directions of the trust; when the sister died, the part appropriated to satisfy her annuity became divisible among the children:—Held, that this

constituted a succession within s. 2 of the Succession Duty Act, and was liable to the payment of succession duty. *Att.-Gen. v. Campbell*, 5 L. R., H. L. 524; 41 L. J., Ch. 611; 21 W. R. 34, n.

By a marriage settlement executed in England, the husband assigned to trustees (all domiciled and resident in England) an English policy of assurance, effected on his own life for 2,000*l.*, payable at the expiration of six months after his death, and the sum of 1,047*l.* 3*s.* 8*d.* consols, and covenanted to pay to the trustees within three years 1,000*l.*; and it was declared that the policy moneys and the 1,000*l.* should be held upon trusts for investment and payment of the income to the wife for life, and then to the husband for life, and then for division among the children of the marriage. The husband died within three years, having been at the time of his marriage, and thenceforth, up to the time of his death, domiciled in New South Wales. The wife survived only three months, and left one child, who was also domiciled abroad. At the time of the wife's death, neither the policy moneys nor the 1,000*l.* covenanted to be paid to the trustees of the settlement had been paid to them:—Held, that succession duty was payable by the child on the funds to which he became entitled under the settlement. *Lyall v. Lyall*, 15 L. R., Eq. 1; 42 L. J., Ch. 195; 27 L. T. 530; 21 W. R. 34.

— Transmission of Residuary Estate to England.]—By his will, the husband appointed trustees and executors in New South Wales to collect his residuary estate (which was all locally situate in that country), and transmit it to trustees and executors in England, who were to invest the funds so transmitted in government funds or real securities, and pay the income to his wife for her life, and after her death to divide it among the children. At the time of the wife's death, no part of the residuary estate had reached the hands of the English trustees, but large remittances were afterwards made to them:—Held, that no succession duty was payable by the child on the funds to which he became entitled under the will. *Ib.*

— Power of Appointment by English Will.]—An English testator by will gave a fund to trustees to pay the income to his daughter for life, and after her death to hold the fund in trust for such persons as the daughter should by will appoint. The daughter for some time previously to and up to her death was domiciled in Jersey. She disposed of the fund by will, giving legacies to two persons, and the residue to her husband:—Held, that the legacies were liable to duty. *Wallop, In re*, 1 De G., J. & S. 656; 33 L. J., Ch. 351; 10 Jur., N. S. 328; 10 L. T. 174; 12 W. R. 587.

The legacies, by reason of the domicil in Jersey, were not liable to legacy duty; but, notwithstanding the fact of such domicil, were liable to succession duty. *Ib.*

— Succession and Legacy Duty.]—Personal property may be subject to succession duty, although exempt from legacy duty by reason of the testator having a foreign domicil. *Capdevielle, In re*, 3 H. & C. 985; 33 L. J., Ex. 306; 10 Jur., N. S. 1155; 12 W. R. 1110.

Testatrix, an unmarried Englishwoman, left

England in 1849, and went to reside abroad with a married sister, the defendant, at B., in Germany, and continued to reside there, contributing her share to the expenses of housekeeping down to her death in 1863, never returning home except on a few occasional visits to relations here. On the occasion of one of the visits she made a will here disposing of all her property, consisting exclusively of money in the English funds and a cash balance at an English bank, and described herself as "I. D., now on a visit to my sister, C." She often told her sister that if she survived she should continue to live in Germany, and that nothing would induce her to return permanently to England:—Held, not sufficient evidence to establish change of domicile, and duty was payable accordingly. *Att.-Gen. v. Blucher de Wahlstatt (Countess)*, 3 H. & C. 374; 34 L. J., Ex. 29; 10 Jur., N. S. 1159; 11 L. T. 454; 13 W. R. 163.

— **Pure Personalty in England.**—Succession duty is not payable upon pure personalty locally situate in England, and passing under the will of a testator domiciled abroad. *Wallace v. Att.-Gen.*; *Jeyes v. Shadwell*, 1 L. R., Ch. 1; 35 L. J., Ch. 124; 11 Jur., N. S. 937; 13 L. T. 480; 14 W. R. 116.

— **Money to be Invested under English Will.**—A testator who was domiciled in Belgium, but for the last ten years of his life resided and carried on business in England, by his will directed 12,000*l.* to be invested in consols and held in trust for A. for life, with remainder for his nephews and nieces, most of whom were Belgians:—Held, that upon the death of A. succession duty was payable on the amount. *Badart, In re*, 10 L. R., Eq. 288; 39 L. J., Ch. 645; 24 L. T. 13; 18 W. R. 885.

— **Residuary Estate.**—When a testator domiciled abroad directs a part of his residuary personal estate which is to be invested in English securities in the names of English trustees, to be set apart to answer a life annuity, and on its determination to fall into the residue, the increase of benefit accruing on the death of the annuitant to the residuary legatees is not a succession within the operation of s. 5. *Callanane v. Campbell*, 11 L. R., Eq. 378; 40 L. J., Ch. 195; 24 L. T. 175; 19 W. R. 406.

— **Appointment under a General Power.**—Personal property appointed under a general power, and not coming within s. 4, ought not to be treated as the property of the donee so as to be, in the case of the donee being domiciled abroad, exempt from succession duty. *Lovelace, In re*, 4 De G. & J. 340; 28 L. J., Ch. 489; 5 Jur., N. S. 694.

b. Predecessors and Successors.

Remainderman—Barring Entail.—A tenant in tail in remainder cannot vary the amount of his liability to succession duty by barring the entail, and resettling the estate in his own favour. The person from whom he derives the estate is his predecessor. *Braybrooke (Lord) v. Att.-Gen.*, 9 H. L. Cas. 150; 31 L. J., Ex. 177; 7 Jur., N. S. 741; 4 L. T. 218; 9 W. R. 601.

A stranger, in 1796, devised real estates to A.

for life, with remainder to his first and other sons in tail male. In 1841 A. became tenant for life in possession, and his eldest son, B., joined A. in executing a disentailing deed, whereby the estates were conveyed, subject to his life estate, to such uses as they should jointly appoint. In 1850 A. and B. jointly executed this power of appointment, and conveyed the property to the use that B. should receive an annuity of 1,200*l.* during the joint lives of A. and himself, and subject thereto to the use of A. for life, remainder to B. for life, remainder to B.'s first and other sons in tail male. By this deed also A. gave up a charge he had on the property for 10,000*l.* On the death of A.:—Held, that B. succeeded to the property by virtue of a disposition made by himself, and not made by himself and A. jointly; and that therefore, under s. 12, B. must pay duty as if he had succeeded to the testator. *Id.*

Held, also, that as A. gave up a charge of 10,000*l.* on the property by the deed of 1850, B. must be charged only one per cent. on that extent of the succession. *Id.*

The act is not to be construed according to the technicalities of the law of England or Scotland, but according to the popular use of the language employed. *Id.*

The protector of a settlement giving his consent to a disposition of property cannot be treated as a creator of such disposition. *Id.*

— Estate "either in England or Scotland."

—A person succeeding on the death of an uncle to an estate, either in England or in Scotland, under an entail created by a direct ancestor, becomes beneficially entitled to the property by devolution by law within s. 2 of the Succession Duty Act, and has not derived the interest from the original settlor, and he is, therefore, liable to pay succession duty at the rate of three per cent. *Zetland (Earl) v. Lord Advocate*, 3 App. Cas. 505; 38 L. T. 297; 26 W. R. 725.

Remainderman in Tail per formam doni.—S., by deed of entail in Scotland, gave an estate to her eldest son, A., and the heirs of his body, whom failing, she gave the same to her grandson, C., and the heirs of his body, with remainders over. A. died without issue:—Held, that S. was the predecessor, and therefore that the duty payable by the grandson was 1*l.* per cent. *Saltoun (Lord) v. Advocate-Gen. for Scotland*, 3 Macq. H. L. Cas. 659; 6 Jur., N. S. 713; 8 W. R. 565.

Where the succession is by provision, the settlor is the predecessor; but where by devolution, the last possessor is the predecessor. Hence C. took by provision. He must be considered in the situation of a remainderman in tail, according to English law, taking per formam doni, to whom the donor, and not the last person who held under the first estate tail, would be considered the predecessor. *Id.*

Where there is an entail giving an estate tail to one, with remainder to another, the donee or remainderman who takes by purchase is the successor, and the entailor the predecessor; and with respect to the heirs of the body, the donee in tail is the ancestor, and the heir of the body is the successor. *Id.*

Appointee under a Power.—St. J., tenant for life in possession, and W., tenant in tail in remainder of certain estates, barred the entail and

settled the estates to such uses as they should jointly appoint. On the following day they appointed the estates to such uses as they should jointly appoint, and in default of appointment to St. J. for life, remainder to W. for life, remainder to the first and other sons of W. in tail male, remainder to such uses as St. J. and T. should jointly appoint, and in default of appointment to T. for life, remainder to the first and other sons of T. in tail male, with remainders over. W. died in 1864, a bachelor, without having exercised his power of appointment. In 1866 St. J. and T. appointed the estates, subject to the life estate of St. J., in the events which happened, to the use that A., the widow of St. J., should receive an annuity, and subject thereto, and to an annuity given in certain events which had not happened to the wife of T., to the use of D. during so much of a certain period as she should live. St. J. died in 1873, and the uses limited in favour of A. and D. thereupon took effect:—Held, that the case fell within s. 2 and was not within s. 4 of the Succession Duty Act. *Charlton v. Att.-Gen.*, 4 App. Cas. 427; 49 L. J., Ex. 86; 40 L. T. 760; 27 W. R. 921—H. L. (E.). Affirming 2 Ex. D. 398; 46 L. J., Ex. 750; 37 L. T. 211; 26 W. R. 154.

And, held, following *Braybrooke (Lord) v. Attorney-General* (9 H. L. Cas. 150), *Attorney-General v. Floyer* (9 H. L. Cas. 477), and *Attorney-General v. Smythe* (9 H. L. Cas. 497), that duty was payable upon the interests of A. and D. as successions derived from W. as predecessor. *Id.*

In cases of appointments by donees of general powers which fall within s. 2 and do not fall within s. 4 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), the canon of construction adopted in *Barker, In re* (7 H. & N. 109) and *Charlton v. Attorney-General* (4 App. Cas. 427), is to be applied whether the power be joint or sole, and the appointees must be held to derive their interest from the donor of the power as "predecessor," and not from the donee. The testator, in 1826, bequeathed personalty in trust for his daughter for life and afterwards (in the event which happened), for such persons as she should by deed appoint, and in default of appointment for her next of kin. The testator died before the coming into operation of the Succession Duty Act, 1853, and legacy duty at 1 per cent. was paid upon the whole absolute interest of the trust fund. After that act came into operation the daughter, by deed, appointed the trust fund to her sister's daughters:—Held, that, as owing to the date of the testator's death, s. 4 did not apply, the appointees derived their interest from their grandfather, the testator, as predecessor within s. 2, and not from their aunt the appointor, and that succession duty was therefore payable on their succession at the death of the appointor at 1 and not at 3 per cent. *Attorney-General v. Mitchell*, 6 Q. B. D. 548; 50 L. J., Q. B. 406; 44 L. T. 580; 29 W. R. 683; 45 J. P. 618.

B., tenant for life, and W., his eldest son, tenant in tail in remainder, suffered a recovery, and in 1821, by virtue of a joint power of appointment, which they exercised, resettled the estates to the use of the father for life, with remainder to the son for life, with remainders to his sons in tail male, with remainder to G. B. and the son of B. for life, with remainder to his sons in tail male. The father died in 1834, and his son entered into

possession, but died in 1856, without issue. G. B. then came into possession, and joined with his son E. in disentailing the estates; and, by virtue of a power of appointment reserved to them, conveyed the estates to the defendant for a term of 500 years, upon trust in case the son survived his father (an event which happened), to pay him an annuity during his life; and power was given to the father to raise portions for younger children, which power he exercised:—Held, that the crown was entitled to duty at 3l. per cent. in respect of the succession of G. B., as having been derived from his elder brother W., as predecessor; that the same amount of duty was payable in respect of the succession of E., as having been derived under a disposition made by himself at the time when he was expectantly entitled to the estates, upon a succession derived from W. as predecessor; and also, that the same amount of duty was payable in respect of the portions of the younger children, as being derived from either their niece W., or their own brother E., as predecessor. *Att.-Gen. v. Floyer*, 9 H. L. Cas. 477; 31 L. J., Ex. 304; 9 Jur., N. S. 1; 7 L. T. 47; 10 W. R. 762.

A. being seised of estates in fee-simple, by a marriage settlement executed in 1812, conveyed them to the use of himself for life, remainder to the use of his sons in tail male successively. A. had three sons, E., R. and C. In 1840 A. and his eldest son E. executed a disentailing deed, and conveyed the estates to such uses as they should appoint, and, in default, to uses of the settlement of 1812. In the same year A. and E., on the intended marriage of E., appointed to the use of A. for life, remainder to E. for life, remainder (subject to provisions for the intended wife and the younger children) to the first and other sons of the marriage successively in tail male, remainder to R. and C. successively in tail male. E. died in his father's lifetime, without issue. A. and R. then conveyed the estates to such uses as they should appoint, and in default to the existing uses. They afterwards appointed to A. for life, remainder to R. for life, remainder to his first and other sons in tail male, with an ultimate remainder to A. and his heirs. R. died without issue. A. then died, and C. succeeded to the estate:—Held, that he was liable to a duty of 3l. per cent. as on a succession derived from his elder brother. *Att.-Gen. v. Smythe*, 9 H. L. Cas. 498; 31 L. J., Ex. 404.

A tenant for life having a general power of appointment by deed or will, by will, executed after the statute came into operation, exercised the power in favour of B. B. was a stranger in blood to the tenant for life, but was the niece of her husband, the donor of the power, who had created it, and died before the act came into operation:—Held, that B. was only liable to a duty of 3l. per cent. as on a succession derived from the donor of the power. *Barker, In re*, 7 H. & N. 109; 30 L. J., Ex. 404; 7 Jur., N. S. 1061; 5 L. T. 206.

Appointees taking upon the death of the appointor are successors to him. *Chapman, In re*, 11 Jur., N. S. 708; 13 L. T. 144.

When a settlement contains a power of appointment in some one other than the settlor, and the exercise of the power transfers the property from the settlor to some one else, the donee of such a power is the predecessor of the appointee. *Ramsay, In re*, 30 Beav. 75; 30 L. J., Ch. 849; 7 Jur., N. S. 1225; 5 L. T. 166; 9 W. R. 910.

Upon an information to recover succession duty, payable in respect of the succession of E. to 2,000*l.* derived from W. P. as predecessor, a special verdict was found, which stated that J. P. died intestate, leaving W. P. his brother; and A. S., the wife of J. H. S., claimed to be a daughter of a sister of J. P.; that by indenture, reciting that letters of administration had been granted to W. P., and in order to obviate any doubts or differences which might arise touching any share which J. H. S. or A. S. might be entitled to in the personal effects of J. P., W. P. had proposed and agreed on having a general release from J. H. S. and A. S., to transfer 30,000*l.*, to be settled upon trusts for J. H. S. and A. S., and the children of their marriage, to which proposal J. H. S. and A. S., had consented and agreed; that 30,000*l.* had been directed to be transferred to trustees by W. P., and that J. H. S. and A. S. had that day executed a general release to W. P. of all claims against him as administrator of J. P. or otherwise; and it was declared that B. and O. should stand possessed of the 30,000*l.* in trust to pay the interest to J. H. S. for life, and after his death to A. S. for her life, and after the death of the survivor, if there should be an only child, in trust for such child, and if there should be two or more children, in trust for such children in such shares as J. H. S. and A. S. or the survivor should appoint; and in case no child should live to attain a vested interest, in trust for the survivor of J. H. S. and A. S. absolutely. Contemporaneously with the indenture a release was executed by J. H. S. and A. S. to W. P. There were ten children of the marriage, and J. H. S. and A. S., having appointed 2,000*l.* to E., one of such children, J. H. S. and A. S. died in or before March, 1854:—Held, that the defendant was entitled to judgment, because it could not be inferred that W. P. was either the sole predecessor of E., within s. 2, or a joint predecessor within s. 13. *Att.-Gen. v. Baker*, 4 H. & N. 19.

The appointee under a general power of appointment, which has taken effect on a death happening since the commencement of the act, takes a succession from the donee of the power. *Att.-Gen. v. Upton*, 1 L. R., Ex. 224; 35 L. J., Ex. 138; 12 Jur., N. S. 489; 14 L. T. 334; 14 W. R. 732; 4 H. & C. 336.

Under the will of her husband, who died in 1856, a widow had a life estate in real property, with a general power of appointment by deed or will. She by deed appointed to the use that trustees should, after her death, receive an annuity during the lives of the wife of the testator's nephew, and of the children of the nephew by her, on trust for the separate use of the wife. Both the testator's nephew and his wife were strangers in blood to the testator's widow:—Held, that the nephew's wife took the annuity as a succession from the testator's widow, and not from the testator himself, and that therefore a duty of 10*l.* per cent. was payable. *Id.*

—**Contemporaneous Settlement.**—In 1852 A., tenant for life, and B. his nephew, and tenant in tail, entered into an arrangement, by which they barred the entail, and conveyed the property to such uses as they should jointly appoint, and subject thereto to the old uses. By a contemporaneous deed, in execution of the joint power, A. secured to B. a life annuity on the property, and B. secured 25,000*l.*, payable when he, B., came into possession. Of this 20,000*l.* was settled

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contemporaneously on A.'s daughters and the remainder on A.:—Held, on the death of A. in 1855, that succession duty was payable on the 20,000*l.* as a succession from A., but that no succession duty was payable on the remaining 5,000*l.* *Jenkinson, In re*, 24 Beav. 64; 26 L. J., Ch. 241; 3 Jur., N. S. 279.

Appointment by Tenant in Tail to himself.—A testator devised his estates in L. to his brother C. for life, with remainder in tail to his first and other sons. On the 22nd March, 1848, C. and his eldest son executed a disentailing deed, whereby they limited the estate to such uses as they should jointly appoint, and in default of such appointment, to the uses declared by the will of the testator. On the same day C. and his son executed another disentailing deed of estates devised to them by another testator, and also limited them to such uses as they should jointly appoint. On the 23rd March, 1848, C. and his son executed a joint appointment, whereby, after reciting the two disentailing deeds, and certain arrangements made in respect of incumbrances, with other stipulations, they appointed the estates in L., to the use that the son might receive thereout the yearly sum of 1,000*l.* during the joint lives of himself and C., and subject thereto to the use of C. for life, in restoration, corroboration, and confirmation of his previous life estate, and after his decease to the use of the son for life, and after his decease to the use of his eldest son for life, with remainder, in tail male. In 1855 C. died:—Held, first, that his son took a succession under a disposition made by himself, within s. 12; it was therefore chargeable with duty at the rate of three per cent. *Att.-Gen. v. Sibthorp*, 3 H. & N. 424; 28 L. J., Ex. 9.

Held, secondly, that the son was not entitled to any allowance in respect of the 1,000*l.* a year, which ceased on the death of C. *Id.*

Power—Exercised by Will—Legatees.—A. bequeathed his residuary personal estate, on the death of his daughter B., unmarried, to trustees, for such purposes as she should by will appoint, and in default of appointment in trust for his brother C. and his sister D. B. died unmarried, having bequeathed the residuary estate (subject to the payment of debts, funeral and testamentary expenses, legacies and annuities) to her uncle C. and her aunt D.:—Held, that B.'s will operated as an exercise of her power of appointment, and that C. and D. were liable to pay duty on the fund appointed at the rate of 5*l.* per cent. and not 3*l.* per cent., the rate at which they would have been liable if they could have taken directly under A.'s will. *Att.-Gen. v. Brackenbury*, 1 H. & C. 782; 32 L. J., Ex. 108; 9 Jur., N. S. 257; 8 L. T. 822; 11 W. R. 380.

Where A. (who died before the 19th of May, 1853), devised to C., a stranger in blood, a reversionary property to which he had become entitled by the exercise of a power of appointment contained in a settlement made by himself:—Held, that when, on the death of the tenant for life (which happened after the 19th of May, 1853), the property vested in possession, C. took a succession under the devise upon which duty was payable at the rate of 10*l.* per cent. *Att.-Gen. v. Gardner*, 1 H. & C. 639; 32 L. J., Ex. 84; 9 Jur., N. S. 281; 7 L. T. 682; 11 W. R. 378.

Succession by Heir.—A. devised his real estate

Y

to his wife for life, with remainder in fee to R., a stranger in blood. R. died intestate before the statute. The wife died after the commencement of that act, when the heir-at-law of R. became beneficially entitled in possession to the property so devised:—Held, that the property vested in him by a derivative title under the disposition made by the will of the testator, within the meaning of s. 15, and consequently that he was chargeable with 10*l.* per cent. duty, being at the same rate at which R. would have been chargeable. *Att.-Gen. v. Rushton*, 2 H. & C. 812; 33 L. J., Ex. 184; 9 L. T. 832.

Disposition by Settlement—Adopted Children.]—Under a settlement in 1812, C. became tenant for life of freehold estates, with remainder to his first and other sons in tail male; remainder to G. for life; remainder to her first and other sons in tail male; remainder to J. for life; remainder to his son F. in tail male. On the 3rd December, 1850, C. and F. executed a disentailing deed, and resettled the estates. By another deed of the same date, F., for valuable consideration, charged the settled estates with 20,000*l.* for the use of C., payable with interest at the expiration of twelve calendar months from the day on which the limitations to C. and G. for their lives and their sons in tail male, or the last of such limitations, should fail. On the 31st December, C., by a deed of settlement, assigned the 20,000*l.* to trustees, as to 14,000*l.* for his adopted son, and as to 6,000*l.* for his adopted daughter. C. died in February, 1857, without legitimate issue; and G. died in November, 1857, without issue, whereupon the adopted children of C. became beneficially entitled to the 14,000*l.* and 6,000*l.*:—Held, that the disposition of the 20,000*l.* by the deed of settlement created a succession, and that duty was payable at the rate of 10*l.* per cent. *Att.-Gen. v. Yelverton*, 7 H. & N. 306; 30 L. J., Ex. 333; 7 Jur., N. S. 1250; 5 L. T. 451.

Settlement on Second Marriage.]—Upon the second marriage of a lady, her second husband settled his property on the children of her former marriage:—Held, that the husband and not the wife was the predecessor, and that 10*l.* per cent. succession duty was payable. *Ramsay, In re*, 30 Beav. 75; 30 L. J., Ch. 849; 7 Jur., N. S. 1225; 5 L. T. 166; 9 W. R. 910.

Reservation of Interest to Settlor—Alternative Conditions of Succession—Succession at Fixed Time or on Death of Settlor.]—Subsequently to the Succession Duty Act of 1853 (16 & 17 Vict. c. 51), B. by an irrevocable deed settled personal property upon trust for himself for a term of four years if he should so long live, and at the end of the term or at his death, whichever should first happen, upon trust for his nieces therein named absolutely. Upon B.'s death, eighteen months before the end of the term, the nieces entered into possession of the settled property, whereupon the crown claimed payment from them of succession duty upon the whole amount of the property, which they declined to pay on the ground that they were only liable to duty on the income of the property for the period between B.'s death and the end of the term:—Held, that the defendants were liable to pay duty under s. 2 upon the whole value of the property, and not merely on the income of it for the period between the death of the settlor and

the end of the term; that the event on which they came into possession was the death of the settlor, and they were chargeable with duty accordingly, and that they could derive no benefit from the fact that they might have come into possession without being liable for any duty on the happening of an alternative event which never did happen. *Att.-Gen. v. Noyes*, 8 Q. B. D. 125; 51 L. J., Q. B. 135; 45 L. T. 520; 30 W. R. 434—C. A. Reversing 40 L. T. 80.

Settlement—Death of Ultimate Beneficiaries before Tenant for Life.]—A. by his will gave to trustees 10,000*l.* upon trust for B., then the wife of C., and after her death upon trust for all her children who should attain twenty-one. B. had seven children who attained that age, two of whom, D. and E., died in the lifetime of their father, intestate, whereby their father, C., became their next of kin and entitled beneficially to the one seventh share of the legacy of 10,000*l.* expectant upon the death of their mother, B. Their father, C., never took out letters of administration, but himself died in the lifetime of his wife, B., and by his will his surviving children became entitled to his residuary personal estate upon which the sum of 448*l.* 10*s.* 4*d.* was paid, being at the rate of 1*l.* per cent., and was paid in respect of the beneficial acquisition of his surviving children of his residuary personal estate, and which included the reversionary value of the two seventh parts of the legacy of 10,000*l.* to which he was entitled as next of kin of his children D. and E., and in respect of which two seventh parts no legacy or succession duty had been paid by C. Upon the death of B., F., who was one of the executors under the will of C., obtained letters of administration of the estate and effects of D. and E., so as to enable him to give and receive a good discharge for their two seventh shares:—Held, that the Succession Duty Act did not apply to such a case. *Att.-Gen. v. Cleave*, 31 L. T. 86.

—Tenant for Life in Possession—Tenancy in Tail.]—A lunatic was tenant in tail in possession of land, with remainder to his younger brother R., and his sister D., successively in tail. R. converted his estate tail into a base fee in remainder, and mortgaged his interest to secure debts of 124,000*l.* with a covenant to convey the fee simple to the mortgagees if he should become able to do so. The mortgage debt was more than the fee simple value of the land, and R. had no beneficial interest in the equity of redemption. For the benefit of all parties a compromise was entered into with the consent of the lord chancellor (as protector and in lieu of the lunatic under 3 & 4 Will. 4, c. 75, s. 33), in pursuance of which R. and D. and the mortgagees all joined in deeds of settlement whereby they conveyed the land, subject to the estate tail of the lunatic but discharged from the mortgage, to trustees upon trust after the determination of the lunatic's estate to raise 37,000*l.* by sale or mortgage of the land and to pay that sum to the mortgagees, and subject thereto to hold the land to the use of D. for life with remainder to her sons successively in tail. This arrangement was carried out, and upon the death of the lunatic, D. became tenant for life in possession, and upon her death the defendant, as her son, became tenant in tail in possession:—Held, that the defendant derived his interest as successor from his

mother D. and not from his uncle R., as predecessor, under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 2, and was therefore liable to duty at 1*l*. per cent. and not at 3*l*. per cent. *Att.-Gen. v. Dowling*, 5 Ex. D. 139; 49 L. J., Ex. 621; 42 L. T. 378; 28 W. R. 673. Affirmed, 6 Q. B. D. 177; 50 L. J., Q. B. 192; 44 L. T. 234; 29 W. R. 327; 45 J. P. 422—C. A.

"Alienation or Title not conferring a new succession."—In 1855, estates which had been settled on S. for life, with remainder to his first and other sons in tail male, were conveyed to such uses as S. and his eldest son C. should appoint. In 1857 by deed of appointment S. and C. appointed that certain of the estates should go to trustees upon trust in case E., the third son of S., should survive him, to raise 20,000*l*. for E. In 1860 S. and C. further appointed that in an event (which happened) the 20,000*l*. should be raised and paid to E., whether he survived S. or not. C. died a bachelor in 1866, and S. died in 1868.—Held, that there was a new succession, and not a succession "vested by alienation or title not conferring a new succession" within the Succession Duty Act, s. 15; and that E. was liable to pay duty under s. 2, as upon a succession from C. as predecessor. *Att.-Gen. v. Cecil*, 5 L. R., Ex. 263; 39 L. J., Ex. 201; 23 L. T. 20; 18 W. R. 949.

"By alienation or by any title not conferring a new succession," in s. 15 of the Succession Duty Act, 1853, means either by alienation or by any title other than alienation, in both cases not conferring a new succession. *Cooper and Allen, In re*, 4 Ch. D. 802; 46 L. J., Ch. 133; 35 L. T. 890; 25 W. R. 301.

Settlement after the Succession Duty Act: A. tenant for life; D. remainder in fee. A. and B. convey their estates for money to C. in fee. C. dies, having devised to D. in fee. D. pays duty on his succession from C., and then sells. On A.'s death no more succession duty will be payable than has already been paid by D. *Id.*

In the Case of a Tontine.—See *Oldfield v. Preston, infra*.

c. Vendors and Purchasers.

In what Cases.—A conveyance or an assignment by way of bona fide sale does not create a succession within the meaning of the Succession Duty Act, 16 & 17 Vict. c. 51. *Fryer v. Morland*, 3 Ch. D. 675; 45 L. J., Ch. 817; 35 L. T. 458; 25 W. R. 21. See also *Henniker (Lord) v. Att.-Gen.*, post, col. 665.

Marriage or a release of dower is not a valuable consideration for money or money's worth within s. 17 of 17 & 18 Vict. c. 51. *Floyer v. Bankes*, 33 L. J., Ch. 1; 9 Jur., N. S. 1255; 9 L. T. 353; 12 W. R. 28.

Where the purchaser of a reversionary life interest in settled property had contracted to sell it to the tenant for life in possession, in consideration of a sum of money paid down and a further sum payable on the death of the tenant for life, secured by a charge on the reversion:—Held, that there was no succession created within the meaning of s. 2, and that no duty would be payable on the death of the tenant for life in respect of the charge. *Id.*

A tenant for life and the reversioner in fee

under a will mortgaged their respective interests, with the usual powers of sale, to the same persons. This power of sale was exercised, and the transferee of the mortgages became absolutely entitled, and devised the estates on trust for sale. Succession duty was paid on the succession to the vendor, the transferee of the mortgages. On a sale exception was taken by the purchaser to the title, on the ground that succession duty was payable also on the succession to the original testator:—Held, that the duty was not so payable. *Cooper and Allen, In re*, 4 Ch. D. 802; 46 L. J., Ch. 133; 35 L. T. 890; 25 W. R. 301.

—Tontine.—A tontine is a contract for value, and therefore within the exceptions of s. 17. *Oldfield v. Preston*, 3 De G., F. & J. 398; 31 L. J., Ch. 256; 8 Jur., N. S. 107; 5 L. T. 650; 10 W. R. 257.

An interest accruing immediately under a tontine does not create the relation of predecessor and successor, so as to make succession duty payable in respect of the accrued interest. *Id.*

Where a father subscribed to a tontine in the names of three of his children, two of whom died before the time appointed for the commencement of the act, but the third survived it:—Held, in the absence of evidence to the contrary, that such surviving child took, not by succession, but in its own right, by way of advancement, and that no duty was payable in respect thereof. *Id.*

By whom Amount Payable.—Estates subject to a jointure rent-charge were settled subject to a power of sale, with trusts for re-investment of the purchase-money in lands to be settled to the like uses, and were sold under the power of sale:—Held, that the charge of succession duty that would become payable on the extinction of the jointure, was shifted by s. 42 from the lands sold to the purchase-money, and the lands on which it might be re-invested, and therefore the purchaser was not entitled to require it to be paid for. *Dugdale v. Meadows*, 6 L. R., Ch. 501; 40 L. J., Ch. 140; 24 L. T. 113. Affirming 9 L. R., Eq. 212; 39 L. J., Ch. 181; 18 W. R. 310.

As between a vendor and purchaser of a reversion, the purchaser is liable to bear the succession duty payable in respect of it. *Cooper v. Treuby*, 28 Beav. 194.

—Settled Estates Act, 1877—No Power of Sale in Settlement.—The effect of a sale by the court under the powers conferred by the Settled Estates Act, 1877, of any settled estates, is, by the operation of the 22nd section of that act, to revoke the uses of the settlement; and by the operation of the 42nd section of the Succession Duty Act, 1853, the duty is shifted from the land sold to the purchase-money or its investments, and the land in the hands of a purchaser is freed from the succession duty. *Warner's Settled Estates, In re, Warner to Steel*, 17 Ch. D. 711; 50 L. J., Ch. 542; 45 L. T. 37; 29 W. R. 726.

Estate Vested in Devisee to give Title to Purchaser.—Where trustees for sale under a will, who have entered into a contract with a purchaser, and paid legacy duty on the amount of the purchase-money, afterwards vest the estate in the person to whom (subject to the trust) the

land is devised, whereby he becomes the proper party to convey, such legacy duty is properly paid, and no new contract is created whereby succession duty becomes payable. *Howe (Earl) v. Lichfield (Earl)*, 2 L. R., Ch. 155; 36 L. J., Ch. 313; 16 L. T. 436; 15 W. R. 323.

d. Allowances and Exemptions.

Real Property—Income Tax and Expenses.]—In calculating the value of an assessment, the commissioners are not to allow deductions on account of income tax upon real property, or on stock the produce of real property, nor for the costs of collecting rents of real property during a temporary absence of the owner abroad. *Elwes, In re*, 3 H. & N. 719; 28 L. J., Ex. 46; 4 Jur., N. S. 1153; *S. P., Att.-Gen. v. Lorton (Lord)*, 5 L. T. 122; 11 Ir. C. L. R. 429.

Rent-Charge Payable by Son Tenant in Tail.]—In 1803 estates were settled to the use of P. for life, with remainder to his first son in tail male. In May, 1826, P. and his first son suffered a recovery, and conveyed the estates to the use of P. for life, with remainder to the use that the wife of P., in case she should survive him, should yearly receive, during her life, a rent of 1,000*l.*, with remainder to such uses and subject to such charges as P. and his son should appoint, and in default of appointment to the use of the son for life, with remainder to his first and other sons in tail male. In December, 1826, P. and his son, in execution of the power, appointed the estates to such uses, and subject to such charges, as they during their joint lives should appoint; and in default of appointment to the son for life, with remainder over. Subsequently P. and his son, in exercise of the power, mortgaged the estates for money lent to them, and for the repayment of which they jointly and severally covenanted. They also mortgaged the estate for a debt due from P., and for the repayment of which he alone covenanted. They also charged the estates with an annuity for the grandson of P., during his life and the life of P. and his son, or the survivor:—Held, first, that on the death of P. his son was entitled, on estimating the value of his succession, to an allowance in respect of the rent-charge during the life of the wife of P., inasmuch as she was chargeable with duty in respect of it. *Peyton, In re*, 7 H. & N. 265; 31 L. J., Ex. 50; 7 Jur., N. S. 921; 5 L. T. 313; 9 W. R. 838.

Held, secondly, that the annuity to the grandson of P., and the mortgage debts, were incumbrances on the succession created by the son, and not made in execution of a prior special power of appointment within s. 34, and consequently the son was not entitled to any allowance in respect of either of them. *Ib.*

— Jointress.]—By a marriage settlement made in 1822, B. and A. (father and son), in pursuance of a joint power of appointment in them vested, limited two rent-charges to the wife of C., if she survived her husband (which event happened); and it was provided that the rent-charges should be in lieu of dower, thirds, and freebench, and should be payable without any deduction or abatement whatsoever on account or in respect of any taxes, charges, impositions, or assessments already imposed or charged, or to be thereafter imposed or charged, upon the

hereditaments or upon the jointure; and for the purpose of better securing the same, hereditaments were demised for a term of years, upon trust, in case the rent-charge should fall into arrear, to raise and pay the same, with all costs, charges and expenses which should be sustained by reason of the nonpayment thereof, or otherwise in relation thereto. The husband died in 1856:—Held, that succession duty was payable by the jointress in respect of the rent-charge. *Floyer v. Bankes*, 33 L. J., Ch. 1; 9 Jur., N. S. 1255; 9 L. T. 353; 12 W. R. 28.

Held, also, that the jointress was entitled to have her rent-charge free of the duty, and that the same was, therefore, a charge upon the estate. *Ib.*

Trusts to Expend Money on Land.]—When lands are left to trustees, to expend certain sums in keeping the land in a proper state, with salaries to servants, &c., and the residue to a beneficial devisee, the succession duty, whether paid by the trustees or the beneficial devisee, cannot be paid with an allowance for these outgoings. *Cowley (Earl), In re*, 1 L. R., Ex. 288; 35 L. J., Ex. 177; 12 Jur., N. S. 607; 14 L. T. 663; 14 W. R. 836; 4 H. & C. 476.

Though a fund bequeathed to trustees to be laid out in land, but not actually so laid out, may be treated by the Court of Chancery as land for some purposes, the fund is not, while the trusts of the will remain undischarged, to be so treated for the purposes of the succession duty. *De Lancey v. Commissioners of Inland Revenue*, 5 L. R., Ex. 102; 39 L. J., Ex. 76; 22 L. T. 239; 18 W. R. 468—Ex. Ch.

Annuity Charged on Land.]—If a tenant for life, and his son, the first tenant in tail under a will or a previous settlement, re-settle the estate, and by such re-settlement an annuity, charged upon the estate, is given to the son during his father's life, and the father dies and the son succeeds to the estate on which the annuity is charged, there must be, in calculating the succession duty under the Succession Duties Act, s. 38, an allowance made to the son in respect of the amount of the annuity. *Commissioners of Inland Revenue v. Harrison*, 7 L. R., H. L. 1; 43 L. J., Ex. 138; 30 L. T. 274; 22 W. R. 559. Affirming 26 L. T. 73.

Whether the re-settlement was made before or after the Succession Duties Act came into operation makes no difference. *Ib.*

Annuity Lost by Succession.]—Entailed estates were by a disentailing deed conveyed to such uses as a father, tenant for life, and his son, tenant in tail, should jointly appoint. By indenture of even date made between the father, the son, the son's intended wife and trustees, the father and son, under the powers of the disentailing deed, conveyed the estates to trustees, by way of mortgage, to secure 20,000*l.*, and the father covenanted with the trustees that he would, so long during his life as the 20,000*l.* should remain due to the trustees, pay them interest on the same, or so much thereof as, for the time being, should remain due, at three per cent. per annum. And it was declared that the trustees should stand possessed of the 20,000*l.*, and the interest thereon, on the trusts of the marriage settlement of the son, namely, on trust for him for life, with the usual trusts over for

wife and children. The marriage took place, and the son received, under the mortgage and settlement deeds, the yearly sum of 600*l.* (being interest, at three per cent., on the 20,000*l.*), until the death of his father. The son then succeeded to the estates, and the annuity ceased:—Held, that the annuity was other property, which the successor, on taking the succession, was bound to relinquish or was deprived of, and in respect of which he was entitled to an allowance under the Succession Duty Act, 1853, s. 38. *Le Marchant v. Commissioners of Inland Revenue*, 1 Ex. D. 185; 45 L. J., Ex. 247; 34 L. T. 152; 24 W. R. 853—C. A. Affirming 10 L. R., Ex. 292; 44 L. J., Ex. 216; 33 L. T. 50.

A., by settlement on the marriage of his daughter with B., covenanted to pay them 500*l.* a year during their lives, provided that if B., by reason of the death of his brother without issue, should come into possession of certain estates, the covenant should cease, determine, and be void. In 1853, B.'s brother died without issue, and B. came into possession of the estates:—Held, that in assessing the duty chargeable, B. was entitled to an allowance in respect of the loss of the annuity. *Micklethwait, In re*, 11 Ex. 452; 25 L. J., Ex. 19.

In 1796, a testator devised freehold estates to his cousin N., for life, with remainder to R. N., eldest son of N., for life, with remainder to the first and other sons of R. N. in tail male. In 1841, R. N. (being tenant for life in possession), and his son (being tenant in tail in remainder), executed a disentailing deed, whereby they limited the estates, subject and without prejudice to the life estate of R. N., to such uses as he and his son should appoint, and in default of such appointment, to such uses as the son, in case he survived him, should appoint, and in default to him for life, with remainder to his first and other sons in tail male. In 1850, R. N. and the son executed a joint appointment, whereby they limited the estate to such uses as R. N. and his son should appoint, and in default thereof (subject to a rent-charge to the son of 1,200*l.* a year), to the use of R. N. for life, with remainder to the son for life, with remainder to his first and other sons in tail male. R. N. died in 1858:—Held, that his son was entitled to an allowance in respect of the 1,200*l.* a year, which ceased on the death of R. N. *Braybrooke (Lord) v. Att.-Gen.*, 9 H. L. Cas. 150; 31 L. J., Ex. 177; 7 Jur., N. S. 741; 4 L. T. 218; 9 W. R. 601.

When Legacy Duty Paid on Purchase-Money.]

—A person devised real estate to trustees by sale or mortgage to raise a certain sum of money, and subject thereto for his son. The trustees sold the estate by auction in lots, and L. became the purchaser of two of the lots. Pending the investigation of the title, the required sum was received out of the purchase-money of the other lots. The commissioners having charged and received legacy duty in respect of the purchase-money of the lots sold to L.:—Held, that the lots were protected by s. 18 from any charge for succession duty. *Howe (Earl) v. Lichfield (Earl)*, 2 L. R., Ch. 155; 36 L. J., Ch. 313; 16 L. T. 436; 15 W. R. 323.

The payment of legacy duty under 36 Geo. 3, c. 52, s. 18, did not exempt the appointees from succession duty, since their succession did not come within the exemption granted by s. 18 of the Succession Duty Act, 1853, to persons already

charged with legacy duty "in respect of the same acquisition of the same property." *Att.-Gen. v. Mitchell*, 6 Q. B. D. 548; 50 L. J., Q. B. 406; 44 L. T. 580; 29 W. R. 683; 45 J. P. 618.

The exemption in the 16 & 17 Vict. c. 51 (Succession duty Act), s. 18, which enacts, that no duty shall be payable "by any person in respect of a succession who, if the same were a legacy bequeathed to him by the predecessor, would be exempted from the payment of duty in respect thereof under the Legacy Duty Acts," applies only to exemptions expressly provided for by those acts. *Att.-Gen. v. Fitzjohn*, 2 H. & N. 465; 27 L. J., Ex. 79.

H., who died in 1803, bequeathed a sum in trust for his daughter A. for life, and after her death in trust for her children. A. died after the 19th of May, 1853, when the Succession Duty Act (which includes every past or future disposition of property) came into operation:—Held, that although by reason of the testator's death before the passing, in 1805, of the 45 Geo. 3, c. 28, which first imposed a duty on legacies by parents to children, or descendants of children no duty would have been payable on the bequest as a legacy, it was not exempted from duty within the meaning of the provision of s. 18 of the Succession Duty Act; the exemption there, if applicable at all, applying to express exemptions in the Legacy Duty Acts in favour of gifts to husbands and wives, to the royal family, and to certain charities. *Id.*

Duty Paid on Letters of Administration.]—

A. died intestate and without having been married. He was entitled to an interest in reversion expectant on his father's death, in a settled fund. The father, to whom letters of administration of A.'s estate were granted, paid 3 per cent. administration duty under s. 27 of the Customs and Inland Revenue Act, 1881, upon the estimated value of A.'s estate, including the above reversionary interest:—Held, that the father was exempted by s. 41 of the same act from paying duty at 1*l.* per cent. in respect of A.'s succession to his father, under s. 10 of the Succession Duty Act, 1853. *Haygarth's Trusts, In re*, 22 Ch. D. 545; 52 L. J., Ch. 416; 48 L. T. 24; 31 W. R. 316.

e. Mode of Valuing Property.

When Interest of Successor Accrues.]—The value of property for the purposes of the succession duty is to be ascertained at the time when the interest of the successor accrues. If the property has then no saleable value, nor any actual or potential annual value, it is not capable of being assessed. Neither possible increase nor diminution in the value of the property after the succession accrued is dealt with by the act. *Att.-Gen. v. Sefton (Earl)*, 11 H. L. Cas. 257; 12 L. T. 242. Affirming *S. C.* in Ex., 2 H. & C. 362; 32 L. J., Ex. 230; 9 Jur., N. S. 1296; 8 L. T. 794.

A person succeeded to land in the neighbourhood of a large town, which land was not at that time capable of being let or sold, though soon afterwards it acquired a high value as building land:—Held, that the value of the succession was to be calculated as at the devolution of the succession, and not as to the prospective or future condition of the land. *Id.*

Seemle, that if the land at the time of succession is incapable, in its existing state, of yielding

any annual income, yet, if it is saleable, then such property has an annual value, namely, a value equal to 3*l.* per cent. on the saleable value at the time of succession. *Ib.*

f. Payment.

Instalments — Continuing Charge.]—The power of a tenant in tail in possession to enlarge his estate, so that he shall become competent to dispose by will of a continuing interest in the entailed property, is incident to the estate which such tenant takes under the instrument creating the entail; and if he exercises the power, he must be treated for the purpose of succession duty as if he had succeeded to such enlarged estate; and any instalments of succession duty that may be unpaid at his decease will become a continuing charge on the property in the hands of his successor or other owner for the time being. *Lilford (Lord) v. Att.-Gen.*, 2 L. R., H. L. Cas. 63; 36 L. J., Ex. 116; 16 L. T. 184; 15 W. R. 595.

16 & 17 Vict. c. 57, s. 21, by which instalments, not become due at the death of a successor, cease to be payable, "except in the case of a successor who shall have been competent to dispose, by will, of a continuing interest," refers to the quantity of interest, and not to the personal capacity of the individual. *Att.-Gen. v. Hallett*, 2 H. & N. 368; 27 L. J., Ex. 89.

A person, therefore, becoming entitled to the disposable interest of a successor, who, being insane or a feme covert, dies intestate before all or any of the instalments of succession are payable, is liable to the payment of such instalments. *Ib.*

By Reversioner—Right to Repayment.]—When a person absolutely entitled to a reversionary interest in personalty settled it on the usual trusts of a marriage settlement, and, on the reversion falling in, paid the whole of the succession duty, which had become payable thereon, out of his own moneys:—Held, that, having regard to s. 32 of the Succession Duty Act (16 & 17 Vict. c. 51), he was entitled to be recouped out of the corpus of the settled fund. *Cuddeon v. Cuddeon*, 4 Ch. D. 583; 46 L. J., Ch. 257; 25 W. R. 341.

Proof of Payment.]—A certificate from the Inland Revenue Office, that the duty is paid in respect of the land contracted to be sold, discharges a purchaser, and no particular form of certificate can be required by a purchaser. *Howe (Earl) v. Lichfield (Earl)*, 35 Beav. 370; 1 L. R., Eq. 641; 14 W. R. 468. Affirmed, 2 L. R., Ch. 155; 36 L. J., Ch. 313; 16 L. T. 436; 15 W. R. 323.

6. LEGACY DUTY.

a. Interests and Property Liable.

i. In General.

Nature of Instrument.]—An instrument vesting property in trustees for the benefit of the grantor for his life, and after his decease for the benefit of other persons, with a power of revocation, is not testamentary, and consequently not liable to the payment of legacy duty. *Tompson v. Browne*, 3 Mylne & K. 32.

So where three sisters, in Scotland, executed

an instrument by which they assigned all their present and future property to and in favour of each other, and the heirs and the assigns of the survivor of them:—Held, that, on the death of one of them, legacy duty was not payable upon the property so assigned, the instrument not being testamentary, but a gift inter vivos. *Brown v. Advocate-General*, 1 Macq. H. L. Cas. 79.

Period of Imposition and Charge.—Within 48 Geo. 3, c. 149.]—A legacy, bequeathed by will of a person dying in 1771, of a sum of money to an executor to pay the interest thereon to the testator's natural child for his life, and, on his death, to pay over the principal to his children, the interest of which had accordingly been regularly paid to the legatee for life up to his death, which happened in 1812, his two sons (his only children) having died long before that time, and previously disposed of their interest in the bequest, is within 48 Geo. 3, c. 149, schedule 3, as being a legacy given by will of a person dying before the 5th April, 1805, and not paid, retained, satisfied, or discharged, till after the 10th October, 1808, and consequently liable (as to the interest taken by the representatives of the children) to the duty of 8*l.* per cent. imposed by that statute on such legacies when given for the benefit of strangers in blood to the testator. *Att.-Gen. v. Manners (Lady)*, 1 Price, 411.

— **Within 55 Geo. 3, c. 184.]**—S. M. devised all his real estates, except his mortgages in fee, unto V. and J. M., their heirs and assigns, upon certain uses, viz. to the use of W. M. and his assigns for life, with remainder in tail to his issue, with divers remainders over. The testator devised all the residue of his personal estate as also all such real estates as he was seised of as mortgagee in fee, unto V. and W. M., their heirs, executors, &c., to convert the whole of the residue into money, and to lay out and invest the same in the purchase of real estate, to be conveyed to V. and J. M. (the trustees of his real estates), their heirs, &c., upon the same uses as his real estates. And the testator declared, that, until such purchases, his executors should place out or continue all the residue at interest, in the names of his executors, on mortgage of real estates, or in the public funds; the interest of which latter was to be paid to the persons to whom the rents of the real estate therewith to be purchased would belong by virtue of his will. The testator appointed V. and W. M. his executors, and died in 1791, when they took upon themselves the execution of the will. The residue amounted to 14,000*l.*, and was invested in mortgage in the names of the executors, before 1796, and before 36 Geo. 3, c. 52; after which V. died; and W. M., who enjoyed the interest during his lifetime, became the surviving executor. W. M. died without issue in 1825. The money was never applied in the purchase of real estate; and W. H. and G. R., the executors named in the will of W. M., on the 26th January, 1832, paid the residue of the personal estate of S. M. (the original testator) to J. M., he being the person entitled to it under S. M.'s will:—Held, that this was a legacy given by the will of a person dying before the 5th April, 1805, and paid, satisfied, or discharged, after the 31st day of August, 1815, within 55 Geo. 3, c. 184, and was liable to the payment of the legacy duty

under that act. *Att.-Gen. v. Hancock*, 2 M. & W. 563; M. & H. 159.

A., who died in 1794, bequeathed a legacy in consolidated stock to executors to pay the interest to B. for life; remainder, after B.'s decease, to the surviving children of B. on their attaining twenty-one; remainder, if no surviving children, to the appointment of B.; remainder in default of appointment to B.'s next of kin. Upon A.'s death the executors transferred the legacies into their own names from that of the testator, paid his debts, and accounted for the residuary estate to the residuary legatee; the dividends were regularly paid by the executors to B. until 1826, when she died, leaving three children:—Held, that the transfer did not amount to a payment, delivery, retainer, satisfaction or discharge of the legacy before the 31st August, 1815, and was therefore liable to the duty under 55 Geo. 3, c. 184. *Att.-Gen. v. Wood*, 2 Y. & J. 290.

A. having, by way of provision under a marriage settlement, executed a bond to the trustees of the settlement, for securing 16,000*l.* after his death, for C. and his wife, and then, subject to trusts in favour of their issue, for A. absolutely, A. bequeathed the 16,000*l.*, in case it reverted into the residue of his estate at any time, in trust as to 14,000*l.* for D. Upon A.'s death in 1794, a chancery suit was instituted for carrying his will into effect; and the master having reported that the 16,000*l.* was a specialty debt due from A.'s estate to the trustees of the settlement, stock (paid into court by A.'s executors) to the value of 16,000*l.* was, in 1807, under an order of court, transferred to the account of C. in the cause. C. died without issue between the date of the order and the transfer, and the dividends of the stock were paid to his widow until her death in 1848, when, upon the petition of D., the court ordered the stock to be sold, and the 14,000*l.* to be paid to him:—Held, that the legacy was paid, delivered, retained, satisfied, or discharged before the 31st of August, 1815, within the 55 Geo. 3, c. 184, Sched. iii., Part Third, and therefore that no legacy duty was payable on the actual receipt of the 14,000*l.* by D. in 1848. *Att.-Gen. v. Loscombe*, 5 H. & N. 564; 29 L. J., Ex. 305.

—Within 8 & 9 Vict. c. 76.]—A., by deed dated in 1802, conveyed lands to trustees, to the use of himself for life, remainder to B., his son, for life, remainder to the defendant, his grandson, for life, with remainders over. The deed provided that it should be lawful for the defendant and the survivor of A. and B. to declare any new uses of the lands. A. died in June, 1822, and, by indenture of appointment of October, 1822, B. and the defendant declared that it should be lawful for B., by deed or will, to charge the lands with the payment of any sum not exceeding 47,000*l.* In 1823, B., by his will, charged the lands with payment to his executors of 47,000*l.*, to be applied in payment of his debts, and the residue in trust for the defendant. B. died in 1842, and, in 1847, his executors raised 11,259*l.* 11*s.* 8*d.*, part of the 47,000*l.*, and paid it to the defendant, the debts having been previously paid:—Held, that this was a gift by will, within the 8 & 9 Vict. c. 76, although it operated originally by virtue of a power, and that legacy duty was chargeable on the 11,259*l.* 11*s.* 8*d.*, it not having been paid to the defendant until after that act came into operation, notwithstanding the testator died

before. *Att.-Gen. v. Hertford (Marquis)*, 3 Ex. 670; 18 L. J., Ex. 332.

Trust Fund—Life Estate.]—Where there is a devise to A. for life of the rents and profits of a real estate, and the interest and dividends of personal property, and, after his death, the whole estates, both real and personal, to be divided between B. and C.; the executors and trustees are bound to pay to A. the annual produce of the personal as well as real property (especially if the personal property is money in the funds), without requiring a receipt stamped as for a legacy, such annual payment not being subject to the tax imposed on legacies. *Green v. Croft*, 2 H. Bl. 30.

—Advance for Maintenance.]—A testator devised real estates to the use of trustees for a term of 500 years, to commence from his decease, and subject thereto and the trusts thereof to A. and B., their heirs and assigns, during the life of C., an infant, to preserve contingent remainders, and after the decease of C., to the use of the first and other sons of C. in tail, with remainder over. The testator declared, that the trustees of the term should until C. attained twenty-one or was married, in aid of another fund provided by the will for the same purpose, apply so much of the rents and profits not exceeding in the whole in any one year, including other payments thereby directed, 2,000*l.*, as they in their discretion should think fit, in maintaining and educating C., and should invest and accumulate the residue of the rents and profits for the absolute benefit of C., in case she attained twenty-one or was married; but if she should die under twenty-one and unmarried, the accumulated fund was to go over for the benefit of the parties to whom the real estates were in the same event limited:—Held, that legacy duty was not payable upon such portion of the rents and profits as had been applied for the maintenance of C. in each year during her minority until the time of her marriage. *Shirley v. Ferrers (Earl)*, 1 Ph. 167; 12 L. J., Ch. 111; 6 Jur. 1047.

—Beneficiaries not ascertained.]—A testatrix gave to trustees such a sum of money, as that the annual produce thereof, when invested in the funds, would produce the clear yearly sum of 500*l.*, and she declared trusts of the fund for some of her relations and other persons in succession, some of them not being ascertained at her death:—Held, that the fund was not exempted from legacy duty. *Sanders v. Kiddell*, 7 Sim. 536.

—Succession or Legacy Duty.]—By a marriage settlement after trusts for the husband and wife for life and trusts for the children (which failed by reason of there being no issue), personal property was settled in trust for the persons who would, at the death of the wife, have been entitled to her personal estate under the Statute of Distributions, in case she had died unmarried and intestate. The wife died in 1831, and her mother became entitled under the trust as her next of kin. She died in 1832, having left the property by will to executors in trust for certain legatees. In 1868 the husband died, and the bequests fell into possession:—Held, that the crown was entitled to legacy duty only. *Att.-Gen. v. Littledale*, 5 L. R., H. L. 290; 40 L. J., Ex. 241; 24 L. T. 921; 20 W. R. 473.

A. by his will gave to trustees 10,000*l.* upon trust for B., then the wife of C., and after her death upon trust for all her children who should attain twenty-one. B. had seven children who attained that age, two of whom, D. and E., died in the lifetime of their parents, intestate, whereby their father, C., became their next of kin, and entitled beneficially to the one seventh share of the legacy of 10,000*l.* expectant upon the death of their mother, B. Their father, C., never took out letters of administration, but himself died in the lifetime of his wife, B., and by his will, his surviving children became entitled to his residuary personal estate upon which the sum of 448*l.* 10*s.* 4*d.* was paid, being at the rate of 1*l.* per cent., and was paid in respect of the beneficial acquisition of his surviving children of his residuary personal estate, and which included the reversionary value of the two seventh parts of the legacy of 10,000*l.* to which he was entitled as next of kin of his children D. and E., and in respect of which two seventh parts no legacy or succession duty had been paid by C. Upon the subsequent death of B., F., who was one of the executors under the will of C., obtained letters of administration of the estate and effects of D. and E., so as to enable him to receive and give a good discharge for their two seventh shares.—Held, that the Succession Duty Act, 1853, s. 14 (16 & 17 Vict. c. 61), did not apply to such a case, and that legacy duty was payable in respect of the beneficial acquisition by C. of the two seventh shares of D. and E., as well as a similar duty in respect of the transmission of the same shares by the will of C. *Att.-Gen. v. Cleave*, 31 L. T. 86.

Devise—Power to Compel Sale—Purchase-Money.—H. left an estate to his nieces, with a power to W. to compel them to put him into possession thereof on payment to them of 10,000*l.* W. having done so:—Held, that legacy duty was payable on the 10,000*l.* under 45 Geo. 3, c. 28, and 48 Geo. 3, c. 149. *Att.-Gen. v. Wyndham*, 1 H. & C. 563; 32 L. J., Ex. 1; 8 Jur., N. S. 1182; 7 L. T. 386; 11 W. R. 185.

Bequest—Charge on Realty.—Under the acts of 1795 and 1805, no legacy duty is payable on the value of personal estate given up by one legatee to another under the doctrine of election; but where the testator devises his own real estate to A., and bequeaths A.'s personal estate to B., the legacy duty is payable on the value of the personal estate so charged on the real estate. *Laurie v. Clutton*, 15 Beav. 131; 21 L. J., Ch. 226; 16 Jur. 825.

"Property which shall not be reduced into Money."—By 36 Geo. 3, c. 52, s. 6, legacy duty shall be paid by the person taking the burden of the execution of the will upon delivery or payment of the residue of any personal estate to the person entitled; and, by s. 22, where the residue shall consist of "property which shall not be reduced into money," the executor may set a value thereon, and the Commissioners of Inland Revenue may accept duty upon that value. Shortly after the death of a testatrix her executor brought in to the Inland Revenue Office the residuary account of her property, in which a value was set upon certain pictures and other personal property not reduced into money, and the commissioners accepted duty upon that

value. Subsequently—the residuary legatee and the executor having always intended that the pictures should be sold in the course of the administration—the executor sold them for a sum greatly in excess of the value upon which duty had been paid, and accounted to the residuary legatee for the proceeds:—Held, that the provisions of s. 22 apply to property which shall not be reduced into money during the course of the administration by the executor, and not merely to property which shall not have been reduced into money when the residuary account is brought in; that the pictures, &c. therefore did not satisfy the description in s. 22, and that the crown were entitled to duty under s. 6 upon the amount paid to the legatee. *Attorney-General v. Dardier*, 11 Q. B. D. 16; 52 L. J., Q. B. 329; 48 L. T. 582; 31 W. R. 499; 47 J. P. 484.

Forgiveness of a Bond Debt.—The forgiveness of a bond debt by will is a legacy, and as such is liable to the payment of legacy duty. *Att.-Gen. v. Holbrook*, 3 Y. & J. 114; 12 Price, 407.

Marriage Settlement—Trusts Incorporated into Will.—P., on the marriage of his daughter, J., covenanted to pay to the trustees of the settlement then made, as a provision for his daughter on her marriage, 2,000*l.* The trusts were to pay the income to J. for life, and after her death to her husband for life, and after the decease of the survivor to the children, and if there should be no child, then to such person as she should appoint, and in default of appointment then to her next of kin; in the same settlement he covenanted that his executors should pay the further sum of 2,000*l.* to the trustees, to be held upon the same trusts, within six months after his decease. On the marriage of his daughter E., he covenanted to pay to the trustees of the settlement then made 2,000*l.* within one month after the marriage. The trusts of this sum were to pay the income to the husband of E. for his life, and after his death to E. for her life, and after the death of the survivor to the children, and if there should be no child, then to such persons as E. should appoint, and in default of appointment to her next of kin. By his will the testator directed, "that the covenants on his part contained in the settlement made on the marriage of his daughters, for the payment of moneys and annuities for the benefit of themselves and their respective children and grandchildren, as therein stated, should be performed," and proceeded as follows:—"In addition to the property settled by my daughter J.'s marriage settlement, I give the further sum of 8,000*l.* to the trustees, to be held upon the same trusts in all respects for the benefit of my daughter J. and her children, as thereby declared as to the property thereby settled; and in addition to the property settled by my daughter E.'s marriage settlement, I give the further sum of 8,000*l.* to the trustees of such settlement, to be held upon the same trusts in all respects for the benefit of my daughter E., and her children and grandchildren, as thereby declared as to the property thereby settled:—"Held, that the words "to be held upon the same trusts in all respects for the benefit of my daughter, and her children and grandchildren, as thereby declared as to the property thereby settled," were to be construed as words of reference,

incorporating the trusts of the settlements in the will; that the trusts for the husbands were not excluded, and therefore that legacy duty was payable upon that principle. *Palmer, In re*, 3 H. & N. 26.

Trust for Payment of Debts.—A testatrix, after giving several legacies free of duty, bequeathed a part of her estate to trustees, "upon trust to pay off all and every debt and debts of her first husband that could be legally and satisfactorily proved against him, as it was her will and desire that the same should be discharged."—Held, that the creditors were liable to the duties payable on this bequest. *Foster v. Ley*, 2 Scott, 438; 2 Bing. N. C. 269; 1 Hodges, 326.

A specific fund was bequeathed for payment of debts. A claim being made in respect of a debt barred by the statute, the administrator offered 1,150*l.* as the price to be paid for a release of all claims. Legacy duty was claimed on this account:—Held, that it must be borne by the administrator, and not by the creditor. *Greville v. Greville*, 27 Beav. 596.

Bequest to Official Assignee in Trust for Creditors.—A., who had been a bankrupt in 1822, by his will, dated in 1851, directed his just debts to be paid, in which he included the unpaid-in-full debts proved in the bankruptcy, and directed his executors to pay to the official assignee, in trust to pay all the creditors under the bankruptcy, so much money as would make the dividend on the estate equal to 20*s.* in the pound:—Held, that legacy duty was payable on the amount. *Turner v. Martin*, 7 De G., M. & G. 429; 26 L. J., Ch. 216; 3 Jur., N. S. 397.

Bequest of Mortgage Debt—Previous Illegal Agreement.—By agreement in 1794, 8,000*l.* stock was transferred by O. to H., upon the terms that H. should repay the money produced by the sale of it, or replace the stock, at the option of O., and in the meantime pay interest at the rate of 5*l.* per cent.; the loan was secured by a bond, mortgage, and a deed of covenant. O. and H. being dead, E. O. being the legatee and heir, but not the personal representative of O., and J. H. being the devisee of H., J. H. applied to E. O. to assist to raise money, which E. O. agreed to do on having a security for the replacement of the stock. E. O. accordingly assigned, in 1842, the bond, mortgage, and deed of covenant of 1794 to H. and P., by way of mortgage, to secure an advance to J. H.; and in consideration thereof, J. H., in 1842, by indenture, conveyed to E. O. the premises comprised in the original mortgage, together with other lands by way of mortgage, with a proviso and covenant to secure the transfer to E. O. of 8,000*l.* stock. E. O. died, and by will forgave the mortgage debt of 1842 to J. H.:—Held, that the mortgage and covenant of 1842 were not so connected with the illegal agreement of 1794 as to be usurious and void; and that therefore legacy duty was payable on the bequest. *Att.-Gen. v. Hollingworth*, 2 H. & N. 416.

Bequest to Executor on Trust—Acceptance and Bequest by Legatee—Disclaimer.—D. bequeathed to W. personal estate of the value of 7,487*l.*, upon trust for D.'s daughter, the wife of B., during her life, and provided she died without issue, he bequeathed the same to B., his heirs

and assigns. B. bequeathed the said and all his other personal estate to S. and the defendant, upon trust to pay debts and legacies, and as to the residue, in trust for such purposes as his wife should by her will appoint, and in default of such appointment, in trust for her executors and administrators. B. appointed S. and the defendant executors of his will, and died, leaving his wife him surviving. After the death of B., his wife appointed the defendant with two other persons trustees of the will of D., in the place of W., and all the personal estate of D. was assigned by D. to them. The wife of B. appointed the defendant, with the two last-mentioned persons, executors of her will, and bequeathed to them the whole of her personal property on certain trusts. She died without ever having had issue, and more than two years after her death, S. and the defendant, on being applied to for payment of legacy duty on the 7,487*l.*, by a writing signed by them, reciting the bequest by D. to B., professed to disclaim and renounce such bequest:—Held, that it was not competent for the defendant to disclaim the bequest, after B. had accepted and bequeathed it, and that the defendant was liable as executor of B. to pay a legacy duty of 10*l.* per cent. *Att.-Gen. v. Mundy*, 3 H. & N. 826.

Sale or Conversion of Estates directed by Will or Court of Chancery.—Where a testator directs a sale of real estate, or it takes place under a power, legacy duty is payable; but where property is sold under the direction of the court, legacy duty is not payable. *Harding v. Harding*, 7 Jur., N. S. 906.

A testator, after giving certain legacies, bequeathed to his executors the residue of his estate, real and personal, at such times as they should think fit, to sell, convey or otherwise convert into money, the same or any part thereof. He also directed that the residue of his estate should be invested as it should be realized, and should be divided amongst his children in certain specified shares and proportions; that in case any of his daughters should marry under twenty-one, the trustees should settle her fortune upon such trusts as were specified in the will of the testator's father, with respect to certain bequests of personal property to the testator's sisters; and he directed that the trustees should have full power in making such sales, of causing any part of the real or personal estate to be valued instead of being sold, and of allotting such part to any of his children at the amount of the valuation as part of his or her proportion of his residuary estate, but to be considered as personal property. The trustees sold the personal and a large portion of the real estate; and the residue of the real estate they caused to be valued, and allotted the same to the son at the amount of valuation. The proceeds of the estate which had been sold they divided amongst the daughters, according to the respective shares:—Held, that legacy duty was payable only on the amount of that part of the estate which had been actually sold. *Att.-Gen. v. Mangles*, 5 M. & W. 120; 2 H. & H. 74; 3 Jur. 281.

A testator devised real estates to trustees, for the benefit of several parties for life, and after their deaths to be distributed amongst their children; and the will contained a power by which the testator directed that it should be lawful for the trustees to sell the same, or part, &c., "a-

shall appear most expedient to my trustee or trustees for the time being, towards the management of my property and affairs." Some portion was sold shortly after the testator's death, because, being suitable for building, it was advantageous to the estate to sell it; and the remainder, after being subject to the trusts for ten years, was sold under an order of a court of equity:—Held, that the money arising from neither sale was liable to legacy duty. *Evans, In re*, 2 C. M. & R. 206; 5 Tyr. 660. See *Att.-Gen. v. Ramsay's Trustees*, 2 C. M. & R. 224, n.

A testator devised to trustees his real estates, to raise a sufficient sum to pay debts and legacies, and also to pay his two daughters annuities of 300*l.* each, and he directed that, subject to those trusts, the trustees should stand seised of the real estates, for his brother for life, and, after his decease, for his children, provided that it should be lawful for the trustees, with the consent of the testator's brother during his life, and after his decease with the consent of the persons beneficially entitled, to sell the whole or any part of the real estate, and out of the purchase-money invest so much as would be sufficient to pay the annuities. The testator died, leaving his two daughters, his brother, and seven children of his brother, surviving. The trustees sold a part of the real estate, and paid the debts and legacies, when it was found that the rents of the residue of the real estate were not sufficient to pay the annuities, whereupon a bill in chancery was filed by the testator's brother and his children against the trustees and the testator's daughter; and, in pursuance of an order of the court, the residue of the real estates was sold, and 20,000*l.*, part of the purchase-money, invested, and the interest applied in payment of the annuities. The daughters and brother having afterwards died, the brother's children became entitled to the 20,000*l.*, when the crown claimed legacy duty on that sum:—Held, that if the Court of Chancery acted on its general power of ordering the sale of real estate to satisfy charges, legacy duty was not payable; but if the court acted on the clause in the will, and, in consequence of the will containing that clause, compelled the trustees to execute the power, legacy duty was payable, inasmuch as, in that case, the sale of the real estate was substantially by direction of the testator himself. *Hobson v. Weale*, 8 Ex. 368; 22 L. J., Ex. 175; S. C., 17 Beav. 178.

A testator devised his real estates to pay the rents to his brothers and sister, and the survivor of them, for their lives, and after the death of the survivor, to convey the estates to all his nephews and nieces equally, as nearly as they could make partition, and in the meantime to pay the rents to them. For the purpose of such partition, it should be lawful for the trustees to sell all or any part of the estates, and they should stand possessed of the money arising from such sale upon the same trusts as were declared concerning the residue of the personal estate, namely, for his brothers and sister and the survivor of them, for life, and then for his nephews and nieces. The testator died in 1819, leaving his sister and two brothers him surviving, the last of whom died in 1832. He also left ten nephews and nieces. In 1833, and at various times afterwards, the trustees sold the real estates for 9,064*l.*, with the view of dividing the proceeds of the sale among the nephews and nieces:—Held, that legacy duty was payable on

this sum, it being money arising from real estate directed to be sold. *Att.-Gen. v. Simcox*, 1 Ex. 749; 18 L. J., Ex. 61.

A testator after devising his real estate to trustees, for certain persons in tail male, empowered his trustees, after his death, to sell or exchange such real estate, and to invest the moneys arising from such sale in the purchase of other real estate, to be settled and conveyed upon the same trusts. The will also empowered the trustees, until such purchases were made, to invest the produce of the sale in the funds, or on mortgage of real estate. The trustees, having sold part of the estate under this power, invested the produce in the funds:—Held, that legacy duty was not payable in respect of the money so invested. *Heale v. Knight*, and *Miles v. Jennings*, 8 Ex. 830; 22 L. J., Ex. 358.

In a chancery suit filed by the trustees for the establishment and performance of a will containing similar clauses, a decree was made accordingly; and, one of the trustees having prayed a sale of part of the real estate, it was referred to the master, who reported favourably, and, although there were no debts, an order for sale was made. The produce of the sale was paid into the Bank of England to the credit of the cause, and subsequently laid out in consols, and the interest paid to the tenant for life. On his death a decree was made for transferring the stock to the party absolutely entitled to the real estate, according to the terms of the will:—Held, that legacy duty did not attach. *Id.*

Where father and son were entitled each to estates for life with remainder to the sons of the latter in tail male, with power to them both to dispose of that property, and they jointly charged the same with a sum payable on the death of the father in payment of his debts and legacies, and to be paid to his executors for that purpose:—Held, that this was the creation of a new personal estate within the meaning of 55 Geo. 3. *Att.-Gen. v. Metcalfe*, 6 Ex. 26; 20 L. J., Ex. 329.

Bequest to Trustees to Sell—No Sale.]—A bequest of real property to trustees to be sold, and the profits to be deemed part of the residue of the testator's estate, or go in aid, if necessary, of the rest of his property in discharge of his pecuniary legacies, given either by his will or any codicil thereto, is liable to the legacy duty imposed by 48 Geo. 3, c. 149, although the residuary legatee took the property in statu quo, and the trustees did not convert it into money by sale, according to the directions of the will, there being no claim to render such sale necessary. *Att.-Gen. v. Holford*, 1 Price, 426.

Where testamentary papers were construed as amounting not merely to a power of sale for the purposes of the trust, but to a direction to sell in case the testator should die without leaving any heir of his body living at the time of his death:—Held, therefore, that though in fact the real estate was not sold, the positive direction to sell rendered it liable to legacy duty. *Williamson v. Advocate-General*, 10 C. & F. 1; 13 Sim. 153.

When real property is by will expressly directed to be sold, and the produce and the testator's personalty all are to constitute one fund applicable to the purposes of the will, the land, though unsold, and though, in consequence of the happening of certain events, it might, for the purposes of devolution, go to the heir, is nevertheless, for fiscal purposes, to be treated as

personal property. *Att.-Gen. v. Lomas*, 9 L. R., Ex. 29; 43 L. J., Ex. 32; 29 L. T. 749; 22 W. R. 188.

—**When done at discretion.**—Prior to the Succession Duty Act, 16 & 17 Vict. c. 51, legacy duty was not chargeable upon real estate, except where its conversion into personalty took place under some imperative trust or direction to that effect. Hence, where the conversion was a thing done at discretion, for the convenience and benefit of the parties, the claim of the crown did not arise. *Advocate-General v. Smith*, 1 Macq. H. L. Cas. 760.

Power of Appointment.—A testator gave to his sons real estates, with power to appoint to any woman they might respectively marry a jointure in bar of dower:—Held, that an appointment under this power was a gift within 45 Geo. 3, c. 28, and liable to legacy duty. *Sweeting v. Sweeting*, 1 Drew. 331; 22 L. J., Ch. 441; 17 Jur. 123.

A donee of a power of appointment, having executed by will in favour of the persons who were to succeed in default of an appointment, so as to bring the subject of the appointment into the sum chargeable with the appointor's debts and legacies:—Held, that the legacy duty must be paid as upon a legacy from the appointor. *Att.-Gen. v. Brackenbury*, 1 H. & C. 782; 32 L. J., Ch. 108; 9 Jur., N. S. 257; 8 L. T. 822; 11 W. R. 380.

By a marriage settlement, 20,000*l.* were vested in trustees, to pay the interest to the father of the wife for his life, after his death to the husband for life, with remainder to the wife for her life, with a power of appointment among her children, if any; and, in default of issue, then on such trusts and subject to such direction and appointment as she should make by her will, in case she died in her husband's lifetime, or by deed or will, in case she should survive her husband, and in default of such appointment by her, in trust for her next of kin. The wife died in the lifetime of her husband, having by her will appointed the above sum to certain described persons:—Held, that legacy duty was payable in respect of it. *Cholmondeley, In re*, 3 Tyr. 10; 1 C. & M. 149.

J. R., by will, directed his real estates to be sold and converted into personalty, and, after giving certain legacies, he thereby vested the residue in trustees for the use of his daughter P., for life, with power to her to appoint the same by will, but expressly excluding from the benefit of that appointment certain persons named or indicated in his will; and directed that, in default of appointment, or so far as such appointment should be incomplete, the residue should be held by the trustees for the next of kin of D. R. This power was exercised by P. by her will, partly in favour of the next of kin of D. R., and partly in favour of other persons:—Held, first, that she must be considered to have had, notwithstanding the special exclusion in her father's will, an absolute power of appointment within 36 Geo. 3, c. 52, and that, consequently, legacy duty was payable by her appointees, upon the bequests made by her, as being, under s. 7, made by her out of personal estate of which she had the power of disposing; and secondly, that this property, though subject to her power of disposal, was not so strictly her own property as

to render it, under s. 18, liable to probate duty under her will, as property which she died possessed of or entitled to. *Drake v. Att.-Gen.*, 10 C. & F. 257.

Charitable Legacies.—A testator bequeathed to trustees 3*l.* per cent. consols, as to a part to pay and apply the dividends in establishing and supporting a daily school, for the instruction of twenty boys, on the principle of a national school, the dividends to be retained by R. B., sen., and R. B., jun., two of the trustees, to be so applied; and he directed that R. B., jun., should be the schoolmaster, and that the management of the school should always remain in the family of R. B. And as to the other part of the stock, the testator directed that the dividends should be paid by the trustees to, and applied by, the schoolmaster for the time being of the school, in providing the boys with pinafores, caps and shoes, and also with books and slates, such clothes, books and slates to be left behind them on leaving the school:—Held, that these bequests were subject to legacy duty. *Griffiths, In re*, 14 M. & W. 510; 15 L. J., Ex. 130.

A bequest of moneys to trustees for the purpose of building, endowing, and repairing a church is subject to a legacy duty of 10*l.* per cent. *Parker, In re*, 4 H. & N. 666; 29 L. J., Ex. 66; 5 Jur., N. S. 1058.

A testator gave charitable legacies, to be paid out of pure personalty, and afterwards directed the duties on all legacies to be paid out of residue in exoneration of the legacies:—Held, that the charitable legacies were exonerated from duty only in the proportion to which the residue consisted of pure personalty. *Jarman, In re, Leavers v. Clayton*, 8 Ch. D. 584; 47 L. J., Ch. 675; 39 L. T. 89; 26 W. R. 907.

By 56 Geo. 3, c. 56, Sched., Part 3, and 5 & 6 Vict. c. 82, s. 38, legacies given for charitable purposes are exempt from duty, but such exemption does not extend to legacies absolute on the face of the will, but bound by a secret trust for charitable purposes. *Cullen v. Att.-Gen. (Ireland)*, 1 L. R., H. L. 190; 12 Jur., N. S. 531; 14 L. T. 644; 14 W. R. 869.

Bequest by a parish priest in Ireland of "all my property and money to the poor." The assets were all in Ireland, and the will was proved there:—Held, liable to legacy duty. To bring a legacy, for a purpose merely charitable, within the exemption from legacy duty in the 5 & 6 Vict. c. 82, s. 38, it must appear by the will itself that the charitable purpose is to be restricted to Ireland. *Kenny v. Att.-Gen.*, 11 L. R., Ir. 253.

A testator gave to his executors all the residue of his property, to be by them appropriated to the education of the children of the poor in Ireland, principally those in or about the city of Limerick, or as they, his executors, should in their better judgment deem meet, to give the bequest the most extensive efficacy. Pursuant to the master's report approving of a scheme for the charity, part of the residue of the testator's estate, which was very considerable, was directed to be applied in establishing a school, and the interest of the residue to be applied towards the expenses of keeping up the school:—Held, that legacy duty at 10*l.* per cent. was payable in the first instance upon the gross amount of the residue, and not merely upon individual shares in the event of particular children deriving a bene-

fit equivalent to 20*l.* *Att.-Gen. v. Fitzgerald*, 7 Jur. 569.

A charitable legacy is liable to pay duty, notwithstanding a direction that the fund is to be distributed among the individual objects in sums of less than 20*l.* *Harris v. Howe (Earl)*, 29 Beav. 261; 30 L. J., Ch. 612; 7 Jur., N. S. 383; 9 W. R. 404.

— **Two Sums to Same Person.**—If any of the objects of the above bounty should have received to the amount of 20*l.* or upwards, by having been selected to receive such bounty on more than one occasion, legacy duty would attach on such amount, and the duty would be calculated according to the nearness of blood of such individual, and in that case the executors would be accountable for and bound to retain the duty chargeable on such amount. *Id.*

— **Discretion of Executors.**—Executors cannot be called upon to pay legacy duty upon the whole of a residue bequeathed to them in trust to divide the interest among poor pious persons, in 10*l.* or 15*l.* as they should see fit. *Wilkinson, In re*, 1 C., M. & R. 142; 4 Tyr. 513; *S. P., Att.-Gen. v. Nash*, 1 M. & W. 237.

— **To Individuals in a Class.**—A bequest to trustees of 2,000*l.* consols, to divide the income yearly between twelve poor persons, but no person to be eligible two years in succession, is liable to legacy duty. *Pearce, In re*, 24 Beav. 491.

Amount Payable.—The legacy duty is to be paid upon the aggregate amount of the residue of the testator's property, at the time of the executor's delivering into the stamp office the note of what he intends to retain as residuary legatee. *Att.-Gen. v. Cavendish (Lord)*, Wightw. 82.

— **When Payment Deferred—Interest.**—Where a legacy is not paid at the time appointed by the testator, legacy duty is payable, not merely on the capital sum bequeathed, but on the aggregate amount of capital and interest which is ultimately received by the legatee. *Thomas v. Montgomery*, 3 Russ. 502.

The amount of legacy duty, being calculable from the time when probate is taken out, must be estimated upon the sum devolved by succession, with the addition of such sums as have accrued by way of interest in the interval. *Att.-Gen. v. Partington*, 1 H. & C. 457; 10 Jur., N. S. 617. Affirmed, 3 H. & C. 193; 33 L. J., Ex. 281; 10 L. T. 751; 13 W. R. 54—Ex. Ch.

But where a specific sum is bequeathed or a specific debt forgiven, which is known and ascertained at the time of the testator's death, legacy duty is not payable upon the interest accruing in respect of such debt or sum of money between the time of such death and the period when the executors close their accounts. *Att.-Gen. v. Holbrook*, 3 G. & J. 114; 12 Price, 407.

ii. Annuities.

Out of Real Estate.—Legacy duty is chargeable upon annuities out of, or rent-charges on, real estate devised. *Att.-Gen. v. Jackson*, 2 C. & J. 101; 2 Tyr. 50.

A testator bequeathed several annuities to relations in equal degree, and therefore subject to the same rate of duty under 36 Geo. 3, c. 52.

He gave all his real and personal estate to trustees for conversion and investment, and payment of the annuities out of the yearly produce, and for accumulation of the remainder. He directed that upon the death of any of the annuitants the trustees should pay, after making provision for the remaining annuities, the capital among a class of persons in the same degree of relationship as the annuitants, and therefore subject to the same rate of duty under 36 Geo. 3, c. 52:—Held, that the duty was payable on the annuities, as annuities, within s. 8, by four equal payments, of which the first instalment was to be made at the end of the first year of the annuity, and not payable upon the whole capital under s. 12. *Crow v. Robinson*, 4 De G., F. & J. 337; 31 L. J., Ch. 516; 6 L. T. 372; 10 W. R. 306.

Payment by Executors—Recovery from Legatee.—Under 46 Geo. 3, c. 52, s. 6, executors who have paid the legacy duty on an annuity eight years after the death of the testator, may recover the amount from the legatee, although such legatee assigned the annuity three years before; on the ground, that the payment by the executors was compulsory, and that they stood in the situation of trustees or sureties to the legatee. *Hales v. Freeman*, 4 Moore, 21; 1 B. & B. 391.

Devise Subject to—Duty Paid by Devisee.—A. devised real estates to B. and C. in trust to convey to the use of D. for life, remainder to B. and C. for D.'s life to preserve contingent remainders, remainder to the use that E. shall take out of the premises such annuity or yearly rent-charge not exceeding 500*l.* per annum for her life as D. shall appoint, such annuity to be paid to her clear of all taxes and deductions whatsoever; and in default of issue of D. the testator devised the premises charged with the annuity or rent-charge to F. D. appointed that the annuity shall be the full annuity of 500*l.* D. died, F. entered, and was compelled by Exchequer process to pay the legacy duty on the annuity:—Held, first, that the annuity was chargeable with legacy duty; secondly, that the legacy duty was a tax within the words of the devise; and thirdly, that F. took the land subject to the payment of the legacy and legacy duty, and could not call upon E. for repayment of the legacy duty. *Stow v. Davenport*, 2 N. & M. 805; 5 B. & Ad. 359.

Power to appoint Annuity Out of Lands by Will.—A., by a deed dated in 1802, conveyed lands to trustees, to the use of himself for life, remainder to B. his son for life, with remainder over. The deed contained a proviso, that it should be lawful for B., by his last will, to limit and appoint to the use of himself, or any other person or persons, any annual sum or sums of money, not exceeding the yearly sum of 700*l.*, to be charged upon, and payable out of the lands included in the deed, to commence from the death of B., and to be either perpetual or in fee, or payable for such times and in such manner in all respects, as B. should think fit. B., by his will, by virtue of this power, appointed an annuity of 700*l.* a year to C. for her life, charged upon and payable out of the land:—Held, that legacy duty was not payable in respect of such annuity. *Att.-Gen. v. Hertford (Marquis)*, 14 M. & W. 284; 14 L. J., Ex. 266.

Annuity appointed in lieu of Dower.]—A testator directed a settlement of his estates to be executed, containing a power for the tenant for life, by deed or will, to charge the estates with an annuity for the benefit of his wife. The donee, by his will, in execution of that power, charged the estates with the payment of an annual sum of 2,000*l.* to his wife during her life, in lieu, bar, and satisfaction of her dower, which she accepted:—Held, that this annuity was a gift subject to legacy duty under 45 Geo. 3, c. 28, s. 4, and not a purchase for a valuable consideration. *Henniker (Lord) v. Att.-Gen.*, 7 Ex. 331; 21 L. J., Ex. 293. Affirmed in error, 8 Ex. 257; 22 L. J., Ex. 41; 16 Jur. 1143—Ex. Ch.

On Life Interests of Husband and Wife.]—A testator directed his executors to assign the residue of his personal estate to the trustees of the settlement of his niece, Mrs. A., the wife of A., on trust out of the annual income to pay to her, during the joint lives of herself and husband, an annuity of 2,000*l.* for her separate use, and that they should stand possessed of the residue upon such trusts, and for such persons and interests, as were expressed in a deed of settlement of Mrs. A. This deed provided that the trustees should stand possessed of the settled property, during the joint lives of A. and his intended wife, to pay her an annuity of 500*l.*, upon trust to pay the residue or surplus of the dividends and annual produce of the stocks, funds, &c. unto A., and authorized him to receive the same during his life, and after the decease of either of them to pay the dividends to the survivor, and authorized him, her or them to receive the same during the life of the survivor:—Held, that, under the 36 Geo. 3, c. 52, s. 8, the duty was to be charged on the value of 2,000*l.* a year to Mrs. A. for the joint lives of herself and her husband, and on the value of the residue of the income for the single life of A. *Att.-Gen. v. Wynford (Lord)*, 9 Ex. 746; 23 L. J., Ex. 223.

Husband and wife being entitled in succession, under the will of the wife's aunt, to life interests in the dividends of stock standing in court, the wife being the first annuitant, the husband granted an annuity to E. charged upon the life interests of his wife and himself. The legacy duty on the wife's annuity was duly paid, and upon the death of the wife E. procured an order in the suit for payment to him of all the dividends of the fund towards payment of his annuity and arrears, undertaking to pay the surplus to the husband. On the death of the husband, who died insolvent, it was ascertained that no part of the legacy duty on his annuity had been paid:—Held, construing the 36 Geo. 3, c. 52, liberally, that this annuity was a legacy within s. 25, and that the receipt of the annuity, without deducting the legacy duty, made E. a debtor to the crown. *Bryan v. Mansion*, 26 L. J., Ch. 510; 3 Jur., N. S. 473.

After Succession Duty Act, 16 & 17 Vict. c. 51.]—A testator bequeathed annuities, and died on the 21st of October, 1852. On the 19th of May, 1853, and before the duty on the annuities was calculated, the Succession Duty Act, 16 & 17 Vict. c. 51, came into operation:—Held, that the duty was chargeable under 36 Geo. 3, c. 52, and not under the Succession Duty Act. *Corn-*

wallis (Earl), In re, 11 Ex. 580; 25 L. J., Ex. 149.

Legacy—Mixture of Two Sums—Assignment of one, subject to Annuities.]—A., who died in 1820, by will directed his estate to be divided into two moieties, in one of which 4,300*l.*, 3*l.* per cent. consols, standing in his name, were to be included; and as to this moiety he directed that (after payment of certain debts) the surplus beyond the 4,300*l.* consols should be invested in the funds in the names of his executors, in trust to pay the dividends thereon, and also on the 4,300*l.* consols, to his wife for life; and upon her death he bequeathed this moiety to A., save and except the 4,300*l.* consols, the dividend upon which, amounting to 129*l.* a year, he directed to be paid to three annuitants of 20*l.* a year each, and the remainder to a nephew during his life. He then bequeathed the annuities of 20*l.* to three other annuitants, and after the death of the survivor of them, he bequeathed the 4,300*l.* consols to A. absolutely. The executors realized the property, and it was ascertained that 5,099*l.* was the amount to be invested to make up, together with the 4,300*l.* consols, the moiety of the dividends on which was to be paid to the wife for life. The executors entered into an arrangement with the widow, and A. and her husband, by which the 5,099*l.* was paid over to the latter, but no legacy duty was paid upon it. The widow died in 1835, and in 1837 A. sold and assigned to B. the 4,300*l.* consols, subject to the annuities then in existence, and legacy duty chargeable on A. in respect thereof:—Held, first, that the 5,099*l.* and 4,300*l.* were separate legacies, and that B. was not a debtor to the crown in respect of the legacy duty payable on the 5,099*l.* *Att.-Gen. v. Giles*, 5 H. & N. 255; 29 L. J., Ex. 176; 8 W. R. 342.

Held, secondly, that the crown had no lien on the 4,300*l.* in respect of such duty. *Id.*

Mode of calculating Duty.]—The 16 & 17 Vict. c. 57, s. 31, which enacts, that where it shall be required to calculate, for the purpose of legacy duty, the value of any annuity, such value shall, after the time appointed for the commencement of the act, be calculated according to the tables in the schedule to that act, and not according to the tables in 36 Geo. 3, c. 52, is confined to cases where the testator died after the commencement of the act, and does not extend to cases where, the death being before, the act of calculation and payment occur after the commencement of the statute. *Cornwallis (Earl), In re*, 11 Ex. 580; 25 L. J., Ex. 149.

iii. *Property or Testator Abroad.*

Principles of Liability or Exemption—Personality follows Domicil.]—Personal property, having no situs of its own, follows the domicil of its owner. *Thomson v. Advocate-General*, 12 C. & F. 1; 9 Jur. 217.

The law of the domicil of a testator or an intestate decides whether his personal property is liable to legacy duty. *Id.* *S. P., Att.-Gen. v. Napier*, 6 Ex. 217; 12 L. J., Ex. 173; 15 Jur. 253.

Stock in Foreign Funds.]—Stock in foreign funds locally situated abroad is personality following the domicil of the owner; therefore a bequest of such stock by a party domiciled in England is

liable to legacy duty. *Equin, In re*, 1 C. & J. 151; 1 Tyr. 92.

Bequest of English Property by Foreigner to English Legatees.—Property in this country belonging to a foreigner, who dies abroad, and appoints an English executor, and bequeaths to English legatees, is not liable to legacy duty. *Bruce, In re*, 2 C. & J. 436; 2 Tyr. 475; *S. P.*, *Wallop, In re*, 1 De G., J. & S. 656; 33 L. J., Ch. 351; 10 Jur., N. S. 828; 10 L. T. 174; 12 W. R. 587. *Capdevielle, In re*, 3 H. & C. 895; 33 L. J., Ex. 306; 10 Jur., N. S. 1155; 12 W. R. 1110.

A testator, being a subject of the United States and resident there at his death, appointed executors, being British subjects living in Great Britain, and bequeathed legacies to British subjects resident at home and in India, and to Americans. The legacies to the residents in India and America were paid abroad from the testator's assets in those countries, and the surplus assets, which ultimately became available for the payment of the legatees in Great Britain, being partly in the British funds and partly remitted here from India in money, were placed in the Bank of England in the name of the accountant-general, to the credit of a suit in chancery, commenced by the British legatees:—Held, that the testator not being a British subject, his personality, wherever situate, was foreign, and that his legacies were not liable to legacy duty. *Id.*

Direction to collect Foreign Property and invest in England.—When personal property is bequeathed by a person not domiciled in this country, it is not, in the first instance, liable to legacy or succession duty on being paid to the legatee. But where the executor, directed to collect foreign property and invest it here, has discharged the duty imposed on him, and has placed the fund, in the way required, in this country, any subsequent devolution of it becomes liable to duty, though the party on whom it may devolve may (like the testator) be domiciled abroad. *Att.-Gen. v. Campbell*, 5 L. R., H. L. 524; 41 L. J., Ch. 611.

Share of Partnership Property Abroad.—Legacy duty is payable upon the share of a deceased partner, a domiciled Englishman, in the proceeds of freehold property in Bombay, used for the purposes of the partnership, and forming a partnership asset. *Forbes v. Steven, Mackenzie v. Forbes*, 10 L. R., Eq. 178; 39 L. J., Ch. 485; 22 L. T. 703; 18 W. R. 686.

Remittances from India.—The personal assets, situate in India, of a testator who resides and makes his will and dies in India, are not subject to legacy duty, although afterwards remitted to this country by an executor who has proved the will in India, to executors who have proved in England, and administered under a decree in the Court of Chancery here. *Arnold v. Arnold*, 2 Mylne & C. 256; 1 Jur., 255; *S. P.*, *Logan v. Fairlie*, 2 Sim. & Stu. 284.

A man possessed of personal estate, situate partly in England, but principally in the East Indies, where he was employed in the service of the East India Company, made his will in the East Indies, and died there. After specifically bequeathing his property in England to his wife, his will gave considerable pecuniary legacies to

his infant children, and to various other persons, some of whom were native inhabitants of India. One of the executors lived in Calcutta, and proved the will there, and having collected the Indian assets, and thereout paid the testator's Indian debts and funeral expenses, he remitted the surplus to England to the other executors, by whom probate of the will in respect of the property in England had been already obtained in this country. In a suit instituted in this country by the testator's children against the executors for the administration of the estate, the fund so remitted was transferred into court, and having proved insufficient to pay the pecuniary legacies in full, was ultimately ordered to be apportioned among the different legatees in proportion to their respective legacies:—Held, that the legacy duty was not payable in respect of any of the sums so appropriated to the respective legatees. *Id.*

A British subject, domiciled in England, made his will and died in England, and by his will disposed of certain government notes of the East India Company, issued at Calcutta, and the amount of which was receivable only under an Indian probate, and appointed an English executor. The executor executed a power of attorney to S., in India, who thereupon obtained letters of administration with the will annexed, in India, under which he received the amount of the notes, and remitted it to the executor in England, who paid it over to the legatees:—Held, that legacy duty was payable thereon. *Coales, In re*, 7 M. & W. 390.

A testator born in Scotland, who resided and died in India, leaving real and personal property there situate, but no assets in England, by his will and testamentary papers left the whole of his property in equal divisions to his four natural children, or the survivors of them, and their heirs, subject to legacies and annuities. His executors obtained an Indian probate, and paid the debts and bequests, and converted the principal part of the estate into money, which they sent to their bankers in England, and invested it in the funds in their own names. Proceedings were commenced in England against the executors, to determine the claims under the will; whereupon the stock was transferred into the name of the accountant-general of the Court of Chancery, and the court made a decree ascertaining the shares of the several claimants:—Held, that legacy duty was not payable on the legacies or shares of the residue bequeathed. *Jackson v. Forbes*, 2 C. & J. 382; 2 Tyr. 355. Affirmed in Dom. Proc., *Att.-Gen. v. Jackson*, 8 Bligh, 15; 3 Tyr. 982.

Realty—Effect of Foreign Domicil.—A testator gave a rent-charge, to issue out of lands in England, to A. for life, and directed that after her death it should be continued, and equally divided between B., C., and D., during their lives and the lives of the longest liver. B. died domiciled abroad, leaving an English will, by which she disposed of her personal estate. On the death of A., who was survived by C. and D., the crown claimed from B.'s executors legacy duty in respect of B.'s third share of the rent-charge:—Held, that such duty was payable, for that the interest in the rent-charge which passed to B.'s executors was, by the Wills Act, "an estate pur autre vie, applicable by law in the same manner as personal estate," and therefore fell within 36 Geo. 3, c. 52, s. 20, and that it was not

exempt from duty by reason of B.'s foreign domicile, inasmuch as, although it was by law applicable in the same manner as personal estate, it was not by any of the statutes made personal estate, but was really not following the person. *Chatfield v. Berchtoldt*, 7 L. R., Ch. 192; 41 L. J., Ch. 255; 26 L. T. 267; 20 W. R. 401. Reversing 12 L. R., Eq. 464; 25 L. T. 121; 20 W. R. 53.

Evidence of Domicil.]—A British subject went to settle in France in 1762, and afterwards purchased an estate and became naturalized there. In 1791 he left France and came to England, in consequence of the French revolution, and shortly afterwards his property was confiscated by the revolutionary government. In January, 1802, he made a will in London, by which he left his property partly to a charity in Ireland, and partly to individuals resident in England, and appointed one of those individuals his executor. In April, 1802, emigrants were permitted to return to France, and soon afterwards he returned to that country. In 1804 he made a will in Paris, in which he stated that he was born at Waterford, and had come to France to obtain restitution of his estate; and, after referring to his former will (which he had mislaid in London), he recapitulated very nearly its contents, and concluded by expressly confirming it. He died in Paris in 1806; and his two testamentary papers were proved both in France and in England. Under the treaty of peace between England and France, in 1815, a large sum of French stock was set apart by the then French government, for the purpose of compensating British subjects whose property had been confiscated by the revolutionary government, and part of that sum was awarded by commissioners, appointed by the British government, to the testator's executors for the loss of his property in France. The commissioners, under the powers of an act of parliament, sold the stock so awarded, and paid the proceeds into the Court of Chancery:—Held, that the testator was domiciled in France at his death, and that the fund in court was not subject to legacy duty. *Commissioners of Charitable Donations v. Decereux*, 13 Sim. 14.

A British subject, domiciled and having real and personal estate in England, went abroad, and purchased, in 1821, the title, castle, and estate of R., in the Papal States. He hired Italian domestic servants, male and female, whom he kept at R. until his death. He expended large sums in repairing and improving the castle and grounds of R., which repairs and improvements were going on at the time of his death. He did not make R. his constant residence, but from 1828 to 1831 sometimes occupied it, sometimes lived in furnished lodgings in the town adjacent, and at other times visited Rome, Florence, and other parts of Italy, residing in furnished lodgings. In 1831, he came to England, and resided in different parts of it till September, 1832. In March, 1832, he made his will in London. In the same month he left England and went to Florence, where he remained two months, and thence to R.; he then lived sometimes in the castle of R., sometimes in furnished lodgings in the adjacent town, till October, 1833, when he went to Rome, and there lived in furnished lodgings till his death, in February, 1834:—Held, that upon these facts there was no evidence of the testator's having actually acquired a domicile

at R., or elsewhere abroad; although they indicated an intention to make R. his domicile; that his English domicile therefore remained, and legacy duty was consequently payable on the bequests contained in his will. *Att.-Gen. v. Dunn*, 6 M. & W. 511.

A person whose name was English, but whose domicile of origin was not shewn, held a commission in the English army. He sold out in 1810, and subsequently resided, down to his death in 1820, in France; there he formed a French connexion, there he educated his son as French, and there he died, and his whole property was in French rentes:—Held, that his domicile at his death was French, and that legacy duty was not payable on his assets. *President of the United States v. Drummond*, 33 Beav. 449; 33 L. J., Ch. 501; 10 Jur., N. S. 533.

A British-born subject resided for many years at Hamburgh, under circumstances which afforded evidence of his having a domicile there. He came for a temporary purpose to England, where he made a will, in which he declared that it was not his intention to renounce his domicile of origin as an Englishman. He returned to Hamburgh, where he died, having also made a will there:—Held, that the testator's declaration of intention could not prevail against the foreign domicile, and therefore that his personal property was not subject to legacy duty in England. *Steer, In re*, 3 H. & N. 594; 27 L. J., Ex. 22.

An unmarried Englishwoman, in 1849, went to reside abroad at the house of her married sister in Germany. She resided there, contributing towards the expenses of housekeeping, until 1863, in which year she died. Her property consisted of money invested in English securities, but she also possessed a valuable library, which she caused to be transported to Germany. She occasionally came over to England with her married sister to visit her friends, and while in England in 1854 she made her will, describing herself as on a visit to her sister, bequeathing her property to trustees to pay the annual income to her sister for life for her separate use, without power of anticipation, with power of appointment to her sister by deed or will. The testatrix told her sister that if she survived her, she should continue to live in Germany, and that nothing would induce her to return to England, except on an occasional visit. She also named the churchyard where she wished to be buried, and where she was afterwards buried:—Held, that her acts and declarations did not shew a sufficient intention to change her domicile; and, assuming she intended to give up her English domicile, that until she acquired a new domicile her English domicile continued, and that the crown was entitled to legacy duty. *Att.-Gen. v. Blucher de Wahlstatt*, 3 H. & C. 374; 34 L. J., Ex. 29; 10 Jur., N. S. 1159; 11 L. T. 454; 13 W. R. 163.

A testator had an Irish domicile of origin. In 1790 he went to India, and entered into partnership in business there. In 1800 the partnership was dissolved. In 1802 he came to England, and took an assignment of a leasehold house in London, and purchased the furniture in the house. In 1811 he sold the house and furniture, and went to reside at Clifton. In 1812 he went to Madeira for his health, and in 1814 he there made his will. In 1815 he went to Lisbon by advice, and died there:—Held, that the domicile of the testator at the time of his death was

English, and that the crown was entitled to legacy duty on the bequests in his will. *Att.-Gen. v. Fitzgerald*, 3 Drew. 610; 25 L. J., Ch. 743.

In 1818, a Portuguese came to England as agent of a wine company, in which capacity he was employed until 1833. He continued to reside in England, and in 1857 was appointed attaché to the Portuguese Embassy, which office he held until his death in 1860. There was no evidence of his having visited Portugal, or communicated with any person there, after he came to England. In a will in his handwriting, he stated that as he was a Portuguese subject, and an attaché, his property was not liable to legacy duty.—Held, first, that he had acquired an English domicile. *Att.-Gen. v. Kent*, 1 H. & C. 12; 31 L. J., Ex. 391; 6 L. T. 864; 10 W. R. 722.

Held, secondly, that his appointment as attaché did not revive his domicile of origin, and consequently his personal property was liable to legacy duty. *Ib.*

C., born at Montory, in France, of French parents, in 1807 went to Cadiz, where he was clerk to a merchant. He afterwards went to Gibraltar. In 1830 he came to England, and carried on business as a commission agent at Manchester until his death in 1859. During all that time he resided in lodgings, for which he paid a weekly rent, and a further weekly sum for his board. In 1835 he visited Montory, and again in 1846, when he passed a solemn act before a notary for the preservation of his cohereditary rights of succession to a property there. He also then purchased a house and land at Montory, and desired that some apartments in the house should be kept ready for his return. He frequently expressed an intention to return to his native country. He devised and bequeathed all his real and personal property to his nephew in England. He had no real property in England, but a large amount of personal property, consisting of cash and railway shares.—Held, that the testator was domiciled in France, and therefore his personal property was not liable to legacy duty. *Capdevielle, In re*, 2 H. & C. 985; 33 L. J., Ex. 306; 10 Jur., N. S. 1155; 12 W. R. 1110.

See also INTERNATIONAL LAW.

—**India.**—A British-born subject, an officer on service in her Majesty's army in India, died there intestate, leaving all his property situate in that country, with the exception of a small sum of money due to him from the War Office in England. His widow took out letters of administration in India, and after paying the debts, &c., invested the rest of the estate in India in her own name, for her own benefit, and that of the next of kin. She afterwards took out letters of administration in England for the purpose of obtaining the debt due from the War Office.—Held, that as the deceased was on duty in India in her Majesty's service, he did not acquire a domicile in that country, and that the whole of his property, though chiefly situate abroad, was liable to legacy duty. *Att.-Gen. v. Napier*, 6 Ex. 217; 20 L. J., Ex. 173; 15 Jur. 253.

A testator, who was an English-born subject and an officer in the royal navy on half-pay, in 1829 obtained leave of absence for the purpose of going to India, and went to Calcutta, where he established a lucrative business. In 1830 he married, and subsequently had three children, born in Calcutta. He continued to

receive his half-pay and to obtain renewals of his leave of absence until 1839. In that year he made his will, and died at Calcutta, without having at any time returned to England.—Held, that at the time of his death the testator's domicile was India, and therefore that no legacy duty was payable on his personal property. *Cockrell v. Cockrell*, 25 L. J., Ch. 730; 2 Jur., N. S. 727.

A testator had a Scotch domicile of origin. In 1807 he sailed from England for the East Indies; the vessel was wrecked, and he was taken prisoner and confined at Verdun till 1814. In that year he was released. In 1815 he went to India, and set up in business. In 1835 he made his will at Calcutta, describing himself as of that place, and appointing two persons resident at Calcutta his executors. In 1836 he sailed from India in a vessel bound for an English port, and died in itinere.—Held, that the domicile at the time of his death was Indian, and therefore no legacy duty was payable upon his personal property. *Lyall v. Paton*, 25 L. J., Ch. 746.

A Scotchman went to India, entered into business, and resided there for eighteen years. He then returned to England for the benefit of his health, leaving all his property in India. He spent eleven months in England and six months in Scotland, having no fixed abode; after which time he went back to India, made his will, describing himself as T. C., coffee planter, Mysore, and died in India a few months after.—Held, that he had abandoned his domicile of origin, had acquired an Anglo-Indian domicile, which he retained at his death, and consequently that his property was not liable to legacy duty. *Allardice v. Onslow*, 33 L. J., Ch. 434; 10 Jur., N. S. 352; 9 L. T. 674; 12 W. R. 397.

P., who was the son of Irish parents, and an officer in the military service of the East India Company on the Bombay establishment, returned to England in 1840, having attained the regimental rank of colonel. By the regulations of the service, officers who have attained that rank were permitted to reside where they pleased, subject to the company's orders for their return to duty in India. P. continued in the service of the company until his death. In 1841 he was appointed plenipotentiary in China, and accepted this appointment with the consent of the East India Company. On his return in 1844, having been made a privy councillor, he purchased the ground-lease of a house in Eaton-place, which he furnished and fitted up for his residence, and resided there. Soon afterwards he was appointed governor of the Cape of Good Hope, where he continued until 1848, when he was appointed governor of Madras. He resided at Madras until 1854, when he returned to his house in Eaton-place, but afterwards went to other places in England, and ultimately to Malta, where he died. In his will and codicils he described himself as of Eaton-place. During the last period of his life he frequently declared his intention of returning to India.—Held, that the fact that he continued in the service of the company, and was liable to be ordered to return to India, did not prevent him from acquiring an English domicile on his return from China; that his subsequent residence as governor of the Cape of Good Hope and at Madras did not involve the loss of his English domicile; and that, as he had acquired an English domicile on his return from

China in 1844, subsequent expressions of intention to return to India, and even the going to Malta with the view of ultimately returning there, did not affect the domicile he had acquired in England. *Att.-Gen. v. Pottinger*, 6 H. & N. 733; 30 L. J., Ex. 284; 7 Jur., N. S. 470; 4 L. T. 368; 9 W. R. 578.

— **"Anglo-Chinese" — Extra Territorial Jurisdiction.**—Notwithstanding the constitution of the Supreme Court of China and Japan, and the jurisdiction conferred on that court by the Order in Council of China and Japan, 1865, over British subjects having a "fixed place of residence in China," a native of this country cannot acquire by residence in the empire of China an Anglo-Chinese domicile analogous to that known as Anglo-Indian, and the estate of a British subject whose fixed place of residence is in the empire of China, is, on death, within the operation of the Legacy Duty Acts. *Tvotal's Trusts, In re*, 23 Ch. D. 532; 52 L. J., Ch. 664; 48 L. T. 816; 31 W. R. 653.

— **In the Colonies.**—In 1856, R., whose domicile of origin was England, was appointed chief justice of Ceylon, during the pleasure of the crown, and he resided with his family there, in the exercise of the duties of his office, until his death in 1860. He left a library and other effects in England, and he invested large sums of money on mortgage in Ceylon:—Held, that in the absence of any evidence of an intention to acquire a foreign domicile, he retained his domicile of origin, and therefore his personal property was subject to legacy duty. *Att.-Gen. v. Rowe*, 1 H. & C. 31; 31 L. J., Ex. 314; 8 Jur., N. S. 823; 6 L. T. 438; 10 W. R. 718.

A British-born subject died domiciled in a British colony. At the time of his death he was possessed of personal property, locally situated in Scotland. Probate of his will was taken out in Scotland, for the purpose of administering his property, and out of the fund thus obtained by the executors legacies were paid to the legatees residing in Scotland:—Held, that legacy duty was not payable in respect of these legacies. *Thompson v. Advocate-General*, 12 C. & F. 1; 13 Sim. 153; 9 Jur. 217.

Colonial Duties Payable out of General Estate.—A testator whose assets consisted partly of personal estate in the colony of Victoria, where duty is payable on the property of all deceased persons, died domiciled in England, and by his will gave many pecuniary legacies, and divided the residue among some of the pecuniary legatees:—Held, that the duties attaching in Victoria, and all expenses of realization, were payable out of the general estate before distribution, and that the pecuniary legatees were entitled to their legacies, free of all colonial duties and expenses except the English legacy duty. *Peter v. Stirling*, 10 Ch. D. 279; 27 W. R. 469.

b. Legacies Clear of Duty.

"All my Legacies."—Where a testator directs that one class of legacies "shall be paid prior to his debts and other legacies, and that all his legacies shall be paid within two years, free from legacy duty," the exemption from duty is not limited to such legacies only as are payable within two years; but the general words, "all

my legacies," will include a legacy given by a subsequent codicil, which is made payable at a different time. *Byne v. Curry*, 2 C. & M. 603; 4 Tyr. 479.

"Without Deduction."—A testator having directed legacies to be paid at the expiration of six months after his decease, without deduction, the legatees are entitled to the full amount, and the legacy duty must be paid by the executors. *Barksdale v. Gilliat*, 1 Swans. 562.

A bequest of one clear yearly rent-charge or annuity of 100*l.* a year out of real and personal estate, is payable without any deduction for legacy duty. *Bailey v. Boulton*, 14 Beav. 595; 21 L. J., Ch. 277.

"Free of Duty."—By a will, some legacies were given free of duty, and their amounts were varied by a codicil:—Held, that they were still exempt from duty. *Fisher v. Brierley*, 30 Beav. 267.

"Clear Income."—A testator gave his residuary personal estate to his executors upon trust out of a certain part thereof to set apart and appropriate so much as would produce the clear income or sum of 100*l.* a year, and pay such income or yearly sum to a named charity:—Held, that the legacy was given free of legacy duty. *Coles, In re*, 22 L. T. 221.

When Residuary Estate Insufficient.—A testator gave certain legacies free of legacy duty, simpliciter, and other legacies free of legacy duty, with a direction that the duty should be paid out of his residuary estate. The corpus of the legacies and the duty having been paid, it was ascertained that the estate was deficient, so that there was no residue available for payment of the duty directed to be thereby borne:—Held, that the gift of duty out of the residuary estate failed pro tanto, and that the legatees whose legacy duty was to be borne by the residuary estate must themselves bear the legacy duty to the extent to which the general personal estate was insufficient to pay the same. *Wilson v. O'Leary*, 17 L. R., Eq. 419.

The legacy duty on a charitable legacy, given free of duty, cannot be paid out of impure personality. *Wilkinson v. Barber*, 14 L. R., Eq. 96; 41 L. J., Ch. 721; 26 L. T. 937; 20 W. R. 763.

— **Abatement.**—A gift of the legacy duty payable on a specific legacy ranks as a pecuniary legacy, and in the case of a deficiency of assets must abate along with other pecuniary legacies. *Farver v. St. Catherine's College, Cambridge*, 16 L. R., Eq. 19; 42 L. J., Ch. 809; 28 L. T. 800; 21 W. R. 643.

c. Rate of Charge and Payment.

Bequest to Daughter and Husband in Equal Shares.—A bequest of all the rest, residue and remainder of the personal estate of a testator to his son-in-law B., and to the testator's daughter P., his wife, their executors, administrators, and assigns, for their absolute benefit, is not chargeable under 55 Geo. 3, c. 184, Sched. 3, with the highest duty of 10*l.* per cent. on the whole amount, as being a legacy given to, or devolving to or for the benefit of B. the husband, a stranger in blood to the deceased; nor chargeable wholly with the lowest duty of 1*l.* per cent., as being a

legacy given to, or devolving to or for the benefit of a child of the deceased (in the person of the daughter), but chargeable by moieties, as being a bequest for the benefit of each to the amount of one-half; and therefore as to one moiety chargeable at the highest, and as to the other at the lowest duty. *Att.-Gen. v. Bacchus*, 11 Price, 1; 9 Price, 30.

—**To Son and Daughter-in-Law.**—A bequest of "a residue of whatever it may consist, such money as arises from it to be invested in the public funds, the interest to be appropriated to the testator's son and his wife (a stranger in blood) for their lives, with remainder to the grandchildren of the testator in equal proportions," is liable to a legacy duty to be calculated at the rate of 1*l.* per cent. for the son's moiety, and 10*l.* per cent. for that of the wife, upon the principle that the son and his wife each take a life interest in one moiety of the income of the residue. *Att.-Gen. v. Burnie*, 3 Y. & J. 531.

Appointment to Person Entitled in Default of Appointment.—J. R., after directing his real estates to be sold and converted into personality, bequeathed the general residue of his personal estate to his daughter, J. A. P., and J. R., J. S., and J. G., his executrix and executors, upon trust, to permit his daughter to receive the rents and dividends during her life, and after her decease, for such person or persons (other than and except J. W. and his relations, M. H. and his relations, and the relations of the late husband of the testator's daughter, and every of them), in such parts, shares, and proportions, and in such manner and form, as J. A. P., whether sole or covent, should by will appoint; and in default of appointment, in trust for the next of kin of D. R. And the testator declared, that, in case his daughter should intermarry with J. W., or any of his relations, or should reside with or receive visits from him or them, the bequests in her power should utterly cease. After the testator's death, J. A. P. married G. E. P., and the interest and dividends of the testator's residuary estate were regularly paid to her until her death. Previously to her death she made a will, and, in exercise of the power under her father's will, she gave 10,000*l.* consols to the descendants of the before-named D. R.; and gave all the rest of her father's property to various persons, strangers in blood to both her father and herself. D. R. was the son of a brother of J. R., the testator:—Held, first, that, on the death of J. A. P., a duty of one per cent. became payable in respect of the bequest, in the will of J. R., of the residue of his estate and effects to J. A. P., after allowing any duty already paid in respect thereof. *Platt v. Routh*, 6 M. & W. 756; S. C., 3 Beav. 257.

Held, secondly, that legacy duty was payable in respect of the bequests contained in the will of J. A. P., at the same rate at which it would have been payable if they had been mere legacies given by her payable out of her own personal estate. *Id.*

Succession to Estate in Remainder subject to Rent-charge.—A testator devised real estate to T. for life, with remainder to his first and other sons in tail, with remainder to T. P. for life, remainder to his first and other sons in tail, remainder to G. P. for life, with remainder over;

and gave a power to the several persons, who, by virtue of the limitations in the will, should be in actual possession of the estates by deed or will to appoint to any woman or women they should marry, by way of jointure, rent-charges not exceeding 750*l.* per annum for life, to be issuing out of and chargeable upon the devised estates, clear of all taxes and deductions whatsoever. T. died without issue, and T. P. entered into possession of the estates, and by his will charged them with 750*l.* per annum, by way of jointure to his wife, under the power, and died without issue male, whereupon G. P. entered into possession:—Held, that G. P. was chargeable with legacy duty, after the rate of 10*l.* per cent. on the value of the rent-charge of 750*l.* per annum. *Att.-Gen. v. Pickard*, 3 M. & W. 552; 1 H. & H. 174. Affirmed in error, *Pickard v. Att.-Gen.*, 6 M. & W. 348.

Devise of Lands in England—Proceeds to "Daughters" of Foreign Mother.—The proceeds of land in England devised by a British subject domiciled in France, on trust to sell and pay the proceeds to his daughters born of a French mother before marriage, but afterwards legitimated according to French law, are liable to legacy duty at 1*l.* per cent. only. *Skottowe v. Young*, 11 L. R., Eq. 474; 40 L. J., Ch. 366; 24 L. T. 220; 19 W. R. 583.

A person of English birth, but domiciled in France, gave, by his will, shares in the proceeds of converted real estate in England to his two daughters, who were not born in wedlock, but had been legitimated according to the law of France:—Held, that the status of the daughters in England must be their status according to the law of France, i.e., that of legitimate children and not of "strangers in blood," and that legacy duty at the rate of 1*l.* per cent. was payable upon the shares taken by them under their father's will. *Id.*

Legacy to Stranger—Duty Paid—Will disputed by Next of Kin.—By an instrument purporting to be the will of S., the whole of his personality, amounting in the net to 12,748*l.*, was bequeathed to J., a stranger in blood, who was made executor. J. took out probate, and paid the duty of 10*l.* per cent. on the whole net; afterwards T., the next of kin to S., disputed the will, on the ground that S. was not of disposing mind. J. paid 6,000*l.* to T., and consented that the will should be revoked, and administration taken out by T., who, in consideration thereof, released to J. her claim on the 12,748*l.* T., from her nearness in blood, was liable to a duty of less than 10*l.* per cent.:—Held, that under 36 Geo. 3, c. 52, s. 37, J. was entitled to a return of duty, not only on the 6,000*l.*, but also on the remaining 6,748*l.*, and that the duty on the whole 12,748*l.* was to be accounted for between T. and the commissioners of stamps, as duty charged on T. at the lower rate. *Reg. v. Stamps and Taxes (Commissioners)*, 6 Q. B. 657.

Proof of Payment.—(36 Geo. 3, c. 52, s. 27.) A copy of an entry in the stamp-office books of the payment of the duty on a legacy is evidence of the payment of the duty. *Harrison v. Borwell*, 10 Sim. 380.

A certificate from the Inland Revenue Office, that the duty is paid in respect of the land contracted to be sold, discharges a purchaser, and no

particular form of certificate can be required by a purchaser. *Howe (Earl) v. Lichfield (Earl)*, 35 Beav. 370; 1 L. R., Eq. 641; 14 W. R. 468. Affirmed, 2 L. R., Ch. 155; 36 L. J., Ch. 313; 16 L. T. 436; 15 W. R. 323.

d. Executors Accountable for.

Omission by Executor to Deduct.]—It is the duty of an executor to deduct the amount of legacy duty; and if he omits to do so, he will become personally responsible for it. *Sammon, In re*, 3 M. & W. 381.

Where legacy duty attaches on a legacy the executors will be accountable for and bound to retain the duty chargeable on the legacy. *Williamson, In re*, 1 C., M. & R. 142; 4 Tyr. 513.

Where executors have paid the amount of legacies in full to the legatees, and the duties were subsequently paid by the executors when the accounts were passed through the stamp office:—Held, that they could not maintain an action to recover the amount of the duties against the legatees in respect of whose legacies they were paid. *Foster v. Ley*, 2 Scott, 438; 2 Bing. N. C. 269; 1 Hodges, 326.

—Duty Paid after Fifteen Years—Recovery from Legatee.]—An executor allowed the legatee of leasehold to occupy for fifteen years, the legacy duty being unpaid. The executor was then called upon to pay duty on the profits accruing for the fifteen years, as well as the principal value of the premises:—Held, that he was liable to the whole of such duty, and that he might recover all the money paid on that account as money paid to the use of the legatee. *Bate v. Payne*, 13 Q. B. 900; 18 L. J., Q. B. 273; 13 Jur. 609.

Trust for Children—Liability to Account.]—A testator made his will in the following terms: "I give and bequeath all my property, of whatsoever description, to my wife, for the maintenance of herself and our children; and I constitute my wife to be executrix of this my will:—Held, that a trust was thereby constituted for the benefit of the children, and that the executrix was bound to deliver an account to the Legacy Duty Office. *Harris, In re*, 7 Ex. 344; 21 L. J., Ex. 92.

Bequest of Reversionary Interest—Sale before Contingency—Executor a Party.]—A cestui que trust of a portion of the proceeds of a contingent reversionary interest in an estate directed to be sold, in case of and upon the happening of the contingency, bequeathed his reversionary interest to a legatee, who sold the same before the happening of the contingency. The executor was a party to the assignment, to obviate all question as to the existence of debts of the cestui que trust, and the purchase-money was thereby expressed to be paid to him, but was in fact paid to the legatee by the purchaser:—Held, that the executor had no claim on the purchaser to be reimbursed the legacy duty, which, after the happening of the contingency, he was compelled to pay on the full value of the share. *Farwell v. Seale*, 3 De G. & S. 359; 18 L. J., Ch. 189; 13 Jur. 483.

Payment of Mortgage Debt—Deficiency of Estate.]—T., being seised in fee of lands, mortgaged them as a security for money lent. The deed contained a covenant by T. to pay the principal

and interest on a certain day. By another deed, T. covenanted to pay, on a certain day, a further sum of money lent, and that the same lands should be charged with that sum also. T., by will, devised his real estate to B., whom he appointed his executor. T. paid the interest on the mortgage debts, but died without having paid the principal. The personal estate of T. was only sufficient to discharge his funeral and testamentary expenses. B., by will, bequeathed his real and personal estate to his two sons, whom he appointed his executors, and died without having paid the mortgage debts. The executors of B. exhausted his personality by paying with it those debts, and on that ground claimed an exemption from legacy duty, and a return of probate duty:—Held, that the executors were bound to pay legacy duty, and were not entitled to a return of probate duty, since they were not justified in paying the mortgage debts with the personal estate of B., notwithstanding the 11 Geo. 4 & 1 Will. 4, c. 47, s. 3, rendered them and B. liable, as devisees, to actions on the covenants on the deeds. *Taylor, In re*, 8 Ex. 384; 22 L. J., Ex. 211.

Money Paid into Court under Legacy Duty Act.]—A testamentary guardian is not entitled as such to obtain payment out of court of funds, the property of his infant ward, which have been paid into court under the Legacy Duty Act:—Sembles, that in ordinary cases, which do not depend upon a special act, a testamentary guardian is entitled to give a receipt for funds coming to his infant ward. *Cresswell, In re*, 45 L. T. 468; 30 W. R. 244.

e. Proceedings against Executors.

Rule to Account.]—A rule for an attachment against an executor for not delivering an account at the Legacy Duty Office is nisi only. *Vyryan, In re*, 1 Tyr. 379; 1 C. & J. 409.

Where, on a rule nisi calling upon executors to account for and pay over legacy duties, the executor did not appear to shew cause, and the rule was therefore made absolute, the court ordered that it should form part of the rule, if, upon the delivery of the accounts, there should be found to be any duties payable to his majesty, that the executor or administrator should pay the costs of the crown, to be taxed in the usual manner. *Robertson, In re*, 2 M. & W. 407; 5 D. P. C. 609; M. & H. 71.

A rule was obtained for the surviving executor of the executrix of the executor of a testator, to account for legacy duties due on the estate of the original testator. The original testator died in 1812; the surviving executor had never acted, except in signing documents; he knew nothing of the estate of his testatrix, and had received no assets of hers, or of the original testator:—Held, that the power given to the court by 42 Geo. 3, c. 99, s. 2, is discretionary, and that the case was not one in which they ought to exercise it. *Pigott, In re*, 1 C. & M. 827; 3 Tyr. 859.

The pendency of a suit in equity, at the instance of a legatee, praying that an account may be taken of a testator's personal estate and effects received by the executors, and that the personal estate may be administered and the legacy paid, is no answer to an application by the commissioners of stamps, under the 42 Geo.

3, c. 99, if any duties have become payable on legacies which have been paid, notwithstanding the 36 Geo. 3, c. 52, which provides that the court in which such suit shall be instituted shall, in giving directions concerning the payment of legacies, take care that no allowance be made in respect of any legacy, without due proof of the payment of the duties thereby imposed. *Sammon, In re*, 3 M. & W. 381.

When in pursuance of the 13 & 14 Vict. c. 97, s. 8, a rule nisi for the payment of a sum of money to the receiver-general of inland revenue as legacy duty has, on no cause being shewn, been made absolute against the person withholding the duty, and both rules have been personally served, the court will grant a rule for an attachment absolute in the first instance. *Evans, In re*, 3 H. & C. 562; 34 L. J., Ex. 87; 11 Jur., N. S. 182; 11 L. T. 717; 13 W. R. 350.

7. PROBATE DUTY.

a. Interests and Property Liable.

Appointment under a Will.—Prior to 23 Vict. c. 15, no duty was payable in respect of property, the subject of appointment by will. *Platt v. Routh*, 6 M. & W. 756; *S. C.*, 3 Beav. 257. Affirmed, nom. *Drake v. Att.-Gen.*, 10 C. & F. 257.

— **Exercise of a Power, what is.**—A testator bequeathed stock to trustees, upon such trusts and subject to such powers, as A. should by deed or will direct or appoint; and in default of appointment, to pay the dividends to A. during her life, and, after her decease to pay the principal amongst her children. After the testator's death, A. executed a deed according to the mode prescribed by the will; by which, after reciting that she was desirous of executing the power, she directed the trustees to transfer the fund to herself and a new trustee, upon such trusts and subject to such powers, as A. should by any deed, with or without power of revocation and new appointment, or by her last will, direct and appoint, with limitations over, in default of appointment, similar to those contained in the will; in pursuance of which deed the fund was transferred into the names of A. and the new trustee. A. afterwards by will, by virtue of the execution of that power, appointed the fund to be transferred to certain persons, in trust that the same might be consolidated with and become part of her residuary estate, and follow the dispositions thereof thereafter mentioned:—Held, that the deed executed by A. being an exercise of the power under the original will, the property thereby became liable to her debts, and became her personal estate, in which she had an interest, and consequently was liable to the payment of probate duty. *Att.-Gen. v. Staff*, 2 C. & M. 124; 4 Tyr. 14.

Moneys Recoverable by an Executor.—All moneys recoverable by an executor by virtue of a probate, in whatever form recovered, whether through the agency of a court of equity or of a court of law, are part of the estate and effects of the testator, and are liable to probate duty. *Att.-Gen. v. Brunning*, 8 H. L. Cas. 243; 30 L. J., Ex. 379; 6 Jur., N. S. 1083; 8 W. R. 762.

Probate duty is payable in respect of the purchase-money of real estate on a contract for

its purchase, made before, but completed after, the death of the testator. *Ib.*

Sum Recoverable as Damages.—A sum recoverable by an executor against a person for damages in negligently causing his testator's death, is not a subject of probate duty. *Ib.*

Contingent Interests.—The duty must be paid on the whole personal estate belonging to an intestate, including contingent interests. *Lord v. Colrin*, 3 L. R., Eq. 737; 36 L. J., Ch. 354; 16 L. T., 53; 15 W. R. 485.

Where such duty was not paid on a contingent interest, which afterwards fell into possession:—Held, that duty must be paid on the present value of the absolute interest, and not on the value of the contingent interest at the date of administration only; although if duty had been paid on the value of the contingency, the crown would not have been entitled to any further duty by reason of the contingency having subsequently fallen into possession. *Ib.*

Realty forming Part of Partnership Assets—Conversion.—The shares of partners in realty forming part of the partnership property must be regarded as personal estate in the absence of any agreement between the partners to the contrary; and probate duty is payable on a deceased partner's share in such realty irrespective of the question whether or not there is in the event any actual conversion into personality. *Custance v. Bradshaw* (4 Hare, 315) discussed. *Att.-Gen. v. Hubbuck*, 10 Q. B. D. 488; 52 L. J., Q. B. 464; 48 L. T. 608. Affirmed, 53 L. J., Q. B. 146—C. A.

Shares in Company—Duty, in what Country.—Shares in railway companies are assets in the country in which the holders must be registered, and therefore, it is in that country the probate duty must be paid thereon by the executors or administrators of deceased proprietors. *Att.-Gen. v. Higgins*, 2 H. & N. 339; 26 L. J., Ex. 403.

— **Purchase out of Assets of Testator.**—Shares in a banking company purchased by executors with the assets of their testator in the name of a party who was entitled to the dividends for life, are included in the probate stamp, and do not require to be covered by the stamp upon the letters of administration granted to the estate and effects of the party in whose name the purchase was made. *Hennell v. Strong*, 25 L. J., Ch. 407.

If the bankers refuse to transfer the shares after an affidavit made by the executor of the testator, in conformity with 48 Geo. 3, c. 149, they do so at the peril of costs. *Ib.*

Property in Foreign Country.—Probate duty is not payable in respect of property in a foreign country belonging to a testator dying in this country, although the property is brought into and administered in this country by the executor. *Att.-Gen. v. Dimond*, 1 C. & J. 356; 1 Tyr. 243.

— **Proceeds of Foreign Stock.**—French stock belonging to an English testator may be sold abroad by the English executor, and its proceeds administered by him here, without paying probate duty thereon. *Ib.*

Probate duty is not payable under 55 Geo. 3, c. 184, in respect of personal assets of an Englishman domiciled and dying in England, which being locally situate in a foreign country at the time of his death, were not brought hither till after that event by his executors; though they had obtained an English probate in respect of his personalty situate in England, and proceeded by virtue of that probate to collect and administer in this country the whole of the assets. *Att.-Gen. v. Hope*, 1 C., M. & R. 530; 4 Tyr. 878; 2 C. & F. 84; 8 Bligh, N. S. 44.

Foreign Bonds.—But probate duty is payable in respect of bonds of a foreign government, of which bonds a testator, dying in this country, was holder at the time of his death, and which have come to the hands of his executors in this country; such bonds being marketable securities within this kingdom, saleable and transferable by delivery only, and it not being necessary to do any act out of this kingdom to render the transfer of them valid. *Att.-Gen. v. Bouwens*, 4 M. & W. 171; 1 H. & H. 319.

Bills Drawn in India on a London Bank.—Bills drawn in India on a London bank in favour of the testator's London bank are, if he dies abroad before they reach England, assets within the jurisdiction, and are liable to probate duty in England under 55 Geo. 3, c. 184, s. 38. *Att.-Gen. v. Pratt*, 9 L. R., Ex. 140; 43 L. J., Ex. 108; 30 L. T. 531; 22 W. R. 615.

P., resident in India, directed his bankers there to realize certain securities and transmit the proceeds to his bankers in England. The securities were realized, and the proceeds transmitted in bills of exchange, payable six months after sight, and drawn by a bank in India upon a bank in London in favour of his English bankers. Whilst the bills were on their way to England, P. died in India. The bills were received by his bankers in England and were accepted, and the proceeds were in due course collected by the bankers, and were received by a person whom the testator had appointed his executor in England, and who had taken out probate here:—Held, that probate duty must be paid on the amount of the bills. *Id.*

Exemption of Heir-at-Law.—An heir-at-law, though liable for debts, held not liable to pay probate duty, either directly or indirectly, which, in case of a deficiency of the impure personalty, after payment of debts and costs, was ordered to be borne by the specific bequest to a hospital. *Shepherd v. Beetham*, 6 Ch. D. 597; 46 L. J., Ch. 763; 36 L. T. 909; 25 W. R. 764.

Legatee Dying in Testator's Lifetime.—A testator bequeathed his personal estate to his son, who died in his father's lifetime, leaving issue:—Held, that the executors of the son were chargeable with probate duty on the amount of the bequest, in the same manner as they would have been had the son actually survived the father. *Perry's Executors v. Reg.*, 4 L. R., Ex. 27; 19 L. T. 520; 17 W. R. 382; *S. C.*, *Bacon v. Reg.*, 38 L. J., Ex. 5.

Gift over on Contingency.—When the whole beneficial interest in a testator's estate was under his will vested in his widow and children, with a limitation in favour of his grandchildren, the

defeasible character of each child's interest only affecting the shares of the children or grandchildren inter se, with a gift over on the happening of a contingency, probate must be delivered on payment of duty at the rate of 5 per cent., notwithstanding that additional duty is payable on the gift over taking effect. *Armstrong v. Wilkinson*, 3 App. Cas. 355; 47 L. J., P. C. 31; 38 L. T. 185; 26 W. R. 559.

Realty directed to be Sold, not Sold before Death of Legatee.—One seized in fee of realty devised and bequeathed by will all his realty and personalty to trustees in trust to sell and to stand possessed of the proceeds, after making certain payments, and to invest the moneys, and to hold the investments and the income in trust to pay an annuity to his widow for life, and as to the residue, in trust for all his children who should attain twenty-one; in default of such children the testator bequeathed the investments, as to certain portions, to certain legatees, and as to the residue on certain trusts which failed. On his death his only child, Margaret, was his heiress-at-law and one of his next of kin. She died afterwards under twenty-one and unmarried. The realty at her death was unsold and uncontracted to be sold, but was subsequently sold, under the trusts of the will, for a sum which was its value, and which was paid to her legal personal representative as such:—Held, that probate duty was payable at Margaret's death upon the value of the realty, as being part of her estate and effects. *Att.-Gen. v. Lomas*, 9 L. R., Ex. 29; 43 L. J., Ex. 32; 29 L. T. 749; 22 W. R. 188.

Probate affected by subsequent Statute.—A testator having died in the colony of Victoria whilst Act No. 388 was in force, and probate to his will having been applied for and granted before Act No. 523 was passed, but after the time fixed for its coming into operation retrospectively:—Held, that the duty payable on the testator's estate under the former act having been directed by s. 10 to be deemed a debt of the testator to her Majesty, accrues due eo instanti on his death, at the rate prescribed by that act, although the amount of such duty might have to be subsequently ascertained. *Bell v. Master in Equity of Supreme Court (Victoria)*, 2 App. Cas. 560; 36 L. T. 936—P. C.

Probate duty in England is a stamp duty payable upon the value of the property the subject of the probate at the time it is granted. The duty payable under Act No. 388 is more in the nature of a succession duty, payable, whether probate is sought or not, on the value of the estate at the time of the testator's death. *Id.*

J. died on the 2nd of August, 1879, having previously made a will which his executors proceeded to prove, and on the 13th of September, 1879, paid 45*l.*, the amount of duty then payable. A caveat being lodged by the next of kin the will was not established until the 13th of April, 1880. Meanwhile the duty payable on or after April 1st, 1880, was increased by 43 Vict. c. 14:—Held, that the probate was liable to the increased duty. *Joy, In re, Lalor v. Jones*, 5 L. R., Ir. 282.

b. Affidavit of Value.

Of Applicant not Conclusive.—In granting probate or letters of administration the court is

not restricted to the oath of the applicant as to the value of the property, but may receive the oath of any competent person to that fact. *De Angulo y Urruela, In goods of*, 1 L. R., P. 598; 38 L. J., P. 21; 19 L. T. 704.

Where, therefore, the property was sworn below its value by the executor who was abroad, the court allowed a fresh affidavit, in which the true value of the property was stated and the mistake in the executor's oath explained, to be sworn and filed by his agent in this country, and probate was ordered to go accordingly. *Ib.*

When Executors Swear under different Sums.]

—One of two executors proved the will, swearing the property (the amount of which depended on the result of a pending suit in chancery) under a certain amount, and paying the duty thereon. The other executor was allowed to take probate, swearing the property under a smaller amount. *Bell, In goods of*, 2 L. R., P. 247; 40 L. J., P. 67; 25 L. T. 163.

c. Stamps.

Amount of.]—The stamp upon letters of administration is to be regulated by the value of the property at the time when they are granted, and not at the time of the death of the intestate. *Doct. d. Richards v. Evans*, 10 Q. B. 476; 16 L. J., Q. B. 305; 11 Jur. 609.

Where, to prove the title of an administrator, an exemplification was offered, which was an exemplification, not only of the letters of administration in question, but also of certain other letters of administration, on one piece of parchment, and covered by one 3*l.* stamp:—Held, that the exemplification was sufficiently stamped. *Doct. d. Edwards v. Gunning*, 2 N. & P. 260; W., W. & D. 460; 7 A. & E. 240; *Doct. d. Bassett v. Mew*, 7 A. & E. 240.

An intestate died possessed of a leasehold estate under the value of 100*l.*, which, by the subsequent erection of a building upon it, was of the value of 100*l.* and upwards at the date of the letters of administration:—Held (before the passing of the 27 & 28 Vict. c. 56, s. 5), that a stamp of 1*l.* was insufficient. *Ib.*

Interest from Date of Death.]—The stamp duty upon letters of administration is to be calculated not only on the principal money which constituted the property of the intestate at the time of his death, but also upon accumulations of interest between the death and the grant of the letters of administration. *Att.-Gen. v. Partington*, 3 H. & C. 193; 33 L. J., Ex. 281; 10 Jur., N. S. 825; 10 L. T. 751; 13 W. R. 54—Ex. Ch. Affirmed, 4 L. R., H. L. 100; 38 L. J., Ex. 205; 21 L. T. 370.

When Claims not Asserted.]—A married woman, entitled as next of kin to the estate of an intestate, died without asserting her claim, leaving her husband surviving, who also died without asserting his claim:—Held, that it was necessary for the next of kin of the husband, in order to enforce the right of the wife and reduce it into possession, to take out letters of administration to both husband and wife, and pay stamp duty upon the property for each grant of administration. *Ib.*

Effect of Insufficient Stamp.]—A. sued to recover a large unliquidated sum due to her testa-

trix, but the stamp on the probate did not cover the amount claimed:—Held, that A. could not obtain a decree in equity even for accounts and inquiries until the probate had been properly stamped. *Howard v. Prince*, 10 Beav. 312.

If an administrator shews that he sues for a greater value than is covered by the ad valorem stamp of his letters of administration, he shews his administration to be void, and cannot recover, although he sues for a doubtful claim. *Hunt v. Stevens*, 3 Taunt. 113.

In trover by an executor he gave in evidence the probate, which bore stamp duty on assets under the value of 600*l.*; on cross-examination he admitted that the assets were of greater value:—Held, that the probate was not admissible for want of a sufficient stamp. *Cormack v. Barragry*, 10 Ir. R., C. L. 147.

A. sued out a commission of bankruptcy against B. upon a debt due to him as executor, but the probate of the will had an insufficient stamp; afterwards, however, a sufficient stamp being affixed:—Held, that it was sufficient to support the petitioning creditor's debt, in an action by the assignees. *Rogers v. James*, 2 Marsh. 425; 7 Taunt. 147.

By 55 Geo. 3, c. 184, s. 49, the commissioners of stamps are authorized to stamp letters of administration de bonis non, on security given, and without payment of the duty, as well in cases where the duty has been paid on the original letters of administration, as where such letters of administration have been originally stamped on credit. *Doct. d. Hanley v. Wood*, 2 B. & A. 724.

In an action by an administrator upon premises made to the intestate and non assumpsit pleaded, the defendant cannot, upon the production of the letters of administration, object that they are not properly stamped; for the plea admits that plaintiff is administrator. *Thynne v. Protheroe*, 2 M. & S. 553.

d. Return of Duty.

Rule to Enforce.]—The court cannot entertain an application for a rule calling on the commissioners of inland revenue to shew cause why they should not grant a return of probate duty, unless by consent of the crown. *Webster, In re*, 1 L. T. 45.

Duty Paid in two Places—The Amount Returnable.]—Where a testator left personal property in each of the provinces of Canterbury and York, and probates were taken out for the property being in each province, and respective duties paid on each probate, and the executors afterwards paid debts indiscriminately out of the whole personality:—Held, that they were not entitled, for the purpose of demanding a return of duty, to add together the amounts in respect of which the two probate duties were paid, deduct from the gross sum the amount of the debts, and then estimate the duty payable on the remainder, and demand back the difference between such duty and the aggregate of the sums paid on the two probates. *Reg. v. Stamps and Taxes (Commissioners)*, 9 Q. B. 637; 16 L. J., Q. B. 75; 11 Jur. 365.

Semble, that an equitable mode of calculating the sum to be returned was to apportion the sum paid for debts in the ratio of the estate in each province, and deduct the respective portions of the debts from the values of the respective estates. *Ib.*

— **Paid in England and India.**—Where a testator or an intestate dies possessed of personal estate both in England and India, and indebted to English creditors, in respect of debts contracted in England, the amount of assets in India cannot be taken into consideration in estimating the amount of duty to be returned to the executor or administrator; India being, for this purpose, to be considered as a foreign country. *Reg. v. Stamps and Taxes (Commissioners)*, 18 L. J., Q. B. 201; 13 Jur. 624.

A. died intestate in England, possessed of personal estate in England to the amount of 5,858*l.* 16*s.* 1*d.*, in respect of which a duty of 150*l.* was paid on the letters of administration. His administratrix paid debts due to creditors resident in England, and contracted in England, to the amount of 4,890*l.* 0*s.* 10*d.*, leaving a balance of 968*l.* 15*s.* 3*d.*, on which the duty would only be 30*l.* A., at the time of his death, was also possessed of personal property in the East Indies to the amount of 12,118*l.* 10*s.* 4*d.*, which had been received by his administratrix by means of letters of administration granted to an agent in India, and there were no other debts due from the intestate:—Held, that the administratrix was entitled to a return of 120*l.* of the duty. *Ib.*

Debts "Due from Deceased."—The words "debts due and owing from the deceased and payable by law out of his or her personal or movable estate," in 5 & 6 Vict. c. 79, s. 23, mean such debts as of themselves and in their own nature and character are payable out of the personal estate, and have no relation to any provision which a testator may make in his will for their payment. *Percival v. Reg.*, 3 H. & C. 217; 33 L. J., Ex. 289; 10 Jur., N. S. 1059; 10 L. T. 622; 12 W. R. 966.

When the provisions in a marriage settlement constitute a debt, inventory duty is not chargeable under 5 & 6 Vict. c. 79, s. 23. *Lord Advocate v. Hagart*, 2 L. R., H. L. (Sc.) 217.

In a marriage settlement the husband became bound to make a provision for his children, the contract giving him a power of appointment, in the exercise of which power he appointed to one of his sons 10,000*l.*, which was duly paid to him. The executors claimed a return of duty in respect of this sum, on the ground that it constituted a debt of the deceased:—Held, that their contention was right, and that they were entitled to a return of 150*l.* *Ib.*

II. CUSTOMS AND EXCISE.

1. EXCISE DUTIES.

"Spirits," Meaning of.—Sweet spirits of nitre are not spirits within 6 Geo. 4, c. 80, ss. 107, 133; 7 & 8 Geo. 4, c. 53, s. 32; and 2 Will. 4, c. 16, s. 10. *Att.-Gen. v. Bailey*, 1 Ex. 281; 17 L. J., Ex. 9; 3 C., 16 M. & W. 74; 16 L. J., Ex. 63.

The term "spirits," in those acts, signifies an inflammable liquid, produced by distillation, either pure or mixed only with ingredients which do not convert it into some article of commerce, not known in common parlance under the general appellation of "spirits." *Ib.*

Sweet, spirits of nitre are not "spirits" for the removal of which a permit is required by 6 Geo. 4, c. 80, s. 115, and 2 & 3 Will. 4, c. 16, ss. 10, 11. Nor are they within ss. 6 and 7 of 6 Geo. 4,

c. 80, by which penalties are imposed for distilling spirits without a licence, or within 7 & 8 Geo. 4, c. 53, s. 32, which enacts forfeiture of excisable goods deposited in any place with intent to defraud the revenue. *Bailey v. Harris*, 12 Q. B. 905; 18 L. J., Q. B. 115.

Wines.—A legatee under a bequest of wines, which arrived in the port of London in a ship before the death of the testator, the report of the arrival of the ship being made before, but the entry of the wines not being made until after the death of the testator, is not subject to the payment of the duties, the executor being bound to pay them out of the assets. *Sewart v. Denton*, 2 Chit. 456; 4 Dougl. 219.

— **Foreign Ambassador — Privilege.**—Where a foreign ambassador, on the termination of his embassy and departure from this country, employed an agent to dispose of certain wines by auction, which he had imported duty free, and such agent employed a broker and an auctioneer, who effected the sale:—Held, that the latter was personally liable to pay the duties in respect of such wines, although he had, from time to time, as he received the proceeds of the sale, paid over the net amount to his immediate employer, the agent. *Att.-Gen. v. Thornton*, 13 Price, 805; 1 M'Clel. 600.

The ambassador's privilege ceased to protect the wines from duty when so sold to a purchaser. *Ib.*

Mineral Waters.—The defendant sold a powder to be used for the purpose of making an effervescing draught, which he advertised as beneficial for a variety of disorders. The draught as made contained a salt of soda, chlorate of potash, and carbonic acid gas:—Held, that the composition came within the head of "Artificial Mineral Waters," &c., in the schedule of 52 Geo. 3, c. 150, the tax on which head was repealed by 3 & 4 Will. 4, c. 97, s. 20; and was not at any time taxable under the "tail" of the schedule of 52 Geo. 3, c. 150. *Att.-Gen. v. Lamplough*, 3 Ex. D. 214; 47 L. J., Ex. 555; 38 L. T. 87; 26 W. R. 323—C. A. Reversing 37 L. T. 247; 25 W. R. 753.

Beer—Exemption from Duty.—By the Inland Revenue Act, 1880, s. 33, sub-s. 3, if the annual value of the house occupied by a brewer other than a brewer for sale does not exceed 10*l.*, the beer brewed by him shall not be charged with duty. The respondent brewed beer (not for sale) in a house occupied by him of an annual value not exceeding 10*l.*, and he occupied, as a residence, another house, which was of greater annual value than 10*l.*:—Held, that the exemption from duty did not apply to the beer so brewed. *Tippett v. Hart*, 10 Q. B. D. 483; 52 L. J., M. C. 41; 48 L. T. 319; 31 W. R. 582; 47 J. P. 199.

2. EXCISE LICENCES.

Spirits—Quantity to be Consumed on Premises.—The 6 Geo. 4, c. 81, imposed a higher duty on licences to retail spirits obtained by spirit grocers in Ireland, and a lower duty on other persons, the spirit grocers being defined as those who do not sell spirits in a greater quantity at one time than two quarts, to be consumed on the premises. The 6 & 7 Will. 4, c. 38

(Ir.), s. 38, enacted that no spirit grocer should obtain a licence to sell on the premises other than a licence to retail spirits in quantities not less at one time than one pint, and to be consumed elsewhere than on the premises, and no other licence should be granted to grocers:—Held, that the latter statute did not impliedly repeal the higher duty applicable to spirit grocers, but that the two statutes were compatible, the one fixing the maximum, and the other the minimum, of the quantity to be sold at one time; and the two descriptions of restrictions did not necessarily imply two different descriptions of persons. *Dickson v. Reg. (in error)*, 11 H. L. Cas. 175; 12 L. T. 405.

Spirits of Nitre.]—A person who distills spirits, for the purpose of making, by the addition of nitric acid, sweet spirits of nitre for sale, was a distiller of spirits within 6 Geo. 4, c. 80, ss. 6, 7, requiring an excise licence, and liable to the penalties imposed on persons having any private or concealed still for making or distilling low wines or spirits. *Att.-Gen. v. Bailey*, 16 M. & W. 74; 16 L. J., Ex. 63.

Sweets or made Wines.]—Since 4 & 5 Will. 4, c. 77, sweets or made wines are no longer excisable liquors, within 9 Geo. 4, c. 61, for which a licence to sell is necessary. *Reg. v. Lancashire*, 7 El. & Bl. 839; 3 Jur., N. S. 1095; *S. C.*, nom. *Lancashire v. Staffordshire (Justices)*, 26 L. J., M. C. 171.

Contract to Defeat the Law—Validity.]—The plaintiff, N., and the defendant, entered into an agreement, whereby the plaintiff agreed to let N. carry on the business of the tap attached to an hotel, in the same room as was then used for a tap, at a weekly payment; and N. agreed to carry on the business, and to pay the weekly sum; and the defendant became surety for N. To an action upon this agreement the defendant pleaded, "that the agreement was entered into with the express object of enabling N. to have possession of the room, in order to sell therein, for his own use and benefit, excisable liquors without a licence:—Held, that the plea disclosed a good defence to the action. *Ritchie v. Smith*, 6 C. B. 462; 18 L. J., C. P. 9; 13 Jur. 63.

Beer, what is.]—M. sold a liquor in bottles, called Summer's Botanic Beer, without having a retail licence to sell beer. The liquor was made of sugar, herbs and water, without hops, and had about 6 per cent. of spirit, while ginger beer and table beer had about the same percentage of spirit. The justices dismissed the information, holding that it was not beer within the meaning of 4 & 5 Will. 4, c. 85, and other acts:—Held, that the justices were right. *Leah v. Minns*, 47 J. P. 198.

Dogs.]—On the 21st of October, S. kept a dog without having in force a licence granted under 30 Vict. c. 5. He thereby became liable to a penalty under s. 8. His default was discovered by the Excise, and he took out a licence at a later hour on the same day. Sect. 5 enacts that every licence shall commence on the day on which the same shall be granted. An information against him laid before a magistrate, charged his offence to have been committed on the 21st of October. At the hearing, he produced the licence granted on the 21st of October, and the

charge was dismissed:—Held, that the dismissal was wrong, because an offence had been committed on the 21st of October, and the subsequent licence operated only from the time when it was granted, and did not relate back to the earliest moment of that day so as to justify the violation of the act before the licence existed. *Campbell v. Strangeways*, 3 C. P. D. 105; 47 L. J., M. C. 6; 37 L. T. 672.

Male Servants at Hotel.]—Every person employed by an hotel-keeper as a waiter in his hotel, if only for two or three weeks together, in addition to his ordinary permanent number of licensed servants, is a male servant, within 32 & 33 Vict. c. 14, ss. 18 and 19, for whom the hotel-keeper is bound to pay the duty, and take out the licence prescribed by the provisions of that act, and is not an occasional waiter, and exempt as such within the meaning of the printed notice or direction given to taxpayers by the commissioners of Inland Revenue. *Spencer v. Sheerman*, 23 L. T. 873.

Groom and Labourer bonâ fide Employed.]—H. was employed in the yard of a farmer to feed cows and horses, chop hay, and do miscellaneous work; also to groom the horse and drive his master to and from the railway station. The farmer being charged with keeping a male servant without a licence, the justices found that H. was bonâ fide employed as a groom and bonâ fide employed as a yardman, and was exempt under 39 Vict. c. 16, s. 5:—Held, that the justices were wrong, as the exemption only applied to one occasionally and partially employed as a groom, and this was not found. *Yelland v. Vincent*, 47 J. P. 230.

Gold and Silver Plate, when Necessary.]—One, not a general trader in silver plate, who sold a piece of plate in a particular instance for a price above the value of old silver, was not therefore a vendor of plate within 31 Geo. 2, c. 32, s. 6, which enacted that all persons using the trade of selling plate shall be deemed traders in, sellers or vendors of plate, and shall take out a licence. *Rees v. Buckle*, 4 East, 346; 1 Smith, 49.

A person who had taken out a licence to deal in plate, under 30 & 31 Vict. c. 90, at the lower rate of duty, 2l. 6s., which, by the terms of the act, does not extend to the sale of an article, composed wholly or in part of gold, "where the gold shall be of the weight of two ounces or upwards," sold, as a gold chain, a chain weighing more than two ounces, but containing less than two ounces of pure gold:—Held, under 30 & 31 Vict. c. 90, ss. 1, 3, 5, that he had dealt in plate without a proper licence, inasmuch as the act did not mean, by "gold" of the weight of two ounces or upwards, pure gold. *Young v. Cook*, 3 Ex. D. 101; 47 L. J., M. C. 28; 37 L. T. 536; 26 W. R. 100.

Within what Time Action Brought.]—An action by one of the officers of the Company of Goldsmiths mentioned in 7 & 8 Vict. c. 22, for penalties under s. 3 of that act, is not an action by a common informer within 31 Eliz. c. 5, nor is it an action by a "party grieved" within 3 & 4 Will. 4, c. 42, s. 3, and consequently can be brought more than two years after the cause of action accrued. *Robinson v. Curry*, 7 Q. B. D. 465; 50 L. J., Q. B. 561; 45 L. T. 368; 30

W. R. 39—C. A. Reversing 6 Q. B. D. 21; 50 L. J., Q. B. 9; 43 L. T. 504; 29 W. R. 284; 45 J. P. 221.

Waggons and Carriages—Course of Trade.]—The proprietors of a travelling equestrian circus gave a daily parade through the towns which they visited. On the day laid in the information, there was the usual parade in Bishop Auckland, and amongst other carriages in the procession there were three drawn by horses; one conveyed the band consisting of eight performers; two others conveyed four persons each, and the persons in one of these were dressed in gaudy attire and carried flags. These three carriages were used also for carrying portions of the luggage and property of the circus from place to place, and at the time before mentioned there were clothes belonging to the circus in the back locker of the band carriage, and also the music and musical instruments of the circus, and also in the other carriages there were some loose deal boxes and brackets:—Held, that these three carriages were not within the exemption specified in 32 & 33 Vict. c. 14, s. 19, sub-s. 6, as carriages "used solely for the conveyance of any goods or burden in the course of trade or husbandry," and that they required to be licensed. *Speak v. Powell*, 9 L. R., Ex. 25; 43 L. J., M. C. 19; 29 L. T. 434.

Letting for Hire—Less than a Year.]—By 32 & 33 Vict. c. 14, s. 27, a penalty of 20*l.* is imposed upon a person keeping a carriage without a licence; and by 38 & 39 Vict. c. 23, s. 11, every person who shall let any carriage for hire for any period less than one year shall for the purposes of the 32 & 33 Vict. c. 14, be deemed to be the person keeping such carriage. A coach-builder by an agreement in writing let to R. two clarence cabs on hire at 30*s.* per week, payable weekly, the cabs to be his property if he regularly paid the 30*s.* for seventy-five weeks consecutively, and an additional 5*l.* at the expiration of that period; but it was stipulated that, if he should omit to make any of the weekly payments as agreed, the owner might resume possession of the cabs:—Held, that under the agreement there was no letting of the cabs for a period less than one year, so as to make him the "person keeping" them within the meaning of the act. *Barber v. Callow*, 2 C. P. D. 558; 37 L. T. 130.

Taxed Cart—Meaning of.]—A local act provided that there should be charged as toll at a turnpike-gate "for every horse or other beast drawing any taxed cart," 3*d.*:—Held, that a cart which had been taxed in the previous year, under 16 & 17 Vict. c. 90, Schedule D, was a taxed cart within the meaning of the local act. *Purdy v. Smith*, 1 El. & El. 511; 28 L. J., M. C. 150; 5 Jur., N. S. 912.

Cart without Owner's Name on it.]—An information was laid against the respondent for using a cart on the highway without having his name painted thereon, as required by 5 & 6 Will. 4, c. 50, s. 76. The cart was a light spring cart with two wheels, used by the respondent in his business as an agricultural implement maker, in which he frequently carried agricultural implements to market, and drove his family about from place to place, and for which he paid duty

under 32 & 33 Vict. c. 14, s. 18. The magistrates dismissed the information:—Held, that the "cart or carriage" contemplated by the 76th section of 5 & 6 Will. 4, c. 50, was "*ejusdem generis*" with a waggon, and that this was not such a cart, and that the magistrates were therefore right. *Danby v. Hunter*, 5 Q. B. D. 20; 49 L. J., M. C. 15; 41 L. T. 622; 28 W. R. 228; 44 J. P. 283.

Paper.]—Before the duty was repealed by 24 & 25 Vict. c. 20, where a party having reduced to pulp, in a paper mill, the fibrous portion of hides, which he took up and dried and pressed into sheets by a process similar to that of the manufacture of paper, produced an article resembling parchment, and applicable to ordinary purposes for which paper is employed:—Held, that such article was liable to duty as paper by 2 & 3 Vict. c. 23, ss. 1, 56, and that, not having taken out a licence as a paper maker, he was liable to penalties by 6 Geo. 4, c. 81, s. 26. *Att.-Gen. v. Barry*, 4 H. & N. 470; 28 L. J., Ex. 211; 7 W. R. 488.

3. PERMITS.

Public-house—To Lessee.]—A. purchased the lease of a public-house from B. and entered into occupation of it, the licence being continued in the name of B. The plaintiff furnished spirits to A., and sent them to the public-house, with a permit made out in the name of B. There was no evidence to shew that the permit was contradictory to the request note, or that it did not comply with the regulations of the excise:—Held, that the fact of its being made out in the name of B. did not invalidate the permit. *Nicholson v. Hood*, 9 M. & W. 365; 12 L. J., Ex. 114.

Time of—Construction.]—A permit for the removing of wine from one place to another, under 26 Geo. 3, c. 59, dated nine o'clock in the morning of one day, and giving the party one hour for removing it out of the stock of A., and two days more for delivering it into the stock of B., expired at ten in the morning of the second day after it was granted. *Cooke v. Sholl*, 5 T. R. 255.

Necessity for—Manufacture in Jersey.]—Spirits manufactured in Jersey, partly from materials not the produce of the United Kingdom, were imported, and the proper duty paid for them, under 3 & 4 Will. 4, c. 52, s. 40:—Held, that they were subject to the regulations of excise, in the same manner as spirits manufactured in England, and that the importer must deliver a request note, under 2 Will. 4, c. 16, ss. 5 and 6, for obtaining a permit. *Reg. v. Excise (Commissioners)*, 6 Q. B. 975; 14 L. J., Q. B. 179; 9 Jur. 618.

4. PENALTIES.

Tobacco—Effect of Liability on Contract.]—The 6 Geo. 4, c. 81, ss. 2 and 26, which subject to penalties any manufacturer of, or dealer in, or seller of tobacco, who shall not have his name painted on his entered premises in manner therein mentioned; or who shall manufacture, deal in, retail or sell tobacco, without taking out the licence required for that purpose, do not avoid a

contract of sale of tobacco made by a manufacturer or dealer who has not complied with the requisites of these sections; their effect is merely to impose a penalty on the offending party, for the benefit of the revenue. *Smith v. Mawhood*, 16 M. & W. 462; 15 L. J., Ex. 149. See *Ritchie v. Smith*, *ante*, col. 687.

— **Adulterated—Innocent Purchaser.**—A dealer in and retailer of tobacco is liable to the penalty of 200*l.*, imposed by 5 & 6 Vict. c. 93, s. 3, for having in his possession adulterated tobacco, although he had purchased it as genuine, and had no knowledge or cause to suspect that it was so. *Reg. v. Woodrow*, 15 M. & W. 404; 16 L. J., Ex. 122.

Malt.—By 7 & 8 Geo. 4, c. 52, s. 33, a maltster is liable to a penalty for treading or forcing together in the couch-frame any grain making into malt. By the 1 Vict. c. 49, s. 5, any excise officer, upon suspicion of the grain having been trodden or forced together, may throw the grain out of the couch frame, and return it and lay it level in the couch-frame; and if any increase in the gauge of the grain shall be found, exceeding a certain proportion, then the increase so found shall be taken as conclusive evidence that the grain has been trodden or forced together, and the maltster shall thereupon be convicted in a penalty. Upon an information before justices against the defendant for the penalty, it appeared that the excise officer had, in pursuance of an order of the commissioners of excise, returned the grain by piling it in a cone in the centre of the couch, and then distributing it equally to all parts of the couch. The increase in the grain, when thus returned, having exceeded that allowed by the act, the defendant was convicted:—Held, that the increase in the grain found by such a mode of returning it was conclusive evidence of the offence, within 7 & 8 Geo. 4, c. 52, s. 33, as it did not appear that the mode of proceeding was unfair or improper, and, consequently, the conviction was right; and that the officer has some, if not an absolute, discretion to exercise in the matter, provided he does not use it improperly. *Reg. v. Speller*, 1 Ex. 401; 17 L. J., M. C. 9.

— **Liability to Seizure.**—A writ of extent having issued against A., a maltster, for a debt due to the crown from him for duties on malt, a cargo of malt was seized under it, in the hands of the defendant. The defendant being allowed to plead to the extent, in order to state his interest in the goods, alleged, by his plea, that the malt, after being manufactured, had had the duty charged upon it, and that such duty was paid; that it was then deposited by A., the maltster, with the defendant, upon a contract with him, that he was to accept bills of exchange drawn by A., and that the malt was to be held by him as a pledge for the payment of them, and in case the bills were not paid, he was to be at liberty to sell the malt; that the bills first accepted were renewed, but before the renewed bills became due the malt was seized:—Held, that the malt was seizable in the hands of the defendant, under 23 Geo. 3, c. 37, s. 21, as goods in the custody or possession of a person in trust for the maltster, chargeable with duties of excise in arrear and owing from such maltster, such goods having been, whilst in the hands of A.,

liable, not only for the specific duties chargeable upon them (which had been paid), but for other duties, for which A. was responsible at that time, and remaining so at the time of the seizure. *Att.-Gen. v. Trueman*, 11 M. & W. 694; 13 L. J., Ex. 70.

Tradesmen's Returns.—A tradesman kept, at his private residence, articles liable to duties under 43 Geo. 3, c. 161. He carried on his business in two shops in different districts, one in the parish of St. B., the other in the parish of M. in London, but made no return of the articles at either shop:—Held, that he was bound to make a return at his shop in St. B., although he never slept there. *Att.-Gen. v. McLean*, 1 H. & C. 750; 32 L. J., Ex. 101; 9 Jur., N. S. 338; 8 L. T. 113; 11 W. R. 292.

But one penalty only is incurred by the omission in any one year to return several lists, and to make the return in several places. *Id.*

A tradesman's place of business is a place where he resides, or is within 43 Geo. 3, c. 161, s. 27. *Id.*

Fraudulent Import Entries.—By 22 & 23 Vict. c. 37, s. 6, any person who shall cause to be imported goods of one denomination concealed in packages of goods of any other denomination shall be liable to a penalty. By s. 8, the word "importer" in any act relating to the customs is to apply to and include any owner or other person for the time being possessed of or beneficially interested in any goods imported:—Held, that the interpretation of the word "importer," in s. 8, is not to be applied to the phrase, "cause to be imported," in s. 6; but that these latter words are only applicable to a person who has ordered the goods, or otherwise, in fact, caused them to be imported. *Budenburgh v. Roberts*, 1 L. R., C. P. 575; 35 L. J., M. C. 235; 15 L. T. 387; 14 W. R. 992.

Held, also, that to constitute the above offence, it was not necessary that the goods of either denomination should be subject to duty on importation. *Id.*

— **Forfeiture.**—The Customs Duties Act, 1871 (New South Wales), s. 8, only supersedes the mode of ascertaining the value of goods in which ad valorem duties are payable under the Customs Regulations Act, 1845, by a new system of verification; and does not otherwise repeal the last-mentioned act. An erroneous declaration under s. 8 is a ground of forfeiture, for such declaration contains the entry referred to by ss. 13 and 18 of the former act. *Prince v. Duncan*, 5 L. R., P. C. 1; 43 L. J., P. C. 14; 30 L. T. 276; 22 W. R. 270.

Where certain goods contained in a package have been omitted from such declaration of value, the whole package is subject to forfeiture; such omission amounting to a misdescription under s. 13. *Id.*

A libel or an information in which both the above statutes are mentioned, and facts and charges are alleged in a manner to support a case under either statute, is sufficient although it does not distinctly allege the law under which the goods are to be forfeited. *Id.*

5. SMUGGLING.

a. Acts of.

Transfer from Foreign Vessel.—On an in-

formation for penalties on 6 Geo. 4, c. 108, s. 45, it was proved, that about two miles from shore, but within the limits of the port of Dover, as set out by commissioners under 13 & 14 Car. 2, c. 11, s. 14, goods were transferred from a foreign vessel without payment of duties, to boats, which conveyed them within the low-water mark:—Held, that whether or not the transfer from the vessel to the boats was or was not within the United Kingdom, there was an illegal unshipment within the statute. *Att.-Gen. v. Tomsett*, 2 C., M. & R. 170; 5 Tyr. 514; 1 Gale, 147.

Fraudulent Landing under Bill of Sight.]—Where customizable goods were landed by bill of sight under 3 & 4 Will. 4, c. 52, s. 24, and were afterwards removed without payment of duties, and without a perfect entry having been made of them pursuant to that statute, they were in the situation, for all purposes, of goods illegally unshipped; and all persons who assisted in removing or harbouring them, knowing due entry not to have been made, were liable to the penalties imposed by 3 & 4 Will. 4, c. 53, s. 44. *Att.-Gen. v. Hurel*, 11 M. & W. 585; 12 L. J., Ex. 413.

Where goods are landed fraudulently under a bill of sight, it is no protection against penalties. *Att.-Gen. v. Hawkes*, 1 C. & J. 121.

Evidence of being concerned in.]—The master of a homeward-bound vessel coming up the Thames, proved to have hired and sent off a boat and men, accompanied by one of his own crew, to bring away certain boxes of foreign and British glass, lying on the sands on the Essex coast, to be landed at Woolwich, which they found and brought as far as Gravesend, where the whole was seized by the custom-house officers:—Held, sufficient evidence of being concerned in unshipping foreign glass without payment of duty, and in unshipping British glass shipped for exportation, subjecting the master of the vessel to the penalties for both those offences, although the whole was one transaction. *Att.-Gen. v. Twiss*, 6 Price, 198.

An owner of a vessel, who knowingly let it for the purpose of fetching goods to be landed without payment of duty, was, if the goods were so landed, liable to penalties under 8 & 9 Vict. c. 87, s. 46, as a person concerned in the illegal unshipping of goods. *Att.-Gen. v. Robson*, 5 Ex. 790; 20 L. J., Ex. 188.

Delivery out of Warehouse.]—The king's warehouse was a warehouse within 3 & 4 Will. 4, c. 53, s. 44, prohibiting the illegal removal of goods from any warehouse or place of security in which they shall have been deposited. *Lowe v. Att.-Gen.*, 2 C., M. & R. 544; 1 Gale, 249; 5 Tyr. 1133.

An importer of goods from a foreign country is liable, on the importation, to the duties of customs payable thereon, and this liability is not affected by 3 & 4 Will. 4, c. 57, the effect of which is only to give the merchant, in the case of goods warehoused under it, time for payment of the duties until the goods are entered for home consumption. *Att.-Gen. v. Ansted*, 12 M. & W. 520; 13 L. J., Ex. 101.

If a merchant has obtained goods from a bonded warehouse without making any entry for home consumption, and without the duties

having been paid, he is liable to an information for the duties; and it is no answer to it that a custom-house agent, employed by him to make the entry and pay the duties, misappropriated the money, and fraudulently obtained the goods. *Id.*

Manner of Package.]—By 22 & 23 Vict. c. 37, s. 6, any person who shall cause to be imported goods of one denomination concealed in packages of goods of any other denomination shall be liable to a penalty. By s. 8, the word "importer" in any act relating to the customs is to apply to and include any owner or other person for the time being possessed of or beneficially interested in any goods imported:—Held, that the interpretation of the word "importer," in s. 8, is not to be applied to the phrase, "cause to be imported," in s. 6; but that these latter words are only applicable to a person who has ordered the goods, or otherwise, in fact, caused them to be imported. *Budenburgh v. Roberts*, 1 L. R., C. P. 575; 35 L. J., M. C. 235; 15 L. T. 387; 14 W. R. 992.

Nature of Goods.]—Held, also, that to constitute the above offence it was not necessary that the goods of either denomination should be subject to duty on importation. *Id.*

The 6 Geo. 4, c. 107, s. 52, provides that certain spirits and tobacco shall be absolutely prohibited to be imported, unless, if spirits, in casks of not less than forty gallons, or in cases of not less than three dozen quart bottles; and, if tobacco, and from the East Indies, in hogsheads, &c. of 100 lbs., and from other places in hogsheads, &c. of 436 lbs. each; and by s. 128, all such goods whose importation is thus restricted on account of the packages shall be deemed prohibited goods. A count stating that the defendant imported spirits and tobacco in casks and cases of less than the legal size, and harboured and concealed the same, knowing no duty had been paid or secured thereon, was bad, for the prohibition of such import was absolute. *Att.-Gen. v. Bell*, 1 C. & J. 237; 1 Tyr. 52.

On an information under 6 Geo. 4, c. 108, s. 45, for penalties for harbouring foreign spirits and tobacco, liable to payment of duty on importation, and which had been imported, the duties not having been first paid or secured, the jury found that the goods were imported in smaller packages and casks than allowed by law, and not in order to be warehoused; and, also, that the defendant harboured them, knowing the duties thereon not to have been paid:—Held, that they were goods prohibited to be imported, and were therefore improperly described in the information. *Att.-Gen. v. Key*, 2 Tyr. 65; 2 C. & J. 2; 1 C. & J. 159.

Liability for Acts of Servant—Concealment.]—Where a trader harbours and conceals smuggled goods, he is liable in penalties for the illegal act of his servant done in the conduct of the business with a view to protect the smuggled goods, though he is absent at the time, and the act is done by the servant upon the exigency of the occasion when the goods are discovered. *Att.-Gen. v. Siddon*, 1 C. & J. 220; 1 Tyr. 41.

b. Forfeiture.

— **Vessel Hired by Admiralty.]**—A vessel

hired by the Lords Commissioners of the Admiralty, and employed to cruise against smugglers, the master and crew of which were appointed by the owner, but which was placed under the superior command of a captain appointed by the board, is forfeitable for an act of smuggling committed on board by such admiralty captain as well as by the owner's master and crew. *Blewitt v. Hill*, 13 East, 13.

— **From what Time.**—A vessel is forfeited from the time of an act of smuggling, so as to avoid any alienation after that time, though before the condemnation. *Locker v. Offley*, 1 T. R. 260.

If a foreign vessel, having on board goods, spirits, &c., which she had unshipped at more than a league from the shore, during the same voyage appeared within one league, she was liable to forfeiture by 3 & 4 Will. 4, c. 53, s. 2. But she incurred the forfeiture in such case only by coming within the distance during the same voyage, and not by doing so in any subsequent and distinct voyages. *Att.-Gen. v. Schiers*, 2 C., M. & R. 286; 1 Gale, 223; 5 Tyr. 1029.

Seizure of Goods.—Contraband goods may be seized in the river before they are landed or offered for sale. *Smyth v. Reynolds*, 2 Wils. 257.

c. Contracts for Smuggled Goods.

Illegality of.—Upon a contract for smuggled goods, though they are received, the money cannot be recovered. *Thomson v. Thomson*, 7 Ves. 493.

Prohibited Goods sold Abroad—Delivery Complete.—An action will lie for goods sold abroad which are prohibited here, if the delivery of them is complete abroad, though the vendor knows they are to be smuggled into England. *Holman v. Johnson*, Cowp. 341.

A foreigner selling and delivering goods abroad to a British subject may recover the price, although he knows, at the time of the sale and delivery, that the buyer intends to smuggle them into this country. *Pellecat v. Angell*, 2 C., M. & R. 311; 1 Gale, 187; 5 Tyr. 945.

An inhabitant of Guernsey cannot recover in the courts of this country the price of goods sold by him there, if he knew it to be the buyer's intention to smuggle the goods into England, and gave him assistance for that purpose. *Clugas v. Penaluna*, 4 T. R. 466.

An action will not lie for smuggled goods sold abroad, if the vendor is to deliver them in England, or if they are only to be paid for in case the vendee succeeds in landing them. *Clarke v. Sher*, Cowp. 334; 2 Dougl. 698, n.

Nor can the vendor of goods abroad, who has packed them in a particular manner by the order of the buyer, for the purpose of smuggling them into this country, and knew at the time that they were to be smuggled, recover the value against the buyer, although he was not concerned in the risk of the importation. *Waymell v. Read*, 5 T. R. 599; *S. P.*, *Bernard v. Reed*, 1 Esp. 91.

Record of Condemnation.—A record of condemnation of goods in the Exchequer for being smuggled is a good defence to an action for goods sold and delivered for the same goods.

Thomas v. Withers, 5 T. R. 117. And see *Hennel v. Perry*, 5 T. R. 117.

Action against Carriers.—In an action against carriers for the loss of goods delivered to them in Ireland to be conveyed to England, the question was, whether the importation of the goods was illegal unless they had been entered at the custom-house:—Held, that, as illegality can never be presumed, it lay upon the carriers, who raised the question, to prove that the goods had not been entered. *Sissons v. Dixon*, 8 D. & R. 526; 5 B. & C. 785.

In an action for not accounting for goods delivered in this country to the master of a ship to be sold by him abroad, it is no defence that they were exported without paying the duties, unless it is shown that the evasion formed part of the agreement. *Cutlin v. Bell*, 4 Camp. 183.

Bill of Exchange.—If the importation of certain goods is prohibited and the plaintiff sells such goods to A., who indorses a bill of exchange to him in payment, he cannot recover on that bill against the acceptor, although there was no evidence that he was the importer of the prohibited goods. *Billard v. Hayden*, 2 C. & P. 472.

d. Proceedings.

Jurisdiction—Condemnation of Ship.—Under the 18 & 19 Vict. c. 96, s. 28, which imposes a penalty of 100*l.* on every person found on board a ship "liable to forfeiture" under the Customs Act, the condemnation of the ship by a court of competent jurisdiction is not a condition precedent to a magistrate's power to convict in the penalty. *Weale v. Brown*, 4 H. & C. 705; 15 L. T. 228.

— **Position of Vessel.**—Where two persons were found and apprehended on board a smuggling boat, under 57 Geo. 3, c. 87, s. 5, whilst afloat in the harbour of F., which had an exclusive local jurisdiction; and, after being taken on shore and detained two days there, were carried on board again, and conveyed to the port of D., where they were convicted by two justices of that town, pursuant to 45 Geo. 3, c. 12, s. 7; 57 Geo. 3, c. 87; and 3 Geo. 4, c. 110:—Held, that such conviction was illegal. *Kite, Ex parte*, 2 D. & R. 212; *S. C.*, nom. *Kite and Lane's case*, 1 B. & C. 101.

A vessel liable to forfeiture under 6 Geo. 4, c. 108, s. 3, was seized on the River Orwell, where the justices of Ipswich had jurisdiction, and a person found on board of the vessel was taken to Harwich, and prosecuted before two justices of that place, who convicted him in a penalty of 100*l.* for having been found on the high seas on board a vessel liable to forfeiture:—Held, that the justices of Harwich, being justices at the first place on land to which the parties were carried, had jurisdiction to try the offence. *Nunn, In re*, 8 B. & C. 644; 3 M. & R. 75.

When the vessel was first boarded, she was just entering the harbour of Harwich:—Held, that, in the absence of all other evidence, a person then found on board might properly be found to have been on board on the high seas. *Id.*

Power of Mitigating Penalties.]—The power of mitigating the penalty imposed upon an offender against the Customs Acts, given to the magistrate by the 16 & 17 Vict. c. 107, ss. 263, 280, does not apply to the case of a person who has been detained, and taken before a magistrate, under 18 & 19 Vict. c. 96, s. 28, for "having been found or discovered to have been on board a ship, having contraband goods on board;" and in such case, upon the confession of the offender, or proof upon oath of the offence, the magistrate is bound to convict him in the full penalty of 100*l.* imposed by s. 28, and the offender must thereupon immediately pay the same without any mitigation under 16 & 17 Vict. c. 107, s. 281, or be committed to gaol in default. *Bond v. Jackson*, 20 L. T. 327.

Detention of Persons—Habeas corpus.]—A prisoner in custody of an officer of customs, on a charge of smuggling, and brought up by habeas corpus at common law, may controvert the truth of the return of the writ, on affidavit, by virtue of 56 Geo. 3, c. 100, s. 4. *Beeching, Ex parte*, 6 D. & R. 209; 4 B. & C. 136.

Without Warrant.]—Where several persons were taken into custody after an engagement at sea between a revenue cutter and a vessel suspected to be a smuggler, and of which the prisoners were the crew, and were delivered on board a king's ship, and detained for fourteen days on suspicion of murder, but without any warrant, and were afterwards brought up by habeas corpus to be discharged; and it appeared from the return that there was cause to suspect them of felony: the court refused to discharge them, but directed them to be committed to the custody of the marshal of the Marshalsea, in order that they might be taken before a competent tribunal, to be examined touching the matters contained in the return, and to be further dealt with according to law. *Krans, Ex parte*, 2 D. & R. 411; 1 B. & C. 258.

Information.]—An information under 8 & 9 Vict. c. 87, ss. 82, 83, 107, might be laid before one justice of the peace. *Reg. v. Russell*, 3 New Sess. Cas. 368; 13 Q. B. 237; 18 L. J., M. C. 106; 13 Jur. 259.

Goods, the importation of which was prohibited when coming from particular places, might, under 3 & 4 Will. 4, c. 53, s. 30, be described in an information for penalties, as goods liable to, and unshipped without, payment of duty, and the defendant might be charged with having been concerned in the unshipping, the duties not having been first paid or secured, although it appeared that they were in fact imported from a place to which the prohibition applied. *Att.-Gen. v. Graves*, 2 C., M. & R. 669; 1 Tyr. & G. 48.

Bribery.]—An information stating that H. was a person employed in the service of the customs, that it was his duty, as such person so employed, to seize certain goods, and that the defendant offered to bribe H. to violate such duty, is bad in arrest of judgment, for not stating the facts out of which the legal duty arose. *Reg. v. Everett*, 2 M. & R. 35; 8 B. & C. 114.

Evidence—Trial for Obstruction of Officer.]—Upon the trial of an information for obstructing

a custom-house officer in the execution of his duty in seizing smuggled goods, the defendant was not allowed to inquire the name of the informer, or dispute the fact of the goods being smuggled. *Reg. v. Akers*, 6 Esp. 125.

Being Concerned in Unshipping Goods.]—An information under 3 & 4 Will. 4, c. 53, s. 44, charged a defendant with being concerned in the unshipping of goods, the duties on which had not been paid; with knowingly harbouring goods imported and illegally unshipped without payment of duties; and with other offences under that section. It appeared, at the trial, that a practice had prevailed at the custom-house of allowing the owners of imported goods to take them away without payment of duty at the time, an entry of them having been previously made in a book kept by the officers; and that the fraud complained of had been effected by a clerk of the defendant's removing some of the leaves from the custom-house book, and substituting others containing false entries of the quantity of goods imported. There was no direct proof that this fact was known to the defendant, but he derived benefit from the fraudulent transactions:—Held, that the jury might infer that the defendant was privy to the fraud. *Reg. v. Dean*, 12 M. & W. 39; 13 L. J., Ex. 33.

Convictions—Evidence.]—In a conviction under 8 & 9 Vict. c. 87, s. 50, for being found in a vessel liable to forfeiture under s. 2, as having on board prohibited goods, it was necessary to negative the exemptions in s. 4. *Van Boven's case*, 9 Q. B. 669; 2 New Sess. Cas. 492; 10 L. J., M. C. 4; 11 Jur. 119.

The 3 & 4 Will. 4, c. 53, s. 44, enacts, that every person who shall be concerned in the unshipping of the goods, the duties for which have not been paid, shall forfeit either the treble value thereof, or be liable to the penalty of 100*l.* The defendant and his partner having been separately convicted of the same offences:—Held, that each was liable to the penalties imposed by the act. *Reg. v. Dean*, 12 M. & W. 39; 13 L. J., Ex. 33.

Indictment.]—The being concerned in unshipping goods prohibited to be imported into the United Kingdom; and the being concerned in importing foreign goods, contrary to statute, are not indictable offences. *Att.-Gen. v. Radloff*, 10 Ex. 84; 2 C. L. R. 1116; 23 L. J., Ex. 240; 10 Jur. 555.

6. OFFICERS OF CUSTOMS AND EXCISE.

Appointment.]—It is part of the ancient prerogative of the crown, as incident to the duty of customs, to appoint officers to gauge all gaugeable articles imported into the kingdom for sale or otherwise. *London (Mayor) v. Long*, 1 Camp. 24.

Duties of—Arrest and Detention.]—Under 7 & 8 Geo. 4, c. 53, officers of excise may do all that is reasonable by way of arrest and detention for the purpose of having the matter adjudicated upon by a justice of the peace. *Evans v. M'Loughlan*, 4 Macq. H. L. Cas. 89; 7 Jur., N. S. 1253.

Seizure.]—The plaintiff's wheat was seized as

a distress for an excise penalty, which he then paid. There was no evidence that he demanded the wheat back; but after ten days the officers brought it back in an open cart damaged, and part lost:—Held, that the officers were not bound to re-deliver the wheat without being requested, and that they were not liable for the negligence in bringing it back, as no count in the declaration alleged that particular misfeasance. *Hutchins v. Morris*, 6 B. & C. 464; 9 D. & R. 499.

A custom-house officer has authority to seize uncustomed goods, with the carriage and horses carrying off the same, though out of the limit of the particular port of which he is denominated an officer in his deputation from the commissioners of customs. *Rex v. Barfoot*, 13 East, 506.

Search.—Excise officers went with a search warrant, and, at the desire of the party, gave it him to peruse, when he refused to return it:—Held, that they had a right to take it from him, and even to coerce his person to obtain the possession of it, provided they used no more violence than was necessary. *Rex v. Milton*, 3 C. & P. 31; *S. C.*, nom. *Rex v. Milton*, M. & M. 107.

A writ of assistance was addressed to certain officers therein mentioned, and to all other his Majesty's officers, ministers, and subjects in England and Wales; it set out the commission of the officers of the customs, which empowered them to enter and search any house, shop, &c., where smuggled goods were or were suspected to be concealed, to appoint officers, &c., and to do all other things necessary for his Majesty's service in such cases, and according to law; and it commanded the several persons to whom it was directed to permit and suffer the commissioners of customs, their deputies, servants and officers, to enter and search the houses, shops, &c., where smuggled goods were or were suspected to be concealed, and to do all things which ought to be done in that behalf, according to the commission and to the laws of the realm; and all persons addressed by the writ were to assist in the execution of the premises:—Held, that this writ did not confer a general and absolute authority to enter and search houses for smuggled goods, but that entry and search must be justified by reference to the event, or to probable cause. *Rex v. Watts*, 1 B. & Ad. 166.

In searches by excisemen, where the presence of a peace officer is required, an officer by reputation attending the rotation justices is not sufficient. *Hill v. Barnes*, 2 W. Bl. 1135.

Entries.—The practice of making prime and post entries at the custom-house is legal and valid. *Timson v. Nodin*, 2 W. Bl. 963.

Actions against.—An action for money had and received does not lie against a revenue officer to recover an over-payment. *Whitebread v. Brooksbank*, Cowp. 69; Lofft, 529.

Nor will it lie against a person who receives money as a collector in a legal office, or as an exciseman or a custom-house officer, and duly pays it over. *Id.*

Nor against an excise officer to recover duties received by him after the act imposing them is repealed, if he has paid them over to his superior. *Greenway v. Hurd*, 4 T. R. 553.

But if a consignee, for the purpose of getting

his goods delivered to him pays more than the net weight amounts to, he may recover back the surplus. *Geraldes v. Donison*, Holt, 346.

— **Non-feasance.**—A collector of customs, appointed by the commissioners under 3 & 4 Will. 4, c. 51, s. 6, to collect duties on articles coming into the kingdom, and on payment sign bills of entry, which are a warrant for delivery of such articles to the party paying, is not a mere servant of the commissioners, but a substantive and an immediate officer of the crown; and his functions as collector are ministerial. Therefore, he is liable in an action for non-feasance in the exercise of his office, as for refusing to sign such bill of entry without payment of an excessive duty. *Barry v. Arnaud*, 10 A. & E. 646; 2 P. & D. 633.

— **Refusal to Sign Bill of Entry—Measure of Damages.**—In an action against a collector of customs for refusing to sign a bill of entry for landing a cargo of foreign wheat, on which no duty was payable by law, the proper measure of damages is the amount of loss sustained by plaintiff by reason of a subsequent fall in the price of wheat. *Barrow v. Arnaud*, 8 Q. B. 595; 10 Jur. 319—Ex. Ch.

Trespass.—An action of trespass lies against an officer of excise for an unsuccessful search after run goods under the usual warrant of two commissioners, obtained on his own information. *Bostock v. Saunders*, 2 W. Bl. 912; 3 Wils. 434. Condemnation of goods in the Exchequer is so conclusive, and so alters their property, that trespass will not lie against the officer who seized them to try the point of forfeiture again. *Scott v. Shearman*, 2 W. Bl. 977.

The plaintiff having landed goods liable to duty at the custom-house, they were taken possession of by custom-house officers, for the purpose of examination, and detained by them, upon a misapprehension that they were prohibited, and liable to forfeiture. They were afterwards returned to the plaintiff:—Held, that the officers were not liable in trespass. *Jacobson v. Blake*, 6 M. & G. 919; 7 Scott, N. R. 772; 13 L. J., C. P. 89; 8 Jur. 272.

An excise officer is not liable to an action for breaking and entering a house to search for run goods under a warrant from the commissioners, though no goods are found. *Cooper v. Booth*, 3 Esp. 135; 4 Dougl. 339; 1 T. R. 535, n.

— **Evidence.**—Upon not guilty in trespass, excise officers executing a body warrant, issued by the commissioners, may give the special matter in evidence. *Wood v. Chessel*, 2 W. Bl. 1254.

— **Justification.**—In order to shew that the defendant, an excise officer, entered the plaintiff's house, the defendant's affidavit was put in, by which he stated that he entered the house, by virtue of a magistrate's warrant, to search for malt that had not paid duty:—Held, that the putting in of this affidavit by the plaintiff did not make out a defence for the defendant, as the affidavit did not state that the warrant was granted upon oath made by an officer of excise, as required by 7 & 8 Geo. 4, c. 53, s. 34. *Davis v. Mosley*, 1 C. & K. 710.

III. STAMPS.

1. AGREEMENTS.

a. Generally.

Nature of Instrument.]—For the purposes of stamp duty it is requisite to ascertain the legal effect and meaning of an instrument, and the description of it given by the parties thereto is immaterial, and there can be no estoppel. *Limmer Asphalt Paving Company v. Commissioners of Inland Revenue*, 1 L. R., Ex. 211; 41 L. J., Ex. 106; 26 L. T. 633; 20 W. R. 610.

Where an instrument is capable of being viewed in two different aspects, in one of which it is liable to stamp duty at one rate, and in the other of which it is liable to stamp duty at a different rate, such instrument may be admitted in evidence, where it is relied upon in the aspect in which it is properly stamped, although it is not duly stamped in the other aspect. *Buck v. Robson* (3 Q. B. D. 686), *Bryce v. Bannister* (3 Q. B. D. 569), and *Fisher v. Calvert* (27 W. R. 301), observed upon. *Adams v. Morgan*, 12 L. R., Ir. 1.

An "agreement, minute, or memorandum of agreement," is liable to be stamped only where the instrument is per se binding on the parties to it. *Ree v. St. Martin, Leicester*, 4 N. & M. 202; 2 A. & E. 210.

An agreement signed by the plaintiff only is, as against him, valid in point of law as an agreement, and must therefore be stamped. *Hughes v. Budd*, 8 D. P. C. 478; 4 Jur. 654.

Where a document has several objects, of which some are merely auxiliary to the main one, the amount of stamp duty is to be measured by the principal object. *Walker v. Giles*, 6 C. B. 662; 18 L. J., C. P. 323; 13 Jur. 588.

Draft Agreement never Executed.]—A company of which the plaintiff and the defendant were both directors, occupied a house belonging to the plaintiff. A draft agreement, prepared by the plaintiff's attorney, was submitted to the solicitors of the company, and by them approved and returned; and at a subsequent meeting of the directors a resolution was made, empowering the solicitors to sign the agreement on behalf of the company. The agreement, however, was never executed. In an action for use and occupation, the plaintiff offered the draft, not as an agreement binding per se (it being neither dated, stamped, nor signed), but for the purpose of shewing that the occupation of the premises was to be by the other directors, exclusive of himself:—Held, that the draft was inadmissible for want of a stamp, inasmuch as it could only be relied on as a proof of the special agreement, the plaintiff's position precluding him from maintaining an action against a co-director upon an implied contract. *Chadwick v. Clarke*, 1 C. B. 700; 14 L. J., C. P. 233.

In an action by the indorsee against the drawer of a bill of exchange, the defence was that time had been given to the acceptor. To meet the defence, a copy of a paper that the defendant had promised to sign was offered. By this the defendant consented to the plaintiff's using any means to obtain payment from the acceptor, without prejudice to his right to recover from the defendant as drawer:—Held, that this

paper did not require a stamp. *Hill v. Johnson*, 3 C. & P. 456.

Two Agreements in one Instrument.]—A contract in writing, by which, after reciting that A. had purchased a piece of ground, with four messuages thereon built, in one of which the plaintiff resided, it was agreed, that the plaintiff should continue to reside therein during the residue of A.'s term therein, provided the plaintiff should so long live, paying the rent of 1s.; and in the event of the plaintiff's dying during the term, leaving his wife him surviving, A. agreed to allow her to reside therein on the same terms; and A. further agreed to assign all his interest in the premises so purchased to the plaintiff, on payment within seven years of 140l., together with all expenses:—Held, in an action by the plaintiff for breach of the agreement to assign the premises, that a lease stamp was not sufficient, and that an agreement stamp was also necessary. *Lovelock v. Franklyn*, 8 Q. B. 371; 15 L. J., Q. B. 146; 10 Jur. 246.

By a written agreement, not under seal, it was agreed that A. should rent of B. a ferry for 6l. 6s. per annum. The same document contained the following memorandum: "Be it also known, that A. has this day bought of B. the great ferry-boat, for 20l.," to be paid by four yearly instalments of 5l. each:—Held, that the document did not require a stamp. *Mayfield v. Robinson*, 7 Q. B. 486; 14 L. J., Q. B. 264.

Where one Agreement Fulfilled.]—Where, in an action to recover a stake of 100l., due upon a horse-race, a document was put in evidence, bearing one stamp, but two agreements, one of which had been fulfilled, the other being that upon which the action was brought:—Held, that the stamp must be taken to apply to the latter. *Erans v. Pratt*, 4 Scott, N. R. 378; 1 D., N. S. 505; 3 N. & G. 759; 6 Jur. 652.

To prove a contract, a paper was produced bearing a stamp, which had been affixed to it for the purpose of the action:—Held, that the circumstance of the same paper having upon it another agreement which had previously been carried into effect, and to which the stamp was never intended to apply, did not render it inadmissible. *Erans v. Pratt*, 4 Scott, N. R. 378; 1 D., N. S. 505; 3 M. & G. 759; 6 Jur. 152.

I O U—Promise to Pay Third Party.]—The following document does not require a stamp, either as an agreement or as a promissory note.—"1839, Nov. 11, I O U 45l. 13s., which I borrowed of Mrs. M., and to pay her five per cent. till paid. R. T." *McLanotte v. Teasdale*, 13 M. & W. 216; 13 L. J., Ex. 358; *S. P., Taylor v. Steele*, 16 M. & W. 666; 16 L. J., Ex. 177; 11 Jur. 806.

Agreement in Form of Promissory Note.]—A promise to pay on a contingency is a promissory note within the Stamp Act, 1870; it must, therefore, be stamped before execution, and cannot be treated as an agreement and stamped after execution. *Yeo v. Dawe*, 32 W. R. 203.

In 1842, W. and S., type-founders, were indebted to G., the plaintiff's testator, in 6,000l., previously to and after which time they supplied the defendant with type, being paid by him quarterly. W. and S. being applied to by G. for payment, delivered to him the following order, signed by

them, and directed to the defendant:—"24th September, 1842. Dear Sir,—We hereby authorize you to pay, on our account, to the order of G., 6,000*l.*, at the following periods, deducting the amount from the quarterly accounts for type furnished to you, and to Messrs. E. and S., viz., 11th November, 1843, 1,000*l.*; 11th November, 1844, 1,000*l.*; 11th November, 1845, 1,000*l.*; 11th November, 1846, 1,500*l.*; and 11th November, 1847, 1,500*l.*—6,000*l.* Yours, W. and S." The defendant returned the following answer:—"To W. G. Dear Sir,—Having received the foregoing authority from W. and S., I undertake to make you the payments as above stated. A. S., 24th September, 1842." The first two instalments, up to November, 1844, were duly paid to G. Type continued to be furnished by W. and S. to the defendant up to December, 1845, quarterly payments for which were duly made by the defendant to W. and S. The quarterly account for type, up to the 31st December, 1845, amounting to 65*l.* 9*s.* 9*d.*, was also paid by the defendant to W. and S., but the 1,000*l.* instalment, due on the 11th November, 1845, was not paid to G. In December, 1845, the defendant stated that he considered himself bound to see all the amounts due from himself to W. and S. applied to the discharge of their debt due to G.:—Held, that the document of the 24th December, 1842, required an agreement, and not a promissory note or a bill, stamp. *Hamilton v. Spottiswoode*, 4 Ex. 200; 18 L. J., Ex. 393.

An agreement, bearing a half-crown stamp, under 14 & 15 Vict. c. 97, for the sale of a lease, concluded with the following clause, signed by both parties:—"The plaintiff doth, at the same time and place, lend to the defendant 84*l.* in cash, to be repaid by instalments:—"Held, not a note, and that the stamp was sufficient. *Mitchell v. Westover*, 14 Jur. 816; *S. P.*, *Follett v. Moore*, 4 Ex. 410; 19 L. J., Ex. 6.

Agreement to Pay Uncertain Amount.—An instrument by which a party promises to pay 65*l.*, and also all such other sums as by reference to his books he owed to another, with interest, requires an agreement stamp. *Smith v. Nightingale*, 2 Stark. 375.

Debenture or Promissory Note—Not under Seal—Payable to Order.—An instrument issued by a company incorporated under the Joint Stock Companies Acts, 1856 and 1862, purporting upon the face of it to be a "debenture," with coupons for the payment of interest half-yearly attached to it, and containing an engagement on the part of the company to pay "the amount of this indenture" to A. B. or order on a given day, with interest at five per cent., is under the Stamp Act, 1870, chargeable with a debenture stamp of 2*s.* 6*d.*, and not with a promissory-note stamp. *British India Steam Navigation Company v. Commissioners of Inland Revenue*, 7 Q. B. D. 165; 50 L. J., Q. B. 517; 44 L. T. 378; 29 W. R. 610.

Memoranda.—A draft agreement had on the back of it the following memorandum:—"We approve of this draft," and this was signed by the parties:—Held, that it did not require any stamp. *Doe d. Lambourn v. Pedgriph*, 4 C. & P. 812.

— **Evidence of Contract.**—The following

instrument, as being evidence of a contract, requires a stamp:—"I hereby acknowledge that I have held the estate called, &c., as tenant to F., at a yearly rent of 50*l.*, from the 4th July, 1837, the rent to be paid quarterly; and I further acknowledge to owe F. 60*l.* for the first year's rent, which was due on the 4th July instant. I have, on the signing hereof, paid the attorney of F. 6*d.* in part of the rent so due to him as aforesaid. A. B." *Doe d. Frankis v. Frankis*, 3 P. & D. 565; 11 A. & E. 792.

— **Previous Contract.**—A document which is not intended to operate as a binding contract, but is only used as evidence of a previous contract, is not within the statute, which imposes a stamp upon an agreement, whether used as evidence of a contract, or as obligatory upon the parties from its being a written instrument. *Beeching v. Westbrook*, 1 D. N. S. 18; 8 M. & W. 411; 10 L. J., Ex. 464.

— **Subsequent Admission.**—“Memorandum.—I have this day received of Mr. F. P. a bill for 27*l.* 10*s.*, at eighteen months' date, on condition that Mr. S. D. accepts the partnership beyond two years; but should Mr. D. give notice at the expiration of eighteen months, and not afterwards rescind the same, the bill to be null and void,”—is admissible without a stamp, not being an agreement, or any minute or memorandum of an agreement, or evidence of a contract within 55 Geo. 3, c. 184; first, because it was only evidence of the contract as a subsequent admission; and, secondly, because it only expressed the same consequence which the law would imply. *De Porquet v. Page*, 15 Q. B. 1073; 20 L. J., Q. B. 21; 15 Jur. 148.

Where Terms fixed.—The following document, given by a plaintiff to a defendant, requires a stamp as an agreement:—"August 2, according to Mr. H.'s (the defendant) request, the land at B. under Mr. E., I will be bound for till next Lady-day—Rent, 48*l.*" *Glover v. Halkett*, 2 H. & N. 487; 26 L. J., Ex. 416; 3 Jur. N. S. 1083.

The following memorandum requires a stamp:—"A. B. agrees to take the two frys of C. D. at 60*l.*; 5*l.* to be paid down, and the remainder of the money at three months from the above date. Harness and goodwill included in the above agreement." *South v. Finch*, 3 Bing. N. C. 506; 4 Scott, 293.

Deposit by Plaintiff—Memorandum by Defendant.—The plaintiff deposited with the defendant 500*l.* for a speculation in foreign stock, and the defendant signed the following memorandum:—"Bristol, August 14th, 1843. Memorandum. Mr. S. has this day deposited with me 500*l.* on the sale of 10,300*l.*, 3*l.* per cent. Spanish, to be returned on demand:—"Held, that this was not a promissory note, and did not require a stamp as such. *Sibree v. Tripp*, 15 M. & W. 23; 15 L. J., Ex. 318; *S. P.*, *Pancourt v. Thorn*, 9 Q. B. 312; 15 L. J., Q. B. 344; 10 Jur. 639.

Terms of Delivery.—A memorandum given by carriers at Dover, on the receipt of goods, in the following terms, viz.:—"Received of L. & Co. a paper parcel, directed to Messrs. H. B. & Co., 62, Lombard-street, value 260*l.*, which we agree to deliver to them to-morrow, fire and

robbery excepted—carriage paid here," and signed by them, is admissible without a stamp, although it was contended that it was an agreement, the subject-matter of which exceeded 20*l*. *Latham v. Rutley*, R. & M. 13.

A memorandum by a wharfinger of the receipt of goods, to be shipped and forwarded to the plaintiff in a particular manner, may be given in evidence for the purpose of shewing the terms on which they were received, without a stamp, although the value of the goods was above 20*l*., the wharfage being of a less amount. *Chadwick v. Sills*, R. & M. 15.

In an action on a contract to re-deliver, on request, wine which had been placed in the defendant's care, the plaintiff offered in evidence a writing, signed by the defendant (a wine merchant), in substance as follows:—"This is to certify, that M. has in his cellar belonging to H. (under whom the plaintiff claimed), that is paid for, twelve dozen of port wine." "March 5th, 1823. Received from H. five bottles of port," &c., "making in the whole," &c., "all the above wine paid for:—"Held, that such writing was admissible without a stamp, not being an agreement, nor any minute or memorandum of an agreement, nor evidence of a contract, within the statute. *Blackwell v. M'Naughtan*, 1 Q. B. 127.

Authority to Honour Acceptance.—The plaintiff sold goods to B., taking his acceptances for the price, and sent them to the defendant as B.'s agent, who consigned them to his partners abroad for sale. While these acceptances were running, the plaintiff doubting B.'s solvency, required additional security, whereupon B. wrote the following letter:—"Mr. W., of N., holding my acceptances for 1,100*l*., or thereabouts, for goods consigned by him, on my account, to your firms at Rio de Janeiro and Bahia, I hereby authorize and direct you, from and out of the remittances that you may receive against net proceeds of any consignments made by me to either of your firms, subsequent to the 1st May last, to pay such acceptances upon and as they become due, or afterwards, if previously to the receipt of such net proceeds of such consignments, the bills are not honoured by me:—"Held, that this letter did not require a stamp, either as an inland bill or as an agreement. *Walker v. Rostron*, 9 M. & W. 411.

Order to Pay over.—A. having goods at the wharf of B., which C. had conveyed there by ship, gave B. a paper by which he authorized him to sell the goods, and out of the proceeds to pay C. the balance due to him for freight, mentioning the sum: B. sold the goods and received the proceeds:—"Held, in an action by C. against B. for the sum mentioned in the paper, that the paper did not require a stamp. *Humphreys v. Briant*, 4 C. & P. 157.

A's attorney gives B. a written authority to pay money for A. This authority does not require a stamp, either as an agreement or as a power of attorney. *Parker v. Dubois*, 7 C. & P. 406; 1 M. & W. 30; 1 Gale, 366.

Request to Landlord's Bailiff.—The following document does not require an agreement stamp:—"I, N. F., do hereby request S. B., bailiff to my landlord, who, on the 4th November, 1848, having distrained my goods on the

premises which I now hold, for 100*l*., as rent due to S. B., and I request him to forbear the sale thereof until the 2nd February, 1849, to enable me to discharge the rent; and I hereby request, agree, and consent, that the goods so distrained shall remain at my proper cost in his possession upon the premises until the 2nd February, 1849, and I undertake to give up the same goods and not to replevy the same, and that this distress shall remain in full force during that time; and I undertake to give up peaceable possession of the premises and effects distrained on the 2nd February, 1849, and pay all costs and charges attending this distress." *Fishwick v. Milnes*, 4 Ex. 825; 19 L. J., Ex. 153; *S. P.*, *Hill v. Ramm*, 6 Scott, N. R. 571; 5 M. & G. 789; 12 L. J., C. P. 275.

Note by Broker to his Principal.—A note sent by a broker to his principal, of a purchase he had made, does not require a stamp, as a minute or memorandum or an agreement, although the subject of the purchase is above 20*l*. value, and not within any exemption from stamp duty. *Josephs v. Pebrer*, 1 C. & P. 341.

Auction—Memorandum by Auctioneer.—A written paper, signed by the auctioneer, and delivered to the bidder, to whom lands were let by auction, containing the description of the lands, the term for which they are let to the bidder, and the rent payable, must be stamped. *Ramsbottom v. Morley*, 2 M. & S. 445.

But a similar paper, not signed by the auctioneer or any of the parties, was not such a minute of the agreement as was required to be stamped, nor such a writing as would exclude parol evidence. *Ramsbottom v. Tunbridge*, 2 M. & S. 434.

Resolution of Company.—A resolution of a company or an association, for the appointment of a clerk or a secretary, at a certain salary, is not an agreement, nor a minute, nor a memorandum of an agreement, that need be stamped. *Vaughton v. Brine*, 1 Scott, N. R. 258; 1 M. & G. 359.

A minute of a resolution entered in the books of a joint-stock company, for the acceptance of a tender for work to be done for the company, is not a minute nor a memorandum of an agreement that need be stamped. *Lucas v. Beach*, 1 Scott, N. R. 350; 1 M. & G. 417.

But a minute of a resolution, which purported, on the face of it, to be an agreement that the plaintiff should have an additional sum for the extra trouble imposed on him by a deviation from the original line of road, and which was read over to the plaintiff, and was assented to by him, required an agreement stamp—per Rolfe, B., at nisi prius. *Lucas v. Beach*, 1 Scott, N. R. 350; 1 M. & G. 417.

Proposals and Acceptances.—Where a proposal was made in writing by A. to let a piece of land to B. on certain terms contained in a written agreement between B. and C., and A. afterwards agreed by parol that B. should have the land upon the terms proposed:—"Held, that the original proposal was receivable without a stamp. *Drant v. Brown*, 5 D. & R. 582; 3 B. & C. 665. And see *Edgar v. Blick*, 1 Stark. 464; *Turner v. Power*, M. & M. 131; 7 B. & C. 625.

Where a proposal made orally is assented to

in writing, the latter being evidence of an agreement, is not admissible without a stamp; as, where it is written by the defendant and signed by the plaintiff. *Hegarty v. Milne*, 14 C. B. 627; 23 L. J., C. P. 151; 18 Jur. 496.

If, after two parties have orally agreed to certain terms, one of them desires that they shall be put into writing, and the other writes them out in the form of a proposal, which is orally accepted, this does not require a stamp as an agreement. *Laing v. Smith*, 3 F. & F. 97.

In an action for work and labour, the defendant offered in evidence a proposal on his part, which was not finally acceded to, containing an estimate of the amount of the work:—Held, that it being a mere proposal and estimate, it might be read, although it was not stamped. *Penniford v. Hamilton*, 2 Stark. 475.

A letter, in which the defendant, who was proprietor of a theatre, wrote to a third person, saying, "F. must be satisfied with his salary until I know what turn the season takes," is not an agreement, and does not require a stamp. *Frazer v. Bunn*, 8 C. & P. 704.

The defendant directed the plaintiff, who was possessed of a patent for furnaces, to send him "a licence to use two of his patent furnaces, to be applied to a single plate, &c., for 25l., as agreed; the engineers' or furnace-builders' time, to superintend or fix the above order, to be paid six shillings a day:—Held, an agreement, and not a mere proposal. *Chanter v. Dickinson*, 2 D., N. S. 838; 6 Scott, N. R. 182; 5 M. & G. 253; 12 L. J., C. P. 147; 7 Jur. 89.

A manager of a theatre wrote to an actor, offering him an engagement, at a weekly salary of 2l. Some months afterwards the manager wrote to the actor, stating that his services would be no longer required, unless he would accept 30s. a week only, for the summer season. The manager, however, subsequently wrote to the actor as follows:—"I have received your letter, and, on reconsideration, will give you the same terms (2l.) per week for the summer season." In an action for the amount of his salary as an actor at the theatre:—Held, that the letters were only proposals, and did not require a stamp. *Hudspeth v. Yarnold*, 19 L. J., C. P. 321; 14 Jur. 578.

Pending a negotiation for a tenancy, the terms of which were arranged by parol, the landlord signed and delivered to the tenant the following memorandum:—"I shall be happy to allow Mr. B. to leave the apartments without any notice, if he finds anything which may at all lead him to suspect that there is any embarrassment in his landlord:—Held, that this was not such an agreement, or a minute of an agreement, as to require a stamp. *Bethell v. Blencowe*, 3 Scott, N. R. 568; 3 M. & G. 119; 10 L. J., C. P. 243.

Rules for the Government of a School.—Signed by Master.—The trustees of a free school drew up rules for the government of the school, prescribing also the terms upon which the master should hold or be dismissed from his office. These were signed by the trustees and by the master, who was already in office, and were produced by the trustees on the trial of a cause between them and the master (then dismissed), as "rules agreed upon at a meeting of the trustees:—Held, admissible without being stamped as an agreement. *Browne v. Dawson*, 4 P. & D. 355; 12 A. & E. 624.

Prospectus.—In an action by a schoolmaster for a sum of money in lieu of three months' notice of the removal of the defendant's sons from school, it appeared that the defendant's agent, having expressed a wish to place the defendant's sons under the plaintiff's care, received from the latter a prospectus, which stated that the terms were 60 guineas per annum, and that three months' notice, or payment, was required previously to the removal of a pupil. The plaintiff, at the time of delivering the prospectus, agreed, verbally, that the boys should be charged for at the rate of 50 guineas per annum each. The boys were thereupon sent to the plaintiff's, and were taken away without the stipulated notice:—Held, that the prospectus was a proposal, and not an agreement, and that no stamp was necessary. *Clay v. Crofts*, 20 L. J., Ex. 361.

Where the agreement on which the action is brought is contained in a prospectus of terms delivered by the plaintiff to the defendant, it is necessary to get that identical copy stamped which has been delivered. *Williams v. Stoughton*, 2 Stark. 292.

Several Letters.—Where a contract is contained in letters, it is sufficient if one of the letters bears a stamp, although on the part of one of the contracting parties the letters are written and signed by an agent. *Grant v. Maddox*, 15 M. & W. 737; 15 L. J., Ex. 104.

Where A., by letter, entered into an agreement with B., who became a party to the engagement by writing a memorandum at the bottom of the copy of the letter, and C. afterwards became guarantee for B. to A. by an indorsement on the back of the copy of the same letter, in which reference was made to the terms of the agreement on the other side of such copy:—Held, that only one stamp was necessary. *Stead v. Liddard*, 8 Moore, 2; 1 Bing. 196.

The defendant having purchased the lease of a house at a public auction, he afterwards wrote to the auctioneer requesting him to send the key, and stating that his auctioneer was desirous of taking an inventory of the fixtures. The auctioneers accordingly met, and disagreeing as to the valuation, appointed an umpire, to whom they inclosed an inventory, stating the fixtures to be the property of the plaintiffs, and valued to the defendant. The umpire made a valuation, and appraised the fixtures at a certain sum, and returned the inventory with an appraisal duly stamped. The defendant by letter afterwards requested the plaintiffs' auctioneer to remove the fixtures, which was done, and on the following day the defendant wrote to the plaintiffs that he would attend at the house and pay them the amount of the fixtures as settled by the appraiser. The first and last letters were signed by the defendant, but the first only was stamped:—Held, that one stamp was sufficient. *Hemming v. Perry*, 2 M. & P. 375.

A letter put in was stamped with a 30s. stamp; a second letter was offered by the defendant to shew that the contract was for a yearly tenancy. This letter was unstamped and was rejected:—Held, the rejection was proper, as if it was a separate agreement it required an agreement stamp; and if it was a portion of the same agreement, a stamp was necessary upon one of the letters. *Atherstone v. Bostock*, 2 Scott, N. R. 637; 2 M. & G. 511; 1 Drink. 96.

D., being the holder of several bills of exchange, and being indebted to the plaintiff, and also to R. and G., the plaintiff's agents, addressed to the latter as such agents a letter, wherein he proposed to hand over to them certain of these bills on receiving from them bills of lading for a cargo of wheat shipped on his order and for his account by the plaintiff. R. and G. received two of the bills of exchange, and wrote a letter to D., varying the terms of his proposal, and consenting to receive the bills generally on account when cashed. The first letter was stamped; the second was not stamped:—Held, that the first letter was the only evidence of the contract upon which the bills were delivered to R. and G., and therefore properly stamped. *Schultz v. Asley*, 2 Scott, 815.

Letters of Traders.—A letter written by a son who managed his mother's trade for her, to a creditor of hers, containing a promise to pay her debt, need not be stamped, and was exempted under 32 Geo. 3, c. 51. *Mackenzie v. Banks*, 5 T. R. 176.

Reference to other Document—Only one Agreement.—Where an agreement refers to another document, so that the two papers, in fact, form only one agreement, it is sufficient if one of the papers only bears an agreement stamp. *Peate v. Dickes*, 1 C., M. & R. 422; 5 Tyr. 116.

The following memorandum, signed by the plaintiff, was offered in evidence:—

"Total value of wheat grown, &c.	£94 10 8
Rent due to Mr. A.	53 10 0
Balance due to Mrs. M.	£41 0 8

and secured by the joint and several note of certain persons. This note is to be subject to the revised valuation of C. and D., and will be more or less than 41l. 0s. 8d., according as they value the corn. The note was given up to me this 20th August, 1844:—Held, that the agreement to which the memorandum referred being already in evidence, the memorandum itself was admissible without a stamp. *Marshall v. Powell*, 9 Q. B. 779; 16 L. J., Q. B. 5; 11 Jur. 61.

Stamped Instrument—Reference to Unstamped.—An instrument legally stamped is not vitiated by referring to instruments which are not stamped. *Duck v. Braddyll*, M'Clel. 217; 13 Price, 455.

Specification—Not Annexed.—A specification referred to in an agreement, but not annexed thereto, may be stamped as a separate instrument. *Briggs v. Peel*, 11 Jur. 611.

Demise—Covenants in Expired Lease—Schedule.—By an agreement of demise, the land was to be farmed according to covenants contained in an expired lease. The expired lease being produced in an action brought for not farming the land according to those covenants:—Held, that it was not a schedule, catalogue or inventory containing the conditions or regulations for the management of a farm, and therefore did not require a stamp. *Strutt v. Robinson*, 3 B. & Ad. 395.

Alteration of Instrument.—If an agreement has a penal clause added after the signature of

one party, it may nevertheless, under circumstances, only constitute one instrument, and so no new stamp be necessary. *Knight v. Crookford*, 1 Esp. 189.

Where the terms of a properly-stamped agreement were altered by a subsequent agreement, which was not stamped:—Held, that the latter agreement could not be read in evidence, nor could the plaintiff recover on the counts on the first agreement only. *Reed v. Deere*, 7 B. & C. 261; 2 C. & P. 624.

Sale by Auction—Several Lots.—If, on a sale by auction, the same person is declared the highest bidder for several lots, a distinct contract arises for each lot. *Emmerson v. Heelis*, 2 Taunt. 38.

Leasehold and copyhold premises were put up to auction in two separate lots, which were knocked down to the purchaser, and he signed the following memorandum:—"I hereby acknowledge that I have this day purchased by public auction Lots 1 and 2 of the estates mentioned in the annexed particulars, at 245l. (150l. for Lot 1 and 95l. for Lot 2)." Upon refusal of the purchaser to complete the purchase, the premises were resold, and an action was brought to recover the difference of the price:—Held, that the memorandum required two stamps. *Watling v. Horwood*, 12 Jur. 48.

Seemle, that if parties choose to divide their contracts, so as to lessen the amount of stamps, they may legally do so. *Hawkins v. Clutterbuck*, 2 C. & K. 810.

The same paper, containing two different contracts for the purchase of different lots by different persons, having one stamp affixed on that part of the paper which contains the contract of sale with the defendant, and to which the stamp officer's receipt for one penalty refers, is sufficient to legalize the evidence of such contract. *Powell v. Edmunds*, 12 East, 6.

Several Parties.—The several underwriters on the same policy have such a community of interest in the subject insured, that if they all agree to refer the demand of the assured on that policy, one stamp for the agreement to refer and one stamp for the award are sufficient. *Goodson v. Forbes*, 6 Taunt. 171; 1 Marsh. 525.

An agreement by several for a subscription to one common fund, such as for making a wet dock at Bristol, though several as to each subscriber, only requires one stamp. *Davis v. Williams*, 13 East, 232.

By a written agreement three persons bound themselves, that, in consideration of A. discharging a debt due from B. to C., amounting to 200l., with the costs thereupon, each of the three would severally pay 50l., and one-fourth part of such costs, and give a bond, bill, or note, for his own proportion:—Held, that the agreement required only one stamp. *Ramsbottom v. Davis*, 4 M. & W. 584; 7 D. P. C. 173.

A cargo of goods, part of which belonged to T. separately, and part to T. and W. as partners, being in the hands of the consignee, T., on application for both parcels, signed an undertaking in the name of T. and W. to pay freight for them, but commencing with, "I hereby engage to pay," and the goods were delivered to him. On an action against T. for the freight of his own parcel, the agreement was produced, with a single stamp impressed, and held admissible,

because, although the agreement related to the goods of the partnership as well as his own, he could not bind his partner as to the latter, but had made himself personally liable for the whole, and therefore the agreement was entire. *Shipton v. Thornton*, 1 P. & D. 216; 9 A. & E. 314.

Where several parties contract to do respectively different kinds of work set forth in a specification:—Held, that the contract is several, and that part of the specification only which relates to the work to be done by any one of the contractors, is part of the agreement of such contractor, and that the agreement may be stamped accordingly by him. *Briggs v. Peel*, 11 Jur. 611.

b. Matters amounting in Value to 20l.

Apparent Value.—On appeal against an order of removal, the appellants, to show that the pauper served more than forty days as an apprentice in the respondent parish with the assent of his master, produced a written paper, purporting to certify that the father of the pauper agreed to give his master eight shillings for the term of his apprenticeship:—Held, that there being nothing to shew that the value of the subject-matter of the agreement was 20l., it did not require a stamp. *Rea v. Enderby*, 2 B. & Ad. 205.

An agreement of reference, of all matters in difference in a cause, does not require a stamp when it does not appear that the matter of the agreement is of the value of 20l. *Lloyd v. Mansell*, 1 L. M. & P. 130; 19 L. J., Q. B. 192.

A memorandum does not require a stamp, if it does not appear affirmatively that it relates to a matter amounting in value to 20l. *Feltham v. Cartwright*, 7 Scott, 695.

Several Matters.—A memorandum signed by a bidder after his name had been marked against several lots at an auction, stating that he agrees to become the purchaser of the several lots set against his name, does not require a stamp, though the aggregate exceed 20l. in value, no single lot being of that price. *Roots v. Dormer (Lord)*, 4 B. & Ad. 77.

An instrument as follows:—"Memorandum.—Mr. B. has left in the cellar at &c. seventy-two barrels containing ale, in Mr. H.'s casks, which I agree to allow Mr. H. to take from my cellar at any time within three months from this date, by receiving one day's notice; and if left in the cellar beyond that time, Mr. B. or Mr. H., or whom it may concern, to pay rent or warehouse-room for the same. Dated this 4th day of August, 1842. J. S.," is admissible without a stamp, although the value of the goods exceeded 20l., the amount of rent (if any) being less. *Baldwin v. Alsager*, 13 M. & W. 365; 14 L. J., Ex. 34.

Limited Interest.—Where the subject-matter of an agreement is a limited interest, worth less than 20l. a year, in a thing worth more than 20l., the agreement does not require a stamp. *Doe d. Morgan v. Amos*, 2 M. & R. 180.

Agreement to confess Judgment.—An agreement to confess judgment for 30l. to secure 5l. and costs, was not an agreement for payment of more than 20l. within 23 Geo. 3, c. 58, s. 4, and

therefore need not be stamped. *Ames v. Hill*, 2 B. & P. 150.

Lease of Ferry and Sale of Boat.—Agreement in April, 1804, not under seal, between A. and B., that B. shall rent of A. a ferry called D. for 6l. 6s. per annum, to be paid half-yearly, for which A. is to have the sole use of the ferry, and whatever profit may accrue from it, for the time he holds the same. "Be it also remembered, that A. has this day bought of B. the great ferry-boat for 20l., to be paid by instalments of 5l. yearly, on April 6th, the first in 1805:—Held, that, as the instrument purporting to convey an incorporeal hereditament was not a lease, because not under seal, it did not require a lease stamp, and that, if the rent only was considered, the subject-matter of the agreement was not of the value of 20l., and, therefore, no stamp was necessary. *Mayfield v. Robinson*, 7 Q. B. 486; 14 L. J., Q. B. 264.

— **Memorandum of Sale not ancillary to Lease.**—Held, also, that the price of the boat could not be taken into consideration, the agreement as to that not being ancillary to the contract for letting, but being a distinct and separate memorandum of a bygone purchase of goods, and, in itself, subject to no stamp duty. *Id.*

Distress—Value not Apparent—Agreement for Withdrawal.—A landlord having distrained the goods of his tenant, withdrew from possession upon the tenant's signing the following memorandum:—"In consideration of your withdrawing the distraint upon the premises I hold of you, for one year's rent, due, &c., at the rate of 44l. per annum, and giving time for the payment of the rent until the 1st February next, I hereby authorize and empower you, on default being made by me in such payment, to re-enter and distrain for the rent, notwithstanding the withdrawal of the distraint now made by you; and I hereby declare your withdrawing the present distraint shall in no ways lessen, abridge, or prevent your again distraining upon the premises:—Held, not an agreement, or a minute or memorandum of an agreement, requiring a stamp; and that, if it was, it did not appear to be an agreement the subject-matter whereof was of the value of 20l. *Hill v. Ramm*, 6 Scott, N. R. 571; 5 M. & G. 789; 12 L. J., C. P. 275.

An indemnity, given on the withdrawal of a distress for 24s. rent, is receivable without a stamp, although the sum sought to be recovered under it exceeds 20l. *Cox v. Bailey*, 6 Scott, N. R. 798; 6 M. & G. 193.

Landlord and Tenant—Agreement to Re-occupy—Right of Occupation.—An instrument as follows:—"I, J. T., agree with W. M. to retake of him two acres of land from the 10th October, 1840, at which time my tenancy expires, until the 25th March, 1841, for 10l." Signed by J. T. only, and acted on by W. M., who allowed him to remain in possession according to its terms:—Held, not to be an agreement, whereof the matter was of the value of 20l., within 55 Geo. 3, c. 184, as the value of the subject-matter in such cases is not the value of the premises to be occupied, but the value of the right of occupation. *Doe d. Marlow v. Higgins*, 3 G. & D. 504; 4 Q. B. 367; 12 L. J., Q. B. 177; 7 Jur. 529; 5 P.,

Marlow v. Thompson, 1 D., N. S. 575; 11 L. J., Q. B. 150; 6 Jur. 300.

To give up Goodwill for 7l.—Penalty, 20l.—An agreement to give up a house and the goodwill of a business for 7l., and not to open a shop in the same line of business within one mile of the house, under a forfeiture of 20l., does not require a stamp, as being for a subject-matter of the value of 20l. *Pemberton v. Vaughan*, 10 Q. B. 87; 16 L. J., Q. B. 161; 11 Jur. 411; *S. P.*, *Emmerson v. Heelis*, 2 Taunt. 38.

Agreement to do Work.—The plaintiff agreed, in writing, with the defendant, to do the brickwork of a building for 1l. 1s. per rod, the defendant to find all materials:—Held, that the agreement did not require a stamp, it not appearing at the time of making it, that its value amounted to 20l., though the work done ultimately exceeded that amount. *Liddiard v. Gale*, 4 Ex. 816; 19 L. J., Ex. 160.

A written undertaking by a builder to do works for "a sum to be fixed by the architect," the value not appearing on the face of it, does not require a stamp. *Rowland v. Lazarus*, 1 F. & F. 466.

Interest on Bill of Exchange.—“In consideration of your discounting for me a bill of exchange of 100l., drawn by J. R. on E. U., dated the 5th August instant, payable at one month after date, I hereby undertake and agree, that if the bill is not paid at maturity, to pay you interest at the rate of 1s. in the pound per month, till the whole is fully paid and satisfied:”—Held, admissible without a stamp, the subject-matter of it being the payment of interest of less value than 20l. *Semple v. Steinar*, 8 Ex. 622; 22 L. J., Ex. 224; 17 Jur. 628.

Agreements for Payment of Money—I O U.—A paper as follows: “Memorandum: I, J. R., consent to take 10s. per month from W. H. H., in discharge of 32l., W. H. H. intends giving him; and upon the said sum being paid, he engages giving a receipt in full of all demands:” signed by J. R., and dated, requires a stamp, as an agreement, whereof the matter is of the value of 20l. *Remon v. Hayward*, 2 A. & E. 666; *Tebbutt v. Ambler*, 9 C. & P. 60.

An instrument in the following form, “11th October, 1831, I O U 20l., to be paid on the 22nd inst. W. B.”—requires a stamp, either as a promissory note, or as an agreement for the payment of money above the value of 20l. *Brooks v. Elkins*, 2 M. & W. 74; 2 Gale, 200.

An I O U, which contains special terms that the sum to be paid shall be reduced in a certain event, and that part of the sum shall be disposed of in a particular manner, will require an agreement stamp, unless it relates to an amount under 20l. *Evans v. Philpotts*, 9 C. & P. 270.

Growing Fruit.—An agreement for the sale of growing fruit and vegetables, to a greater amount than 20l., requires a stamp. *Rodwell v. Phillips*, 9 M. & W. 501; 1 D., N. S. 885; 11 L. J., Ex. 217; *S. P.*, *Emmerson v. Heelis*, 2 Taunt. 38.

Indemnity—All Costs, Charges, Damages, &c.]—An agreement to indemnify A. from all costs, charges, damages, or other expenses which he

may incur as bail for B., requires an agreement stamp, the arrest of B., and consequently the liability of A., being for more than 20l., though the costs incurred do not amount to that sum. *Wrigley v. Smith*, 3 N. & M. 181; 5 B. & Ad. 1117.

c. Sale of Goods.

Nature of Order.—In an action for not delivering goods made by the defendant for the plaintiff in pursuance of an order, a memorandum in writing ordering the goods, but not proving the contract between the parties, may be read without a stamp. *Ingram v. Lea*, 2 Camp. 521.

When under Seal.—A contract under seal, relating to the sale of goods, is not exempt from duty. *Clayton v. Burtenshaw*, 7 D. & R. 800; 5 B. & C. 41.

Containing Stipulations.—An agreement respecting the sale of goods need not be stamped, though it contains stipulations concerning the mode of payment and other things. *Heron v. Granger*, 5 Esp. 269.

A written memorandum for the purchase of goods is an agreement, although it contains a stipulation for payment to be made at a future day; and therefore does not require a promissory note stamp. *Ellis v. Ellis*, Gow, 216.

To Supply a House with Water by Pipes.—An agreement to supply a house and buildings with water by means of pipes, to be laid in a certain manner and to a certain height, is an agreement relating to the sale of goods, and need not be stamped. *West Middlesex Waterworks v. Suwer-kropp*, M. & M. 408; 4 C. & P. 87.

To take Half Share in Goods—Joint Account.]—The defendant agreed in writing to take one-half share of certain goods bought by the plaintiff on their joint account, half in the profit or loss, and to furnish the plaintiff with half the amount in time for the payment thereof, the goods being to be paid for by bills:—Held, that this was an agreement relating to the sale of goods, and did not require a stamp. *Venning v. Leckie*, 13 East, 7.

Sale of Ship.—An agreement that A. will sell a ship to B.; that part of the price shall be secured by mortgage of the ship; that A. will procure the ship to be chartered on a voyage; that the earnings on the voyage shall be paid to A. as part of the price; that at the end of the voyage the mortgage shall close; is an agreement for and relating to the sale of goods, and requires no stamp. *Meering v. Duke*, 2 M. & R. 121.

An agreement between merchants, that one shall take a share in the outfit of a ship and the adventure, is not an agreement for the sale of goods. *Leigh v. Banner*, 1 Esp. 403.

Railway Shares.—In the morning of a day A. gave B. a verbal order for fifty shares in a railway company. In the afternoon of the same day, A. signed a memorandum that he had bought of B. fifty shares in the company, at 10l. a share; which memorandum was handed to B.:—Held, that it required an agreement stamp. *Knight v. Barber*, 2 C. & K. 333; 16 M. & W. 66; 16 L. J., Ex. 18; 10 Jur. 929.

Broker's Note.]—A note sent by a broker to his principal, containing an account of a purchase of shares in a joint-stock company and the price paid for the same, did not require a stamp. *Tomkins v. Savory*, 9 B. & C. 704; 4 M. & R. 538.

Goods not made.]—Where a man agreed to sell a quantity of oil, not having at the time the oil ready made, but only the raw materials for making it:—Held, that this was a contract for the sale of goods, wares, and merchandise. *Wilkes v. Atkinson*, 1 Marsh. 412; 6 Taunt. 11.

To Finish Goods.]—If a written paper contains a specification of goods, and the vendor by it agrees "to finish the goods in a tradesmanlike manner:" this agreement does not require any stamp, as it is an agreement for the sale of goods and not for the doing of work. *Hughes v. Breeds*, 2 C. & P. 169.

To Make and Deliver Goods.]—A contract to make a chattel and deliver it within a certain time, is a contract relating to the sale of goods. *Pinner v. Arnold*, 2 C., M. & R. 613; 1 Tyr. & G. 1; 1 Gale, 271.

To deliver Manure and take Loads of Straw.]—The following agreement is a contract relating to the sale of goods: "I agree to take all manure at 4d. each horse, a week, for forty-five horses by the year, and to keep it cleared away every week; and likewise to let the few gardeners have a few loads at the same price, and serve them; and to let me have during the year sixty loads of straw, at 1l. 9s. per load: begun the year 23rd of July, 1853, and ends 23rd of July, 1855." *Gurr v. Scudds*, 11 Ex. 190.

Second Agreement—Alteration of First.]—After breach of a contract for the sale and delivery of goods, the defendant entered into a fresh agreement in writing to cancel the former agreement, and for the future sale of the goods upon different terms: the second agreement relates to the sale of goods, and does not require an agreement stamp. *Whitworth v. Crockett*, 2 Stark. 431.

Advance of Money on Goods.]—A letter from a principal to his factor, containing bills of exchange drawn upon the latter, and in which the principal promised to provide for the bills, if certain goods, then either in the factor's possession, or about to be placed in his hands, should remain unsold at the time of the bills falling due, requires to be stamped, and does not come within the exception in the stamp acts as a letter for or relating to the sale of goods: the primary object of such letter not being the sale of goods, but the obtaining of an advance of money on the goods. *Smith v. Cator*, 2 B. & A. 778.

For Future Crops.]—A written agreement for the sale of all the hops which shall be grown upon a certain number of acres of land, to be delivered in pockets at a certain place, must be stamped with an agreement stamp. *Waddington v. Bristow*, 2 B. & P. 452.

Auction—Sale by Auctioneer.]—An agreement with an auctioneer, in a letter to him, employing him to sell goods in consideration of an advance obtained by him, is exempt as relating to the sale of goods. *Topping v. Bull*, 2 F. & F. 408.

The following memorandum was handed by a trader to an auctioneer:—"Memorandum of 107l. had by me of S. (the plaintiff), being an advance on books sent in for immediate sale by auction:" signed by the defendant. The books were sold, and an action having been brought by the auctioneer for a balance due to him on the sale:—Held, that the memorandum related to the sale of goods, and therefore was admissible without a stamp. *Southgate v. Bohn*, 16 M. & W. 34; 16 L. J., Ex. 50.

Agreement for Licence to use Patent.]—A memorandum as follows: "Send me a licence to use two of A.'s patent furnaces to be applied to a single plate, for which I agree to pay, as agreed, 25l., as a patent right, and which is to include iron works, fire-bricks, and labour; engineers' or furnace-builders' time to superintend or fix the above order to be paid 6s. per day,"—is not within the exemption in 55 Geo. 3, c. 184, as relating to the sale of goods, wares, or merchandise, as either the primary object of the agreement is the licence, or it is an agreement for the erection of fixtures. *Chanter v. Dickinson*, 5 M. & G. 253; 6 Scott, N. R. 182; 2 D., N. S. 838; 13 L. J., C. P. 147; 7 Jur. 89.

Fixtures.]—On a sale of fixtures by an outgoing to an incoming tenant, the following memorandum was given by the broker employed by the former:—"Received of Mr. H. 3l. for letting a house to him for a term of seven years, Mr. H. to take the fixtures at a valuation if he be accepted as tenant, and in the event of his not being accepted as tenant, then the 3l. to be returned:"—Held, that fixtures are not goods, wares, or merchandise, and therefore that the memorandum, being part of the contract between the parties, could not be received without a stamp. *Wick v. Hodgson*, 12 Moore, 213.

The word "fixtures" means the right of severance of chattels attached to the soil, but not part of the freehold. A transfer of "fixtures" is therefore, at least, the transfer of a right of severance, and is a conveyance within the words of the 55 Geo. 3, c. 184, which includes the "transfer of any right," and as fixtures are not goods, wares, or merchandise, it is not within the exemption. *Horsfall v. Key*, 2 Ex. 778; 17 L. J., Ex. 266.

Sale of Horse with Collateral Arrangements.]—The following agreement relates to the sale of goods, wares or merchandise, and is therefore admissible, without a stamp, to shew a partnership between A. and B.:—"Memorandum of agreement between A. and B., which is, the horse to be 34l., B. to have half at 17l., and to pay half of the horse's expenses being with C. At the same time agreed for the horse to go to Newcastle to be entered for the handicap and silver cup." *Marsden v. Short*, 2 Scott, 243; 2 Bing. N. C. 118; 1 Hodges, 260.

Under Guarantees.]—A broker, when he bought goods for his principal, agreed for half per cent. to indemnify him from any loss on the re-sale: the agreement, if reduced to writing, need not be stamped, because it is a contract relating to the sale of goods. *Curry v. Edensor*, 3 T. R. 524.

The defendant was indebted to the plaintiff in 47l.; and C. and W. were indebted to the defendant in 48l. By agreement between C. and

W., the plaintiff and the defendant, the following document was delivered to the plaintiff: "To C. and W., I request you will supply Mr. C." (the plaintiff) "with such parcels of Roman cement as he shall require, to the amount of 48l., and charge to the account standing with you to my credit. R. C." (the defendant). Under this was written, "To Mr. C." "On the consideration above named we agree to supply to your order, when you shall require it, Roman cement to the amount of 48l. C. and W.:"—Held, that this was an agreement relating to the sale of goods, and therefore did not require a stamp. *Chatfield v. Cox*, 18 Q. B. 321; 21 L. J., Q. B. 279; 16 Jur. 594.

A guarantee in writing, for the payment of goods thereafter to be purchased by a third person to a certain amount, is a contract for or relating to the sale of goods, and need not be stamped. *Warrington v. Furber*, 8 East, 242; 6 Esp. 89; *S. P.*, *Watkins v. Vince*, 2 Stark. 368.

The following document: "Gentlemen, in consideration of your consigning to my friends, Messrs. H. & Co., of Calcutta, sixteen casks of sherry wine, and engaging to pay me one per cent. on the amount of the proceeds, I hereby agree to guarantee you the proper sale of the wines, and the payment of the proceeds in due time. J. J.," is a contract relating to the sale of goods. *Sadler v. Johnson*, 16 M. & W. 775; 16 L. J., Ex. 178.

"In consideration of your agreeing to supply goods to K. at two months' credit, I agree to guarantee his present or any future debt with you to the amount of 60l.: should he fail to pay at the expiration of the above credit, I bind myself to pay you within seven days from the date of receiving notice from you:"—Held, that, as to all the debts guaranteed, it was an agreement relating to the sale of goods. *Martin v. Wright*, 6 Q. B. 917; 14 L. J., Q. B. 142; 9 Jur. 178.

2. DEEDS.

Articles of Agreement.—An instrument which is sealed, but which merely amounts to an agreement for a lease, required a 1l. 15s. stamp as a deed not otherwise charged, by 55 Geo. 3, c. 184. *Clayton v. Burtenshaw*, 7 D. & R. 800; 5 B. & C. 41.

Articles of agreement by which one party agreed to pay the other a fixed salary, and they were mutually bound in a penalty of 600l. to perform the agreement, required only a 1l. 15s. stamp. *Mounsey v. Stephenson*, 7 B. & C. 403.

— **Under Seal.**—Articles of agreement under seal could not be given in evidence, unless stamped with a deed stamp, although the agreement stamp was of the same value, but differently formed. *Robinson v. Drybrough*, 6 T. R. 317; 1 Esp. 243. And see *Chamberlain v. Porter*, 1 N. R. 34; *Farr v. Price*, 1 East, 55; *Taylor v. Hague*, 2 East, 414.

Licence.—The plaintiff, having agreed to sell to the defendant the permission to use a patent furnace, delivered to him the following document under his hand and seal: "I, J. C., patentee and proprietor of the invention known as 'Chanter and Co.'s Patent for Improvements in Furnaces,' do, by virtue of the King's letters-patent, in consideration of 33l. to be paid by J. & Co., give and grant to J. & Co. full and free licence, consent and permission to erect and use,

upon and at certain premises, one patent furnace to a 30-horse steam-boiler, for which the letters-patent have been granted. As witness my hand at London, J. C.:"—Held, that the licence was not a deed, and, therefore, did not require a stamp. *Chanter v. Johnson*, 14 M. & W. 408; 14 L. J., Ex. 289.

Sufficiently Stamped under Act in Force at Date—Wrong Date.—A deed, purporting to appoint a new trustee, appeared when tendered in evidence to be sufficiently stamped according to the law in force on the day when it was dated, but it was proved to have been executed some years previously, and the stamp according to the law then in force was insufficient:—Held, on the construction of 83 & 34 Vict. c. 97, ss. 15—17, that the deed could not be admitted in evidence. *Clarke v. Roche*, 3 Q. B. D. 170; 47 L. J., Q. B. 147; 37 L. T. 633; 26 W. R. 112.

Several Parties.—If a number of persons severally bind themselves in a penalty by one bond, conditioned for the performance by each and every of them of the same matter, such bond requires only one stamp. *Bowen v. Ashley*, 1 N. R. 274.

One stamp as for one annuity is sufficient, though part of the consideration-money belonged to a third person, and was paid by the hands of the grantee's agent. *Cook v. Jones*, 15 East, 237.

By a deed, reciting that the parties of the first part had encroached upon a common, and were in possession of their several encroachments, and that they had agreed to relinquish, release and convey all and singular their several and respective estates and interests therein to the parties of the third part; it was witnessed, that in consideration of 10s. to each of them, paid by the parties of the third part, they and each and every of them granted, bargained, sold and assigned to the parties of the third part, the several premises, describing them:—Held, that, there being a community of interest in the subject-matter of the conveyance in all the conveying parties, one stamp only was necessary. *Doe d. Croft v. Tidbury*, 14 C. B. 304; 23 L. J., C. P. 57; 18 Jur. 468.

An indenture, where several persons jointly convey their separate interests in certain shares in an incorporated company, does not require several stamps, but one ad valorem stamp is sufficient. *Wills v. Bridge*, 4 Ex. 193; 18 L. J., Ex. 384.

A deed in which several persons combine to effect a common purpose requires only a single stamp. *Allen v. Morrison*, 3 M. & R. 70; 8 B. & C. 565.

Two Considerations.—A feoffment in consideration of natural affection, and also of 10s., does not, under 55 Geo. 3, c. 184, require two separate stamps of 1l. 15s. each. *Doe d. Wheeler v. Wheeler*, 4 N. & M. 10; 2 A. & E. 28.

Containing Collateral Matters.—Where a document has a double object, and has an unappropriated stamp on it large enough for it in either sense, it is admissible when offered to establish one of its objects. *Walker v. Giles*, 6 C. B. 662; 18 L. J., C. P. 323; 13 Jur. 588.

A deed of settlement of a company declared that all transfers of shares not made conform-

ably thereto, and according to the regulations of the directors, should be invalid; and that every transferee should, if required by the directors, execute a deed whereby he would enter into covenants with the trustees to observe all the stipulations for the time being affecting the holders of shares. In pursuance of regulations by the directors, a transfer deed contained the following covenant by the transferee: "I, J. S. C., do hereby covenant with W. H., and also separately with the trustees of the company, that I will abide by and perform all the rules and regulations in respect of the same shares."—Held, that the deed did not require a further stamp duty, as a deed containing other matter besides what was incident to the sale and conveyance of the property sold, or relative to the title thereto, in pursuance of 55 Geo. 3, c. 184. *Wolsley v. Cox*, 2 Q. B. 321; 11 L. J., Q. B. 9; 6 Jur. 599.

A deed, conveying certain lands in trust, and also containing a declaration of a similar trust with respect to government stock, is not to be considered two deeds under 55 Geo. 3, c. 184; and one stamp is sufficient. *Doe d. Hartwright v. Fereday*, 4 P. & D. 287; 12 A. & E. 23.

An order of the Charity Commissioners appointing new trustees of a charity and vesting the trust property in them is an instrument relating to two separate and distinct matters within s. 8 of the Stamp Act, 1870, and must be stamped both as a conveyance and as an appointment of new trustees. *Hudgett v. Commissioners of Inland Revenue*, 3 Ex. D. 46; 37 L. T. 612; 26 W. R. 115.

In proving title in ejectment, a deed of conveyance, duly stamped, was produced, which purported to have been executed by power of attorney, but no power of attorney was proved or produced. On the same parchment was a writing bearing a later date, which was a confirmation of the former instrument and also a substantive conveyance; this instrument was not properly stamped as a conveyance:—Held, that an additional conveyance stamp was not necessary. *Doe d. Priest v. Weston*, 1 G. & D. 524; 2 Q. B. 249; 6 Jur. 601.

A party, having purchased an estate, agreed with the vendor, that such estate should be surrendered to a third party, who had advanced a portion of the purchase-money, such third party holding the estate by way of security for the amount of the loan:—Held, that a deed carrying out these objects only amounted to one deed, and was subject, therefore, only to one stamp. *Rushbrooke v. Hood*, 5 C. B. 131; 17 L. J., C. P. 58; 11 Jur. 931.

Land was conveyed upon a sale by an instrument, dated the 28th October, 1847, in the following manner: the land was first bargained and sold by the vendor to a trustee for the purchasers for a term of three months, and then the reversion conveyed to the purchaser. The instrument was twice executed by the vendor, once by a mere signature, and then immediately afterwards by his signing, sealing, and delivery:—Held, that two stamp duties were chargeable upon the instrument, as having two distinct operations, one as a lease, and the other as a conveyance on a sale. *Brightman v. Commissioners of Inland Revenue*, 18 L. T. 412.

Indorsements.—A memorandum on the back of a deed, altering some of the terms of it, does

not require to be stamped. *Herne v. Hale*, 3 Esp. 227.

But where an indorsement (not memorialized), containing a clause of redemption (bearing date after the deed), had not been made prior to the execution of it, it could not be received in evidence for want of being stamped. *Schumann v. Weatherhead*, 1 East, 537. And see *Lyburn v. Warrington*, 1 Stark. 162.

—**Progressive Duties.**—The indorsement on a deed of exchange of the names of the executing parties, and the date, &c., is no part of the instrument itself, and therefore it was not to be taken into calculation with a view to the progressive stamp duty imposed by 55 Geo. 3, c. 184, Sched. Part 1, tit. Exchange. *Windler v. Fearon*, 7 D. & R. 185; 4 B. & C. 663.

3. CONVEYANCES OF PROPERTY.

Property, what is.—The definition of "property" under the stamp laws is "that which belongs to a person exclusively of others, and which is the subject of bargain and sale to another." *Limmer Asphalt Paving Company v. Commissioners of Inland Revenue*, 7 L. R., Ex. 211; 41 L. J., Ex. 106; 26 L. T. 633; 20 W. R. 610.

—**Judgment Debt.**—A judgment debt is not property within 55 Geo. 3, c. 184, Sched. Part 1, tit. Conveyance; and therefore an assignment by indenture of such a debt does not require an ad valorem stamp, but must have the ordinary deed stamp. *Warren v. Howe*, 3 D. & R. 494; 2 B. & C. 281.

An assignment of a policy of assurance as security for a debt, with a proviso for redemption on payment, is a mortgage within 55 Geo. 3, c. 184, and requires an ad valorem stamp. *Culdwell v. Dawson*, 5 Ex. 1; 14 Jur. 316.

Conveyance.—Any written instrument operating as the record of a transfer of property is a conveyance within the meaning of the 55 Geo. 3, c. 184. *Horsfall v. Hey or Key*, 2 Ex. 778; 17 L. J., Ex. 266.

Assignment of Commission — Mortgage or Conveyance.—A., an architect, employed to superintend the erection of certain buildings upon commission by deed, assigned to D., a creditor, all the commission to which he then was or might thereafter be entitled in respect of such superintendence, upon trust to pay C. a certain debt due from A., and to retain the residue towards satisfaction of a certain debt due from A. to D., and in which deed were contained a power of attorney to receive the commission, and covenants that A. would pay the debt due to D., would not receive the commission, or revoke the power thereby given, or do any act by which D. might be hindered in receiving payment; that he had a right to assign, had not encumbered, and for further assurance:—Held, that this deed was not a mortgage but an absolute conveyance of the commission-money; and that a conveyance stamp calculated upon the amount of commission eventually received was sufficient. *Poolley v. Goodwin*, 5 N. & M. 466; 4 A. & E. 94.

Assignment of Goodwill.—An assignment by deed of the goodwill of a trade is a conveyance of property within 13 & 14 Vict. c. 97, Sched.,

tit. Conveyance, and, as such, is liable to ad valorem duty. *Potter v. Commissioners of Inland Revenue*, 10 Ex. 147; 23 L. J., Ex. 345; 18 Jur. 778.

Partnership—Conveyance of Estate and Interest.—By an indenture reciting that a dissolution of partnership between two partners had taken place, and the share of the retiring partner in the assets of the firm had been found to be a certain specified sum, and an arrangement had been made, by which a portion of that sum was to be paid at once by the continuing partner, and the remainder secured by a mortgage of the partnership assets, the retiring partner conveyed to the continuing partner all his estate and interest in the partnership assets:—Held, that this indenture was a conveyance upon a sale within 13 & 14 Vict. c. 97, Sched., tit. Conveyance, and was chargeable with an ad valorem stamp duty upon the amount of the sum so found to be payable to the retiring partner. *Christie v. Commissioners of Inland Revenue*, 2 L. R., Ex. 66; 36 L. J., Ex. 11; 15 L. T. 282; 15 W. R. 258; 4 H. & C. 664.

By a deed executed on a dissolution of partnership, which recited that the share of the retiring partner should be taken by those who remained in the firm, and that he should be allowed in account a certain sum of money as an equivalent for the value of his share, it was witnessed that the retiring partner, in consideration of that sum, "part of the moneys and assets of the dissolved co-partnership to the retiring partner so allowed in account, appropriated and paid as aforesaid," conveyed and assigned his share of the partnership assets to the other partners:—Held, that this deed was a conveyance, and therefore liable to an ad valorem duty. *Phillips v. Commissioners of Inland Revenue*, 2 L. R., Ex. 839; 36 L. J., Ex. 199; 16 L. T. 839.

An assignment for money from one partner to another of his share of the partnership interest in contracts with government, was not a sale of property within 48 Geo. 3, c. 149, and did not require an ad valorem stamp. *Belcher v. Sykes*, 9 D. & R. 231; 6 B. & C. 234.

Conveyance not by Deed—Agreement.—An instrument which in terms purported to be a conveyance of land, but which, not being by deed, could not operate as such, contained a stipulation not to disturb the party intending to take the premises:—Held, to operate as an agreement, and to require an agreement stamp. *Rex v. Ridgwell*, 6 B. & C. 655; 9 D. & R. 678.

Concealing Consideration.—A., being seised in fee of land, agreed with the defendant, a builder, to execute to him a lease of the land, and of a house which it was agreed the defendant should build thereon, for ninety-nine years, at a rent of 9l. 5s. The defendant was to lay out 600l. in building the house. The house having been built, B. contracted to buy for 850l. all the defendant's interest in the house and land. The defendant, in order to effect this contract, procured an indenture to be made between himself, A. and B., whereby A. leased the house and land to B. for ninety-nine years, at the rent of 9l. 5s., payable to A. The purchase-money was not stated in the lease, which was the principal and only deed whereby the house and land were conveyed:—Held, that the lease to B. was a conveyance

upon the sale of land within the schedule of the 55 Geo. 3, c. 184; that duty was payable thereon as upon a conveyance, and that the defendant and B. were liable to penalties for not truly inserting the consideration in the lease. *Att.-Gen. v. Brown*, 3 Ex. 662; 18 L. J., Ex. 336. See *Henniker v. Henniker*, 1 El. & Bl. 54; 22 L. J., Q. B. 94; 17 Jur. 436.

Agreement—Consideration 9,000l.—Presentation.—Where A. by writing, not under seal, agreed in consideration of 9,000l. to present the nominee of B. to a rectory, and to furnish an abstract to and execute a conveyance of the next presentation to B., such writing is only an agreement, not a conveyance, and does not require an ad valorem stamp. *Wilmot v. Wilkinson*, 9 D. & R. 620; 6 B. & C. 506.

"Mortgage, Debt, or Sum of Money."—The words "mortgage, debt, or sum of money," in 16 & 17 Vict. c. 59, s. 10, include contingent as well as absolute debts. *Mortimore v. Commissioners of Inland Revenue*, 2 H. & C. 838; 33 L. J., Ex. 263; 10 Jur., N. S. 868; 10 L. T. 655.

Bond to replace Stock.—Upon a loan of money produced by the sale of stock a bond was given conditional to replace the stock on a given day. By agreement of the same date reciting the bond and a deposit of title-deeds of property, it was agreed that the deeds should remain as a collateral security for replacing the stock, and that the borrower should execute a mortgage of the property to secure the replacing of the stock:—Held, that the bond was properly stamped with an ad valorem stamp. *Blair v. Ormond*, 14 Q. B. 732; 19 L. J., Q. B. 228; 14 Jur. 191—Ex. Ch.

Mortgage.—A ten-shilling deed stamp on a mortgage deed is insufficient: therefore a purchaser is entitled, on a contract for sale with a mortgage, to require the mortgage deed, where so stamped, to be stamped before completion to the full ad valorem duty at the vendor's expense, notwithstanding that the mortgagee may have consented to join in the conveyance. *Whiting to Loomes*, 14 Ch. D. 822; 49 L. J., Ch. 617; 43 L. T. 83; 28 W. R. 822.

Sale of Coal in Mine.—A paper, signed by the defendant, stated that the plaintiff agreed to sell to the defendant upper veins or beds of coal, containing by admeasurement sixteen acres, at the price of 77l. per acre, to be paid for as follows: 100l. on the day of the date thereof, and the remainder by equal quarterly payments of 25l. each. And it was stipulated, that if the defendant should work more coal than in any year should exceed 100l., at the rate of 77l. per acre, he should pay for such excess:—Held, that the instrument did not require an ad valorem stamp, as upon a conveyance under 55 Geo. 3, c. 184, and that a stamp of 35s. was sufficient. *Phillips v. Morrison*, 16 M. & W. 740; 13 L. J., Ex. 212; 8 Jur. 343.

Surrender of Copyhold.—A copy of court roll admitting a surrenderee in trust for the grantee of an annuity there stated to be secured by the bond of the purchaser, and subject thereto, to the use of the purchaser, his executors, adminis-

trators and assigns, requires an ad valorem stamp in respect of the purchase-money expressed to be so paid by the purchaser to the surrenderor, but without reference to the annuity, whether the statement is taken to refer to an annuity already granted or to an annuity to be created in futuro. *Doe d. Chapeau v. Reynolds*, 2 N. & M. 383.

Compulsory Redemption.—By an indenture, between M. of the first part, G. of the second part, a dock company of the third part, and P. of the fourth part, reciting that M. had agreed to sell to the company land for 9,000*l.*, also reciting that G. had agreed to sell the company a pier, and that it was agreed that the consideration for such purchase should be 37,000*l.*, and that 10,000*l.* only should be paid in gross by the company to G., and that 15,000*l.* should be represented by an annual rent-charge of 750*l.*, redeemable on payment of 15,000*l.*, and that 12,000*l.* should be represented by an annual rent-charge of 600*l.*, redeemable on payment of 12,000*l.* (after stating the conveyance from M. to the company for 9,000*l.*), it was witnessed, that in consideration of the rent-charges of 750*l.* and 600*l.* payable to G., and in consideration of 10,000*l.* to G. paid by the company, G. conveyed the pier to P., to the use that G. should receive out of the rents a yearly rent-charge of 750*l.* and 600*l.*. The indenture then provided that the company might at any time redeem the rent-charge of 750*l.*, upon payment of 15,000*l.*, after twelve months' notice, and that, after a time, G. might by notice require the company to redeem the rent-charge of 600*l.*, and pay him 12,000*l.* in redemption thereof; and that, if no such notice should be given by G., then that the company might redeem that rent-charge, on payment of 12,000*l.*. The commissioners having required this deed to be stamped, under the 13 & 14 Vict. c. 97, Sched., tit. Conveyance, with an ad valorem duty of 230*l.*, as a conveyance upon the sale of property for 9,000*l.* and 27,000*l.*:—Held, that as G. might by his own act compel the company to redeem the rent-charge of 600*l.* by payment of 12,000*l.*, that sum was part of the purchase or consideration-money, within the meaning of the statute, and subject to the ad valorem duty, but that such duty was not payable on the 15,000*l.*, and therefore the stamp must be reduced from 230*l.* to 155*l.*. *Gill, In re*, 8 Ex. 376; *S. C.*, nom. *Plymouth Great Western Dock Company v. Inland Revenue Commissioners*, 22 L. J., Ex. 188.

Conveyance by Father to Son.—Conveyance by a father to son of a freehold estate, reciting "that he (the father) was minded and had resolved to give and assure the same to his son, as well in consideration of the natural love and affection which he entertained for his son, as also in consideration of the provision which his son had that day made by his bond or obligation in writing of 1,500*l.* in augmentation of the portions or fortunes of his eight sisters":—Held, that this was not a sale to the son, and that the conveyance did not require an ad valorem stamp. *Denn d. Manifold v. Diamond*, 6 D. & R. 328; 4 B. & C. 243.

Conveyance of Crops in Trust for Creditors.—By a deed of assignment five persons conveyed all their crops, goods and effects to trustees, in trust to sell, and with the proceeds, to be pro-

duced by such sale, to discharge, first, debts due to the trustees, with interest from the date of the deed; then, debts due to other creditors; with a resulting trust as to the residue to the parties conveying:—Held, that such deed did not require an ad valorem stamp, as upon a conveyance or mortgage, as the former part of that clause operated only on actual sales between vendor and vendee; and that this deed fell within the exception in the latter part of the clause, viz., "where such conveyance shall be made for the benefit of creditors generally," and therefore that a common deed stamp was sufficient. *Coates v. Perry*, 6 Moore, 188; 3 B. & B. 48. And see *Whitwell v. Dimsdale*, Peake, 168.

Fixtures.—The word "fixtures" means the right of severance of chattels attached to the soil, but not part of the freehold. A transfer of "fixtures" is, therefore, at least, the transfer of the right of severance; and whether a memorandum of the sale of fixtures transfers any interest in the chattels themselves or not, it is a conveyance within the words of the 55 Geo. 3, c. 184, which includes the "transfer of any right;" and as fixtures are not goods, wares and merchandise, it is not within the exemption. *Horsfall v. Key*, 2 Ex. 778; 17 L. J., Ex. 266.

An instrument, if it is "a memorandum, letter or agreement, relating to the sale of goods, wares and merchandise," is exempted from all stamp duty; but if it operates as a transfer of anything else, it must be stamped as a conveyance. *Id.*

Policy of Insurance.—A., being entitled during his life to the dividends of bank annuities, and B. being entitled to the stock at the death of A., it was agreed between them, that, in consideration of A.'s permitting B. to sell out the stock, the latter should pay to A., during his life, an annuity equivalent to five per cent. on the principal money produced by the sale of the stock, and that, as a security for the payment of the annuity, B. should assign to A. a policy of assurance on goods on a voyage to India. By a deed reciting these facts, and that the stock had been sold out and produced a given sum, which had been paid to B., the latter bargained, sold, and assigned to A. the policy, and covenanted that in case no money should be produced by the policy he would, within one month after his return from the voyage he was about to make to India, pay to A. a sum of money, which, when invested in stock, would produce an annuity equal in amount to five per cent. on the principal money produced by the sale of the stock:—Held, that the deed did not require an ad valorem stamp, the transaction described in it not being a sale of an annuity within the meaning of the words in the 55 Geo. 3, c. 184, Sched. Part 1, and the assignment of the policy not being a conveyance of property within the meaning of that word in the same statute. *Blandy v. Herbert*, 9 B. & C. 396.

The assignment to trustees of a marriage settlement, of a policy of insurance effected on the settlor's life for a sum named, and all moneys assured or to become payable by or under the policy, is not liable to the payment of an ad valorem duty under 13 & 14 Vict. c. 97, as being a deed whereby any definite and principal sum of money is settled. *Sanville v. Inland Revenue Commissioners*, 10 Ex. 159; 23 L. J., Ex. 271.

Marriage Settlement—Annuity.—By a marriage settlement, the defendant, in consideration of 4,000*l.* paid by the father of the intended wife as a marriage portion, and in consideration of the marriage, covenanted to pay an annuity of 800*l.* a year to the plaintiff, to the use of the intended husband and wife during their joint lives:—Held, that the deed did not require a 45*l.* ad valorem stamp as upon the sale of an annuity. *Massy v. Naney*, 3 Bing. N. C. 478; 4 Scott, 258.

—**Foreign Bonds.**—A marriage settlement is chargeable with ad valorem duty under 13 & 14 Vict. c. 97, in respect of Brazilian bonds, New Brunswick bonds, Nova Scotia bonds, scrip Peruvian loan, Chilean bonds, Mexican Remanet bonds, and Indian 5*l.* per Cents., created by 22 & 23 Vict. c. 139. *Albager, In re*, 2 H. & C. 969; 10 Jur., N. S. 828; 10 L. T. 238; 12 W. R. 477; *S. C.*, nom. *Guidici v. Commissioners of Inland Revenue*, 33 L. J., Ex. 161.

Partition Deed.—The 48 Geo. 3, c. 149, s. 22, incorporated into 55 Geo. 3, c. 184, applies only to sales of lands, properly so called, and does not extend to a deed of partition between several members of a family, by which the entirety of lands is conveyed to one of the parties in lieu of his undivided share in those and other lands, and in consideration of a sum of money paid by him for equality of partition. *Henniker v. Henniker*, 1 El. & Bl. 54; 22 L. J., Q. B. 94; 17 Jur. 436.

Sale of Land Abroad.—A conveyance executed in England upon a sale of land in Australia requires an ad valorem stamp. *Wright, In re*, 11 Ex. 458; *S. C.*, nom. *Wright v. Inland Revenue Commissioners*, 25 L. J., Ex. 49.

When no Property passed.—By an indenture between a company and a licensee, in consideration of 7,500*l.*, of which the sum of 1,500*l.* was paid, and the remainder was to be paid in monthly instalments of 1,000*l.*, the company granted to the licensee "the sole and exclusive right, licence, and authority to carry on with the asphalt of or to be supplied by the company, but not with any other asphalt, the business of asphalt paving, and of therein and otherwise using, vending and dealing in asphalt, and of an asphalt company or asphalt business generally, within the counties of Lancaster and Chester," during the continuance of the company's concessions. The company covenanted to supply the licensee with asphalt, but was not to be bound to prevent the use or sale of asphalt within these counties by any other person, excepting only the use or sale of such asphalt as was agreed to be supplied under the contract, either by the company or by persons purchasing from the company; and the licensee agreed, during the continuance of the licence, not to use, sell, or deal within these counties in any other asphalt than that to be supplied by the company. The licensee covenanted to pay the remaining 6,000*l.* by six monthly instalments of 1,000*l.*, and if he should assign the licence, to pay the whole of the remaining instalments on the expiration of two months from the date of the assignment:—Held, first, that the deed was not chargeable as a conveyance on sale, no property being in fact conveyed by it. *Limmer Asphalt Paving Company v. Commissioners of*

Inland Revenue, 7 L. R., Ex. 211; 41 L. J., Ex. 106; 26 L. T. 633; 20 W. R. 610.

Held, also, that if it had been so chargeable one duty only could have been charged in respect of the 7,500*l.*, and not a second duty in respect of the covenant to pay by instalments the 6,000*l.* remaining unpaid. *Ib.*

Assignment with Power of Sale.—A warrant of attorney was given in November, 1840, to secure 1,000*l.* with interest. On the 13th October, 1841, the debtor executed, by way of further security, a deed of assignment of goods, with a power of sale, to secure the 1,000*l.* with interest, from the 30th November, 1840, being the day up to which the interest on the principal debt had been paid:—Held, that this assignment required a common deed stamp only. *Pierpoint v. Goucer*, 5 Scott, N. R. 605; 4 M. & G. 795; 2 D., N. S. 652; 12 L. J., C. P. 55.

Transfer of Mortgage—Several Deeds.—By 24 & 25 Vict. c. 91, s. 30, where there are several deeds upon the transfer of a mortgage from old to new trustees, if one of the deeds be stamped with the duty of 1*l.* 15*s.* it shall be sufficient that the others are stamped with the duty on a duplicate or counterpart, viz., 5*s.* The 28 & 29 Vict. c. 96, s. 17, after reciting that certain duties on the transfers of mortgages were imposed by 13 & 14 Vict. c. 97, enacts that in lieu thereof the duty of 6*d.* shall be payable on every 100*l.* or fractional part of 100*l.* transferred:—Held, that 24 & 25 Vict. c. 91, s. 30, was not repealed by 28 & 29 Vict. c. 96, s. 17, and that it was sufficient that one of the deeds was stamped with the duty of 1*l.* 15*s.* and the others with that of 5*s.* *Foley (Lord) v. Commissioners of Inland Revenue*, 3 L. R., Ex. 263; 37 L. J., Ex. 109; 16 W. R. 1055.

Several Transferors and Objects.—A deed executed by four persons entitled to personal estate under a will, purporting to operate as a transfer and release to each of the four (by two of them who were the executors, in pursuance of an agreement for partition) of shares in various railway companies forming part of a testator's estate is chargeable with only four stamp duties of 30*s.* each under 55 Geo. 3, c. 185, sched. tit. Transfer, notwithstanding that the effect of the deed may be to vest in each of the four persons stock in eight or nine different companies. *Freeman v. Commissioners of Inland Revenue*, 6 L. R., Ex. 101; 40 L. J., Ex. 85; 24 L. T. 323; 19 W. R. 590.

Joint Conveyance of Separate Interests.—A deed, by which several persons jointly convey their separate interests in shares in an incorporated company, does not require several stamps, but one ad valorem stamp is sufficient. *Wills v. Bridge*, 4 Ex. 193; 18 L. J., Ex. 384.

Such a deed is not a deed of transfer, and is properly chargeable with one 35*s.* stamp duty only. *Ib.*

—**Assignment of Prize-money.**—An assignment of the prize-money of several seamen on board a privateer, being payable out of one fund, only requires one stamp. *Baker v. Jardine*, 13 East, 235, n.

Alteration of Name of Transferee.—A deed of

transfer of shares was executed by A., the vendor, with the name of B. inserted as the purchaser; before any execution of the deed by B., it was arranged that C., instead of B., should be the purchaser; whereupon the name of B. being struck out and that of C. substituted, A. re-executed the altered deed:—Held, that the deed was so far completed as between A. and B. that it could not operate as a conveyance to C. without a new stamp. *London and Brighton Railway Company v. Fairclough*, 2 M. & G. 674; 3 Scott, N. R. 68; 2 Railw. Cas. 544.

4. ASSIGNMENT OF DEBTS.

What are.]—The plaintiff in an interpleader issue was the trustee of the estate of a debtor, who had given to the defendants a document, by which he assigned to them "the sum of 40*l.*, or any other sum now due, or that may hereafter become due, in respect of the steam-launch which" he was then building for a third party. This order or assignment was agreed to by the third party, and the money was paid into court:—Held, that this document constituted an assignment of the debt, and was not an order for the payment of money which could not be stamped after execution. *Buck v. Robson*, 3 Q. B. D. 686; 48 L. J., Q. B. 250; 39 L. T. 325; 26 W. R. 804.

Equitable Assignment—Not a Bill of Exchange.]—M., being indebted to the plaintiffs, gave them an unstamped document addressed to C., who was trustee of his father's will, in the following words:—"I hereby authorize and direct you to pay to the plaintiffs on their order the sum of 140*l.* out of the moneys now due or hereafter to become due to me under the will of my late father, and before making any payment to me thereout:—Held, that such document was an equitable assignment and not a bill of exchange under s. 48 of the Stamp Act, 1870, and could, therefore, be produced in evidence on payment of the proper duty and penalty. *Buck v. Robson* (*supra*) followed. *Fisher v. Carter*, 27 W. R. 301.

A document on which an action was brought was capable of being considered either as an assignment or as an order for payment of money:—Held, that though it could not be used as a bill of exchange, as it was not stamped as such with an impressed stamp; yet that, being duly stamped as an assignment, it could be relied on as such, and an action could be maintained upon it in that character. *Adams v. Morgan*, 12 L. R., Ir. 1. Affirmed, on other grounds, in C. A.

A written authority, signed by a creditor, directed to his debtor, and delivered to A. B. in this form:—"I hereby authorize you to pay A. B. the sum of 365*l.*, being the amount of my contract, he having advanced me that sum," is a good assignment, if stamped as such, without being stamped as an order for payment. *Diplock v. Hammond*, 5 De G., M. & G. 320; 23 L. J., Ch. 550.

Judgment Debt.]—An assignment by indenture of a judgment debt does not require an ad valorem stamp, but must have the ordinary deed stamp. *Warren v. Howe*, 3 D. & R. 494; 2 B. & C. 281; 14 Jur. 316.

5. RECEIPTS.

When Stamp Required.]—An acknowledg-

ment of having received the acceptance of a bill of exchange, was a receipt for money within 23 Geo. 3, c. 49. *Scholey v. Welby*, Peake, 24.

A receipt for money advanced to the party giving a bill of exchange does not require a stamp. *Jones v. Horry*, 1 F. & F. 333.

A receipt stamp is necessary, where it appears from the paper that the acknowledgments were made at successive times upon the payment of the money. *Wright v. Shaucross*, 2 B. & A. 501, n.

Where a receipt was produced purporting to be a receipt for money given by the agent of a person who received money from different customers, for the purpose of negotiating the purchase and sale of annuities:—Held, to require a stamp. *Catt v. Howard*, 3 Stark. 3; but see *Clarke v. Hougham*, *infra*.

If a party on payment of his bill writes the word "settled," by way of receipt, he is liable to the penalty for giving a receipt without a stamp. *Spawforth v. Alexander*, 2 Esp. 621; Peake, 25.

A bill of parcels on which was written the following words, "Settled by one bill at three, and another at nine months," should have a receipt stamp. *Smith v. Kelby*, 4 Esp. 249.

Periodical Payments.]—A payment by instalments is a periodical payment within the Stamp Act, 1870, s. 72. *Limmer Asphalt Company v. Commissioners of Inland Revenue*, 7 L. R., Ex. 211; 41 L. J., Ex. 106; 26 L. T. 633; 20 W. R. 610.

When made Abroad.]—Where an action was brought for money lent in France and unstamped receipts were produced in proof of the loan, evidence to shew that by the law of France such receipts required stamps to render them valid was rejected on the ground that the courts of this country will not notice the revenue laws of foreign states. *James v. Catherwood*, 3 D. & R. 190.

An unstamped receipt, dated at Cologne, is receivable here; and the fact that such a receipt would not be receivable at Cologne until it had been stamped, on payment of a penalty, would make no difference as to its admissibility here, as our courts do not take notice of foreign revenue laws. *Bristow v. De Sequeville*, 5 Ex. 275; 3 C. & K. 64; 19 L. J., Ex. 289; 14 Jur. 674.

Memoranda in the Nature of.]—A memorandum importing that one party had paid money, but containing no acknowledgment by the other that he had received it, is not a receipt. *Rez v. Harvey*, R. & R. C. C. 227.

Where a landlord fraudulently and improperly received various sums of money from several of his tenants, and the evidence of payments by them consisted of memoranda of account delivered to the tenants, in which the items in question were set down, and to each of which the landlord wrote the word "paid:—Held, that such memoranda were admissible without a stamp, when coupled with entries in the steward's books to the same effect. *Clarke v. Hougham*, 3 D. & R. 325; 2 B. & C. 149.

The defendant, in support of a plea that he had paid five quarters' rent to M., tendered the following paper, signed by M.: "Mr. Jones (the defendant) having written off the sum of 72*l.* from his mortgage debt, being five quarters' rent of his house, I hereby discharge the same rent till the 24th July, 1841." M. had delivered the

paper to the defendant, being then indebted to him on a mortgage debt exceeding 72*l.*:—Held, that the instrument was a receipt. *Lucas v. Jones*, 5 Q. B. 949; D. & M. 774; 13 L. J., Q. B. 208; 8 Jur. 422.

In an action against the drawer of a bill of exchange for 9*l.* 5*s.*, accepted by M., the defendant pleaded payment by the acceptor, and gave in evidence the following document:—"Myself v. Marks. Mr. M. has this day left with me 10*l.* on account of the debt, interest and costs in this action. E. L. Levy, the plaintiff in person:—"—Held, that this did not require a receipt stamp. *Levy v. Alexander*, 4 Ex. 485; 19 L. J., Ex. 113.

A paper in the following form, signed by the party: "Memorandum, 30th April, 1836, settled all accounts of law business up to this day, and will give a receipt in full of all demands when called for. (Signed) J. T."—stamped with an agreement stamp, is receivable without a receipt stamp. *Tebbutt v. Ambler*, 9 C. & P. 60.

In an action to recover 170*l.*, with interest, the plaintiff proved a loan of between 150*l.* and 180*l.*, and in order to take the case out of the Statute of Limitations, offered this document:—"170*l.* 16th March, 1841. Received from B. T. the sum of 170*l.*, for which I promise to pay her at the rate of 5*l.* per cent. from the above date:—"—Held, that this document did not require to be stamped, either as a receipt, a promissory note, or an agreement. *Taylor v. Steele*, 16 M. & W. 665; 16 L. J., Ex. 177; 11 Jur. 806.

In an action for goods sold and delivered, in which the defendant pleaded payment, the only evidence offered in support of the plea was a document in the following form, signed by the plaintiff: "Memorandum. That any demand we may have against Mr. G. W. for ironwork is this day discharged in consideration of services rendered by him to us. N. B. Particulars of our account shall be delivered with a stamped receipt:—"—Held, that since the document was offered as evidence of a transaction amounting to a payment of money, it was offered as a receipt or a discharge for or upon the payment of money, and therefore required a receipt stamp. *Litigstone v. Whiting*, 15 Q. B. 722; 19 L. J., Q. B. 528; 15 Jur. 147.

In an action by a coal merchant against his clerk, to recover the amount of money received and not accounted for, the plaintiff having proved an admission by the defendant, on the 15th August, that a sum of 12*l.* was due, the latter offered in evidence an unstamped receipt of a subsequent date for a larger amount. This being rejected, the defendant gave in evidence a memorandum on the back of the same paper, written and signed by the plaintiff as follows:—"Balanced up this day, as per cash-book. S. F. 19th November:—"—Held, that this memorandum did not require a receipt stamp, and was properly admitted without producing, and without notice to produce, the cash-book to which it referred, which was in the plaintiff's possession. *Finnay v. Tootell*, 5 C. B. 604; 17 L. J., C. P. 158; 12 Jur. 291.

Containing Collateral Matters.—A receipt indorsed on the back of a deed may be separately read in evidence, though it is a part of an instrument requiring another stamp. *Ody v. Cockney*, 1 M. & Rob. 517.

A receipt, not having a proper stamp, cannot be used as evidence of a matter collateral

to the payment of the money. *Evans v. Prothero*, 2 Mac. & G. 819; 20 L. J., Ch. 448; 15 Jur. 113.

Thus, where it was sought to prove an agreement for purchase by means of a receipt for the purchase-money, such receipt not being properly stamped:—Held, that the evidence could not be admitted. *Ib.* See *S. C.*, 1 De G., M. & G. 572; 21 L. J., Ch. 772.

The following document, stamped as an agreement, is admissible without a receipt stamp:—"I have received your cheque for 391*l.* 10*s.* 3*d.*, being the payment for an overdue bill and interest, in the hands of D.; and I hereby undertake to procure and hand the bill over to you." *Von Dadelsen v. Swann*, 5 Ex. 825; 20 L. J., Ex. 50.

When a receipt for money and an agreement are written on the same piece of paper: this is receivable as a receipt, if it has a receipt stamp, without an agreement stamp. *Grey v. Smith*, 1 Camp. 387.

A receipt for the price of a horse, with a warranty of soundness, may be received as evidence of the warranty, without an agreement stamp. *Skrine v. Elmore*, 2 Camp. 407.

In an action for goods sold, the defendant, in order to prove that the goods were sold to D., and not to himself, put in an unstamped paper containing a bill of parcels from the plaintiff to D., at the foot of which were the words "settled, W. M." (the plaintiff). The whole of the paper had been written at one time, and no money in fact passed:—Held, that the two parts being distinct, so much of the paper as consisted of the bill of parcels was admissible, for the above-mentioned purpose, without a receipt stamp. *Millen v. Dent*, 10 Q. B. 846; 16 L. J., Q. B. 374; 11 Jur. 818.

A written acknowledgment at the foot of an account, stating that such account is correct, may be given in evidence without a receipt stamp. *Wellard v. Moss*, 7 Moore, 503; 1 Bing. 134.

Where a paper purports to be a receipt, and, as such, requires a stamp, but also purports to be an agreed statement of accounts, which does not require a stamp, it may be given in evidence to shew the agreed state of accounts only, though it has not been previously stamped. *Matheson v. Ross*, 2 H. L. Cas. 286; 13 Jur. 307.

Its admissibility under such circumstances is restricted to this extent: so far as it relates simply to proving the statement of accounts, and is not produced for the purpose of proving the receipt of money. It cannot be used for the purpose of proving the receipt of money in any way. *Ib.*

When the cases say that an unstamped receipt may be given in evidence to prove a collateral matter, they must be taken to mean a matter wholly unconnected with the fact of payment. *Ib.*

In an action for work and labour, there was tendered a paper containing a statement of accounts, which declared a balance of 68*l.* 9*s.* 4*d.*, and at the end was an acknowledgment of the payment of that sum. This paper was offered by the defendant, not for the purpose of proving that the money had been paid, for that was not in contest between the parties, but in order to shew what was the admitted state of accounts at a particular time:—Held, admissible for that purpose. *Ib.*

An instrument given by an overseer of the poor to the reputed father of a bastard child, stating that he had received a sum of money

from the latter by a bill of exchange, payable after date, and which, when paid, would exonerate him from the expenses attending the birth and maintenance of such child, does not require an agreement stamp, but a receipt stamp is sufficient. *Watkins v. Hewlett*, 3 Moore, 211; 1 B. & B. 1.

A receipt for rent, stipulating that acceptance of rent shall not operate as a waiver of a previous notice to quit, does not require an agreement stamp. *Doe d. Wheble v. Fuller*, 1 Tyr. & G. 17.

Taxes by Deputy Receiver-General.]—A receipt for taxes, signed by a clerk of the deputy receiver-general of a county in his name, requires no stamp. *Edden v. Read*, 3 Camp. 338.

Counsel's Fees—Taxation of Costs.]—The master ought not to require a receipt stamp to be affixed to counsel's signature to a fee before allowing the charge. *Beaman, In re*, 5 De G., M. & G. 40; 23 L. J., Ch. 536.

6. FOREIGN BONDS AND AGREEMENTS.

Bonds.]—A company incorporated in America and having its chief seat of business at New York, issued a parcel of their bonds at a certain price to a banking firm in that city, who contracted to purchase them. The bonds were transmitted by the firm to their agents in London with instructions, in pursuance of which the agents published a prospectus announcing the issue and inviting subscriptions for the bonds. One of the bonds having been afterwards allotted to an applicant in England:—Held, that, although thus disposed of on the English market by means of a prospectus, the bond was not a foreign security issued in the United Kingdom within 34 Vict. c. 4, s. 1, and was therefore not liable to the stamp duty imposed on such an instrument by 33 & 34 Vict. c. 97. *Grenfell v. Commissioners of Inland Revenue*, 1 Ex. D. 242; 45 L. J., Ex. 465; 34 L. T. 426; 24 W. R. 582.

A bond for foreign stock signed in Paris, but issued in England, did not require an English stamp before the passing of 25 Vict. c. 22. *Yriaarri v. Clement*, 2 C. & P. 223.

Agreement.]—An agreement made between two persons residing in Calcutta, relating to property in Calcutta, need not necessarily be written on stamped paper. *Gilchrist v. Herbert*, 26 L. T. 381; 20 W. R. 348.

Articles of a foreign ship made abroad, regulating the wages of the sailors, even where the sailor had been hired in London, and which articles are lodged with the consul in London, may be given in evidence of the agreement for the hiring and wages to the sailor without being stamped. *Winbled v. Malmberg*, 1 Esp. 454.

Where a paper, purporting to be an agreement, is entered into out of England, and an action brought on it, it need not be stamped. *Ximenes v. Jaques*, 1 Esp. 311; 6 T. R. 499.

A conveyance executed in England upon a sale of land in Australia, requires an ad valorem stamp. *Wright, In re*, 11 Ex. 458; S. C., nom. *Wright v. Inland Revenue Commissioners*, 25 L. J., Ex. 49.

7. BILLS OF EXCHANGE.—See BILLS OF EXCHANGE.

8. OTHER CASES.

Bank Notes—Duty on.]—The intention to impose a charge upon the subject must be shewn by clear and unambiguous language. Where by an act of the Cape Colony (No. 6, 1864), "for imposing a duty upon bank notes," which act was assumed to have been validly extended to the province of Griqualand West, it was provided that banks issuing within the colony notes of their own, purporting to be issued within the colony, and so (unless expressed to be payable elsewhere) to be payable by them within the colony, should make a return thereof with a view to the imposition of the duty chargeable by that act; it was held, that the appellant bank, which had a branch within the province, and there put in circulation notes issued by the bank in the colony payable in the colony, but did not issue any notes payable in the province, was not liable, according to the true construction of the act, to make any return to the respondent, the treasurer of the province, or to pay duty on the notes put into circulation by its branch. *Oriental Bank Corporation v. Wright*, 5 App. Cas. 842; 50 L. J., P. C. 1; 43 L. T. 177—P. C.

Order for Settlement.]—An order of the court making a settlement should bear the usual settlement stamp. *Gowan, In re, Gowan v. Gowan*, 17 Ch. D. 778; 50 L. J., Ch. 248.

Solicitor—Certificate.]—M., a solicitor, who practised and had an office in Birmingham, and whose certificate bore a 3l. stamp (M. being under three years' standing), attended a taxation of a bill of costs at the central office in London on behalf of a client. M. having proceeded to tax his own bill, it was objected that his certificate did not admit of his practising in London:—Held, that M. was entitled to tax his bill; what he had done did not alone constitute practising or carrying on business in London. *Horton, In re*, 45 L. T. 541; 30 W. R. 102.

See further cases, sub tit. SOLICITOR.

Instruments under Public Health Act.]—The City of Bath Act, 1851, constituting the corporation of Bath the local board of health for the city, incorporates portions of the Public Health Act, 1848, but expressly excepts s. 151, which exempts from stamp duty, deeds, &c., executed by local boards for the purpose of that act. The Bath Act declares that the act shall be subject to the provisions of any subsequent act for amending the Public Health Act, 1848. The Local Government Act, 1858, is to be construed with and form part of the Public Health Act, 1848, and to take effect where the act of 1848 was already in force wholly or partially; and local boards formed under the later act are to have all the rights and liabilities of boards under the act of 1848. A subsequent act of 1861 provides that the act of 1858 shall extend to local boards constituted under local acts as well as under the general act of 1858, with this qualification, that provisions of the general act opposed to or restrictive of the provision of any local act, shall be of no force in the district for which the local act was passed:—Held, that a deed by which (in pursuance of the powers in the act of 1858) land was conveyed to the corporation of Bath "acting as the local board, and requiring the land thereby conveyed for a street

improvement within their district," was exempt from stamp duty by virtue of the Public Health Act, 1848, s. 151, notwithstanding the express exception of that section from the Bath Local Act of 1851. *Bath (Mayor) v. Commissioners of Inland Revenue*, 40 L. J., Ex. 181; 20 W. R. 80.

Newspaper.—A publication containing public news, printed and published in London, for sale for less than sixpence, exceeding one sheet and not exceeding two sheets of paper of the dimensions of twenty-one inches in length and seventeen inches in breadth, and published periodically in parts or numbers at intervals exceeding twenty-six days, was not liable to stamp duty under 6 & 7 Will. 4, c. 76. *Att.-Gen. v. Bradbury*, 7 Ex. 97; 21 L. J., Ex. 12; 16 Jur. 130.

Affidavits.—Before 4 & 5 Vict. c. 34, s. 1, which repeals the duty, affidavits used in answer to an application to set aside an award pursuant to a submission to arbitration, by deed, required to be stamped, because they were not used in any action or suit. *Templeman, In re*, 9 D. P. C. 962; 5 Jur. 400.

Voting Papers.—The Stamp Act of 1870 (33 & 34 Vict. c. 97), imposing a penny stamp on "Voting paper; that is, any instrument for the purpose of voting by any person entitled to vote at any meeting," does not extend to voting papers used, under 7 Will. 4 & 1 Vict. c. 78, ss. 13, 14, at a meeting of the town council of a municipal borough for the election of aldermen. *Reg. v. Strachan or Strahan*, 7 L. R., Q. B. 463; 41 L. J., Q. B. 210; 26 L. T. 835; 20 W. R. 629.

Proxies for Appointment of Commissioners.—A note in writing signed by proprietors under a local act authorizing others to act for them in the nomination and appointment of a special commissioner, requires to be stamped. *Reg. v. Kelk*, 12 A. & E. 559; 4 P. & D. 185.

Appraisements and Valuations.—An agreement to take stock, &c., at a valuation, there being no written valuation, or an inventory of the things valued, requires no stamp. *Banyard v. Seabrook*, 1 F. & F. 321.

Nothing being referred to appraisers except the mere value of the goods and of repairs, an appraisement stamp upon the written valuation is sufficient, and an award stamp is not necessary. *Leeds v. Barron*, 12 East, 1; *S. P., Perkins v. Potts*, 2 Chit. 599.

If a broker is called to prove the value of goods, he need not produce an inventory written on an appraisement stamp. *Stafford v. Clarke*, 1 C. & P. 225.

A valuation for the information of parties, and not binding on them, is not liable to an appraisement stamp though an agreement is founded on its date. *Jackson v. Shepherd*, 2 C. & M. 361; 4 Tyr. 330; *S. P., Atkinson v. Fell*, 5 M. & S. 240.

Where an objection that a valuation of houses was an appraisement under the 46 Geo. 3, c. 43, s. 9, and should have been stamped, was not made at the trial, although that section of the act was brought under the notice of the judge who tried the cause, for another purpose, the court held it could not be taken advantage of for a new trial. *Jakes v. Gardiner*, 7 Jur. 513.

Agreements for the Hire of Labourers, within 55 Geo. 3, c. 184.—An overseer in a printing-office is an artificer within the exemption in the stamp acts. *Bishop v. Letts*, 1 F. & F. 401.

A. entered into the following agreement with B.:—"A. engages to take charge of the glebe lands of B., his wife undertaking the dairy and poultry, at 15s. per week till Michaelmas, 1850, and afterwards at a salary of 25l. a year, and a third of the clear annual profit, after all expenses of rent and rates, labour and interest on capital are paid, on a fair valuation made from Michaelmas to Michaelmas, three months' notice on either side to be given, at the expiration of which time the cottage to be vacated by A., who occupies it as bailiff, in addition to his salary:—Held, that this agreement constituted the relation of master and servant between B. and A., and not that of partners; that A. was not a menial servant but a labourer, and that the agreement was admissible, though unstamped, as it fell within the exemption in 55 Geo. 3, c. 184, as an agreement for the hire of a labourer. *Reg. v. Wortley*, 2 Den., C. C. 333; 21 L. J., M. C. 44; 15 Jur. 1137.

The plaintiff and defendant being resident in England, and P. at Havana, and the defendant being a foreign agent, a written agreement was entered into by the plaintiff with the defendant on behalf and representation of P. of Havana, that the plaintiff would proceed as foreman and stoker on board a steamer about to leave London for Havana, calling at intermediate ports, to be placed in the service of P., and would faithfully do the work of fireman or stoker on board the steamer, and obey the orders of the engineers. In consideration of the service the plaintiff was to receive wages at 5l. per month, payable monthly, and 2l. per month for providing himself in provisions. During the outward passage rations were to be served out to the plaintiff on account of P. The contract to be understood to be in force for one year certain from the date, and should the plaintiff be discharged before that time, three months' wages to be paid in advance, besides finding him a passage home; P. being at liberty to confirm and continue the engagement on the terms stated, or to discharge the plaintiff and to find him his passage back to England. The wages to be payable up to the day of the plaintiff's arrival in England, unless he should be discharged for misconduct; one month's pay to be advanced for the plaintiff's outfit for the voyage:—Held, that the agreement did not require a stamp, being within the exemption of a memorandum or agreement for the hire of any labourer in 55 Geo. 3, c. 184. *Wilson v. Zulmeta*, 14 Q. B. 405; 19 L. J., Q. B. 49; 14 Jur. 366.

9. NUMBER OF WORDS.

Figures as Words—Indorsement.—Figures are to be counted as words, but an indorsement on the back, and a page of the particulars of sale, containing a mere repetition of the description of the property, which was described in another page of the same particulars, are not to be counted. *Dudley (Lord) v. Robins*, 3 C. & P. 26.

Receipt of Penalty.—The receipt of the penalty put on an agreement at the stamp office, when it is stamped there on payment of the penalty, is not to be reckoned in counting

whether the agreement, "with any receipt, &c., indorsed thereon," contains 1,080 words, although the agreement cannot be read unless such receipt for the penalty is indorsed on it. *Bouring v. Stevens*, 2 C. & P.

Sums and Signatures.—Several persons signed an agreement to pay their proportions of costs incurred in defending particular acts, rateably, according to the sums subscribed by each, and set opposite their respective names. The words of the agreement when counted with each sum and signature, as far as and including that of the defendant, amounted to less than 1,080 words. The result was similar on counting the words of the agreement with the signatures, but without the sums; but on adding all the sums and signatures to the words in the body of the agreement, it proved to contain more than 1,080 words:—Held, that it being necessary to read every sum and signature, in order to ascertain the proportion payable by each subscriber, a 1*l.* 15*s.* stamp was necessary under 55 Geo. 3, c. 184. *Linley v. Clarkson*, 3 Tyr. 353; 1 C. & M. 436.

Maps—Names on.—Three persons in the same line of business "agreed to divide and not interfere with certain districts of the several cities, boroughs, &c. set forth on Bowle's Post Map of England and Wales, thereto annexed and referred to," and that the three parties should respectively sell without interruption in the several cities, &c. marked and set forth and described in the map, which was annexed to the agreement:—Held, that all the names of places on the map must be counted as words, and that, if the words of the agreement with the names on the map amounted to more than 1,080, the agreement must be stamped accordingly with a 1*l.* 15*s.* stamp under 55 Geo. 3, c. 184. *Wickens v. Evans*, 4 C. & P. 359.

Paper described as Annexed.—Where an agreement and a writing, described therein as annexed to it, contained together more than 1,080 words, a 35*s.* stamp was required under the same statute, although in fact the writing was annexed to the agreement after it was executed. *Veal v. Nicholls*, 1 M. & Rob. 248.

Memorandum Explanatory.—By an agreement which recited that A. and others had applied to parliament for a bill to authorize them to reclaim from the sea waste land in which B. and C. claimed certain interests, and that B. and C. had objected to the bill, it was agreed that B. and C. should withdraw their opposition and promote the bill, and should receive portions of the land when reclaimed, and that A. and others should pay to B. 1,000*l.* on the passing of the act. After a few weeks, a memorandum was indorsed on the paper on which the agreement was written, to the effect that it was agreed that B. and C. were only severally and not jointly bound for the fulfilment of the written agreement; that the 1,000*l.* within mentioned to be paid to B. was for costs and expenses of surveys, and the written agreement for facilitating the bill was only to be in force for the existing session of parliament. The agreement contained more than 1,080 words, and was stamped with a 35*s.* stamp. The memorandum contained less than that number, and was stamped with a 20*s.* stamp:—Held, that the memorandum did not

incorporate the agreement so as to make it necessary to count the words of the agreement in the number of the words of the memorandum for the purpose of the stamp duty; and that even if it did incorporate it, there was no provision in 55 Geo. 3, c. 184, to justify the reckoning the words of the agreement in estimating the amount of duty to which the memorandum was liable, and consequently, that the 20*s.* stamp was sufficient. *Fishmongers' Company v. Dimsdale (in error)*, 12 C. B. 557; 22 L. J., C. P. 44; 16 Jur. 799—Ex. Ch.

Schedule of Goods.—A schedule of goods, referred to in a deed to which it is annexed, must have the proper deed stamp by 37 Geo. 3, c. 80, s. 7, according to the number of words, and not merely the single schedule stamp. *Luke v. Ashwell*, 3 East, 326.

Arbitration Clause.—Where an agreement, duly stamped, contains a special clause for referring disputes to arbitration, and, in a second agreement between the same parties, it is stipulated that disputes as to the construction of the second agreement shall be decided by arbitration, according to the provision of the first agreement, a stamp adapted to the number of words actually written in the second agreement, without counting the clause referred to, is sufficient. *Attwood v. Small*, 1 M. & R. 246; 7 B. & C. 390; 2 Y. & J. 72; 3 C. & P. 208.

Sale—Subject to Lease.—An agreement for the sale of a house stated, that the sale was subject to the covenants set forth in a draft lease delivered this day:—Held, that, in calculating the number of words, with reference to the stamp upon the agreement, the covenants in the lease were not to be included. *Sneezum v. Marshall*, 7 M. & W. 417; 9 D. P. C. 267.

10. ADMISSIBILITY OF UNSTAMPED DOCUMENTS.

a. Generally.

Validity of Document.—The want of a stamp does not avoid a document; it only prevents its being produced in evidence. *Goodright v. Gregory*, Lofft, 339.

If a document which is unstamped, but requires a stamp, is offered in evidence, and, if stamped, would be evidence to establish any point litigated between the parties, it cannot be received. *Matheson v. Ross*, 2 H. L. Cas. 286; 13 Jur. 307. See *Evans v. Prothero*, 2 Mac. & G. 319; 15 Jur. 113.

If it would be of no benefit when stamped, it may, though unstamped, be received. *Id.*

Articles of agreement under seal could not be given in evidence unless stamped with a deed stamp, although the agreement stamp was of the same value but differently formed. *Robinson v. Bryborough*, 6 T. R. 317; 1 Esp. 243.

To prove Admission in a Recital.—In an action by payee against maker of a promissory note for 485*l.*, in which he pleaded that he did not make the note, it was proposed, in addition to proof of his signature of the note, to put in an unstamped agreement between the same parties, of the same date as the note, in which it was recited that the one had bought of the other the

lease of a public-house for 485*l.*, and had given a note for that sum as a security for the purchase-money, and by which it was agreed that the vendor should hold the lease of the house till the purchase-money was paid:—Held, that as the agreement was one that ought to have borne a stamp, it was not receivable even for the purpose of proving the admission contained in the recital. *Keane v. Jones*, 2 C. & K. 725.

Promissory Note—Evidence of being given under Intoxication.—But in an action on a note, the defendant was allowed to produce an unstamped note to prove that it was given in a state of intoxication. *Gregory v. Frazer*, 3 Camp. 454.

Sale by Agreement—Agreement Inadmissible—No other Evidence Admissible.—B. owed A. a sum of money, for which A. had B.'s promissory note as a security. A. applied for payment. B. proposed that an inventory should be made of the goods on his premises, and that A. should take them at a valuation in discharge of the debt. A. consulted his attorney, who prepared a document. After the preparation of the document, B. delivered the inventory to A., and A. and B. insured the goods against fire in their joint names, and A. gave up to B. the note, which was destroyed. A. at the same time credited B. in his book to the amount of the debt. A. took possession of a few articles included in the inventory, for which B. had no use, but B. remained in possession of the rest of the goods as before. The goods being seized by the sheriff in execution, at the suit of a third party against B., A. claimed them as his own, and sued the sheriff in a county court for taking them, and, in order to maintain his claim, offered the document in evidence. This was objected to, and rejected for want of a stamp:—Held, that as B. was in possession of the goods, it lay on A. to prove clearly that they were his; and that as the document which contained the terms of the arrangement between A. and B. was inadmissible for want of a stamp, no other evidence of a sale was admissible, and that, consequently, the facts above stated were no evidence of A.'s title to the goods. *Forke v. Smith*, 21 L. J., Q. B. 53; 16 Jur. 63.

For Collateral Purpose.—Generally speaking, whenever a written instrument is tendered, not for the purpose of establishing a binding agreement between the parties, but for the collateral purpose of shewing the illegal notice of some transaction, it is not an objection that the instrument is unstamped. *Coppock v. Bower*, 4 M. & W. 361.

Therefore, where a petition containing charges of bribery was presented to the House of Commons against the return of a member, and the petitioner entered into an agreement, that, in consideration of a sum of money and other terms, he would not further prosecute his petition:—Held, that the agreement was illegal, and that the papers put in to establish the existence of that agreement did not require to be stamped. *Ib.*

Where A. brings an action against B. for the price of a gun ordered by the latter, he may read in evidence, for a collateral purpose, part of a letter written by B. to him; although the remainder of the letter contains directions for making the gun, and is not stamped as an

agreement. *Forsyth v. Jervis*, 1 Stark. 437. See also *cases ante*, col. 730.

Replevin—Evidence of Rent.—In replevin, the issue being whether the plaintiff held certain closes at a fixed rent, specified in the avowry:—Held, that unstamped receipts tending to shew that he had previously paid for the same premises the like rent so specified, were inadmissible to support the issue. *Hawkins v. Warre*, 5 D. & R. 512.

Letter to prove Contract of Marriage.—A letter read to prove a contract of marriage need not be stamped. *Orford v. Cole*, 2 Stark. 351.

Register of Vessel—Action to Recover—Pledging Document.—An instrument as follows:—“You will be pleased to receive the register of the brig *Gratitude*, which I inclose, and which I lodge in your hands as a security for the payment of all demands and charges on account of the vessel since she has been in this port, and which I hope will be satisfactory to you,” is not receivable in an action by the writer to recover possession of the register, without an agreement stamp. *Bowen v. Fox*, 2 M. & R. 167.

Bill of Sale—Former Bill Unstamped.—On an issue to try the property in goods, which the plaintiff claimed under a bill of sale, a former bill of sale of the same goods, but which had been cancelled, was tendered to shew that the second bill of sale was given *bonâ fide*, and not fraudulently. This document having been rejected, on the ground that it was not stamped:—Held, that it was properly rejected, and was inadmissible without a stamp. *Williams v. Gerry*, 10 M. & W. 296; 2 D., N. S. 201; 11 L. J., Ex. 389.

Documents made Abroad.—A document which, by the law of a foreign country, is not admissible in evidence, for want of a stamp, may nevertheless be admitted in this country. But where, by the foreign law, the want of a stamp renders the contract void, it cannot be enforced here. *Bristow v. Sequeville*, 5 Ex. 275; 3 C. & K. 64; 19 L. J., Ex. 289; 14 Jur. 674. See also *James v. Catherwood*, 3 D. & R. 190.

Receipt to refresh Memory.—Where a receipt was given on unstamped paper, it may be used by a witness who saw it given, to refresh his memory. *Rambert v. Cohen*, 4 Esp. 213.

Acknowledgment to save Statute of Limitations.—P. being indebted to the executors of C. in 11,000*l.*, to which A. was beneficially entitled, sent a letter to A. as follows: “I have sent you a note for the money due to you, which your mother left for you.” Inclosed in this letter was a promissory note, on a receipt stamp for 11,000*l.*, and 4*l.* per cent. interest. At the time of this letter and note being sent the debt was barred by the statute:—Held, that there was not a sufficient acknowledgment by P. without referring to the note to see what was the promise made, and this could not be done for the want of a proper stamp. *Parmiter v. Parmiter*, 3 De G., F. & J. 461; 30 L. J., Ch. 508.

Bill of Exchange to prove Uselessness.—An insufficiently-stamped bill of exchange is ad-

missible for the purpose of shewing that it is an unavailable security, and thereby of rebutting an inference which might be drawn from the statement of an account, that a debt due to the plaintiff had been satisfied by such bill. *Smart v. Nokes*, 6 M. & G. 911; 7 Scott, N. R. 786; 13 L. J., C. P. 79; 8 Jur. 44.

In Proof of Fraud.—A document which purports to be an agreement, and is valid upon the face of it, but which is tendered to shew the transaction with which it is connected to be a fraud, is admissible, although unstamped. *Holmes v. Sizemith*, 7 Ex. 802; 21 L. J., Ex. 312; 16 Jur. 619.

A memorandum stamped as a receipt having been rejected, because requiring a stamp as an agreement, an agreement for the hire of goods, of which the value was mentioned only by reference to the receipt, does not require a stamp, the value of the hire not appearing to exceed the amount of 20*l.*, and the rejected receipt allowed to be looked at, with reference to the real state of the transaction, in order to shew fraud. *Chittenden v. Day*, 2 F. & F. 77.

Bond—Many Indorsements—No Room for Receipt.—Where, from the number of indorsements, there is no room on the back of the bond, receipts written on unstamped paper, annexed to the bond, may be read in evidence. *Orme v. Young*, 4 Camp. 336.

Coming from Opposite Party.—A written agreement, though coming out of the possession of the opposite party, cannot be given in evidence, unless it is legally stamped. *Doe d. St. John v. Hore*, 2 Esp. 724.

Stamped with a Denoting Stamp.—Documents stamped with a denoting stamp by the commissioners, under 13 & 14 Vict. c. 97, s. 14, cannot be objected to, when tendered in evidence, as being improperly stamped. *Prudential Mutual Assurance Investment and Loan Association v. Curzon*, 8 Ex. 97; 22 L. J., Ex. 85.

Where the instrument is objected to at the trial as being insufficiently stamped, and afterwards, but before the case is argued in banc, a denoting stamp is affixed to it, such objection to the sufficiency of the first stamp is not thereby removed. *Ib.*

In Criminal Proceedings.—Before 17 & 18 Vict. c. 83, s. 12, if an agreement or other written instrument was charged to be part of a fraud or other crime, it was immaterial whether it was stamped or not. *Rees v. Foulle*, 4 C. & P. 592.

b. On Payment of Penalty.

Not objected to.—An agreement which has not been duly stamped, cannot be admitted without payment of the penalty, although no objection to its admission is offered by either side. *Harris v. Chapman*, 17 L. T. 517.

Insufficiently Stamped.—Where an instrument has an insufficient stamp, it may at any time be made available by affixing a proper stamp and paying the penalty. *Burton v. Kirkby*, 2 Marsh. 480; 7 Taunt. 174.

Before and after 7 & 8 Vict. c. 21.—An agree-

ment made at a time when the 55 Geo. 3, c. 184, was in force, and under which it required a stamp of 1*l.*, was, subsequently to 7 & 8 Vict. c. 21, coming into operation, stamped, under a penalty, with the stamp of 2*s.* 6*d.*, as required by s. 2.—Held, admissible. *Deakin v. Penniell*, 2 Ex. 320; 17 L. J., Ex. 217.

Receipt of Penalty Erased.—If an instrument has been originally unstamped, but has been stamped on the payment of a penalty, it is admissible, though the receipt for the penalty has been erased; provided it is proved that such receipt had been indorsed on it; it is not necessary to prove the commissioners' signatures to such a receipt. *Apothecaries' Company v. Fernyhough*, 2 C. & P. 438.

Indorsement by Commissioners.—A memorandum indorsed upon an instrument, purporting to be an acknowledgment by the commissioners of stamps on the payment of a penalty, is not receivable in evidence. *Rees v. Preston*, 3 N. & M. 31; 5 B. & Ad. 1029.

— **Before and after 16 & 17 Vict. c. 59.**—A bill of exchange for 25*l.*, dated 17th January, 1857, was drawn on one of the threepenny receipt stamps, rendered useless by 16 & 17 Vict. c. 59. In 1859, on application to the Commissioners of Inland Revenue, they, on the payment of the penalty, affixed a bill stamp of the required value (3*d.*) to the instrument.—Held, that they had authority to do so, and that the bill so stamped was properly admitted. *Haiser v. Grout*, 1 L. T. 44; 5 H. & N. 85.

c. Secondary Evidence.

Document Inadmissible for want of Stamp.—When an agreement in writing is in existence, which ought to be but is not stamped, it is not a nullity, so as to admit of parol evidence being given of the terms of the agreement. *Delany v. Alcock*, 24 L. J., Ex. 68; 1 Jur. N. S. 498; *S. C.*, nom. *Alcock v. Delany*, 4 El. & Bl. 660. A party cannot be cross-examined as to the contents of a document not admissible for want of a stamp. *Baker v. Dale*, 1 F. & F. 271.

Lost Document—Evidence of being Unstamped.—It lies upon the party objecting to secondary evidence of the contents of a lost document, on the ground of the want of a stamp, to shew that it was not stamped. *Closmadeuc v. Carrel*, 18 C. B. 36; 25 L. J., C. P. 216; 2 Jur. N. S. 474.

If it is shewn that at one time it was unstamped, that fact by itself will raise the presumption that it continued without a stamp. *Ib.*

But where it appeared that a charterparty at the time of its execution was unstamped, and within the fourteen days allowed by 5 & 6 Vict. c. 79, for stamping such an instrument, it was taken to the district stamp office in the country and the duty and postage paid, in order that it might be sent to London to be stamped, and the clerk to whom it was delivered proved that he sent to London all documents left with him for that purpose; and the clerks in London said they were unable to say whether such a document was or was not returned, but if it was, it would be returned in the usual course to the district office in the country; and the clerk there could not say

whether it was returned or not, but on search being made for it, no trace of it could be discovered :—Held, that the evidence left it altogether uncertain whether the document was stamped or not, that the presumption of its being unstamped was done away with, and that the secondary evidence was admissible. *Id.*

Agreement not Produced after Notice.]—An agreement, which by law ought to be stamped, not being produced upon notice given, secondary evidence is not allowed of its contents, if shewn that, at the time of its delivery to the party not producing it, it was unstamped. *Arbor v. Fuswell*, 9 Jur., N. S. 753 ; 7 L. T. 283 ; 11 W. R. 26. See *Rippiner v. Wright*, 2 B. & Al. 478.

Devise of Lands—Sale—Lost Plans.]—A. devised lands to B. for life, with remainders over. He afterwards contracted to sell part of the lands to C., and the contract partly described them, and partly referred to a plan. C. did not pay the whole purchase-money, but entered into possession, and became bankrupt. The court of review made an order in the bankruptcy, declaring that A. had a lien for his unpaid purchase-money, and directed a sale. A. became the purchaser for a less sum than was due to him, and proved against C.'s estate for the difference. A. entered into possession, and so continued until his death. The plan had never been stamped, and was lost :—Held, that parol evidence was not admissible to shew what was contained in the lost unstamped plan. *Andrew v. Andrew*, 8 De G., M. & G. 336 ; 25 L. J., Ch. 779 ; 2 Jur., N. S. 719.

Work and Labour—Written Agreement Unstamped—Extra Work.]—In an action for work, where it appears that the work was done under a written agreement, which is inadmissible for want of a stamp, parol evidence is not receivable to shew that there was extra work done not included in the original agreement ; nor will the judge look at the contract for this purpose. *Buckstone v. Cornish*, 1 D. & L. 585 ; 12 M. & W. 426 ; 13 L. J., Ex. 91 ; 8 Jur. 46.

To prove Document to be a Receipt.]—A document, not purporting on the face of it to be a receipt for the payment of money, may be shewn to be a receipt by extrinsic evidence. *Reg. v. Overton*, Dears. C. C. 308 ; 23 L. J., M. C. 29 ; 18 Jur. 134.

Joint Interest in Document—Admissibility of Stamped Copy.]—In an action founded on a document in which both parties have an interest, and which was in the possession of one, but is said by him to have been lost, a judge cannot order, that if such party does not produce the document to be stamped, a copy, duly stamped, shall be read in evidence at the trial, and that the original shall not be produced on the other side, nor objection taken to the want of a stamp on the original. The court rescinded such an order after it had been enforced by the judge at nisi prius, and made a rule of court. *Rankin v. Hamilton*, 15 Q. B. 187 ; 14 Jur. 930.

Admitted Copy.]—An admitted copy of a document may be received without a stamp, and without proof that the original is stamped. *Traviss v. Hargreave*, 4 F. & F. 1078.

Examined Copy of Court Rolls.]—An examined copy of court rolls is admissible to prove a surrender of copyhold lands without being stamped ; the provision in 55 Geo. 3, c. 184, as to copies of court rolls, applying only to such copies as are given out and signed by the stewards. *Doe d. Burrows v. Freeman*, 12 M. & W. 844 ; 1 C. & K. 386 ; 14 L. J., Ex. 142.

Attested Copy of Deed.]—An attested copy of a deed on a one-shilling stamp is admissible as secondary evidence. *Ditcher v. Kenrick*, 1 C. & P. 161.

Agreement in two Parts—Only one Stamp.]—If plaintiffs put in one part of a written agreement which is signed by the defendant only, and is duly stamped, the defendant may put in the other part of the agreement which is signed by one of the plaintiffs for self and the other executors, although that part of the agreement is not stamped. *Turner v. Hardey*, Car. & M. 449.

If there are two parts of a written agreement, both executed at the same time, but the one stamped and the other unstamped, the unstamped part is receivable as secondary evidence of the contents of the stamped part. *Waller v. Horsfall*, 1 Camp. 501.

Copy of Deed to refresh Memory.]—The copy of a deed produced and read in court, if it is merely used as a memorandum to refresh the memory of a witness, who has read the original, and compared the copy with it, is not liable to the duty imposed by 44 Geo. 3, c. 98, Sched. A., and 48 Geo. 3, c. 149, Sched. 1, Pt. 1, on copies of documents. *Braithwaite or Braythwaite v. Hitchcock*, 2 D., N. S. 444 ; 10 M. & W. 494 ; 12 L. J., Ex. 38 ; 6 Jur. 976.

d. Time of Stamping.

Guarantee after Bankruptcy.]—It is no objection to a guarantee given by a bankrupt that it was not stamped at the date of the bankruptcy. The court does not look at the date of a stamp. *Nicholson, Ex parte*, 4 Jur. 1066.

Deed Stamped after Proceedings.]—A deed stamped after proceedings have begun is good ab initio. *Broune v. Savage*, 5 Jur., N. S. 1020.

Where a deed is produced bearing the proper stamp, the court will receive it without entering into the inquiry whether it was affixed upon the payment of a sufficient penalty, and within proper time, although it is proved not to have been stamped when executed. *Re v. Preston*, 3 N. & M. 31 ; 5 B. & Ad. 1029.

Where limited by Statute.]—But with reference to the effect of the deed, the court will inquire into the time it was stamped, in cases where stamping within a limited period is required by statute. *Id.*

Before and after 1870—Date of Execution.]—A deed executed before the commencement of the Stamp Act, 1870, and at the time of execution requiring a 35s. stamp, was not dated nor stamped until afterwards ; so that on its face it appeared to be duly stamped with a 10s. stamp, under ss. 4 and 78 :—Held, that evidence of the real date of execution was admissible ; and that, under s. 17, the deed could not be given in

evidence. *Clarke v. Roche*, 3 Q. B. D. 170; 47 L. J., Q. B. 147; 37 L. T. 633; 26 W. R. 112.

Probate—When Payable under preceding Statute.]—J. died on the 2nd of August, 1879, having previously made her last will, which her executor proceeded to prove, and on the 13th of September, 1879, paid 450*l.*, being the amount of duty then payable. A caveat was lodged by the next of kin, and it was not until the 13th of April, 1880, that the will was established. In the meantime the 43 Vict. c. 14, was passed, altering and increasing the duties payable upon probates on and after the 1st of April, 1880:—Held, that the probate was liable to the increased duty made payable by the 43 Vict. c. 14, s. 9. *Joy, In re, Lator v. Jones*, 5 L. R., Ir. 282.

e. Objections and Proof.

Several Parties—Proof on One making Objection.]—Where an agreement between several parties is offered in evidence, and it is objected to on the ground that it is not sufficiently stamped, by reason of the omission of a stamp, proof of that lies on the party who makes the objection, it being a fact. *Waddington v. Francis*, 5 Esp. 182.

The onus of shewing that an instrument, otherwise regular, has been duly stamped, lies on the party impeaching it. *Doc d. Fryer v. Combs or Combe*, 3 Q. B. 687; 3 G. & D. 193; 11 L. J., Q. B. 36; 6 Jur. 930; *S. P. Wilson v. Smith*, 12 M. & W. 401; 1 D. & L. 633; 13 L. J., Ex. 113.

The burthen of proving an instrument to be unstamped lies, in the first instance, on the party who objects to its production on the ground that it is unstamped. *Marine Investment Company v. Hariside*, 5 L. R., H. L. 624; 42 L. J., Ch. 173.

Presumption.]—When there is no evidence on either side it will be presumed to have been stamped. *Ib.*

But when once satisfactory evidence has been given that at a particular time the instrument was unstamped, there is an end of any presumption of law in favour of its having been stamped; the onus of proof is shifted, and the party who relies on the instrument must prove it to have been duly stamped. *Ib.*

Claim for Exemption.]—Where an agreement is *prima facie* liable to stamp duty, it is for the party offering it to bring it within the exemption. *Chanter v. Dickinson*, 2 D., N. S. 838; 5 M. & G. 253; 6 Scott, N. R. 182; 12 L. J., C. P. 147; 7 Jur. 89.

Obliterated Stamp.]—Where a deed requiring an ad valorem stamp is produced, bearing the appearance of having had a stamp upon it, but the nature of which, by reason of obliteration, cannot be ascertained, it is for the party objecting to the deed to give some evidence that a proper stamp had not been imposed, otherwise a presumption may be made that the deed had been duly stamped. *Doc d. Fryer v. Combes, or Combe*, 3 Q. B. 687; 3 G. & D. 193; 11 L. J., Q. B. 36; 6 Jur. 930.

Objection as to Number of Words.]—Where it is objected that an agreement is inadmissible in evidence because it contains more than 1,080

words, the counsel making the objection must be prepared with a witness who can prove that he has counted the words, and can positively state their number. *Bowering v. Stevens*, 2 C. & P. 337.

Agreement to waive Objection.]—The court cannot sanction an agreement between the parties, that an objection for want of a proper stamp shall be waived. *Owen v. Thomas*, 3 Mylne & K. 353.

An agreement, that if it should become necessary to stamp a document, and pay any penalty for doing so, one of the parties to it should be at liberty to charge the other with the expense of stamping it, is an evasion of the stamp act, and will not be enforced by a court of equity as to the penalty. *Abbott v. Stratton*, 3 J. & Lat. 603.

An agreement which has not been duly stamped cannot be admitted in evidence, although an application is made by both sides that the agreement should be admitted without being stamped, as it would amount to an evasion of the stamp laws. *Harris v. Chapman*, 17 L. T. 517.

The 17 & 18 Vict. c. 125, s. 28, which enacts that it shall be the duty of the officer of the court to call the attention of the judge to any omission or insufficiency of the stamp upon any document produced in evidence, does not preclude a party to the suit, or his counsel, from taking the objection. *Austin v. Bunyard*, 6 B. & S. 687.

If when a written agreement is put in, the opposite party objects that it contains a greater number of words than the stamp is proper for, and calls a witness who has counted the words in the counterpart, that is reasonable evidence that it does contain more than the proper number of words, and the judge will direct the officer of the court to count the words in the original. *Dudley (Lord) v. Robins*, 3 C. & P. 26.

Objection by Associates.]—Under 17 & 18 Vict. c. 125, s. 28, the associate can make only such objections, for want of a stamp, as the parties might have made if the statute had not passed. *Travers v. Hargreave*, 4 F. & F. 1078.

Question as to whether Original was Stamped is for the Jury.]—On the trial of an action on a policy in which the existence of the policy was in issue, the plaintiffs, pursuant to notice to produce, called on the defendant to produce the original policy. He declined, and they thereupon, with a view of proving that it had been duly executed, proceeded to put in a document, purporting to be a copy of the policy which they had received from the defendant's broker. The defendant objected, and requested the judge to hear evidence to shew that no original policy was or ever had been in existence. The objection was overruled, and the alleged copy admitted. Later in the cause the defendant gave evidence tending to prove that in fact there had never been any duly stamped policy, or indeed any policy at all executed, and the judge left it to the jury to say whether there had or had not been executed a duly stamped policy by the defendant. The jury found in the affirmative:—Held, that the question was rightly left to the jury, inasmuch as if the judge had himself decided it, he would in fact have decided the main issue between the parties. *Stowe v. Querner*, 5 L. R., Ex. 155; 39 L. J., Ex. 60; 22 L. T. 29; 18 W. R. 466.

When Point Doubtful.—An objection that a document requires a stamp will not be given effect to if the point is doubtful. *Westlake v. Adams*, 1 F. & F. 183.

Lease—At Trial—When to be taken.—Where an instrument was put in evidence as an agreement, properly stamped, but during the trial it was subsequently relied upon as a lease:—Held, that the objection to its inadmissibility, for want of a proper stamp, ought to have been taken at that period of the trial when it was first tendered as a lease. *Doe d. Phillip v. Benjamin*, 2 W. & H. 96.

An objection to the admissibility of a document for the want or insufficiency of a stamp must be taken at the time it is tendered in evidence. *Robinson v. Vernon (Lord)*, 7 C. B., N. S. 235; 29 L. J., C. P. 310.

f. Decision as to.

Motion on.—Semble, that s. 31 of 17 & 18 Vict. c. 125 has deprived the courts of jurisdiction to entertain any motion upon a point reserved on the stamp laws. *Heiser v. Grout*, 5 H. & N. 35.

Judge at Nisi Prius.—The question whether or not a document offered in evidence requires to be or is sufficiently stamped is to be decided by the judge at nisi prius, and cannot properly be reserved for the opinion of the court. *Tattersall v. Fearnley*, 17 C. B. 368; *S. P., Siordet v. Kuczyński*, 17 C. B. 251; 25 L. J., C. P. 2.

Unless he decides against its admissibility. *Cory v. Davis*, 14 C. B., N. S. 370; *S. P., Sharples v. Richards*, 2 H. & N. 57.

Documents—Pending Decision.—Documents which require to be stamped, may be taken as put in conditionally, on a point reserved as to their sufficiency or necessity. *Webber v. Mowbray*, 2 F. & F. 310.

Jurisdiction to order Production of Document to be Stamped.—The court will compel the production, by a defendant, of a letter, with a view to its being stamped as an agreement, at the expense of the plaintiff (such letter being a part of an alleged agreement, which it is necessary for the plaintiff to prove as part of his case), the plaintiff being no party to such document, but claiming only an interest in it. *Hall v. Bainbridge*, 3 D. & L. 92; 14 L. J., Q. B. 289; 9 Jur. 451.

— **When Exercised.**—B. and C. entered into partnership by an unstamped agreement, which was in the hands of S. A. sued B. and C., as partners, for goods sold, and applied to S. to take or send the agreement to the stamp office, that A. might get it stamped. S. refused to do so, and a judge would not order him to do so as he held the agreement for B. and C., and did not in any way hold it for A. *Dyke v. Brewer*, 2 C. & K. 828.

IV. COMMISSIONERS.

1. JURISDICTION.

One Commissioner.—One commissioner of taxes has no power, under 52 Geo. 3, c. 93, to

receive an information and issue a summons for non-payment of taxes. *Reg. v. Griffin*, 9 Q. B., 155; 2 New Sess. Cas. 368.

Re-Assessment—How Enforced—Mandamus.]

—Where the commissioners of taxes refused to re-assess the inhabitants upon a default made by the collector, unless they were indemnified, being doubtful of their authority so to do; the court, being of the opinion that they were bound to do so, granted an order in the nature of a mandamus. *Wootton, In re*, 6 Price, 103.

If the acting commissioners of taxes refuse (unless indemnified) to proceed to make a re-assessment on a parish, to which the deficiency applies, where an insuper has been set on the parish, whose collector is a defaulter, the court will order them to do so by rule to shew cause, in the nature of a mandamus; and will also order a service on their clerk to be deemed good service: the crown is not limited to any time within which to make such an application. *Id.*

The mode of enforcing a re-assessment of the amount of a deficiency in the collection of the assessed taxes is by distringas, under 43 Geo. 3, c. 99, s. 47, against the collectors, on motion by the attorney-general on the part of the commissioners for affairs of taxes. *Anon.*, 12 Price, 153.

Commissioners of Land Tax.—See cases ante, col. 620.

2. CLERK TO.

Election of—Mandamus.—Before 17 & 18 Vict. c. 85, if the clerk of the commissioners of land tax was improperly elected under 43 Geo. 3, c. 99, a mandamus would lie to them to admit the person who had the majority of legal votes. *Re v. Thatcher*, 1 D. & R. 426.

3. COLLECTORS OF TAXES.

Appointment of.—The insertion of the name of a person as collector of the assessed taxes in the warrants of the commissioners, is not a sufficient appointment to that office. *Re v. Radley*, Forrest, 150.

The Land Tax Acts require the assessors and collectors to be inhabitants of the respective parishes, &c., for which they are to act:—Held, that the acts of a person duly appointed as assessor and collector were valid, although he was not duly qualified by inhabitancy. *Waterloo Bridge Company v. Cull*, 1 El. & El. 213; 28 L. J., Q. B. 70; 5 Jur., N. S. 464.

Default of One—Re-Assessment.—If there are two collectors of taxes appointed under 43 Geo. 3, c. 99, s. 13, for a single parish, by the commissioners, one for one division of the parish called the upper parish, and one for another called the lower parish, and they accordingly collect the taxes separately from the several inhabitants of their respective divisions; in case of a deficiency in the amount of the taxes collected through the misconduct of either, the whole parish must be re-assessed, and not the particular district, the collector of which has misapplied the money, and from the collection of whose taxes the deficiency arises, although the taxes of the other division have been collected and paid over to the receiver-general. *Henllam, Ex parte*, 7 Price, 594.

If a collector of assessed taxes does not pay over all sums collected by him, the parish is answerable to the crown for the deficiency. *Res v. St. George's, Hanover-square*, 3 Anst. 920.

— **Liability of Others.**—A joint collector is liable for any deficiency in the collection for a year, in the amount received by his coadjutor, although he has not himself collected during the time, and although his appointment may not have been quite formal, if he has in any manner acknowledged his appointment, or acted or received a share of the poundage at any time. *Bromley, In re*, 5 Price, 5.

— **Imprisonment.**—A collector in custody under an extent is not entitled to be discharged, although his deficiency has been made good to the crown by a re-assessment upon the parish. *Res v. Bennett*, Wightw. 1.

Committal.—The income-tax commissioners have no power to commit a defaulting collector of income-tax in the county of Middlesex to Newgate; the commitment should be made to Whitecross-street prison. *Masters, In re*, 33 L. J., Q. B. 146; 9 L. T. 733.

Where a warrant for the apprehension of a defaulter, under 3 Geo. 4, c. 88, s. 3, was issued by commissioners of taxes of the Cambridge district, and it was backed by justices of Lancashire and Gloucestershire, and on a return to a habeas corpus it appeared that he was in custody on the warrant in Cambridge gaol, the court refused to discharge him, on a suggestion that he had been apprehended at Cheltenham, being clearly in legal custody at Cambridge. *Sharpe, Ex parte*, 9 D. P. C. 513.

Exacting Duty not Charged in Assessment.]

—A collector exacting a duty, in respect of which there had been no charge at all in the assessment upon the person from whom the payment was exacted, is not liable to the penalties under 43 Geo. 3, c. 99, s. 12. *Lister v. Priestley*, Wightw. 67, 405.

Collection without Warrant—Liability of Sureties.—A duplicate of the assessment of duties under Schedule A of 5 & 6 Vict. c. 35, made on persons in M. for three years ending April, 1847, had been delivered to L. by the commissioners of income-tax, together with a warrant for collecting the same; but no such duplicate of assessments under Schedule D, nor warrant for collecting had been delivered to him. On the 14th October, 1846, he died, having received previously some of the duties, under Schedules A and D, for the year ending April, 1847, for which he had given the usual receipt as collector:—Held, that his sureties were not liable in respect of the duties received under Schedule D, as, for want of the duplicate and warrant, L. had not at the time authority to receive the same. *Kepp v. Wiggett*, 10 C. B. 35; 14 Jur. 1137.

See PRINCIPAL AND SURETY.

4. JURISDICTION OF COURT IN REVENUE MATTERS.

Hearing of Revenue Matters.—The court is

always sitting to hear revenue matters. *Reg. v. Morse*, 6 D. & L. 224; 3 Ex. 223.

The equity jurisdiction of the Exchequer, as a court of revenue, is not taken away by 5 Vict. c. 5. *Att.-Gen. v. Halling*, 15 M. & W. 687; 16 L. J., Ex. 303.

Power of Court to order Return of Stamp Duty paid on filing of Resolutions—Refusal of Registration.—When the registration of liquidation resolutions is refused, the court has no power to order repayment of the ad valorem duty paid on the presentation of the resolutions for registration. The only mode of obtaining a return of the duty is by a memorial to the Commissioners of Inland Revenue. *Icard, Ex parte*, *Moir, In re*, 20 Ch. D. 703; 51 L. J., Ch. 939; 47 L. T. 212; 30 W. R. 861—C. A.

Removal of Proceedings.—The court has jurisdiction to remove at any stage of the proceedings an action commenced in another court against a revenue officer, for an act done in the execution of his duty. *Att.-Gen. v. Kingston*, 1 D., N. S. 358; 8 M. & W. 163.

Where actions, brought against revenue officers for acts done by them in discharge of their duty, are removed into the Exchequer, they are like other causes on the plea side of the court, and the proceedings are not conducted in the office of the Queen's remembrancer. *Smith v. Cameron*, 9 Jur. 405.

A vessel, having a quantity of firearms on board, was seized by the officers of the Board of Customs, and, after being detained some time, was delivered up unconditionally to the owners. An action having been commenced in the Common Pleas for such seizure and detention, the Exchequer made a rule absolute in the first instance, on motion of the attorney-general, and upon his statement, without affidavit, for the removal of the cause into that court, on the ground that the revenue of the crown might be affected. *Adams v. Freemantle*, 3 Ex. 453; 6 D. & L. 10; 17 L. J., Ex. 312.

The prerogative of the crown to remove into the Court of Exchequer a cause in another court touching the crown revenue is not affected by the County Courts Act (9 & 10 Vict. c. 95), s. 90. *Mountjoy or Mountjoy v. Wood*, 1 H. & N. 58; 2 Jur., N. S. 452.

When a cause is removed by virtue of this prerogative, it is in the same stage in the Exchequer as it was in the other court. *Id.*

— **Affidavit in Support of.**—An affidavit in support of an application for the removal of proceedings from one court to another is properly entitled, "The Attorney-General, informant, r. A., defendant," if some proceedings have been commenced, though the information has not been filed. *Att.-Gen. v. Kingston, supra.*

5. PROCEEDINGS.

Informations.—By 8 & 9 Vict. c. 87, s. 82, all penalties imposed by any act relating to the customs may be sued for, prosecuted and recovered by action, or by information before two justices of the peace. By s. 83, upon the exhibiting any information before any justice for any offence against any act relating to the customs, such justice is required to issue a summons for the

appearance of the party before two justices of the peace:—Held, that s. 82 referred only to the hearing of the information; and that by s. 83, the information might be exhibited before one justice. *Reg. v. Harwich (Justices)*, 3 New Sess. Cas. 368; 13 Q. B. 237; 18 L. J., M. C. 106; 13 Jur. 259.

—**Form of.**—It is no objection to an information for penalties under the revenue laws, that several offences are charged against several defendants, some in one count and some in another, nor that some of the defendants jointly charged are acquitted and some found guilty, and judgment for the whole amount of penalties and costs given only on one count against each, who was convicted upon it. *Ruck v. Att.-Gen. (in error)*, 3 H. & N. 208; 27 L. J., Ex. 313; 4 Jur., N. S. 167—Ex. Ch.

Misjoinder of counts and of offences, in an information for penalties, is only the subject of an application at the trial to have the defendants tried separately. *Ib.*

In informations for acts done contrary to 16 & 17 Vict. c. 107 (the Customs Consolidation Act), counts following literally the forms given in Schedule B are good. *Att.-Gen. v. Henley*, 8 Ir. C. L. R. 267.

These forms are applicable in proceedings before all courts having jurisdiction, as well as in proceedings before justices. *Ib.*

Effect of Statute of Limitations.—The 3 & 4 Will. 4, c. 53, s. 120, enacted that all suits, indictments or informations exhibited for any offence against that or any other act relating to the customs in any of his majesty's courts of record at Westminster, shall be brought within three years after the date of the commission of the offence:—Held, that this was confined to indictments to be brought, under ss. 75 and 112, in the name of the attorney-general, in one of the courts of record at Westminster, and did not apply to an indictment preferred at the assizes for a conspiracy to defraud the Queen of certain duties, which was an offence at common law. *Reg. v. Thompson*, 16 Q. B. 832; 20 L. J., M. C. 183; 15 Jur. 654.

Actions for Penalties.—The enactment in 44 Geo. 3, c. 98, s. 10 (prohibiting the bringing of actions for penalties "incurred by virtue of that or any other act relating to the stamp duties," unless prosecuted in the name of the attorney-general, or of the solicitor of stamps), applies only to cases in which the subject-matter of the action relates to the stamp duties, and not therefore to an action on 38 Geo. 3, c. 78, ss. 7 & 10, for publishing a newspaper without having delivered a proper affidavit at the Stamp Office, and without stating in such paper the true names and additions of the printer and publisher. *Smith v. Gillett or Gilbert*, 4 N. & M. 225; 2 A. & E. 361.

Petition—Question of Revenue taken by Consent.—A testator bequeathed a legacy to C. "for her absolute use and benefit, except as hereinafter limited," and directed the same, with other legacies to females, to be invested, and the interest to be for the legatees' separate use; and in case any of the legatees should become bankrupt, or assign the interest bequeathed to her,

the same was to fall into his residuary estate, "except in respect of C., whose legacy is to go to her children, according to her appointment, and in default to them absolutely." By C.'s marriage settlement her husband had covenanted to settle all after-acquired property of his wife. C. died without having become bankrupt or assigned her interest in the legacy, and having, by will, appointed the same to her children equally. The Commissioners of Inland Revenue thereupon insisted that C.'s share did not go to her children directly under the will, but that her husband must take out administration to her estate, in order to obtain possession of it. By consent the question was raised upon a petition for the opinion of the court under 22 & 23 Vict. c. 35, s. 30:—Held, that by consent the question, although between the crown and a subject, might be decided on this petition; and that under the will the legacy upon C.'s death went directly to her children. *Ware, In re*, 41 L. J., Ch. 121; 25 L. T. 737; 20 W. R. 142.

Right of Beginning.—On an executor, who has been summoned by writ under the Succession Duty Act (16 & 17 Vict. c. 51), ss. 47, 48, to deliver accounts and pay duty, or shew cause to the contrary, appearing to shew cause, the crown has the right to begin. *Greenwood, In re*, 39 L. J., Ex. 30; 4 L. R., Ex. 327; 21 L. T. 25; 17 W. R. 861.

—**Special Case stated by Commissioners.**—In a special case, stated for the opinion of the Exchequer by the commissioners for the purpose of deciding a question as to the proper stamp duty to be paid upon a conveyance:—Held, that the counsel for the appellant was entitled to begin. *Chandos (Marquis) v. Commissioners of Inland Revenue*, 6 Ex. 464; 20 L. J., Ex. 269.

—**Right of Reply.**—And the counsel has the general right to reply; and per Pollock, C. B., in the Exchequer, the crown has the right to general reply in all cases, where the crown has an interest. *Ib.*

—**On Appeal.**—On an appeal against the decision of the commissioners, the appellant, on the argument of the case, is entitled to begin. *Micklethwaite, In re*, 11 Ex. 452; 25 L. J., Ex. 19.

Number of Counsel.—When a writ of summons against executors, calling upon them to pay legacy duty to the crown, has been turned into a special case, on the argument, the court will only hear one counsel on each side. *Hantie, In re*, 18 W. R. 72.

Evidence—Examiners to take.—The equity jurisdiction of the Court of Exchequer in matters of revenue still exists, notwithstanding 5 Vict. c. 5; and the court, on an application on behalf of the attorney-general, appointed clerk examiners to take evidence in a revenue suit instituted on the equity side, although the office of clerk examiner was in terms abolished by s. 15. *Att.-Gen. v. Evans*, 5 L. T. 760.

—**By Affidavit or Orally—Discretion of Court below.**—An information was filed on the equity side of the Exchequer Division to recover passen-

ger duty from a railway company, the question in dispute being whether certain trains run by the company were cheap trains within the meaning of the act exempting from passenger duty the fares for the conveyance of passengers at fares not exceeding one penny per mile by cheap trains. The company applied to have the evidence taken orally:—Held, that the evidence ought to be orally, as it was desirable that in such a case the court should be able to obtain immediate information and explanations by putting questions to the witnesses. *Att.-Gen. v. Metropolitan Railway Company*, 5 Ex. D. 218; 42 L. T. 342; 28 W. R. 376—C. A. Reversing 42 L. T. 93.

— **Witness—Questions as to the Informer.**—

—The rule of public policy, which prevents a witness being asked such questions as will disclose the informer, if he is a third person, applies equally to questions which will disclose whether or not the witness himself was the informer. *Att.-Gen. v. Briant*, 15 M. & W. 169; 15 L. J., Ex. 265.

Therefore, in an information by the attorney-general for a breach of the revenue laws, the court decided that a witness for the crown could not be asked this question, "Did you give the information?" *Ib.*

— **Defendant as a Witness for Himself.**—

On the trial of an information by the attorney-general, for the recovery of penalties for smuggling under 8 & 9 Vict. c. 87, the defendant was tendered as a witness on his own behalf and rejected:—Pollock, C. B., and Parke, B., held, that he was not rendered a competent witness by 14 & 15 Vict. c. 99, and therefore, that he was properly rejected on the ground that the proceedings by the attorney-general to recover penalties by an information filed by him on behalf of the crown are criminal proceedings. Platt, B., and Martin, B., contra. *Att.-Gen. v. Radloff*, 10 Ex. 84; 23 L. J., Ex. 240; 18 Jur. 555.

On the trial of an information for penalties incurred under 5 & 6 Vict. c. 35, and 16 & 17 Vict. c. 34, against an annuitant for refusing to allow the tenants of the premises, on which the annuity was charged, the property-tax, to be deducted out of the rents, he cannot be called as a witness. *Reg. v. Sheil*, 1 F. & F. 204.

Impressed Stamp.—Under 13 & 14 Vict. c. 97, s. 14, the commissioners, by impressing the stamp therein provided, adjudicate that the proper stamp duty has been paid. *Morgan v. Pike*, 14 C. B. 473; 23 L. J., C. P. 64.

Conviction for Offence against Police Regula-

tion—Sufficiency of.—By 4 & 5 Will. 4, c. 85, s. 2, every person applying for a licence to sell beer or cider by retail, to be drunk on the premises, must annually deposit with the excise a certificate of good character, signed by six householders. By s. 8, a penalty is imposed upon summary conviction on any person who shall in such certificate certify any matter as true, knowing the same to be false. Other sections impose a duty on excise licences for selling beer, &c., and relate to the revenue of the excise. By 11 & 12 Vict. c. 43, s. 17, summary convictions may be drawn upon a short form given in the

schedule. But, by s. 35, nothing in the act shall extend to any proceedings under or by virtue of any of the statutes relating to her Majesty's revenue of excise. Upon a rule to quash a conviction, under 4 & 5 Will. 4, c. 85, s. 8, for an offence against s. 2, which was drawn up in the form given in the schedule, as authorized by 11 & 12 Vict. c. 43, s. 17:—Held, that the conviction, which was for an offence against a police regulation, in s. 2, was sufficient, although there were in the statute other sections relating to the revenue of excise. *Reg. v. Bakewell*, 7 El. & Bl. 848; 26 L. J., M. C. 150; 3 Jur., N. S. 1003.

Distress—Legality of.—One warrant of distress for the amount of several duties imposed by different acts of parliament, each giving a power of distress, is legal. *Patchett v. Bancroft*, 7 T. R. 367.

The judgment of the commissioners of land tax on appeal is conclusive in trespass, brought against the officer for levying under a warrant of distress. *Ib.*

A collector of taxes cannot, under a warrant of the commissioners, break open the outer door of a house, for the purpose of taking a distress for land tax, under 38 Geo. 3, c. 5, s. 17, without the presence of a constable. *Forn v. Racine*, 4 M. & W. 419; 7 D. P. C. 53; 1 H. & H. 403; 8 C. & P. 699.

The necessity of such presence is not confined to the breaking open of a box or a chest within the house. *Ib.*

A vicar, who was also farmer of the rectorial tithes, was assessed to the land tax in one gross sum for the rectorial and vicarial tithes: he paid the assessment on the vicarial tithes, but refused to pay on the rectorial tithes, the land tax on them having been redeemed; the collector therefore distrained under the general warrant of distress given by 38 Geo. 3, c. 5, s. 17. The vicar did not appeal under that statute, but brought trespass:—Held, that the action lay, and that he was not bound to appeal. *Charleton v. Alway*, 3 P. & D. 618; 11 A. & E. 993; 9 L. J., Q. B. 237.

The distress being made for an assessment alleged to be due on a past half-year:—Held, that the collector could not justify under a distress for the current half-year, no demand having been made for the sum due for the latter period. *Ib.*

Under 38 Geo. 3, c. 5, ss. 2, 12, land tax for the quarter ending 25th May is due, and may be demanded, and upon default in payment distrained for, at any period during that quarter. Under 38 Geo. 3, c. 5, ss. 9, 17, and 43 Geo. 3, c. 99, s. 33, where payment of land or assessed taxes is demanded upon the premises, in the absence of the owner, mere non-payment, without notice of the demand, is not a neglect or refusal to pay, to justify an immediate distress; a reasonable interval must be allowed between the demand and the seizure. *Gibbs v. Stead*, 2 M. & R. 457; 8 B. & C. 528.

A rate of one-tenth of a penny in the pound on the rateable property in a parish was sufficient to raise the quota which the parish was liable to contribute to the land tax; but in order to avoid the difficulty and inconvenience of collecting such small sums as would under that rate have to be collected, amounting in many cases to no more or even less than a penny, the assessors assessed the parish at the rate of one penny in the

pound, thereby realizing an amount which, after deducting the quota payable by the parish to the tax, left a large surplus; and it was the intention of the commissioners that such surplus should be collected yearly for four years, and be applied at the end of each year, under 24 & 25 Vict. c. 91, so as in four years' time wholly to extinguish the land tax chargeable on the parish. Due notice of a meeting of commissioners to hear appeals from persons aggrieved was given, but no ratepayer appealed. Upon the plaintiff refusing to pay the penny rate assessed on a leasehold house belonging to and occupied by him, the collector, acting under a warrant of distress signed by the defendant and another commissioner, seized a piece of furniture of the plaintiff's on the premises; whereupon the plaintiff brought an action in the county court against the defendant for an illegal distress, in which judgment was given, with damages, in the plaintiff's favour; and on appeal by the defendant, it was held that the distress warrant and proceedings thereunder being perfectly regular, the case came within and was concluded by *Patchett v. Bancroft* (7 T. R. 367), and that the plaintiff could not go behind the warrant which justified the persons executing it; and that, the quota being established, the rate assessed, not being appealed against, must be considered as the rate payable under the judgment of the commissioners, and the plaintiff, if objecting to the amount, should have appealed to them under the provisions of 38 Geo. 3, c. 5, by which their decision was made final and conclusive. *Simpkin v. Robinson*, 45 L. T. 221. But see *Charleton v. Alway*, *supra*.

A collector of the house and window tax under 43 Geo. 3, c. 161, might distrain, for arrears of those taxes, the goods of a third person found on the premises charged, though the goods were only borrowed, and the person in arrear had other goods of his own on the premises, sufficient to satisfy the arrears. *Jusan v. Dixon*, 1 M. & S. 601.

Capias—Before Information.—A defendant arrested by a capias under 3 & 4 Will. 4, c. 53, s. 95, for an offence against the Customs Act, is not entitled to be discharged out of custody on the ground that no information was filed before issuing the capias. *Att.-Gen. v. Reilly*, 12 M. & W. 217; 1 D. & L. 399; 13 L. J., Ex. 82.

Appeal—Notice of.—An information under 7 & 8 Geo. 4, c. 53, contained four counts. The justices convicted on the fourth and acquitted on the others. The defendant gave notice of appeal from the judgment to the sessions; but the officer on the part of the crown gave no notice of appeal against the judgment of acquittal on the first three counts:—Held, that the defendant's notice of appeal was limited to the judgment of the convicting justices on the fourth count; and that if, on the hearing, the court of appeal was of opinion that the count was not sustained by the evidence adduced, but that the second count was, the judgment must be altogether for the defendant. *Reg. v. Gambell*, 16 M. & W. 384; 2 New Sess. Cas. 687; 16 L. J., M. C. 149.

Where an officer of excise, by whom an information of penalties is exhibited, is absent at the time of the hearing, and there is an appeal against the judgment, on the part of the crown, to the sessions, under 7 & 8 Geo. 4, c. 53, s. 82, the

notices of appeal required by s. 83 may, by virtue of 4 & 5 Will. 4, c. 51, ss. 22 and 23, be given and signed by an officer of excise who is present, conducting the proceedings. *Reg. v. Woodrow*, 15 M. & W. 404; 2 New Sess. Cas. 346; 16 L. J., M. C. 122.

The 20 & 21 Vict. c. 43, which gives an appeal against an order of justices, binds the crown. *Moore v. Smith*, 28 L. J., M. C. 126; 5 Jur., N. S. 892.

When an adjudication by justices on an information under the Excise Act (7 & 8 Geo. 4, c. 53), is appealed against, notice of appeal must be served on the justices:—Held, that service in court upon the clerk to the justices, in their presence, was good service. *Reg. v. Eaves*, 5 L. R., Ex. 75; 39 L. J., M. C. 70; 21 L. T. 829.

Notice of hearing of the appeal is also by 4 Vict. c. 20, s. 30, required to be served on the respondent at his place of abode:—Held, that such notice must be served on the person laying the information, and that service at the office of excise was insufficient, although by 7 & 8 Geo. 4, c. 53, s. 61, no information can be exhibited under the act except by the order of the commissioners of excise. *Id.*

Certiorari.—It appeared, on affidavit, that the court of appeal, constituted by 7 & 8 Geo. 4, c. 53, s. 82, suspended its judgment, and stated a special case for the opinion of the Court of Exchequer, under s. 84:—Held, that no certiorari was requisite to enable that court to give its direction on the special case. *Reg. v. Gambell*, 16 M. & W. 354; 2 New Sess. Cas. 687; 16 L. J., M. C. 149.

A licence for the sale of beer, granted by an officer of excise without the production of a certificate from the overseer, required by 3 & 4 Vict. c. 61, s. 2, is not a judicial act removable by certiorari. *Reg. v. Salford (Overseers)*, 18 Q. B. 687; 21 L. J., M. C. 223; 16 Jur. 907.

Costs following the Event.—In revenue cases costs follow the event, unless otherwise ordered. *Att.-Gen. v. Blucher de Wahlstatt (Countess)*, 3 H. & C. 390.

Quarter Sessions—Against the Crown.—An officer of excise having, on behalf of the Queen, sued before two justices for a penalty imposed by one of the excise acts, and the information being dismissed, appealed on behalf of the Queen to the quarter sessions, where the sessions made an order by which his appeal was dismissed with costs. The court quashed the order of quarter sessions, on the ground that they had no jurisdiction to award costs against the crown in such cases. The provisions of the 18 & 19 Vict. c. 90, ss. 1, 2, do not apply to such a case. *Reg. v. Beadle*, 7 El. & Bl. 492; 26 L. J., M. C. 111; 3 Jur., N. S. 863.

On Appeal.—When the decision of the Commissioners of Inland Revenue is appealed against, and the court decides in favour of the appellant, he is entitled to costs against the crown. *Micklethwaite, In re*, 11 Ex. 452; 25 L. J., Ex. 19.

Charge of Several Penalties—Proof of One.—Where one count of an information

charges several penalties, the crown having established a right to one penalty alone, is entitled to the costs of proving that penalty only where the statute gives costs to the crown. *Att.-Gen. v. Skillibeer*, 4 Ex. 606; 19 L. J., Ex. 115.

REVERSION.

I. COVENANTS RUNNING WITH.—*See COVENANT.*

II. ON LEASES.—*See LANDLORD AND TENANT.*

III. MERGER.—*See MERGER.*

REVERSIONER.

Who is.—The term "owner" as well as that of "proprietor" of premises, may mean anyone who has the whole legal interest in the premises, so that no one else has any estate in possession or reversion, or it may mean one who has a subsisting estate at the time of the wrong complained of, or one who is the owner of the whole, or of some interest as distinguishable from that of tenant in possession. *Chauntler v. Robinson*, 4 Ex. 163; 19 L. J., Ex. 170.

When Action is Maintainable by.—For Injury to Chattel.—An owner of a chattel, e.g., a barge, which is out on hire for an unexpired term, may maintain an action against a third person for a permanent injury thereto. *Mears v. London and South-Western Railway Company*, 11 C. B., N. S. 850; 31 L. J., C. P. 220; 6 L. T. 190.

For Injury to Land.—There must be some injury to the land, to enable a reversioner to support an action on the case. *Baxter v. Taylor*, 1 N. & M. 14; 4 B. & Ad. 72.

Wrongful Entry on Land.—A reversioner cannot maintain an action against a stranger, for merely entering upon his land held by a tenant on lease, though the entry is made in exercise of an alleged right of way; such an act during the tenancy not being necessarily injurious to the reversion. *Id.*

Excavating Coal.—The plaintiff having demised a cottage without exception of mines:—Held, that he might sue for an injury occasioned to the cottage by a stranger who had excavated coal; though it was not clear whether the injury resulted from excavation under the cottage, or under an adjoining house in the occupation of the plaintiff. *Raine v. Alderson*, 4 Bing. N. C. 702; 6 Scott, 691; 1 Arn. 320.

For Injury to the Inheritance.—But an action lies by a reversioner for any injury done to the value of the inheritance. *Jenner v. Gifford*, 4 Burr. 2141.

An action for an injury to the inheritance lies by the reversioner against the tenant pending the term, for inclosing and cultivating waste land included in the demise, and for continuing the grievance. *Queen's College (Oxford) v. Hallett*, 14 East, 489.

Not keeping House in Repair.—A house was devised to A. for life, she keeping the same in good repair, remainder to B.:—Held, that the court had no jurisdiction to enforce the condition at the suit of B. *Kinnersley v. Williamson*, 39 L. J., Ch. 788; 23 L. T. 39; 18 W. R. 1016.

Injury must be of a Permanent Character.—The erection on the defendant's house of eaves, and a pipe overhanging and conducting water on land, in the occupation of a tenant, is a permanent injury, which gives a right of action to the reversioner. *Tucker v. Newman*, 3 P. & D. 14; 11 A. & E. 40; 3 Jur. 1145.

To entitle a reversioner to maintain a suit for a private nuisance, the wrong complained of must be of a necessarily permanent character. *Mott v. Shoolbred*, 20 L. R., Eq. 22; 44 L. J., Ch. 380; 23 W. R. 545.

What Injury is Permanent.—The landlord of a house cannot maintain an action for an alleged injury to his reversion, by reason of the noise made by the defendant hammering in adjoining premises during the tenancy, although less rent is paid by the tenant in consequence of such noise. *Mumford v. Oxford, Worcester, and Wolverhampton Railway Company*, 1 H. & N. 34; 25 L. J., Ex. 265.

By a section of an act incorporating a railway company, the owners of lands adjoining the line were empowered to lay down or extend, either upon their own lands or on lands on the side thereof belonging to the company, or upon the lands of any other persons, with the consent of such other persons, any collateral or continuous branch from such respective lands to communicate with the railway, for the purpose of bringing carriages upon or across the same. B., in 1839, with the assent of the company, made a siding on his land connecting the railway with a wharf, part of which was in his own occupation, and other part in that of certain tenants; and down to 1857 the company carried coals and other goods for B. and his tenants, placing the trucks on the siding, and so sending them down to the wharf. In the course of that year, however, the company (with a view of diverting the trade from B.'s wharf to another wharf in which they were interested) gave B. notice, under another section of their act, that after the 30th of September, they would no longer provide him with locomotive power for the conveyance of his goods along their line; and afterwards they placed carriages and other matters across the junction, for the purpose of permanently obstructing and preventing B. and his tenants having access to the wharf by means of their railway. Neither B. nor his tenants had availed themselves at this time of the authority given to them by the act of parliament to provide locomotive power of their own, and consequently they were not in a position to be actually obstructed. The tenants, however, finding their trade destroyed, removed from B.'s wharf, and carried their business to the company's wharf:—Held, that these wrongful acts of the company con-

stituted such a permanent obstruction and injury to B.'s right to the use of his siding, as to entitle him as reversioner to maintain an action. *Bell v. Midland Railway Company*, 10 C. B., N. S. 287; 30 L. J., C. P. 273; 7 Jur., N. S. 1200; 4 L. T. 293; 9 W. R. 612.

The plaintiff was entitled in reversion to two houses in a street. The defendants carried on an extensive business in a newly-built warehouse, at which carts and vans were constantly loading and unloading goods. The carts and vans obstructed the carriage-way and occasioned a nuisance to the tenants of the plaintiff's houses and their lodgers so that some of the lodgers quitted, and the apartments could not be let, except at a lower value:—Held, that a suit for an injunction to restrain the nuisance could not be maintained, for the injury complained of was not in itself a permanent character, and there was nothing to lead to the inference that it would be permanent, except the presumed intention of defendants to continue the nuisance. *Mott v. Shoolbred*, *supra*.

— **Nuisance.**—A reversioner may maintain an action for a nuisance, which produces no present injury beyond that to his reversionary right, and which may be removed before the reversion comes into possession. *Shadwell v. Hutchinson*, M. & M. 350; 4 C. & P. 333.

An obstruction or a nuisance, not in itself of a permanent character, may operate to the permanent injury of a reversion, and may therefore form the subject of an action by the reversioner. *Metropolitan Association for Improving Dwellings of Industrious Classes v. Petoh*, 5 C. B., N. S. 504; 27 L. J., C. P. 330; 4 Jur., N. S. 1000.

Making fires, and causing smoke to issue from a chimney, the erection of a chimney itself not being a nuisance, but only the use made of it, is not ground for an action by a reversioner of adjoining premises, although his tenants have given notice to quit in consequence, and the premises would sell for less if the nuisance was continued. *Simpson v. Savage*, 1 C. B., N. S. 347; 26 L. J., C. P. 50; 3 Jur., N. S. 161.

The owner of a house occupied by weekly tenants is within the rule that a reversioner cannot maintain an action in respect of a temporary nuisance. *Jones v. Chappell*, 20 L. R., Eq. 539; 44 L. J., Ch. 658. See also *Mumford v. Oxford, Worcester and Wolverhampton Railway Company*, *supra*.

Injury done by Tenants.—An action lies at the suit of a landlord against his tenant, for acts done by the latter, while holding over after the expiration of a notice to quit. *Burchell v. Hornsby*, 1 Camp. 360.

A court of equity will not, at the instance of a person having a mere reversionary interest in the freehold, interfere to restrain the breach of a covenant entered into by the tenant with the lessor against carrying on a business upon the demised premises, unless special damage is shewn. *Johnstone v. Hall*, 2 Kay & J. 414; 26 L. J., Ch. 462; 2 Jur., N. S. 780.

Where, in an action by the reversioner against the tenant of a house, for opening a door in a wall without his consent, and thereby damaging the house, and prejudicing his reversionary interest, the opening of the door is proved, and all actual damage is disproved, the jury should be

directed to inquire whether the reversionary interest has or has not been injured. *Young v. Spencer*, 5 M. & R. 47; 10 B. & C. 145.

The reversionary interest of the plaintiff might be injured, although the house itself was not. *Id.*

A declaration by a deceased tenant of a farm, unaccompanied any act, that he was not entitled to common of pasture in respect of the farm, is not admissible evidence against the reversioner. *Papendick v. Bridgwater*, 5 El. & Bl. 166; 24 L. J., Q. B. 239.

Proof of Tenancy.—In an action, an averment that the plaintiff's close, at the time of the injury, was in the occupation of J. V. and H. V., is sufficiently proved, if at the time of the injury it was in their occupation, though the tenancy was since changed, before action. *Fowles v. Miller*, 3 Taunt. 137.

In an action for an injury done to the plaintiffs' reversion, they proved that they were tenants in common under a demise; and a witness stated that he occupied part of the premises under both the plaintiffs, and that he had at first an agreement in writing, which he signed; and another witness said, that he occupied under one of the plaintiffs only, and that he did not know the other:—Held, that there was sufficient evidence of a tenancy by both the occupiers under both the plaintiffs. *Strother v. Barr*, 2 M. & P. 207; 5 Bing. 136.

A first count was for injuring the plaintiff's reversion in lands, by cutting and carrying away branches from trees growing on it. Second count, in trover, for the branches. Proof that the plaintiff demised the lands to a tenant, by a written agreement not produced, and that the defendant carried away some branches, the value of which was not shewn:—Held, that the plaintiff could not support the first count without producing the written agreement; but that, on the second count, he was entitled to nominal damages. *Cotterill v. Hobby*, 6 D. & R. 551; 4 B. & C. 465.

In an action for an alleged injury to the plaintiff's reversionary interest in a house, he averred in his declaration that the premises were in the occupation of P., as tenant thereof to the plaintiff. It was proved that the house had been let to P. by a cestui que trust, to whom she had paid rent, the plaintiff being his trustee:—Held, to be no variance, as the legal estate was in the plaintiff, and the cestui que trust was to be considered as his agent or bailiff. *Vallance v. Savage*, 5 M. & P. 576; 7 Bing. 595.

Proof of Reversionary Title or Interest.—In an action for pulling down a messuage and premises in the possession and occupation of H., as tenant to the plaintiff, to the injury of his reversionary estate and interest, the defendant pleaded that the messuage and premises were not in the possession and occupation of H. as tenant to the plaintiff, nor did the reversion belong to the plaintiff. It appeared at the trial that H. held at a profit rent of the plaintiff, who had a limited interest in the premises, but that H. had given up possession to the defendant a short time before the act complained of, without, however, assigning away his interest:—Held, first, that the plea was substantially proved, the plaintiff's right to the reversion in the premises being the substantial question raised by it. *Hosking v.*

Phillips, 3 Ex. 168; 5 Railw. Cas. 560; 18 L. J., Ex. 1; 12 Jur. 1030.

Held, secondly, that the correct measure of damage was the amount less by which the reversion would sell in consequence of the act of the defendant. *Id.*

In an action by the reversioners of a copyhold estate, for an injury to their reversion, they proved the payment to them of rent by the tenant; the defendants proved the surrender to, and admittance of, third parties to the estate, in 1821:—Held, that the payment of rent was sufficient *prima facie* evidence of the reversion being in the plaintiffs, and that the surrender proved by the defendants did not cast the onus of proof upon the plaintiffs, to shew a reconveyance of the estate to them. *Daintry v. Brocklehurst*, 3 Ex. 207; 18 L. J., Ex. 57.

A plaintiff sued for a consequential injury to her reversionary estate in a several fishery in an arm of the sea, alleging her right to the soil between high and low water mark, into which she charged the defendant with cutting, and stating that such soil and fishery were in the possession of F., her tenant. The defendant was tenant of a neighbouring property under G. In support of the plaintiff's title, evidence was offered of the proceedings in a former action, brought by F., while tenant to the plaintiff, against G., complaining of a similar injury to the fishery. The declaration in the former action alleged that the present plaintiff was owner of the soil between high and low water mark, and charged G. with cutting the soil, and thereby injuring F.'s fishery. Not guilty being pleaded, the cause was referred to arbitration, and an award was made in favour of F.:—Held, that these proceedings were not admissible as evidence of reputation of the plaintiff's ownership of the fishery, or as proof or an admission by G. of the plaintiff's title to the soil or fishery. *Wenman v. Mackenzie*, 5 El. & Bl. 447; 25 L. J., Q. B. 44.

Necessity of Proving Damage.—An action against the sheriff for selling the reversionary interest of the plaintiff in goods in the possession of an execution debtor, cannot be supported unless actual damage has been sustained. *Tancred v. Allgood*, 4 H. & N. 438; 28 L. J., Ex. 362. See also *Hosking v. Phillips*, *supra*.

Form of Action.—A lessor may sue in tort for an injury to his reversionary interest, though the injury is the working a mine, contrary to the terms of the lessee's covenants, and for the commission of which an action on the covenant would lie. *Marker v. Kenrick*, 13 C. B. 188; 22 L. J., C. P. 129; 17 Jur. 44.

Sufficiency of Pleadings—Claim.—A count, stating the plaintiff to be reversioner of premises occupied by his tenants, and abutting on a public navigable river; and that he and all the liege subjects of her Majesty were accustomed of right to have free navigation and passage on the river for boats, and he was accustomed of right to have, for the enjoyment of the premises by his tenants, free use and navigation of that part of the river near to the same, and free passage for all persons in boats to approach the same, and pass to the premises, from the river, and unload the boats on the premises, without obstruction; but that the defendant fixed barges and planks in that part of the river

near the premises, and thereby obstructed the use and navigation of that part, and hindered persons from passing to the premises, from the river, and hindered the unloading of boats on the premises; and, by means thereof, the plaintiff was injured in his reversionary interest—is bad in arrest of judgment, as not shewing a damage to the reversionary interest. *Dobson v. Blackmore*, 9 Q. B. 991; 16 L. J., Q. B. 233; 11 Jur. 556.

So a count which states that certain messuages were in the possession of tenants of the plaintiff, and alleges a similar obstruction, and that the plaintiff was injured thereby in his reversionary interest, is bad, as shewing no act which, *per se*, imports any damage to his reversionary interest. *Id.*

If the plaintiff declares as a reversioner for an injury done to his reversion, the declaration must allege it to have been done to the damage of his reversion, or must state an injury of such a permanent nature as to be necessarily injurious to his reversion; otherwise the want of such allegation will be cause for arresting the judgment. *Jackson v. Pesked*, 1 M. & S. 234.

A declaration by a reversioner, after stating that he had a right of way for the tenants of his close over the close of the defendant, averred that he wrongfully locked, chained, shut and fastened a gate across the way, by means of which premises the plaintiff was injured:—Held, that the declaration disclosed a good cause of action. *Kidgell v. Moor*, 1 L. M. & P. 131; 9 C. B. 364; 19 L. J., C. P. 177; 14 Jur. 790.

A declaration for an injury to a reversionary interest by obstructing ancient lights, is sufficient if it shews an obstruction which may operate injuriously to the reversion, either by its being of a permanent character or by its operating in denial of the right. *Metropolitan Association for Improving Dwellings of Industrious Classes v. Petch*, 5 C. B., N. S. 504; 27 L. J., C. P. 330; 4 Jur., N. S. 1000.

Defence.—In an action by a reversioner for an injury to the reversion, it is no answer that the injury complained of was caused by the wrongful act of the tenant, for which he might be liable to an action. *Egremont v. Putman*, M. & M. 404.

In an action, by a reversioner, for an injury to a house and land in the occupation of his tenant, by reason of the defendant not cleansing a watercourse on his own land, which it was his duty to do, it is no answer to plead that the obstruction of the watercourse was caused by the neglect of the tenant to repair a wall on the demised land, and in consequence it fell into the watercourse and caused the damage, and that the defendant removed the obstruction within a reasonable time after the notice; because the plea ought, at all events, to shew an obligation on the tenant to repair the wall; and also, because the removal, after notice, or even as soon as possible after the injury, would not make the defendant the less bound to compensate for neglect of an unqualified legal duty. *Bell v. Twentyman*, 1 G. & D. 223; 1 Q. B. 766; 6 Jur. 336.

To a declaration for breaking and entering rooms in the occupation of the tenant of the plaintiff, and tearing down the ceiling over the landing of the staircase, the roof over the same, and the chimneys, and demolishing the windows, the defendant justified under a deed of assign-

ment in trust for creditors, from H. (who was shewn to be the lessee of the premises before the accrual of the title of the plaintiff), whereby a right of entry was given to take and sell furniture:—Held, that the plea was bad, as confessing more than it avoided, inasmuch as the right to enter did not give a right to tear down the ceiling, &c., unless an entry could be obtained in no other way; which was not averred. *Foulkes v. Scarfe*, 1 D., N. S. 691; 4 M. & G. 126; 4 Scott, N. R. 713.

To an action by a reversioner for an injury to his reversionary interest, a plea by the defendant that he was the occupier of the adjoining house and wall, and that, whilst he was repairing his dwelling-house, by accident and against his will, and without any default on his part, it fell down, and in falling fell upon the adjoining wall and close to the plaintiff, and threw the plaintiff's wall down; that thereupon the defendant, within a reasonable time, rebuilt the wall at his own expense, and in so doing committed the grievances mentioned—is bad, for not shewing that he had the leave and licence of the tenant, or of some party having authority to allow him to come on the land. *Taylor v. Stendall*, 3 D. & L. 161; 7 Q. B. 634; 14 L. J., Q. B. 301; 9 Jur. 1096.

Damages Recoverable.—In an action by a reversioner, for the removal of the eaves from his house, and the erection of a building with eaves and a gutter overhanging his wall, evidence of a diminution of the saleable value of the premises in consequence of the nuisance was rejected; and it appearing that the cost of replacing the tiles which had been removed would not exceed 30s., and the defendant having paid 40s. into court on account thereof, the jury was directed to find for the defendant, if they thought the sum paid into court was sufficient to cover the actual damages sustained by the plaintiff:—Held, that the evidence tendered was properly rejected, and the direction right, the true measure of damages being, not the diminution in the saleable value, although the nuisance might be of a permanent character, but such damages as the jury might think sufficient to compel the defendant to abate the nuisance. *Battishill or Bathishill v. Reed*, 18 C. B. 696; 25 L. J., C. P. 290.

For the portions of the wharf occupied by his two tenants, B. was to be paid a certain royalty on all coals sold; the minimum royalty to be paid by one being 200l. per annum, and by the other 180l.; and B. was, at the time of the obstruction complained of, in treaty with a third person for letting him the remaining portion of the wharf at 300l. per annum:—Held, that the jury was warranted in taking these sums into their consideration in estimating the amount of damage B. had sustained from the obstruction of a right of way. *Bell v. Midland Railway Company*, 10 C. B., N. S. 287; 30 L. J., C. P. 273; 7 Jur., N. S. 1200; 4 L. T. 293; 9 W. R. 612.

Held, also, that the case was one in which the jury was justified in giving exemplary damages. *1b.* See also *Hoaking v. Phillips*, ante, cols. 758, 759.

Liability of.—An action lies against a reversioner who has demised his premises with the chimneys in a ruinous condition and in danger of falling, they being known by him to be so at

the time of the demise, and in consequence of their condition, falling during the demise, and injuring the building of another person. *Todd v. Flight*, 9 C. B., N. S. 377; 30 L. J., C. P. 21; 3 L. T. 325; 9 W. R. 145.

A nuisance of a permanent character having been created on land in the occupation of a tenant from year to year, the reversioner is liable for damage caused by it, if it is shewn that since the creation of the nuisance and before the damage he might have determined the tenancy and did not, such continuing of the tenancy being equivalent to a re-letting; and it is no defence that he had no notice or knowledge of the existence of the nuisance. *Gandy v. Jubber*, 5 B. & S. 78; 33 L. J., Q. B. 151; 10 Jur., N. S. 652; 9 L. T. 800; 12 W. R. 526. See *S. C. (in error)*, 5 B. & S. 485; 13 W. R. 1022; and 9 B. & S. 15.

Conveyance of Reversion.—A remote reversion in fee was held to pass under general words in an act by way of settlement in execution of articles, though the reversion was not particularly in contemplation at that time, the general words being sufficient to carry it; and the intention of the party being to include all the estate of the settlor. *Freeman v. Chandos (Duke)*, Cowp. 360.

REVISING BARRISTER.

See ELECTION LAW.

REVIVOR.

See PRACTICE (PARTIES).

REWARD.

Who Entitled to.—A reward offered by handbill to any person who should disclose facts leading to a conviction for a felony, may be claimed by a person who, having notice of the handbill, makes the disclosure solely from motives of revenge against the felon. *Williams v. Carcardine*, 1 N. & M. 418; 4 B. & Ad. 621; 5 C. & P. 566.

The first person who gives the information is entitled to the reward, and the motive of such person in giving the information is not material. *1b.*

If two persons go together to give the information they must bring a joint action for the reward. *1b.*

D., who had been robbed of jewellery, published an advertisement, headed "30l. Reward," describing the articles stolen, and concluding thus:—"The above sum will be paid by the adjutant of the 41st regiment, on Recovery of the property

and conviction of the offender, or in proportion to the amount recovered." A soldier, on the 10th of June, informed his sergeant that B. had admitted to him that he was the party who had committed the robbery, and the sergeant gave information at the police station. On the 14th, a police constable, learning from C. that B. was to be met with at a certain place, went there and apprehended him. The police constable, by his activity and perseverance, afterwards succeeded in tracing and recovering nearly the whole of the property, and in procuring evidence to convict B. :—Held, that the constable was not, but (per Tindal, C. J., and Cresswell, J.) that the soldier was the party entitled to the reward. *Thatcher v. England*, 3 C. B. 254; 15 L. J., C. P. 241; 10 Jur. 597.

What Sufficient to Earn.]—A tradesman published a handbill, stating that watches and jewellery described therein had been stolen from his shop, and that a reward would be given to any person who would give such information as should lead to the apprehension and conviction of the thief or thieves. The burglary was committed on the 6th February; on the 14th, R. brought one of the watches to the shop of a watchmaker, who gave information to the tradesman, upon which R. was taken into custody as a receiver. While in custody he told the police that the thieves would be found at a certain house, where two of them were apprehended, and the third subsequently, and the three were convicted of the burglary. In an action to recover the reward :—Held, that the information was not too remote from the apprehension and conviction of the thieves, and that it was properly left to the jury, whether it led to their apprehension and conviction, within the meaning of the handbill. *Turner v. Walker*, 1 L. R., Q. B. 641; 35 L. J., Q. B. 179; 12 Jur., N. S. 808; 14 L. T. 660; 14 W. R. 793; 6 B. & S. 871. Affirmed, 2 L. R., Q. B. 301; 36 L. J., Q. B. 112; 16 L. T. 234; 15 W. R. 407; 8 B. & S. 314—Ex. Ch.

Where an advertisement respecting a stolen child promised a reward to the person who would give information where the child was, so as that he might be restored to his parents, and A. communicated to B. her suspicion where the child was, in order to put the matter into his hands for his benefit, if he chose to run the risk, and the child was afterwards restored to its parents by the exertions of B. acting upon A.'s communication :—Held, that A. could not recover from B., to whom the reward had been paid, either the whole or any portion of it. *Fullick v. Barber*, 1 M. & S. 108.

G. having been guilty of forgery, absconded. The defendants published a handbill offering a reward of 200l. "to any person or persons giving such information to A., superintendent of police, Dewsbury, or to H., superintendent of police, Wakefield, as will lead to the apprehension of the said G." Afterwards G. presented himself at the police office, Exeter, and said there was a warrant against him. The plaintiff, who was chief constable, on searching the Police Gazette and finding the notice therein, telegraphed to Dewsbury, and being informed that there was a warrant against G., apprehended and charged him, and he was ultimately convicted. In answer to questions left to them, the jury found that G. was not in custody before the telegram was sent;

but they were unable to agree as to whether or not he had given his name before it was sent :—Held, that the plaintiff was not entitled to claim the reward,—the apprehension of G. not being the consequence of the plaintiff's information, but of the criminal surrendering himself to justice. *Bent v. Wakefield Bank*, 4 C. P. D. 1; 39 L. T. 576; 27 W. R. 168.

A party who had been robbed of bank-notes, put forth a handbill, wherein it was stated, that "whosoever should give information whereby the same might be traced, would, on conviction of the parties, receive a reward of 20l. :—Held, that the only person entitled to the reward was he who first gave information by which the notes were traced to the robbers, so as to ensure their conviction, and that it was not necessary that such information should be communicated to the party robbed, if it was given to a person authorized to receive it and to act upon it in the apprehension of the offenders, as to a constable. *Lancaster v. Walsh*, 4 M. & W. 16; 1 H. & H. 258.

Where a reward was offered to whoever would give such information as would lead to the discovery of the offender, and A. told B. that C. was a person who knew something of the robbery, and that if he were given refreshment, he might be induced to confess, whereupon, such refreshment being given, C. did confess, and was afterwards tried and convicted :—Held, that A. was entitled to the reward. *Smith v. Moore*, 1 C. B. 438; 9 Jur. 352.

— When Informant is a Policeman.]—A party sued for the reward promised by advertisement to any person who would give such information as would lead to the conviction of those concerned in a burglary in his house, pleaded that the plaintiff was a policeman of the district where the house was, and therefore, that it was his duty to give the information without reward :—Held, that the information might have been supplied under such circumstances, as that the plaintiff had done more than his ordinary duty required, and that therefore he was entitled to judgment. *England v. Davidson*, 3 P. & D. 594; 11 A. & E. 856; 4 Jur. 1032.

A police constable apprehended a boy (in Bedfordshire), having in his possession a horse and a gig, under circumstances of suspicion, and discovering that the boy had absconded with them from Woolwich, gave notice to his superintendent, who within a reasonable time gave notice to the boy's master. After the boy's apprehension, but before the master received notice thereof, the latter had issued an advertisement, offering a reward of 10l. to any one who would give such information as should lead to the recovery of the property and the apprehension of the thief :—Held, that a plea, charging the police constable with a breach of duty in neglecting to inform the master of the boy's apprehension until after the issuing of the advertisement, was no answer to an action by the constable for the reward. *Neville v. Kelly*, 12 C. B., N. S. 740; 32 L. J., C. P. 118.

To whom Information must be given.]—A handbill, relating to a stolen parcel, offered a reward to whoever would give such information as would lead to the early apprehension of the guilty parties :—Held, that the information must be given, with the view of its being acted on, either to the person offering the reward, or

his agent, or some person having authority by law to apprehend the criminal. *Lockhart v. Barnard*, 14 M. & W. 674; 15 L. J., Ex. 1; 9 Jur. 929. See also *Lancaster v. Walsh*, *supra*.

RIDING.

The word "Riding" in the Statute of Bridges (22 Hen. 8, c. 5, s. 3) is not confined to districts called by that name, but includes any division of a county which corresponds in its definition to a riding. *Reg. v. Isle of Ely*, 4 New Sess. Cas. 222; 15 Q. B. 827; 19 L. J., M. C. 223.

RIOT.

See CRIMINAL LAW—HUNDRED.

RIPARIAN PROPRIETORS.

See WATER.

RIVERS.

See WATER.

ROADS.

See WAY.

ROBBERY.

See CRIMINAL LAW.

ROMAN CATHOLICS.

Monastic Bodies—Trust for Church belonging to that Body.—The prohibition of monastic bodies in the Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), applies to such bodies as settled in the realm after the passing of the act as well as to those who were then residing in it:—Held, therefore, that a trust for the benefit of a church

belonging to the Society of St. Vincent de Paul, who came to Ireland in 1838, having left it in 1690, and who are bound by religious or monastic vows, is void. *Liston v. Kegan*, 9 L. R., Ir. 531.

Monks.—The doctrine of civil death, in consequence of profession as a monk or a nun, is not law. *Blake v. Blake*, 4 Ir. Ch. Rep. 349; *S. P., Metcalfe, In re*, 2 De G., J. & S. 122; 33 L. J., Ch. 308; 10 Jur., N. S. 224; 12 W. R. 538.

Removal of Disabilities.—The 10 Geo. 4, c. 7, removed only such disabilities and restrictions as were imposed on Roman Catholics by the general law of the land, and therefore did not operate to remove a prohibition against the alienation of an estate, contained in a private estate act, settling the estate of a Roman Catholic family according to certain limitations, there being no general law in operation at the time of the passing of the estate act, to prevent Roman Catholics from aliening. *Shrewsbury (Earl) v. Hope-Scott*, 6 C. B., N. S. 1; 29 L. J., C. P. 34; 6 Jur., N. S. 452. Affirmed, 6 C. B., N. S. 221; 29 L. J., C. P. 190; 6 Jur., N. S. 472—Ex. Ch.

Marriages.—See HUSBAND AND WIFE.

Priests as Witnesses.—See EVIDENCE.

SACRILEGE.

See CRIMINAL LAW.

SAILOR.

See SHIPPING.

SALE.

A. OF GOODS.

I. THE CONTRACT.

1. Construction.

- a. Generally, 768.
- b. Particular Terms, 769.
- c. Divisible or Entire, 775.
- d. Evidence as to Meaning, 776.

2. The Consideration.

- a. What is Sufficient.—See CONTRACT.
- b. Price, 780.
- c. Payment, 781.
- d. Sale on Credit, 783.

II. STATUTE OF FRAUDS.

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A. OF GOODS.

I. THE CONTRACT.

1. CONSTRUCTION.

a. Generally.

For the Court.—The construction of the contract, unless there is something peculiar to the words, by reason of the custom of the trade to which the contract relates, is for the court. *Bowes v. Shand*, 2 App. Cas. 455; 46 L. J., Q. B. 561; 36 L. T. 857; 25 W. R. 730.

As to Meaning acquired by Mercantile Usage.—If a mercantile document is insensible when read according to the ordinary sense of the words used therein, it is a question for the jury whether the language thereof has not acquired a definite meaning by mercantile usage. *Ashworth v. Redford*, 9 L. R., C. P. 20; 43 L. J., C. P. 57.

A plaintiff sold to the defendants goods; the invoice was dated the 1st of May, and at the foot of it were written the words: "Terms—Net cash, to be paid within six to eight weeks from date hereof." The goods not having been paid for, the plaintiff issued a writ to recover the price on the 18th of June, scarcely seven weeks from the 1st of May. At the trial the judge left

to the jury the question whether the credit had expired on the 18th of June according to mercantile usage; the jury having found that the action was not brought too soon:—Held, that the direction to the jury was proper, and that the plaintiff was entitled to the verdict. *Id.*

b. Particular Terms.

Words of Estimate and Expectation—"About 150 Tons."—The plaintiffs having been informed by S., a commission agent, that the defendants had a quantity of old iron in their yard for sale, "about 150 tons," wrote to the defendants, "We are buyers of good wrought scrap iron free of light and burnt iron, for our American house, and understand from S. that you have for sale about 150 tons. We can offer you 80s. per ton." There were three intermediate letters relating to the place of delivery and expense of carting, and then the defendants wrote, "We accept your offers for old iron, viz., 80s. per ton; we delivering alongside vessel in one of the London docks. Please let us know when you can send a man here to see it weighed, and also inform us where to send it." Before S. saw the plaintiffs he had seen in the yard of the defendants, who were builders, a heap of iron, and said, "You seem to have about 150 tons there." The reply was, "Yes, or more." The defendants only delivered 44 tons, that being the quantity of the heap in the yard. The plaintiffs recovered 50*l.* damages in an action for short delivery:—Held, that the words "about 150 tons" were merely words of estimate and expectation, and there was no warranty as to quantity, and, therefore, the defendants were not bound to deliver 150 tons; that the subject-matter of the contract was not 150 tons of iron, but the iron which S. had seen in the defendants' yard. *McLay v. Perry*, 44 L. T. 152.

—"Say."—An agreement was made, by which the plaintiff agreed to buy, and the defendant to sell, all the naphtha he might make during two years, say from 1,000 to 1,200 gallons per month. A declaration on this agreement contained no averment of any construction given by mercantile usage to the word "say":—Held, that it was no breach not to have made any naphtha, there being no allegation that the neglect or refusal to do so was in fraud of the agreement. *Gwillim v. Daniel*, 2 C., M. & R. 61; 1 Gale, 143; 5 Tyr. 644.

An agreement, dated the 12th December, between the plaintiff and the defendant, who carried on the business of a puller of wool, stipulated that the defendant should sell to the plaintiff what he might pull up to the 6th January, "say not less than 100 sacks of wool":—Held, that in the absence of an averment that the word "say" had any particular meaning, the agreement imported that the defendant should pull and supply to the plaintiff 100 sacks, as a minimum, during the specified period, and that the plaintiff should take any further quantity which should be pulled by the defendant during the period. *Leeming v. Snaith*, 16 Q. B. 275; 20 L. J., Q. B. 164; 15 Jur. 988.

M., on behalf of the firm of M. & Co., merchants in Quebec, of which he was a member, entered into the following contract with R. M.: "R. M. sells and Messrs. M. & Co. buy, all of the spars manufactured by R. M., say about 600 red pine spars, averaging by cutter's measure-

ment in Quebec 16 inches, at the sum of, &c., delivered free of charge in Quebec. The above spars will be out of the lot manufactured by B., the lengths of which, according to his specification, I am satisfied with." The lot manufactured by B. was found to consist of 603 spars, of which 496 averaged 16 inches:—Held, that M. & Co. were bound to accept the 496 spars at the rate agreed on, the words "say about 600 red pine spars," being words of estimate only and not amounting to a warranty. *McConnell v. Murphy*, 5 L. R., P. C. 203; 28 L. T. 713; 21 W. R. 609.

A charterparty provided that the ship should proceed to the port of lading, and there load a full and complete cargo of iron ore, "say about 1,100 tons." The charterer provided a cargo of 1,080 tons, the actual capacity of the ship being 1,210 tons:—Held, that the words "say about 1,100 tons" were not words of expectation but words of contract, and that the charterer's undertaking was not to load the ship up to her actual capacity; but that three per cent. was a fair amount of excess over 1,100 tons to allow in estimating what was a full and complete cargo of about 1,100 tons, and consequently that the cargo actually provided fell short of the charterer's obligation by 53 tons. *Morris v. Leticson*, 1 C. P. D. 155; 45 L. J., C. P. 409; 34 L. T. 576; 24 W. R. 517.

Cargo.—The plaintiff sold to the defendant "a cargo of from 2,500 to 3,000 barrels (seller's option) American petroleum." The plaintiff chartered a vessel, on which were placed 3,000 barrels of petroleum, and a bill of lading was signed making them deliverable to the plaintiff; but as this quantity did not constitute a full cargo, 800 additional barrels were placed on board, which were marked with a different mark, and for which a separate bill of lading was signed. The plaintiff gave notice to the defendant of the shipment of the 3,000 barrels, and as ready to order the vessel from its port of call to any port of delivery within the contract, and there to deliver to the defendant the 3,000 barrels, and to take the 800 himself, or to deliver to the defendant at any such port 2,750 barrels as the mean between 2,500 and 3,000, but the defendant refused to accept either the 3,000 barrels or any other quantity. The plaintiff having brought an action for non-acceptance:—Held, that, on the true construction of the contract, "cargo" meant the entire load of the vessel which carried it; that the defendant was therefore not bound to accept part of a cargo, and that the action was not maintainable. *Borroman v. Drayton*, 2 Ex. D. 15; 47 L. J., Ex. 273; 35 L. T. 727; 24 W. R. 194.

"As soon as possible."—The plaintiff contracted to furnish iron hoops to the defendant, "as soon as possible":—Held, that "as soon as possible" meant "as soon as the plaintiff possibly could," and that his contract was so far performed if he furnished the hoops without unreasonable delay, regard being had to his ability to make them, and the orders he had already in hand. *Attwood v. Emery*, 1 C. B., N. S. 110; 26 L. J., C. P. 73.

"Market Value."—The plaintiff agreed with the defendant to make for him a covering for a tent of very large dimensions, the canvas used to be equal to pattern, and of the market value of 11*d.* per yard, and the making to be charged

at 5*d.* per yard; and it was agreed that, if the market value of the canvas should be less than 11*d.* per yard, the amount (the difference) should be deducted:—Held, that “market value” meant the price in the market to an ordinary consumer, irrespectively of the particular contract. *Orchard v. Simpson*, 2 C. B., N. S. 299.

Discount less Duty.—Where goods were sold under a written contract at so much per load, “to be taken by the dock account and paid for in cash, allowing 2½ per cent. discount within fourteen days from the date; the goods to be taken on board and the duty deducted;” and the duty was payable by the buyer:—Held, that the discount was to be calculated on the sum to be received by the seller only, exclusive of the duty. *Smith v. Blandy*, R. & M. 260.

“Good” or “Fine” Barley.—The defendants wrote to the plaintiffs, offering them a certain quantity of “good” barley, upon certain terms; to which the plaintiffs answered, after quoting the defendant’s letter, as follows:—“Of which offer we accept, expecting you will give us fine barley and full weight.” The defendants in reply stated that their letter contained no such expression as fine barley, and declined to ship the same. Evidence was given at the trial, that the terms “good” and “fine” were terms well known in the trade; and the jury found that there was a distinction in the trade between “good” and “fine” barley:—Held, that although it was a question for the jury what was the meaning of those terms in a mercantile sense, yet that they having found what that meaning was, it was for the court to determine the meaning of the contract; and the court held, that there was not a sufficient acceptance. *Hutchinson v. Bowker*, 5 M. & W. 535.

“Seed Barley.”—The plaintiff having heard that the defendant had some barley to sell went to his counting-house, when his agent produced a sample which he said was “seed barley,” offered to the defendant at 39*s.*, and said that if the plaintiff would take it at 40*s.* he might have it; the plaintiff approved of it and agreed to buy it. The plaintiff afterwards sold it under a warranty in writing as “Chevalier seed barley.” It turned out that it was “barley bigg,” a species of barley unfit for malting purposes; and the person to whom the plaintiff had sold it recovered damages against him for the breach of warranty:—Held, that the contract was satisfied by the delivery of barley fit for sowing; and that if the term “seed barley” meant barley fit for malting purposes, that ought to be shewn by clear and irresistible evidence. *Carter v. Crick*, 4 H. & N. 412; 28 L. J., Ex. 238.

On Arrival.—A., by a bought and sold note, agreed to sell to B. “100 tons of nitrate of soda, at 18*s.* per cwt., to arrive ex Daniel Grant, to be taken from the quay at landing weights,” &c.; and below the signature of the brokers there was the following memorandum: “Should the vessel be lost, this contract to be void:”—Held, that the contract did not amount to a warranty, on the part of the seller, that the nitrate of soda should arrive, if the vessel arrived, but to a contract for the sale of goods at a future period,

subject to the double condition of the arrival of the vessel with the specified cargo on board. *Johnson v. Macdonald*, 9 M. & W. 600; 12 L. J., Ex. 99; 6 Jur. 264.

There is no difference, in such cases, between the legal effect of the words “on the arrival” and “to arrive.” *Id.*

A contract in London for the sale of tallow then at sea, in which it was agreed that if it did not arrive at a certain time, the bargain was to be void, means arrival in London and not elsewhere. *Idle v. Thornton*, 3 Camp. 274.

If there is a contract for the sale of goods by a particular ship on arrival, this means on the arrival of the goods which the ship is expected to bring, and if the ship arrives empty, without any default on the part of the vendor, he is not liable to the purchaser for the non-delivery of the goods. *Bayd v. Siffkin*, 2 Camp. 326.

— Nature of Condition.—Where there is an agreement to deliver goods on a condition which, without any default on the part of the vendor, never happens, he will not be liable for a non-delivery; but where the agreement is absolute, or conditional on an event which happens, the vendor will be liable for a breach, though without default on his part; for it is his own heedlessness if he runs the risk of undertaking to perform an impossibility, when he might have provided against it by his contract. *Hale v. Rawson*, 4 C. B., N. S. 85; 27 L. J., C. P. 189; 4 Jur., N. S. 363.

Contract for the sale of fifty cases of East India tallow, at the price of 48*s.* 6*d.* per cwt., to be paid fourteen days after finishing the landing thereof, “to be delivered by the seller to the purchaser on safe arrival of ‘The Countess of Elgin,’” at the time of the contract on her passage from Calcutta to London, the quality to be equal to sample:—Held, that no property in the tallow passed to the purchaser by the sale. *Id.*

Held, also, that the contract was an absolute contract to sell and deliver the tallow, provided the vessel arrived, and was not subject to the condition of the tallow arriving in the vessel. *Id.*

In a contract to sell 500 bales of cotton, to arrive in Liverpool, per ship or ships, from Calcutta, there was the following stipulation: “The cotton to be taken from the quay:”—Held, that this stipulation was an independent stipulation for the seller’s benefit, and not a condition precedent which the purchaser had a right to insist on being performed. *Neill v. Whitworth*, 1 L. R., C. P. 684; 35 L. J., C. P. 304; 12 Jur., N. S. 761; 14 W. R. 844; 1 H. & R. 832—Ex. Ch.

On an action by a vendee, for non-delivery of goods:—Held, that in an agreement “for the delivery of goods on arrival, to be delivered with all convenient speed, but not to exceed a given day,” the arrival in time for delivery on that day is a condition precedent; and if they do not so arrive (without default of the vendor) the agreement is null. *Alewyn v. Pryor*, R. & M. 406.

For Delivery.—Where a quantity of barley was sold upon a contract to “deliver alongside a sloop or warehouse at G. or K., at the buyer’s option, in all April, or sooner,” and the barley was brought into dock at G. on the 29th of

April :—Held, that the contract was broken, inasmuch as it would have taken four days to unload the vessel and deliver the cargo into the buyer's possession. *Cox v. Todd*, 7 D. & R. 131.

Action on a contract for the sale of 50 tons of bicarbonate of soda at "11l. per ton, in 1 cwt. kegs; or, if taken in 10 cwt. casks, the price to be 10s. less per ton; free on board, to be delivered in equal monthly quantities during April, May and June, 1865." Averment, that the defendant duly delivered divers portions of the goods according to the agreement, and that the plaintiff was not required by the defendant to accept the delivery of the residue. Breach, non-delivery of the residue. Plea, that the defendant was ready and willing to deliver the residue according to the agreement, whereof the plaintiff had notice, and that the plaintiff was not ready and willing to accept, and would not accept, and did not require, the delivery of the same :—Held, that before the defendant was bound to deliver the goods, the plaintiff was bound to name the ship or the place where he desired the goods to be delivered, and that a tender of the goods by the defendant was not a condition precedent to their delivery, or to the ship or place being named by the plaintiff. *Sutherland v. Allhusen*, 14 L. T. 666.

Ice to be taken "from the Deck."—A cargo of ice was consigned to the plaintiff, and before the ship came into harbour the defendants purchased the cargo, with a condition that the ice was to be taken from the ship's deck by them :—Held, that the contract "from the deck" meant that the vendor should pay all that was necessary in order to enable the purchaser to remove the cargo from the deck, and that harbour dues charged to be paid before goods could be removed were payable by the vendor. *Playford v. Mercer*, 22 L. T. 41.

Purchaser "to take upon himself all Risks and Dangers of Sea."—By an agreement in which C. was described as vendor, and P. as purchaser, C. agreed to ship a cargo of ice, and on being shipped, to forward to P. bills of lading, on receipt of which he was to "take upon himself all risks and dangers of the sea," &c., he agreeing also to buy and receive the ice on its arrival, taking the ice from alongside the ship, and paying for it in cash on delivery at the rate of 20s. per ton, weighed on board during delivery :—Held, that the effect of the clause as to risks and dangers of the sea was not merely to save C. from liability for non-delivery, but to bind P. to insure the cargo on receiving the bill of lading; and that the ship and cargo having been lost on the voyage through perils of the sea, P. was liable to pay C. the price or the value of the cargo. *Castle v. Playford*, 7 L. R., Ex. 98; 41 L. J., Ex. 44; 26 L. T. 315; 20 W. R. 440—Ex. Ch. Reversing 5 L. R., Ex. 165; 39 L. J., Ex. 150; 22 L. T. 516; 18 W. R. 811.

For Shipment.]—A contract for the sale of flax exported from Petersburg, contained a stipulation "that the flax should be dispatched from Petersburg, not later than 31st of July, O. S., either for Hull or London :"—Held, to be enough that before the day specified the flax had been sent down from Petersburg in lighters, and put on board the ship at Cronstadt, although she was not dispatched on her homeward voyage

till after the day. *Busk v. Spence*, 4 Camp. 329.

A stipulation in such a contract, that "as soon as the seller knows the name of the vessel in which the flax will be shipped, he is to mention it to the buyer," forms a condition precedent. *Ib.*; *S. P., Graves v. Legg*, 9 Ex. 709; 23 L. J., Ex. 228.

Bill of Lading—Delivery of, to Purchaser.]—A., by letter, requested B. to purchase for him 150 bales of cotton. The letter contained the following terms: "Upon executing the above, and forwarding a bill of lading, I will accept your draft at sixty days' sight after the receipt of the bill of lading :"—Held, that B. was bound to deliver the bill of lading as soon after its arrival as he conveniently could, without reference to the arrival or unloading of the cargo. *Barber v. Taylor*, 5 M. & W. 527.

—Time of Shipment.]—A. contracted to sell to B. a specific cargo of wheat, described in the bought and sold note as "shipped per Diletta Mimbella, as per bill of lading, dated September or October," and which was all on board at the date of the contract :—Held, that this did not necessarily entitle the buyer to rescind the contract, on its turning out that all the wheat was not shipped before the bill of lading was given. *Gattorno v. Adams*, 12 C. B., N. S. 560.

As to Allowances.]—In a contract for the sale of ten bales of cotton at so much a pound, the following stipulation was contained :—"Claims for damaged cotton allowed at the value of the sound cotton at the time of return, if claim and return made within ten days and three months." Of two out of the bales delivered respectively, two-thirds were sound and one-third was damaged :—Held, that the purchaser was not entitled to return and to be allowed for the whole bales, but only the one-third that was damaged. *Mellor v. Street*, 15 L. T. 223.

Bought and Sold Notes—"Put off."]—A broker, employed by the plaintiffs to sell 200 casks of tallow, sold fifty to the defendant and the remainder to two other parties, to be delivered some months subsequently to the sale. In the bought note he described the transaction as a purchase of fifty casks for his principals, i.e. the buyers; and in the sold note, as a sale of 200 casks sold to his principals. In his book he stated the defendant as the purchaser of fifty casks, and the two other parties as purchasers of the remainder. There was no disclosure of the principals on either side. About the time appointed for the delivery, the broker urged the defendant to buy 100 other casks of a third person, and on the latter objecting to do so, on the ground that the fifty casks already contracted for by him would soon be delivered, offered to "put off" those casks. The fifty casks were never actually delivered to the defendant. It was objected, that the plaintiffs ought to be nonsuited on two grounds: first, that inasmuch as there was a variance between the bought and sold notes, the broker's book not being evidence of the contract, there was no valid contract; and, secondly, that there was nothing to shew any delivery of the fifty casks to the defendant. The judge being of that opinion, nonsuited the

plaintiffs:—Held, that the nonsuit was wrong on the second ground, it being a question for the jury whether the words "put off" meant a sale of the goods to a third person by the broker on account of the defendant, or a postponement of the delivery with or without the consent of the plaintiffs. *Thornton v. Charles*, 9 M. & W. 802.

c. Divisible or Entire.

Sale of Certain Quantity.]—The plaintiffs contracted to sell to the defendants twenty-five tons (more or less) Penang pepper, October and November shipment, name of vessel or vessels, marks and particulars to be declared within sixty days from date of bill of lading. Within the stipulated time the plaintiffs declared twenty-five tons by a vessel called the B., only twenty tons of which complied with the terms of the contract as to shipment, and made no further declaration. The defendants declined to accept any portion of the pepper:—Held (by Cotton and Thesiger, L. J.J., Brett, L. J., dissenting), that the contract was entire, and that the defendants were not bound to accept the twenty tons, but were entitled to insist upon the delivery of twenty-five tons according to the contract. *Reuter v. Sala*, 4 C. P. D. 239; 48 L. J., C. P. 492; 40 L. T. 476; 27 W. R. 631—C. A.

Order of Several Articles.]—If a person orders several articles from a tradesman at the same time, though at distinct prices, he may consider the whole as forming one order. *Baldev v. Parker*, 3 D. & R. 220; 2 B. & C. 37.

And he will not be obliged to accept or pay for any particular article, unless all the rest are furnished according to the terms agreed on; but if he accepts of any one article, he is precluded from saying that the order was entire, and he will be obliged to accept and pay for so many as are individually furnished according to the contract. *Champion v. Short*, 1 Camp. 53.

Sale by Auction of Several Lots.]—Where different lots are sold at an auction for different sums, the contracts are separate both in law and fact; and in an action for refusing to adhere to the conditions of sale, the plaintiff cannot consolidate the two contracts. *James v. Shore*, 1 Stark. 426.

Goods belonging to different Owners.]—Where a horse-dealer employed to sell the horses of different persons, sold two horses belonging to several owners at an entire price, and warranted both sound:—Held, that, as respected the warranty, the contract was several. *Symonds v. Carr*, 1 Camp. 361.

At different Places.]—A. and B. went (in one day) to several places distant a few miles from each other, where they agreed for the purchase and sale of several lots of timber, and at the last place a memorandum of the whole transaction was made and signed by A. Part of the timber was accepted by B., but he refused to take the rest:—Held, that the whole formed one joint contract. *Bigg v. Whisking*, 14 C. B. 195.

Plans of Goods to be Delivered.]—The defendant agreed with the plaintiff to supply him with

150 tons weight of cast-iron girders of various sizes, to be shewn in drawings to be provided by the plaintiff's architect, at so much per ton; drawings for a few tons' weight only were sent within a reasonable time from the making of the agreement:—Held, that the contract was not divisible, and that as drawings for the whole of the girders had not been sent within a reasonable time, the plaintiff could not recover for non-delivery of those for which drawings had been sent within a reasonable time. *Kingdom v. Cox*, 5 C. B. 522; 17 L. J., C. P. 155; 12 Jur. 336. See also *cases post*, col. 823.

d. Evidence as to Meaning.

Mercantile Usage—When Admitted.]—If a mercantile document is insensible when read according to the ordinary sense of the words used therein, it is a question for the jury whether the language thereof has acquired a definite meaning by mercantile usage. *Ashworth v. Redford*, 9 L. R., C. P. 20; 43 L. J., C. P. 57.

Contract not Ambiguous.]—In an action for not accepting linseed bought under a contract, which stipulated that fourteen days were to be allowed for the delivery of the linseed, from the time of the ship being ready to discharge:—Held, that the contract not being ambiguous in its terms, the judge was right in rejecting evidence of its meaning. *Sotilichos v. Kemp*, 3 Ex. 105; 18 L. J., Ex. 36.

Contract Insufficient.]—The defendant having ordered goods by letter, which did not mention any time for payment, the plaintiff sent the goods and an invoice:—Held, that evidence to shew that the order was given on the terms of six months' credit was admissible, the letter not being a valid contract within the Statute of Frauds. *Lockett v. Nicklin*, 2 Ex. 93; 19 L. J., Ex. 403.

"Prime Bacon."]—On a contract of sale of "prime bacon," it was held inadmissible to shew that by a usage of the trade, bacon with an "average taint" answered the description. *Yates v. Pym*, 6 Taunt. 446.

Allowance of Credit.]—The defendant's traveller entered and signed in the plaintiff's order-book a contract in the following terms: "Of E. Y., 39 pockets Sussex hops, Springett's, 5 pockets Kenward's, 78s.; Springett's, to wait orders." In an action by the purchaser for the non-delivery of the thirty-nine pockets:—Held, that parol evidence of the course of dealing between the parties was not admissible to shew that the sale was at a credit of six months. *Ford v. Yates*, 2 Scott, N. R. 645; 2 M. & G. 549.

"Ware Potatoes."]—In an action on a written contract for the delivery of "ware potatoes," it appearing that the term "ware" applied equally to all kinds of potatoes, and meant the best or largest of any kind:—Held, that evidence to shew that a particular sort, called "Regent's wares," were intended, was inadmissible. *Smith v. Jeffryes*, 15 M. & W. 561; 15 L. J., Ex. 325.

Firm Name.]—A contract was made for the sale of a quantity of "Scott & Co.'s mess pork," and it appeared by the evidence of mercantile

men that Scott & Co. were accustomed to prepare and manufacture pork of a superior quality, which insured it a premium in the market:—Held, that the warranty was not satisfied by supplying pork which had merely passed through the hands of Scott & Co. as consignors, and which bore their brand-mark, but that it meant pork of their manufacture. *Poncell v. Horton*, 2 Hodges, 12; 2 Bing. N. C. 668; 3 Scott, 110.

Held, also, that the evidence of the mercantile men was properly received. *Id.*

"Best Oil."—A plaintiff sold to a defendant "fifty tons of best palm oil expected to arrive, per 'The Chalco,' at 40l. 10s. per ton; wet, dirty, and inferior oil, if any, at a fair allowance." The oil, on arrival, contained one-fifth only of "best oil":—Held, that oral evidence was admissible to shew that, according to mercantile usage, the contract was satisfied if the oil delivered contained a substantial portion of "best" oil. *Lucas v. Bristow*, El. Bl. & El. 907; 27 L. J., Q. B. 364; 5 Jur., N. S. 68.

"Bales."—So on a contract for 1,170 bales of gambier, "now on passage from Singapore, and expected to arrive at London, viz. per R. 805 bales, per L. A. D. 365," evidence is admissible to shew what the word "bales" meant by the custom of the trade. *Gorissen v. Perrin*, 2 C. B., N. S. 681; 27 L. J., C. P. 29; 3 Jur., N. S. 867.

"Your Wool."—A wool-buyer purchased of sheep-farmers a quantity of wool, described in the written contract simply as "your wool." A previous conversation had taken place between the parties, in which the farmers had stated that, beside their own clip of wool, they had purchased the clips of four or five neighbouring farmers, whose names were specified, and that altogether the quantity amounted to "2,300 stones; 100 stones more or less":—Held, in an action against the buyer for not accepting the wool, that evidence of this conversation was admissible to explain what was meant by the term "your wool." *McDonald v. Longbottom*, 1 El. & El. 987; 29 L. J., Q. B. 256; 6 Jur., N. S. 724; 8 W. R. 614—Ex. Ch.

From particular Place.—The plaintiff sold to the defendant, "deliverable in London, ex Ion, from Savannah, 400 loads of pitch pine timber, the timber warranted of fair average quality; to be taken of fair average of the cargo." Evidence was given that pitch pine timber is an article which comes from several parts of Central America, and that pitch pine timber from Darien has more heart in it, being better butted and with fewer holes than that from Savannah:—Held, that the evidence was admissible to explain the contract, and that upon this evidence the contract must be construed as for timber of a fair average of Savannah pitch pine timber. *Jones v. Clarke*, 2 H. & N. 725; 27 L. J., Ex. 165.

Price—Consideration for.—C. contracted, in writing, with B., to make and deliver 7,000 knapsack slings, at 3s. 9d. a set, to be delivered in certain quantities every month. The agreed price having been paid to C., but the slings not having been delivered in time, B. brought an action for the breach of contract:—Held, that evidence for B. was inadmissible to shew that

part of the agreed price was given in consideration of the delivery within the specified times, and that the market price was 2s. 10d. a set. *Brady v. Oastler*, 3 H. & C. 112; 33 L. J., Ex. 300; 11 Jur., N. S. 22; 11 L. T. 681.

"Cwt."—In an action upon a sold note, in the following form: "Sold to Mr. S., 18 pockets Kent hops, viz., 10 pockets Burton East Kent, 8 pockets Springall, Goodhurst, at 100s.,"—parol evidence is admissible, either to supply the term "cwt." or to shew that the term "pockets" meant cwt. *Spicer v. Cooper*, 1 Q. B. 424; 1 G. & D. 52; 5 Jur. 1036.

Mistake in Note.—In trover the following plea, as an equitable defence, was allowed on an affidavit of its truth:—"That the plaintiff was owner of chemical works, that the goods for which the action was brought were stock-in-trade and materials on the premises, that the defendant agreed to purchase the chemical works of the plaintiff, and that the goods were included in those sold; that the brokers employed by the plaintiff and defendant to make the contract made it by bought and sold notes, and by mistake they so made the notes that they did not include the goods; that possession of the chemical works with the goods had been given to the defendant, and that the purchase had been completed and the purchase-money paid, and that the plaintiff was unjustly availing himself of what was a mistake in the drawing of the bought and sold notes." *Steele v. Haddock*, 10 Ex. 643; 24 L. J., Ex. 78.

Effect of Note.—The plaintiff, professedly as C.'s agent, sold bark to the defendants at a price to be subsequently ascertained by C. in a manner agreed on, and induced them to sign a bought note, which described the plaintiff as the seller at an ascertained price per ton, by representing that this price was nominal, and that as the defendants were dealing with the crown, whose officer C. was, they would incur no risk. A day was fixed by the note, on which a deposit of twenty per cent. was to be paid. The plaintiff had, in fact, himself purchased the bark from C. by verbal contract, but had not paid for it. Afterwards, and before the deposit was paid, the plaintiff sent the defendants an invoice specifying the quantity of the bark, and debiting them, as buyers from himself, with a sum calculated at the price per ton in the bought and sold notes (the real price not having been then ascertained by C.), and requesting them to pay the deposit to C., as originally arranged. The deposit was accordingly paid to C. by the defendants, without objection to the basis on which it was computed. The plaintiff subsequently treated the sale as a sale by himself, as principal, at the price in the bought and sold notes. The defendants thereupon disclosed the whole transaction to C., paid C. the price which he had then ascertained in the manner originally agreed, and took possession of the bark:—Held, that parol evidence was admissible to shew that the bought and sold notes did not really contain the contract between the parties. *Rogers v. Hadley*, 2 H. & C. 227; 32 L. J., Ex. 241.

A contract made by brokers in their own names, for the purchase of iron for the plaintiffs, was contained in bought and sold notes. The notes differed only in these particulars, that

while the bought note delivered by the brokers to the plaintiffs had the words "Deposit 5s. per ton, brokerage 0 per cent.," the sold note contained the words "Deposit (blank), brokerage half per cent.:"—Held, that parol evidence was admissible to shew an arrangement between the brokers and the plaintiffs, by which they required the latter to pay a deposit of 5s. per ton, and that the apparent variances, so explained by the usage of the parties between the notes, was not material. *Kempson v. Boyle*, 3 H. & C. 763; 34 L. J., Ex. 191; 11 Jur., N. S. 832; 14 W. R. 15.

Where a complete contract (through brokers) for the sale of goods is to be gathered from a written offer on the one side and a written acceptance on the other, such contract is not the less binding on the buyer because bought and sold notes are subsequently exchanged between the brokers, containing terms not warranted by the authority given to the buyer's broker; at all events, in the absence of evidence of a custom in the particular trade to contract by bought and sold notes, or of a distinct understanding between the parties to that effect. *Hoyworth v. Knight*, 17 C. B., N. S. 298; 10 Jur., N. S. 866.

Sale by Brokers—Undisclosed Principal.]—The plaintiff employed T. and M., London brokers, to sell oil for him, and S. employed the defendants, who were also London brokers, to buy for him. The dealing was between the brokers. The defendants sent to T. and M. a sold note, signed by them, as follows:—

"London, Aug. 14, 1855.
"Sold this day, for T. and M., to our principals, ten tons of linseed oil, &c.

"D., M. & Co., brokers."
T. and M. made the following entry in their books:—

"London, Aug. 14, 1855.
"Sold to D., M. & Co., per account of C. H., ten tons of linseed oil, &c.

"T. and M., brokers."
The defendants did not disclose their principal till an unreasonable time after the contract; and evidence was given that, according to the usage of the trade, whenever a broker purchased without disclosing the name of his principal, he was liable to be looked to as the purchaser:—Held, first, that there was evidence of a contract of bargain and sale, and that evidence of the usage was admissible, as it was not repugnant to or inconsistent with the written instrument. *Humfrey v. Dale*, 7 El. & Bl. 266; 26 L. J., Q. B. 137; 3 Jur., N. S. 213. Affirmed on appeal, El., Bl. & El. 1004; 27 L. J., Q. B. 390—Ex. Ch.

Parol evidence of a broker may be admitted, to shew that a sale of goods was made to a third person, for whom the buyer acted as agent, although the bought note and invoice were made out in the name of the buyer. *Wilson v. Hart*, 1 Moore, 45; 7 Taunt. 295.

The defendant, a merchant residing at St. Petersburg, carried on business in London through H., who had himself no capital or credit, and was universally known to represent the defendant, though H.'s name was always used. The defendant gave notice to H. that he purposed to cease employing him; after which H. contracted with the plaintiff to sell him tallow (of more than 10l. value), and H.'s name was used as before, H. intending to make the contract on his own account; but the plaintiff

did not know this, and believed that H. represented the defendant as usual. The contract was made by a broker, acting for both parties. He signed the bought and sold notes; the former beginning, "Bought for T.," and the latter, "Sold for H. to my principals;" no buyer or seller being further named:—Held, that the defendant was liable for the non-delivery of the tallow, that the bought and sold notes constituted a sufficient note in writing to charge the defendant, and that no objection lay to the admission of parol evidence of these facts as varying the written instrument. *Trueman v. Loder*, 11 A. & E. 589; 3 P. & D. 567.

Evidence was offered by the defendant of a custom in the tallow trade that on such contracts as the above "a party might reject the undisclosed principal and look to the broker for the completion of the contract:"—Held inadmissible, as varying a written instrument. *Ib.*

Broker's Book as Evidence.]—Where the notes of a sale, delivered by a broker to the parties, differ in the terms, the broker's book is not evidence to shew which is correct. *Thornton v. Meux*, M. & M. 43.

In an action by the vendee on a contract made through a broker, it is sufficient for the vendee to produce the bought note, handed to him by the broker, and to shew the employment of the latter by the vendor. If the sold note varies from the bought note, it lies on the vendee to prove that variance by producing the sold note. *Hawes v. Forster*, 1 M. & Rob. 368.

When a contract is made through a broker, the bought and sold notes delivered to the parties constitute the contract, not the entry made by the broker in his book, especially when, by the usage of trade, the bought and sold notes are looked upon as the contract. *Ib.*

Where bought and sold notes are given, the bought and sold notes constitute the contract between the parties, and not the entry of the contract made by the broker in his book. But if there are no bought and sold notes, the entry in the broker's book may be resorted to. *Twincend v. Drakeford*, 1 C. & K. 20.

See also cases post, col. 794.

2. THE CONSIDERATION.

a. What is Sufficient.

See CONTRACT.

b. Price.

When not Mentioned.]—A contract of sale may be complete and binding, though silent as to the price (such silence being equivalent to a stipulation for a reasonable price) and as to the time and mode of payment. *Valpy v. Gibson*, 4 C. B. 837; *S. P., Joyce v. Swann*, 17 C. B., N. S. 84.

A memorandum which is silent as to price will not support a count alleging a contract at the shipping price. *Acebal v. Levy*, 10 Bing. 376; 4 M. & Scott, 217.

Nor where the parol evidence discloses a contract at the shipping price, will it, under a count for goods bargained and sold, prove a contract at a reasonable price. *Ib.*

When a contract, that is silent as to price, is executed by the acceptance of the goods by the

vendee, the law will supply the want of an agreement as to price, by inferring that the parties must have intended a reasonable price. *Id.*

A contract to furnish goods, with a certain latitude as to the price, as saddles at 24s. or 26s., may be described as a contract to furnish them at a reasonable price. *Laing v. Fidgeon*, 6 Taunt. 108; 4 Camp. 169.

Uncertain.]—Where the contract declared upon was, that the defendant should deliver to the plaintiff all his tallow at 4s. per stone, and the contract proved was, that the defendant should deliver it at 4s. per stone, and so much more as the plaintiff paid to any other person: this was held a variance. *Churchill v. Wilkins*, 1 T. R. 447.

Mistake.]—On the sale of a specific article for a certain price, a dispute afterwards arising as to the amount, if the parties never were ad idem as to the price, by reason of mutual mistake, there would be an implied contract (the article having been retained so long that it could not be returned in the same condition) to pay its real value. *West v. De Wesele*, 4 F. & F. 596.

"Fair Value thereof."]—In March, 1853, H., by parol, sold goods to the defendant, at an agreed price, and the defendant then took possession. In the following May, by articles of agreement, it was agreed between them as follows: "That H. shall sell and the defendant shall purchase the same goods, and that the price to be paid for the same shall be the fair amount of the value thereof, such amount to be settled, in case the parties differ as to the same, by arbitration, in manner hereinafter mentioned; and that the defendant shall pay to H. the amount of such price within two calendar months after such price shall have been fixed." The defendant continued in possession of the goods, and never objected to the price originally fixed. H. having become bankrupt in August, his assignees sued the defendant for the amount, as for goods sold and delivered:—Held, that in the absence of evidence that the parties had differed since March as to the amount then fixed, it was not shewn that the event upon which the arbitration clause was to apply had ever arisen, and that the fair value mentioned in the agreement must be taken to be the value previously ascertained and agreed to. *Cunnam v. Fowler*, 14 C. B. 181; 23 L. J., C. P. 48.

c. Payment.

After Delivery.]—Where an agreement, as described in a declaration, was "to deliver fifty tons of iron, for the price of 9l. per ton, the goods to be delivered forthwith to the defendant, at his works, and the price to be paid in cash in fourteen days from the time of the making the contract:"—Held, that it sufficiently appeared upon the face of the contract, as stated, that the delivery was intended to be a condition precedent to the payment. *Staunton v. Wood*, 16 Q. B. 638; 15 Jur. 1123.

Where the words "terms cash" are inserted in a contract, payment on delivery is not a condition precedent. *Nelson v. Patrick*, 2 C. & K. 641.

A contract for the sale of thirty bales of goats'

wool, at a certain price per pound, contained the following stipulation:—"Customary allowance for tare and draft, and to be paid for by cash in one month, less five per cent. discount:"—Held, that the vendee was entitled to have the goods delivered to him immediately, or within a reasonable time, but was not bound to pay for them until the expiration of the month. *Spartali v. Bonecke*, 10 C. B. 212; 19 L. J., C. P. 293.

After Action brought.]—A. contracted to buy of B. cement, in casks and bags, at a given price, for cash, B. agreeing to allow A. 3s. 6d. for each cask and 2s. 6d. for each bag that should be returned perfect. In an action by A. against B., for not accepting and paying for the casks and bags, the declaration averred, that A. duly paid B. for the cement, and for the casks and bags, and that although A. was ready and willing and offered to return the casks and bags, B. refused to accept or pay for them. B. pleaded that A. did not duly pay B. for the cement, casks and bags, and that A. was not ready and willing to return the casks and bags to B. within a reasonable time:—Held, that a payment of the price of the cement by A., after an action brought against him, was a payment according to the contract, so as to entitle him to complain of a breach of the contract on the part of B. *Nelson v. Patrick*, 3 C. B. 772; 16 L. J., C. P. 98.

Resuming Possession in Default.]—An agreement between vendor and vendee of a chattel, that the former may resume the possession if the price is not duly paid, is a personal contract, not binding on an alienee, or the personal representative of the vendee. *Howes v. Ball*, 1 M. & R. 288; 7 B. & C. 481.

By Bills—Dishonour—Production.]—A purchaser having given the seller in payment for goods bills of exchange, which were afterwards dishonoured, the latter sued him for the price of the goods:—Held, that the seller was not bound to produce the bills at the trial, and that the fact of their being in the possession of his agent at the time did not bar his right to recover. *Hadwen v. Mendizabel*, 2 C. & P. 20; 10 Moore, 477.

A purchaser, in payment of goods, accepted two bills drawn on him by the vendor, and returned them to him by post. The vendor in a letter, to which a receipt stamp was affixed, acknowledged the receipt of the bills, and that they had been placed to the purchaser's credit. He afterwards sent the same bills by post to the purchaser, in a letter, requesting him to accept the bills, payable at a banker's, and then to return them. The bills never were returned; the purchaser denied having received them back, but there was other evidence that he had so received them. It was found as a fact, that the vendor had not accepted the bills as payment:—Held, that he might recover the price of the goods without producing the bills. *Widders v. Gorton*, 1 C. B., N. S. 576; 26 L. J., C. P. 165.

—Renewal—Discharge.]—The purchaser of goods to be paid for by a bill upon an agent, who has no funds in hand when it becomes due, is not discharged by the renewal of the bill without notice. *Clarke v. Noel*, 3 Camp. 411.

—Custom in London—Time for Rescission.]

—If goods in the city of London are sold by a broker to be paid for by a bill, the vendor has a right within a reasonable time, if he is not satisfied with the sufficiency of the purchaser, to annul the contract; but the vendor must intimate his dissent as soon as he has an opportunity to inquire into the solvency of the purchaser. *Hodgson v. Davies*, 2 Camp. 530.

Five days considered too long a period for this purpose. *Ib.*

—**For more than Price.**—A vendor of goods being paid for them by a bill at one month after sight, given by the purchaser's banker for a larger sum than the price, the vendor paying the difference, is not, upon the bills being dishonoured, precluded from recovering against the buyer the price of the goods. *Fry v. Hill*, 7 Taunt. 397.

—**By Approved Bill.**—If it is stated generally on a bought and sold note that the goods are to be paid "by bill," evidence cannot be received to shew, that by bill is meant an approved bill; and, semble, that an approved bill is a bill to which there is no reasonable objection, and that ought to be approved. *Hodgson v. Davies*, *supra*.

The plaintiffs sold to the defendants goods to be paid for according to the contract between the parties by cash or "approved banker's bills." The defendants paid for them by an approved banker's bill, which was dishonoured on presentment for acceptance. They were not parties to the bill, and received no notice of dishonour. In an action against them by the plaintiffs for the price of the goods:—Held, that their liability was not more extensive than it would have been if they had indorsed the bill, and that they were therefore discharged, not having received due notice of dishonour. *Smith v. Mercer*, 3 L. R., Ex. 51; 37 L. J., Ex. 24; 17 L. T. 317.

By Cheque—No Funds to Meet.—On a sale of goods for ready money, if the purchaser gives in payment his cheque, which he then knows he has not funds in the bank to meet, this amounts to a false representation of a material fact, which vitiates the sale and entitles the seller to rescind the contract, even though the purchaser at the time believed, and had reasonable grounds for believing, that the cheque would be paid. *Loughnan v. Barry*, 6 Ir. R., C. L. 457.

d. Sale on Credit.

Nature of Contract.—On a contract for credit, a promise to pay before the time is nudum pactum, but it may be material as to whether the contract was for credit. *Heritage v. Lawrence*, 2 F. & F. 532.

Credit—To whom given.—Where a tradesman makes out an account for goods in the name of a particular person, it must be taken that they were furnished on the credit of such person, unless it is shewn by unequivocal evidence that the credit was in fact given to another. *Starr v. Scott*, 6 C. & P. 241. See *Leggat v. Reed*, 1 C. & P. 17; *Thompson v. Davenport*, 9 B. & C. 86.

Evidence as to Person to whom Credit given.—In an action for goods sold and delivered upon

the credit of the defendant, a question as to the amount of his income cannot be put, if the evidence is tendered with a view to shew the improbability of the authority having been given to purchase the goods. *Rowe v. Polkinghorne*, 1 C. & K. 618.

Where, however, an action was brought against a widow for dresses ordered and worn by her daughter, who was about to be married:—Held, that evidence of the amount of her income was admissible, as tending to shew that the dresses were not supplied upon her credit, but upon the credit of her daughter's future husband. *Ib.*

Where a plaintiff, through his agent, contracted with K. for the sale of goods, and the question was, whether they were sold on the credit of K. or of the defendant (whose agent K. was for the purchase of such goods):—Held, that a letter of instructions from the plaintiff to his agent on the subject, not communicated to K., or to the defendant, was not admissible for the plaintiff. *Smethurst v. Taylor*, 12 M. & W. 545; 14 L. J., Ex. 86.

In an action for goods supplied for building cottages, the question was, whether the goods were supplied to a builder afterwards a bankrupt, or to the defendant who had employed the builder. The defendant called the builder, who stated that the plaintiff's contract was made with himself, and that he had received moneys from the defendant in respect of the cottages:—Held, that he might also be asked by the defendant which way the balance was between him and the defendant at the time of the bankruptcy. *Gerish v. Chartier*, 1 C. B. 13; 14 L. J., C. P. 84; 9 Jur. 69.

A bill of parcels, delivered by the plaintiff, having at the foot of it a receipt written at the same time with the bill, is nevertheless admissible without a receipt stamp for the purpose of proving that the goods were sold to a third person, and not to the defendant. *Millen v. Dent*, 10 Q. B. 846.

Married Woman.—Where the husband neither does, nor assents to, any act to shew that he has held out his wife as his agent, to pledge his credit for goods supplied on her order, the question whether she bears that character must be examined upon the circumstances of the case. That question is one of fact. The management of the husband's house would raise a presumption of agency as to matters necessarily connected with that management, which might not be got rid of by a mere private arrangement between husband and wife. Otherwise, where such management did not exist. A. was the manager of a limited company's hotel at Bradford—where his wife acted as manageress—they cohabited—he made his wife an allowance for clothes, but forbade her to pledge his credit for them. She purchased clothes in London, the bills for which were at first made out in her name and were paid by her. She afterwards incurred, with the same tradesmen, a debt for clothes, payment for which was demanded from the husband, with whom, previously, they had had no communication:—Held, that the husband was not liable—that under the circumstances here the mere fact of cohabitation did not raise a presumption of agency, nor require a proof of notice not to trust the wife. *Debenham v. Mellon*, 6 App. Cas. 24; 50 L. J., Q. B. 155; 43 L. T. 673; 29 W. R. 141; 45 J. P. 252—H. L. (E.).

If the wife, with the concurrence of her husband, carries on a separate trade, she has an implied authority to order goods for the purposes of that trade. *Petty v. Anderson*, 3 Bing. 170.

The presumption that a wife has authority to order all the requisites of a household on her husband's credit may be rebutted by proving that she had no such authority. *Jolly v. Rees*, 15 C. B., N. S. 628; 33 L. J., C. P. 177; 10 Jur., N. S. 319; 10 L. T. 299; 12 W. R. 473.

And see HUSBAND AND WIFE.

No Proceeding before Credit expired.]—Goods sold on a credit unexpired, is a denial of any right of action by the vendor for the price. *Broomfield v. Smith*, 2 Gale, 114; 1 M. & W. 542.

If goods are sold on a credit, the vendor cannot before the credit has expired maintain an action for goods sold, even though he can prove that the goods were not bought in the fair way of trade, but for the fraudulent purpose of being immediately resold at an under price. *Ferguson v. Carrington*, 9 B. & C. 59; 3 C. & P. 457; *S. P., Sturt v. Smith*, 1 C., M. & R. 312; 4 Tyr. 1019.

On a sale of goods, the invoice expressed that they should be paid for in "from six to eight weeks." The sale took place on the 1st of May, and the action for the price was commenced on the 18th of June. At the trial the judge left it to the jury to say what was the mercantile meaning of the expression "from six to eight weeks;" and the jury found that the action had not been brought prematurely. The judge, being of the same opinion, directed a verdict for the plaintiff:—Held, that the question was properly left to the jury, and the verdict right. *Ashforth v. Redford*, 9 L. R., C. P. 20; 43 L. J., C. P. 57.

On Vendee's Refusal to give Bill.]—Where goods were sold upon a contract, that the vendee was to pay for them in three months by a bill at two months:—Held, that the contract was for a credit of five months, and therefore that an action for goods sold and delivered could not be brought at the end of three months, upon the neglect of the vendee to give his bill at two months; the remedy being by a special action for damages for not giving such bill. *Mussen v. Price*, 4 East, 147.

Goods were sold, and work was done, the price of which amounted to 24*l.*, upon an agreement that 30*l.* should be paid in ready money, and the residue by bills of 30*l.* each, payable in succession every three months:—Held, that, until the expiration of the period at which the last bill would become due, the vendor could not recover in an action for goods sold and delivered and work done, although the defendant had omitted to pay the 30*l.* or to give the bills, and that the proper remedy was by a special count for not paying that sum and giving the bills. *Paul v. Dod or Dodd*, 2 C. B. 800; 15 L. J., C. P. 177; 10 Jur. 335.

Where goods are sold and delivered upon an agreement to be paid for by a present bill payable at a future day, it does not create a present debt, on which an action for goods sold and delivered is maintainable by the vendor, before the time when the bill agreed to be given becomes

due, and when the contract is no longer executory. *Hoskins v. Duperoy*, 9 East, 498; 6 Esp. 58.

The plaintiffs contracted to deliver iron of a certain quality to the defendants, and agreed to receive payment for each delivery, either in cash for discount within a month, or by bills at four months, according to the defendants' option. Upon application by the plaintiffs in July for payment for iron delivered in June the defendants elected to pay by bill. Before, however, the bill was given, the defendants discovered that the iron which had been worked up into plates was of inferior quality to the sample, and useless to them. They therefore refused to accept any more bills, and the plaintiffs immediately, in August, brought an action to recover the contract price of the June delivery:—Held, that the contract having been broken by the plaintiffs delivering iron of inferior quality, and it being consequently their fault that the bill for the invoiced price was not given, and yet both parties having at the time, and up to the discovery of the quality of the iron, treated the delivery as made under the contract, and to be paid for under it, the period of credit had not expired, and the plaintiffs were not entitled to sue either for the contract price or on a quantum valebant for the reduced value of the goods. *Wayne's Merthyr Steam Coal and Iron Company v. Morewood*, 46 L. J., Q. B. 746.

If the agreed terms of payment for goods sold are by a three months' bill, the buyer to have the option of paying cash at 2½ discount, the buyer is not bound to accept a bill for a larger amount than his debt, and even if he refuses to accept a bill correctly drawn the seller cannot sue for goods sold and delivered before the end of three months from the date of the bill drawn by him. *Anderson v. Carlisle Horse Clothing Company*, 21 L. T. 760.

If, however, the agreed terms are cash, with buyer's option of a bill, the seller can sue immediately upon the buyer's refusal to accept. *Id.*

When goods were sold under the following terms, "2½ per cent., or three months' bill," which was explained to mean cash at the expiration of the month succeeding the current month, deducting a discount of 2½ per cent., or, at the buyer's option, a bill at three months from the same period; the buyer having refused to accept a bill at the end of the second month:—Held, that the seller might at once sue him for the price of the goods, and was not bound to wait the additional three months. *Rugg v. Weir*, 16 C. B., N. S. 471.

B. agreed to furnish goods to C., to the amount of 600*l.*, on the terms of half cash, and half by bill at six months; goods to the amount of 88*l.* having been delivered without either cash or bill from C., and an application having been made by him for payment, he replied by letter, that "the demand was opposed to treaty," that he "closed all further orders," and desired that what he had "not purchased might be taken off the premises:"—Held, that his letter was a rescission of the contract, and that B. was not bound to bring his action on the special contract, but might sue at once for the goods actually delivered. *Bartholomew v. Markwick*, 15 C. B., N. S. 711; 33 L. J., C. P. 145; 10 Jur., N. S. 615; 9 L. T. 651; 12 W. R. 314.

Where goods are sold at three months' credit, the vendor agreeing, if the vendee should want further time, to take his bill at three months' date at the end of the first three months; unless the vendee gives such a bill, although before the end of the first three months the vendor may bring his action immediately. *Nickson v. Jepson*, 2 Stark. 227.

Where a bill of exchange given in payment for goods sold is, upon presentment to the drawee, refused acceptance:—Held, that the holder having declared against the drawer on the bill, and joined counts for goods sold, may treat such bill as a nullity, and recover his demand on the latter counts, although the credit on the bill is not expired. *Hickling v. Hardy*, 1 Moore, 61; 7 Taunt. 312.

Goods sold at six months' credit, payment to be then made by a bill at two or three months, at the purchaser's option, is in effect a nine months' credit. *Helps v. Winterbottom*, 2 B. & Ad. 431.

Option to give Bill—Part Payment.—A person bought goods upon the following terms of payment: "four months' bill on the 10th of the month following delivery, or 20s. for cash." After the delivery of the goods he paid part of the price in cash:—Held, that he had exercised his option of paying ready money, and therefore that the seller might sue him for goods sold and delivered, without waiting for the expiration of the four months. *Schneider v. Foster*, 2 H. & N. 4.

Six or Nine Months.—Upon a sale of goods at six or nine months' credit, the purchaser, by not paying at the end of six months, makes his election to take credit for the nine months, and there is no debt till they are expired. *Price v. Nixon*, 2 Rose, 438; 5 Taunt. 338.

After Expiration of Credit.—After the time of credit expired, the action will lie. *Miller v. Shaw*, 4 East, 149.

If goods are sold at two months' credit to be paid for by a bill at twelve months, and the goods are not paid for after the expiration of the fourteen months, the vendor may sue for goods sold and delivered. *Brooke v. White*, 1 N. R. 330; *S. P.*, *Marshall v. Poole*, 13 East, 98.

So, if the time given was after the sale, or if the sale was not bona fide, the party may sue for his debt immediately. *De Symons v. Minchewich*, 1 Esp. 430.

From what Date Credit begins to Run.—In computing the time of credit on a mercantile contract, the day on which the contract was made is to be excluded from the reckoning. *Webb v. Fairmaner*, 6 D. P. C. 549; 3 M. & W. 473.

Non-Delivery of Goods sold on Credit.—A., having bought some sheep on credit, left them in the custody of the vendor. Without any default on the part of A., the vendor resold the sheep:—Held, that though the price had not been paid or tendered by A., the resale was a conversion of the sheep by the vendor in respect of which A. was entitled to maintain trover. *Chinery v. Viall*, 5 H. & N. 288; 29 L. J., Ex. 180; 8 W. R. 629.

II. STATUTE OF FRAUDS.

1. WHAT WITHIN THE STATUTE.

a. Subject-Matter.

Mixed.—A contract for the sale of goods, of the value of 10l. or upwards, is not the less within the 17th section of the Statute of Frauds, because it also embraces some other matter to which the statute does not extend. *Harman v. Reeve*, 18 C. B. 587; 25 L. J., C. P. 257.

Auction.—Sales by auction are within the 17th section. *Xenworthy v. Schofield*, 4 D. & R. 556; 2 B. & C. 945.

Bonds and Shares.—A contract for the sale of railway shares, or shares in a banking company, of the value of 10l., is not a contract for the sale of goods, wares or merchandise, within the 17th section. *Boulby v. Bell*, 3 C. B. 284; 16 L. J., C. P. 18; *Humble v. Mitchell*, 3 P. & D. 141; 11 A. & E. 205; 2 Railw. Cas. 70.

Nor is a contract to buy, sell or deliver Spanish bonds. *Heselline v. Siggers*, 1 Ex. 856; 18 L. J., Ex. 166.

Nor is a sale of a share in a mining company. *Watson v. Spratley*, 10 Ex. 222; 24 L. J., Ex. 53.

Artificial Teeth.—But a contract to make a set of artificial teeth to fit the mouth of the employer is a contract for the sale of a chattel, and a count for work, labour and materials is not sustainable. *Lee v. Griffin*, 1 B. & S. 272; 30 L. J., Q. B. 252; 7 Jur., N. S. 1302; 4 L. T. 346; 9 W. R. 702.

Carriage.—Where the plaintiff agreed by parol, that, if the defendant would employ his ship to carry corn, he would procure him coals at A., and convey them to B. at a stipulated price:—Held, that this was not a contract nor an agreement within the provisions of the statute, so as to be required to be in writing; nor was part delivery or part payment necessary to make it binding on the parties. *Cobbold v. Caston*, 1 Bing. 399; 1 C. & P. 51; 8 Moore, 456.

L., a cornfactor at N., agreed to sell barley of the plaintiff to the defendant, to be delivered at L.'s warehouse at D., to go by the first boat of L., which went from N. to D., at 38s. per quarter, which was a higher price on account of its being to be delivered at L.'s expense; and the barley being then in the hands of T., the defendant desired him to see it delivered and measured, and put up properly, and the barley was sent by L.'s first boat, and the invoice delivered to the defendant, who requested time to pay, but afterwards refused to accept the barley:—Held, that this was a contract for the sale of goods, and not a mixed contract for the carriage as well as sale, though the price was enhanced by the carriage; and that the defendant's having appointed the particular boat, and having desired T. to inspect the loading, did not amount to an acceptance on his part. *Astey v. Emery*, 4 M. & S. 262.

To Grow Crops.—Where A. agreed to supply B. with a quantity of turnip seed, and B. agreed to sow it on his own land, and sell the crop of seed produced therefrom to A., at 1l. 1s. the Winchester bushel, and the seed so produced at the price agreed upon exceeded in value the sum

of 10*l.*:—Held, that this contract was within the statute, and void for want of a memorandum in writing. *Watts v. Friend*, 10 B. & C. 446.

Sale for Delivery Elsewhere.—A sale of goods for more than 10*l.* by sample in one place, to be afterwards delivered at another, is within the statute. *Cooper v. Elston*, 7 T. R. 14.

Trees to be Felled.—The plaintiff verbally agreed to sell to the defendant trees growing upon the plaintiff's land, "to be got away as soon as possible." The defendant thereupon cut down some of the trees, and lopped off the stumps and branches. The plaintiff afterwards countermanded the sale, but the defendant cut down the remaining trees and carried them away:—Held, that as the trees were to be felled forthwith after the agreement to buy them, the contract did not relate to an interest in land within s. 4 of the Statute of Frauds; that the contract was for the sale of goods, and that there had been a sufficient acceptance and actual receipt to satisfy s. 17. *Marshall v. Green*, 1 C. P. D. 35; 45 L. J., C. P. 158; 33 L. T. 404; 24 W. R. 175.

Writing differing from Contract.—A parol agreement was for the sale of a quantity of whisky to be ascertained by a redip:—Held, that a memorandum in writing, representing the sale of an ascertained quantity, was not sufficient to satisfy the Statute of Frauds. *Mahalen v. Dublin and Chapelizod Distillery Company*, 11 Ir. R., C. L. 83.

b. Executory Contracts.

Construction of Statutes.—The 17th section of the 29 Car. 2, c. 3, and the 7th section of the 9 Geo. 4, c. 14, are to be read together. *Harman v. Reeve*, 18 C. B. 587; 25 L. J., C. P. 257.

The effect of the 7th section of the 9 Geo. 4, c. 14, is to substitute for the words "for the price of 10*l.*" in the 17th section of the 29 Car. 2, c. 3, the words "of the value of 10*l.*" *Id.*

Goods made, and to be made.—Where an order is given for goods, some of which are ready-made at the time of the contract, and the rest are to be manufactured according to order, and the goods which are ready-made are afterwards delivered and paid for, the acceptance of them is a part acceptance of the whole, to satisfy the 17th section of the Statute of Frauds, and the 9 Geo. 4, c. 14, s. 7, as the whole forms but one entire contract. *Scott v. Eastern Counties Railway Company*, 12 M. & W. 33; 13 L. J., Ex. 14; 7 Jur. 996.

Where Materials Found.—A printer verbally agreed to print for the defendant 500 copies of a treatise, to which a dedication was to be prefixed, at a certain price per sheet, including paper. The treatise was printed, and after the proof-sheet of the dedication was revised by the defendant, and returned to the printer, he, for the first time, discovered that it was libellous matter, and refused to complete the printing of it:—Held, that this was not a contract for the sale of goods, within the 17th section of the Statute of Frauds, as extended by 9 Geo. 4, c. 14, s. 7. *Clay v. Yates*, 1 H. & N. 73; 25 L. J., Ex. 237; 2 Jur., N. S. 908.

The 9 Geo. 4, c. 14, s. 7, only applies to cases

where the bargain is for goods afterwards to be made, and not for goods for which the material is found. *Id.*

Materials to be Procured.—A contract for the sale of goods, to be delivered at a future day, is not invalidated by the circumstance, that, at the time of the contract, the vendor neither has the goods in his possession, nor has entered into any contract to buy them, nor has any reasonable expectation of becoming possessed of them by the time appointed for delivering them, otherwise than by purchasing them after making the contract. *Hibblewhite v. M'Morine*, 5 M. & W. 462; 3 Jur. 509.

2. SUFFICIENCY OF NOTE OR MEMORANDUM.

a. General Requisites.

Contents.—The memorandum of a contract for the sale of goods required by the Statute of Frauds must express every essential element of the contract. *M'Lean v. Nicoll*, 7 Jur., N. S. 999; 4 L. T. 863; 9 W. R. 811.

When made.—The memorandum of a contract for the sale of goods must have been made before the commencement of the action. *Bill v. Bament*, 9 M. & W. 36.

The memorandum or note of an agreement must be a memorandum of an agreement complete at the time the memorandum is made. *Munday v. Asprey*, 13 Ch. D. 855; 49 L. J., Ch. 216; 28 W. R. 347.

Attempted Repudiation.—A. upon one and the same occasion bought several parcels of goods of B., one parcel (consisting of chimney-glasses amounting to 38*l.* 10*s.* 6*d.*) for ready money, the rest (some of which had to be manufactured) on credit. The goods were sent to the purchaser at different times. The chimney-glasses being damaged in the carriage, he declined to receive them. A. afterwards, in answer to an application by B. for payment for the whole of the goods, wrote to him in substance as follows: "The only parcel of goods selected for ready money was the chimney-glasses, amounting to 38*l.* 10*s.* 6*d.*, which goods I have never received, and have long since declined to have, for reasons made known to you at the time; with regard to the rest I am ready to pay." An action having been brought to recover the value of the whole of the goods, A. paid into court sufficient to cover all but the price of the chimney-glasses, and the jury found that the chimney-glasses were sold under a separate contract from the rest of the goods:—Held, that the letter, inasmuch as it contained an admission of the bargain and of all the substantial terms of it, was a sufficient note or memorandum of the contract, notwithstanding the subsequent attempted repudiation of liability. *Bailey v. Sweeting*, 9 C. B., N. S. 843; 30 L. J., C. P. 150; 9 W. R. 273.

b. Statement of Price.

Whether Necessary.—Where an executory contract is entered into for the fabrication of goods, without any agreement as to price, the memorandum of the contract required by the statute is sufficient without the specification of

price. *Hoadley v. M'Laine*, 10 Bing. 482; 4 M. & Scott, 340.

The defendant agreed to purchase the plaintiff's goods at a discount of twenty-five per cent., from a list of goods with prices annexed, and he signed an order for the goods, referring to the list. The terms as to discount were not mentioned in the order:—Held, that the order was not a sufficient memorandum of the bargain, as it did not contain the price. *Goodman v. Griffiths*, 1 H. & N. 574; 26 L. J., Ex. 145.

A sold note expressed "eighteen pockets of hops at 100s.:"—Held, that parol evidence was admissible to shew that the 100s. meant the price per cwt. *Spicer v. Cooper*, 1 G. & D. 52; 1 Q. B. 424; 5 Jur. 1036.

The defendants, merchants at St. Vincent's, sent the plaintiffs an order to ship goods therein specified, by the Emerald. The order directed that the terms were to be "moderate." The plaintiffs accepted the order, and shipped the goods accordingly. They were lost in the passage out:—Held, first, that there was a sufficient contract within the Statute of Frauds. *Ashcroft v. Morrin*, 4 M. & G. 450; 6 Jur. 783.

Held, secondly, that it was not necessary for the completion of the contract that the price of the goods should be specified; it was enough to say that the price should be moderate, and the goods being named, that price might be ascertained with sufficient certainty to satisfy the statute. *Ib.*

A contract of sale may be complete and binding, though silent as to price (such silence being equivalent to a stipulation for a reasonable price) and as to the time and mode of payment. *Valpy v. Gibson*, 4 C. B. 837.

There may be a complete contract, so as to pass the property in goods from the seller to the buyer, although the price has not been definitely agreed on between them. *Joyce v. Swann*, 17 C. B., N. S. 84.

A note of a bargain for the purchase and sale of goods must state the price of the goods, or it will not satisfy the requisites of the statute. *Elmore v. Kingscote*, 8 D. & R. 343; 5 B. & C. 583.

— Part Performance—Parol Evidence.]—

After a parol agreement for the sale of goods, to be delivered by successive consignments at a specified price, had been entered into, a memorandum in writing of the bargain, but omitting the price, was made and signed by the agent of the sellers; and several of the consignments were delivered, accepted and paid for at the price agreed on:—Held, in an action for non-delivery of the remaining consignments, that the memorandum was merely an admission of a contract of which there had been part performance, and that parol evidence was admissible to prove the price. *Jeffcott v. North British Oil Company*, 8 Ir. R., C. L. 17.

Method of Payment.—At the time of entering into a contract for the sale of goods it was agreed that payment should be made by a cheque on the defendant's brother:—Held, that the omission of that stipulation did not vitiate the memorandum. *Sarl v. Bourdillon*, 1 C. B., N. S. 188; 26 L. J., C. P. 78; 2 Jur., N. S. 1208.

Upon a sale of whisky, the parol agreement was that the price should be paid in cash within a month after delivery, or by a bill at four

months with bank rate of interest added:—Held, in an action for non-delivery of the whisky, that a memorandum in writing, representing the sale as for "net cash," was not sufficient to satisfy the Statute of Frauds. *Mahalen v. Dublin and Chapelizod Distillery Company*, 11 Ir. R., C. L. 83.

c. Names of Buyer and Seller.

Certainty as to.—A contract in writing to satisfy the Statute of Frauds must contain the name of the seller, quā seller, as well as the signature of the person to be charged. *Vandenberg v. Spooner*, 1 L. R., Ex. 316; 35 L. J., Ex. 201; 14 W. R. 843; 4 H. & C. 519.

The following bought note: "D. S. agrees to buy the whole of the lots of marble purchased by V., now laying at Lyme, at 1s. per foot," is not a sufficient memorandum, inasmuch as it does not appear by reasonable construction or necessary intendment that V. is the vendor. *Ib.*

It is not necessary that the parties should be described as buyer and seller, provided it is clear from the surrounding circumstances which position they respectively occupy. *Newell v. Radford*, 3 L. R., C. P. 52; 37 L. J., C. P. 1; 17 L. T. 118; 16 W. R. 97.

A baker bought of a flour dealer a quantity of flour. At the time of the sale Williams, the dealer's agent, by whom the sale was effected, wrote and signed the following entry in the baker's book: "Mr. Newell, 32 sacks culasses, at 39s. 280. To wait orders. John Williams. June 8th:"—Held, that the surrounding circumstances of the contract might be looked at in ascertaining the meaning of the document, and that it was a sufficient note or memorandum of the contract within the statute. *Ib.*

How Inserted.—It is immaterial when the name of the party sought to be charged is added by the party himself, on what part of the paper it appears—whether at the head, in the middle, or at the end; and it is the same thing, in that respect, when it is put there by the party's authorized agent. *Durrell v. Evans*, 1 H. & C. 174; 31 L. J., Ex. 337; 9 Jur., N. S. 104; 7 L. T. 97; 10 W. R. 665—Ex. Ch.

d. Signature.

Of Party to be Charged.—It is no objection to the validity of a contract for the sale of goods, signed by the seller, that the seller cannot enforce the same contract against the buyer, because the buyer has never signed it. *Allen v. Bennet*, 3 Taunt. 169.

A party cannot sue another for not accepting goods, if the contract note was only signed by himself; for if he acted as a broker, he cannot sue as a principal; and if he was a principal, his signing would not bind the vendee. *Rayner v. Linthorne*, 2 C. & P. 124; R. & M. 325.

A memorandum signed by parties, whereby they agreed to give so much for goods, takes the case out of the statute, though not signed by the seller, nor expressing any consideration for their promise, otherwise than by inference from their own obligation. *Egerton v. Matthews*, 6 East, 307; 2 Smith, 339.

A note or a memorandum of a contract for the sale of goods, signed by the seller only, is

not sufficient. *Champion v. Plummer*, 1 N. R. 252; 5 Esp. 240.

Entry in Parties' Books.—A memorandum of sale of goods in the vendor's books, signed by the vendee in initials, the vendor's name not appearing in the book, is not a sufficient note in writing; nor will the defect be cured by a letter from the vendee, in which the vendor's name does appear, unless the letter clearly refers to the memorandum. *Jacob v. Kirk*, 2 M. & Rob. 221.

The traveller of hop merchants in London agreed with the defendant, at Leeds, for the sale to him, by sample, of a quantity of hops. The defendant wrote in his own book, which he kept, the following memorandum: "Leeds, 19th October, 1836, sold John Dodgson, 27 pockets Playsted, 1836, Sussex, at 103s.; 4 pockets Selme Beekley at 95s. The bulk to answer sample. Samples and invoice to be sent per Rockingham coach. Payment in bankers' bills at two months." This was signed by the traveller on behalf of the sellers.—Held, a sufficient memorandum of the contract. *Johnson v. Dodgson*, 2 M. & W. 653.

The defendant went into the plaintiff's shop, and agreed to purchase goods in the aggregate exceeding the value of 10l. The several articles, with their respective prices, were entered in the plaintiff's order-book, on the fly-leaf, at the beginning of which was written the name of the plaintiff; and the defendant wrote his name at the foot of the entry, for the purpose of verifying the bargain.—Held, a sufficient signature of the contract by both parties. *Sarl v. Bourdillon*, 1 C. B., N. S. 188; 26 L. J., C. P. 78; 2 Jur., N. S. 1208.

Open Proposal Signed by Writer.—A promise in writing, signed, to pay any one unnamed, who shall furnish goods to the writer, or to a third person making default, will become a binding contract with any one, whosoever he may be, who shall accept the promise in writing and furnish the goods. *Williams v. Byrnes*, 1 Moore, P. C. C., N. S. 154; 9 Jur., N. S. 363; 8 L. T. 69; 11 W. R. 487.

Name Printed.—A letter containing proposed terms of a contract between A. B., the sender, and the sendee, written out by the sender upon paper bearing a printed heading, "Memorandum from A. B.," was held to be a sufficient note in writing to charge A. B. A memorandum of a contract is sufficiently signed within the 4th section of the Statute of Frauds if it contains the terms of the contract and the name of the party charged, and is given by him to the other party under circumstances which shew a recognition of the name as it stands for his own. *Tourret v. Cripps*, 48 L. J., Ch. 567; 27 W. R. 706.

A bill of parcels, in which the vendor's name is printed, delivered to the vendee at the time of an order given for the future delivery of goods, seems to be a sufficient memorandum of the contract. *Saunderson v. Jackson*, 2 B. & P. 238; 3 Esp. 180.

A bill of parcels, in which the name of the vendor is printed, and that of the vendee written by the vendor, is sufficient to charge the vendor. *Schneider v. Norris*, 2 M. & S. 286.

Who can Sign as Agent.—One of the parties to a contract cannot sign the name of the other

as his agent, so as to bind him under the Statute of Frauds. The signature as agent must be by some third person. *Sharman v. Brandt*, 6 L. R., Q. B. 720; 40 L. J., Q. B. 312; 19 W. R. 956.

A broker, carrying on business as "W. S. & Co.," was authorized by Messrs. B. & H. to buy for them in the market 200 tons of hemp. He drew up and forwarded to them a contract-note: "Bought for Messrs. B. & H. of our principals 200 tons of hemp—W. S. & Co., brokers." He had, in fact, no principals as sellers in the transaction; but B. & H. had no notice of this. They having refused to accept hemp under the contract.—Held, that he could not maintain an action on the contract, on the grounds that the contract in writing was with an undisclosed principal as seller, and not with himself as seller; and also, that he, if a party to the contract, could not sign as agent for Messrs. B. & H., so as to bind them within s. 17 of the Statute of Frauds. *Id.*

The agent contemplated by the 17th section of the Statute of Frauds, who may bind a person by his signature to the memorandum of a bargain, must be a third person, and not the other contracting party. Where, therefore, an auctioneer wrote the name of the defendant in his book opposite to a lot purchased.—Held, in an action brought in the name of the auctioneer, that such entry was not sufficient to take the case out of the statute. *Farebrother v. Simmons*, 5 B. & A. 33.

The vendor is not an agent of the vendee sufficient to satisfy the statute, though he wrote the note by the direction and at the dictation of the vendee; an agent must be some third person. *Wright v. Dannah*, 2 Camp. 403.

In an action to recover the price of clocks sold by the plaintiff to the defendant, it appeared that the plaintiff's traveller, when he took the order for the goods, wrote out in the presence of the defendant upon printed forms, two memoranda of it, putting the defendant's name upon them, and handing one of the papers to the defendant, who kept it.—Held, that there was no evidence that the traveller signed the memoranda as agent of the defendant, so as to bind him within the Statute of Frauds, s. 17. *Murphy v. Boese*, 10 L. R., Ex. 126; 44 L. J., Ex. 40; 32 L. T. 122; 23 W. R. 474.

The signature of a contract by an agent authorized to make a binding contract is sufficient, and it is not necessary that, at the time of signing, there should be any intention that such signature should be binding within the Statute of Frauds. *Durrell v. Evans*, 1 H. & C. 174; 31 L. J., Ex. 337; 9 Jur., N. S. 104; 7 L. T. 97; 10 W. R. 665—Ex. Ch.

D., a hop-grower, having sent samples of his hops to his factor, E., went to the factor and offered to buy some at 16l. 16s. a cwt. After some negotiation between E., the factor and D., the latter agreed to sell the hops at that price, and the factor wrote in his book, in the presence of D. and E., a memorandum of the bargain in duplicate, one part of which he headed with the name of E. and the other part with the name of D. E. requested that the date might be altered, so that by the custom of the hop trade he would have a week's more time for payment. D. consented, and the alteration was made by the factor, who tore from his book the part of the memorandum headed with the name of E., and delivered it to him, and kept the counterfoil in his possession.—Held, that there was evidence that

the factor was the agent of both parties for the purpose of drawing the record of the contract binding on them; and that, if he was, the name of E., at the head of that part of the memorandum delivered to him, was a sufficient signature by his agent. *Ib.*

A contract for the sale of goods was, in the presence and at the desire of the buyer, written and signed by the seller's traveller in a book belonging to the former, as follows: "Of North & Co., 30 mats, Maurs. Cash, two months. Joseph Dyson:"—Held, that this was not a sufficient note or memorandum of the bargain, Dyson not appearing to be authorized to sign it as agent for the buyer. *Graham v. Mussen*, 7 Scott, 769; 5 Bing. N. C. 603; *S. P.*, *Graham v. Fretwell*, 4 Scott, N. R. 25; 3 M. & G. 368.

The authority of an agent to sign such a contract need not be in writing. *Ib.*

Bought and Sold Notes.—The sold note, bearing the signature of the broker, who acts for both buyer and seller, is a note or memorandum in writing of the bargain signed by a lawfully authorized agent of the buyer, to satisfy the 17th section of the Statute of Frauds. *Parton v. Crofts*, 16 C. B., N. S. 11; 33 L. J., C. P. 189; 10 L. T. 34; 12 W. R. 553.

A broker, signing a contract-note as selling as broker for undisclosed principals, cannot sue as principal on the contract. *Sharman v. Brandt*, 6 L. R., Q. B. 720; 40 L. J., Q. B. 312; 19 W. R. 956.

Where the vendor countermanded the authority of the broker after he had agreed to sell, but before the sale note was made out:—Held, that the contract could not be enforced. *Farmer v. Robinson*, 2 Camp. 339, n.

A broker acting for the plaintiff made a contract for the sale of goods to the defendant, sending a note to each party, but signing only that which was sent to the seller; he, however, entered the contract in his book, in which he signed both the bought and sold notes. The defendant kept the note which was sent to him without objection until called upon to accept the goods, when he repudiated the contract, assigning for reason that the note sent to him was not signed:—Held, that his conduct amounted to an admission that the broker had authority to make the contract for him, and consequently that his signature to the sold note bound him. *Thompson v. Gardiner*, 1 C. P. D. 777.

Held, also, that the signed entry in the broker's book was a sufficient memorandum of the bargain to satisfy the Statute of Frauds. *Ib.*

A broker having a general authority to purchase spiccs for one person, having purchased some for that person on Saturday, went to another person on the Sunday, and offered them to him for sale, saying that he would deliver the contract on the Monday. The person to whom they were offered said, that he must have the contract on that day (Sunday). A bought note was accordingly delivered to him on the Sunday. The broker could not say when he made out a sold note for the vendor, whether it was within a week or more from the Sunday; but stated that he informed him of the sale on the Monday or Tuesday. The entry in the broker's book was not signed:—Held, that the contract was not sufficient under the statute. *Smith v. Sparrow*, 2 C. & P. 544; 4 Bing. 84.

A broker, employed to effect a sale of goods

for his principal, made a verbal contract with the vendee, and after entering it into his own book without signing it, delivered a bought and sold note to the vendor and vendee respectively, each paper differing in its items:—Held, that there was no memorandum in writing of the contract to bind either under the statute. *Grant v. Fletcher*, 8 D. & R. 59; 5 B. & C. 436.

Where a broker is authorized by one man to sell goods, and by another to buy such goods, an entry in his book of a sale of those goods from the one to the other, signed by him, is a binding contract between the parties. *Heyman v. Neale*, 2 Camp. 337.

If a broker makes a contract with the defendant for the purchase of goods, and delivers by mistake a bought note to each party, and does not mention his principal's (the buyer's) name, but makes a proper entry of it in his book:—Held, that the buyer may maintain an action for the breach of this contract. *Gale v. Wells*, 1 C. & P. 388.

Where there is an entry of the contract between buyer and seller, by a broker acting for both parties, in his book, signed by him, that entry is the binding contract between the parties, and a mistake made by him when sending them a copy of it in the shape of a bought or sold note will not affect its validity. *Sicre-wright v. Archibald*, 17 Q. B. 103; 20 L. J., Q. B. 529; 15 Jur. 947.

Where a broker omits to enter and sign any contract in his book, and sends bought and sold notes to the buyer and seller, if these agree they constitute a binding contract; but if there is any material variance between them, they are both nullities, and there is no binding contract. *Ib.*

Where, in a sale between brokers, the bought and sold notes were not exchanged, and there was no evidence that the seller had notice of the contract, but the contract was in part performed:—Held, that there was a binding memorandum. *Thomas, Ex parte*, 11 Jur., N. S. 49; 11 L. T. 586.

If a broker, employed both by seller and buyer, negotiates a sale, but by mistake delivers to the several parties sale notes differently describing the goods, no contract arises. *Thornton v. Kempster*, 5 Taunt. 786; 1 Marsh. 355.

The signed entry of a contract in a broker's book is not of necessity the only evidence to render the contract binding within the statute. *Goom v. Aftalo*, 9 D. & R. 148; 6 B. & C. 117.

Where a broker entered in his book the terms of a contract, but did not sign it, and delivered to the parties bought and sold notes copied from his book, and which he did not sign:—Held, that these constituted a sufficient note or memorandum of the bargain, and rendered it binding upon the parties. *Ib.*

A broker who is employed to sell goods for any person, and who agrees for the sale of them, and gives to the purchaser and his employer a sold note, is to be considered as an agent for both parties; and such note is a sufficient note within the Statute of Frauds. *Rucker v. Cammeyer*, 1 Esp. 105.

Where a person is told by two parties that he is to be the broker, to make a contract between them for the sale of goods, and he in consequence reduces it into writing, and sends a sale note of the terms to each party, this is a valid

contract within the statute. *Chapman v. Partidge*, 5 Esp. 256.

The defendants bought of the plaintiff a quantity of wool, it being agreed between them, in the presence of a broker, that the wool was to be delivered in good dry condition. On the same day the broker sent a sold note signed by him to the plaintiff, no copy of which was communicated to the defendants, but in which he omitted the stipulation as to the condition of the wool. The wool delivered to the defendants was not in good dry condition:—Held, in an action against them for the price of the wool, that they were not liable, there being no note in writing within the Statute of Frauds, as the broker was not their agent to make the contract, but merely to sell them wool in a good dry condition. *Pitts v. Beckett*, 13 M. & W. 743; 14 L. J., Ex. 358.

The defendant, a merchant residing at St. Petersburg, carried on business in London through H., who had himself no capital or credit, and was universally known to represent the defendant, though H.'s name was always used. The defendant gave notice to H. that he purposed to cease employing him; after which H. contracted with the plaintiff to sell him tallow (of more than 10*l.* value), and H.'s name was used as before, H. intending to make the contract on his own account; but the plaintiff did not know this, and believed that H. represented the defendant as usual. The contract was made by a broker acting for both parties. He signed the bought and sold notes; the former beginning, "Bought for T.," and the latter, "Sold for H. to my principals:—"—Held, that the bought and sold notes constituted a sufficient note in writing to charge the defendant, and that he was liable. *Trueman v. Loder*, 11 A. & E. 589; 3 P. & D. 567.

D. M. & Co., brokers in London, being employed by S. to purchase oil, dealt with T. & M., brokers, who were employed by the plaintiff to sell oil, without either broker disclosing the names of their principals. D. M. & Co. delivered to T. & M. a note as follows:—"Sold this day for T. & M. to our principal, ten tons of oil," specifying the terms and price, which was above 10*l.* This note was signed "D. M. & Co., brokers, quarter per cent. brokerage to D. M. & Co." D. M. & Co. did not disclose the name of their principal, S., till after the lapse of an unreasonable time, when S. had become insolvent. The plaintiff sued D. M. & Co. for not accepting the oil, laying the sale as by himself to D. M. & Co. D. M. & Co. denied the contract. On the trial, the plaintiff proved a custom in the trade, that, when a broker purchased without disclosing the name of his principal, he was liable to be looked to as principal:—Held, that evidence of this custom was admissible as explaining the terms of the instrument, and that as thus explained it was a sufficient memorandum of the contract to satisfy the Statute of Frauds. *Dale v. Humphrey*, El., Bl. & El. 1004; 27 L. J., Q. B. 390; 5 Jur., N. S. 191—Ex. Ch.

Where A., having goods to sell, employed a broker for the purpose, and B., being desirous of purchasing them, authorized the broker's salesman to offer a certain price, who in consequence brought the parties together, and who having concluded the contract in the absence of the salesman, dictated to him the terms of it; of which he made an entry in his master's book,

but did not sign it, and afterwards communicated the circumstances to the broker, who directed a clerk to enter and sign the contract in his book, and sent a sale note, signed by himself, to A., but no bought note was sent to B.:—Held, that there was no note or memorandum in writing, signed by an agent duly authorized, to satisfy the statute. *Henderson v. Barnewall*, 1 Y. & J. 387.

Auctioneers.—It seems that taking sales of goods by auction to be within the 17th section, the auctioneer or broker, who is a middleman, must be taken to be the agent of both parties, so as to bind the purchaser by his signature. *Hinde v. Whitehouse*, 7 East, 558; 3 Smith, 528.

An auctioneer is an agent lawfully authorized by the buyer to sign a contract for him, whether it is for the purchase of an interest in land or goods, and his authority is given by the buyer bidding aloud; and the name of the purchaser of divers lots at an auction being written down on the sale bill opposite to such lots, for which the purchaser was declared to be the highest bidder, is a note or memorandum in writing sufficient to satisfy the intent of the statute. *Emmerson v. Heelis*, 2 Taunt. 38.

— **Entry in Sale Book.**—The highest bidder is bound by the entry in the sale-book of the auctioneer's clerk made in his presence, upon his name being called out as the purchaser, even in an action brought by the auctioneer. *Bird v. Boulter*, 1 N. & M. 313; 4 B. & Ad. 443.

In an action by an auctioneer against a purchaser for goods sold, an entry in the sale-book by the auctioneer's clerk, who attended the sale, and, as each lot was knocked down, named the purchaser aloud, and on a sign of assent from him, made a note accordingly in the book, is a memorandum in writing by an agent lawfully authorized; for the clerk is not identified with the auctioneer, and in the business which he performs of entering names, &c., he is impliedly authorized by the persons attending the sale to be their agent. *Id.*

Upon a sale by auction, subject to conditions of sale, the auctioneer's entry in his book is void under the Statute of Frauds, unless the entry contains such reference to the conditions as to identify them upon production as being the conditions mentioned therein. *Rishton v. Whatmore*, 8 Ch. D. 467; 47 L. J., Ch. 629; 26 W. R. 827. See *Pierce v. Conf*, 9 L. R., Q. B. 210; 43 L. J., Q. B. 52; 29 L. T. 219; 22 W. R. 299.

— **After Auction.**—The plaintiff put up for sale by public auction a quantity of timber, several lots of which were unsold. A few days afterwards the defendant called on the auctioneer, and selected from the catalogue two of the unsold lots, which he agreed to purchase. The auctioneer then wrote, in the defendant's presence, his name in the catalogue opposite these lots:—Held, that the auctioneer was not the agent of the defendant, so as to bind him by signing his name, and consequently there was no sufficient note or memorandum of the bargain. *Mews v. Curr*, 1 H. & N. 484; 26 L. J., Ex. 29.

So a receipt given by an auctioneer's clerk three days after the sale, and signed by the clerk, acknowledging payment of part of the purchase-money for "Lot 4, Mr. J. S.'s property," is not

such a memorandum in writing as would bind the vendor. *Semble*, that the name of the auctioneer printed on the back of the particulars and conditions of sale, is sufficient to bind the vendor. *Dyas v. Stafford*, 7 L. R., Ir. 590.

e. Subsequent Ratification.

Alteration—Connected Documents.—A verbal order for goods was given with a direction that they should be sent by a particular route. The goods were afterwards sent by another route, and a letter written to the purchaser by the vendors stating the original order and the alteration in the mode of transit, and inclosing an invoice which contained the particulars of the goods and the price. The goods did not reach the purchaser, who, on being applied to afterwards for payment, wrote a letter in which he acknowledged the original order, but declined to pay on the ground that the goods were not sent by the route directed. In an action for the price of the goods, the jury found that the purchaser, by his conduct, had ratified the alteration in the route:—Held, that the letters and invoice constituted a memorandum in writing of the original contract within the Statute of Frauds, and the alteration of the route having been ratified by the purchaser, the vendors were entitled to recover, although the ratification was not in writing. *Leather Cloth Company v. Hieronimus*, 10 L. R., Q. B. 140; 44 L. J., Q. B. 54; 32 L. T. 307; 23 W. R. 593.

Admission of Parol Evidence to prove Assent or Terms.—A memorandum containing proposed terms for the sale of a ship having been drawn up by the vendor's broker, but not signed, was sent to the purchaser. He made interlineations in red ink altering the terms, and having signed the document, returned it to the vendors' broker. The alterations were subsequently not acquiesced in by the vendors, and were struck out, and further interlineations were made by the vendors. The vendors' broker then signed the document and submitted it to the purchaser, who assented to the terms of it as it then stood:—Held, in an action on a contract in the last-mentioned terms against the purchaser, that, notwithstanding the provisions of the Statute of Frauds, parol evidence was admissible to shew that the purchaser had so assented, inasmuch as there never had been a contract between the parties until such assent on his part; and the effect of the parol evidence was, therefore, not to vary a written contract, but merely to shew what was the condition of the document when it became a contract between the parties. *Stewart v. Eddowes*, *Hudson v. Stewart*, 9 L. R., C. P. 311; 43 L. J., C. P. 204; 30 L. T. 333; 22 W. R. 534.

A. and B. being jointly interested in a quantity of oil, A. entered into a contract for the sale of it without the authority or knowledge of B., who, on receiving information of the circumstance, refused to be bound by it, but afterwards assented by parol, and samples were delivered by the vendors:—Held, that B.'s subsequent ratification of the contract rendered it binding; and that it was to be considered as a contract in writing within the statute. *Soames v. Spencer*, 1 D. & R. 32.

Authority of Agent.—If an agent, without authority, makes a contract in writing for the purchase of goods by his principal, who sub-

sequently ratifies the contract, such ratification will render a note or memorandum of the sale, signed by the agent, sufficient under the statute. *Maclean v. Dunn*, 4 Bing. 722; 1 M. & P. 761.

See also PRINCIPAL AND AGENT.

Admission to Agent.—Where the defendant having commissioned R. to buy for him a mare belonging to the plaintiff, and R. on the 15th May wrote to the defendant that he had bought the plaintiff's mare for 42l., and asked for a cheque; and on the 25th the defendant wrote to R. that he only returned home the day before, or he would have at once answered his letter and sent a cheque for the mare which he had bought for him, and promised to send a cheque:—Held, that the written admission by the purchaser to his agent, that he had bought certain goods for him, was a sufficient note or memorandum of the bargain between him and the vendor. *Gibson v. Holland*, 1 L. R., C. P. 1; 35 L. J., C. P. 5; 11 Jur., N. S. 1022; 13 L. T. 293; 14 W. R. 86; 1 H. & R. 1.

f. Connected Documents.

Bought and Sold Notes—Material Alterations and Variations.—A material alteration in a sale note by the broker, after the bargain made, at the instance of the seller, without the consent of the purchaser, annuls the instrument, so as to preclude the seller from recovering upon the contract, evidenced by the instrument so altered by him. *Powell v. Dickett*, 15 East, 29.

A material alteration in a sold note made by the buyer, without the knowledge or consent of the seller, prevents the former suing on the contract, notwithstanding the duty of the latter may not be varied by the alteration. *Mollett v. Wackerbarth*, 5 C. B. 181; 17 L. J., C. P. 47; 11 Jur. 1065.

If there is a material discrepancy between the bought and sold notes there is no contract. *Townend v. Drakeford*, 1 C. & K. 20; *S. P.*, *Fisenden v. Levy*, 11 W. R. 258; *Gregson v. Ruck*, 4 Q. B. 737.

A broker delivered to the vendor bought and sold notes written on one sheet of paper, and the day for payment was inserted at the end of the bought note only, but in those made out for the purchasers the day was inserted at the end of the bought as well as of the sold note:—Held, that as the bought and sold notes delivered to the vendor were both written on one sheet of paper, the whole must be considered as forming one contract; and consequently that there was no variance. *Maclean v. Dunn*, 4 Bing. 722; 1 M. & P. 761.

C. & Co. and H. & Co. were merchants at Calcutta. H. & Co. sold to C. & Co. indigo, through the medium of a broker, who drew up a sold note addressed to H. & Co., and submitted it to H. for his approval; when H. having objected to a particular word remaining, the broker took the sold note to C., and informed him of H.'s objection. C. struck his pen through the word objected to by H., placing his initials over that erasure, and returned it to the broker, who thereupon delivered it, so altered, to H. & Co. The broker delivered to C. & Co., on the following day, a bought note, which differed in material terms from the sold note:—Held, that the transaction was one of bought and sold notes, and that the

circumstances attending C.'s alteration of the sold note, and affixing his initials, were not sufficient to make that note alone a binding contract; and that there being a material variation in the terms of the bought note with the sold note, they together did not constitute a binding contract. *Cowie v. Remfry*, 5 Moore, P. C. C. 232; 3 Moore, Ind. App. 448; 10 Jur. 789.

— **Intention to Bind.**—A broker, acting for the plaintiff, verbally contracted to buy hemp of the defendant, and sent him a note, stating the terms, commencing thus: "Sold for Mr. C. to Mr. M." The defendant sent back another note, commencing: "I have this day sold, through you, to Mr. M.," &c. The time of the sale, as stated in the two notes, varied materially. In an action against the defendant for non-delivery, treating the note signed by him as the contract:—Held, that his liability depended upon the question of fact, whether the note signed by him was intended by both parties to be the contract, in which case he would be liable, or whether the defendant only intended to be bound as the seller, provided the plaintiff should also sign a note to bind himself as buyer. *Moore v. Campbell*, 10 Ex. 323; 23 L. J., Ex. 310.

See also cases ante, cols. 778, 794.

Letters—Acceptance in Terms.—Letters do not constitute a note in writing of the contract if they vary in their description of the terms of the contract. *Smith v. Surman*, 4 M. & R. 455; 9 B. & C. 561.

A letter written by a defendant, in answer to letters of the plaintiff containing the terms of a bargain for the sale of cotton, does not amount to a sufficient memorandum, because it does not amount to an absolute admission of the existence of a contract in the terms alleged by the plaintiff, being equally consistent with the existence of a different contract. *Caregan v. Richards*, 15 L. T. 252.

On the 11th of January, B. verbally agreed with R. to buy his wool for a price exceeding 10*l.*, and wrote the terms in a letter, which R. took away. One of those terms was, "the whole to be cleared in about twenty-one days." In a letter sent to B. on the 8th of February, and signed by R., he said, "It is now twenty-eight days since you and I had a deal for my wool which was for you to have taken all away in twenty-one days from the time you bought it. I do not consider it business to put it off like this, therefore I shall consider the deal off, as you have not completed your part of the contract. . . ." On the 9th of February, B. verbally asked R. for a copy of the contract which he had given him on the 11th of January, and later on the same day R. wrote and signed a letter to B.: "I beg to inclose a copy of your letter of the 11th of January, 1871." On the same paper, and underneath, there was, in R.'s writing, a copy of the letter of the 11th of January. B. having sued R. for not delivering the wool:—Held, that, rightly interpreted, R.'s two letters admitted the contract, but alleged that his construction of the contract was the correct one; and that taking the three letters together there was a sufficient memorandum in writing to charge R. within s. 17 of the Statute of Frauds. *Buxton v. Rust*, 7 L. R., Ex. 1; 41 L. J., Ex. 1; 26 L. T. 502; 20 W. R. 100. Affirmed, 7 L. R., Ex. 279; 41 L. J., Ex. 173; 27 L. T. 210; 20 W. R. 1014—Ex. Ch.

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The defendant agreed to purchase of the plaintiff goods, at a discount of twenty-five per cent., from a list of goods with prices annexed, and he signed an order for the goods referring to the list. The terms as to discount were not mentioned in the order. The defendant afterwards wrote to the plaintiff, requesting him to send the invoice, which he did. The defendant wrote in reply a letter, signed by him, returning the invoice, and declining to take the goods:—Held, that the order was not a sufficient memorandum of the bargain, as it did not contain the price. And, that the letter returning the invoice was not a sufficient admission of the contract as stated in the invoice, so as to satisfy the statute. *Goodman v. Griffiths*, 1 H. & N. 574; 26 L. J., Ex. 415.

A nephew of the plaintiff having a horse to sell, some negotiations took place between them; but as they could not agree as to the price, the horse was not sold; subsequently, however, the plaintiff wrote to his nephew, making an offer for the horse, stating in his letter that he should consider it a bargain if he did not hear to the contrary. His nephew did not reply, and having a sale shortly afterwards of some of his effects, the horse was sold by mistake, the auctioneer having had instructions from the nephew not to sell it. Two days after the sale, the nephew wrote to the plaintiff, the contents of which letter shewed that he intended to accept his uncle's offer:—Held, in an action by the plaintiff against the auctioneer for the conversion of the horse, that as there was no memorandum in writing binding the nephew at the time of the sale, and no evidence that he had at that time accepted the offer, the property in the horse had not vested in the plaintiff, and that he could not rely on the subsequent letter of the nephew, as that would not relate back so as to complete the plaintiff's title at the time in question. *Felthouse v. Bindley*, 7 L. T. 835; 11 W. R. 429—Ex. Ch.

A defendant authorized his brokers by letter to buy for him a cargo of bone-ash at a certain price per ton, "on a basis of 70 per cent. mean of two London chemists; usual London terms, viz. cash in twenty-eight days, less 2½ per cent." This offer was communicated by the defendant's brokers to the sellers' brokers, by letter, as follows: "We can take the cargo, cash in twenty-eight days from last day of landing, less 2½ per cent.; to be analyzed by two London chemists." The sellers accepted the offer, and sent a bought-note to the buyer's brokers, describing the terms of payment thus: "Payment, cash before delivery, allowing a discount of 2½ per cent. equal to cash in Liverpool within twenty-eight days from last day of landing:—Held, that there was no substantial difference between the offer and the acceptance, and consequently there was a binding contract between the parties. *Heyworth v. Knight*, 17 C. B., N. S. 298; 10 Jur., N. S. 866.

In an action for a mare sold and delivered, it appeared that the defendant having seen and ridden the mare, wrote to the plaintiff, "I will take the mare at twenty guineas, of course warranted, and as she lays out, turn her out my mare." The plaintiff agreed to sell her for the twenty guineas. The defendant subsequently wrote again to him: "My son will be at the World's End (a public house) on Monday, when he will take the mare, and pay you; send anybody with a receipt and the money shall be paid;

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only say in the receipt, sound and quiet in harness." The plaintiff wrote in reply, "She is warranted sound and quiet in double harness; I never put her in single harness." The mare was brought to the World's End on the Monday, and the defendant's son took her away without paying the price, and without any receipt or warranty. The defendant kept her two days and then returned her as being unsound. The judge stated to the jury that the question was whether the defendant had accepted the mare; and directed them to find for the defendant, if they thought he had returned her within a reasonable time; and desired them also to say whether the son had authority to take her away without the warranty. The jury found that the defendant did not accept the mare; and that the son had not authority to take her away:—Held, that there was no complete contract in writing between the parties; that, therefore, the direction of the judge was right; that the defendant was not bound by the act of the son in bringing home the mare, inasmuch as he had thereby exceeded his authority as agent, and, consequently, that the plaintiff was not entitled to recover. *Jordan v. Norton*, 4 M. & W. 155; 1 H. & H. 234.

A. having applied to B., a coachmaker, to build for him a carriage of a particular description, the latter, at his request, sent him a drawing, which A. returned with objections; B. thereupon wrote to A., expressing his regret that the drawing sent did not meet his approval, adding, "If you order, every attention shall be paid to any particulars you may think proper." A., in answer, wrote, "I have duly received your reply to my last, and can only continue to wonder at your disinclination to furnish me with so simple a drawing as I then requested, with the view of obviating, as far as possible, the chance of any misconception which might otherwise arise in respect to my order, which I can now, of course, give in general terms only, and on the assumption that you undertake to execute it in a manner which will meet my approval, not only on the score of workmanship, but also that of convenience and taste." The carriage was thereupon built, and forwarded to A., who found many faults in it and rejected it:—Held, that the order having been given and accepted on the express condition that the carriage should meet the approval of A., on the score of convenience and taste, the latter was entitled (acting *bonâ fide*, and not from mere caprice) to reject it. *Andrews v. Belfield*, 2 C. B., N. S. 779.

The plaintiff wrote to the defendants, offering to sell them seed of growing turnips, to which the defendants replied asking what turnips he had in growth, their quantities and prices. The plaintiff answered that all he could offer them at present was the produce of five acres of white globe seed at 18s. per bushel. The defendants offered to take two or three acres at 16s. 6d. per bushel. The plaintiff replied that he could not accept less than 18s. The defendants then wrote to him as follows: "In reply to your favour of this morning, we beg to say as our neighbours are giving you 18s. per bushel for white globe turnips, we, as a beginning with you, will take the produce of three acres at that price, to be delivered as soon as harvested, 1861, free of carriage to London station. Let us know what other sorts you may have to offer, and also wurzell seeds of sorts for 1861 harvest: waiting

your reply." The plaintiff wrote no answer to this letter, but subsequently saw one of the defendants at their warehouse, on which occasion it was found by the jury that the plaintiff verbally assented to the terms contained in that letter:—Held, that there was a sufficient memorandum or note in writing of the contract. *Watts v. Ainsworth*, 1 H. & C. 83; 31 L. J., Ex. 448; 6 L. T. 252.

The defendant verbally agreed to purchase of the plaintiff barrels of flour. The defendant afterwards wrote to the plaintiff, stating that he had received some barrels which were not so fine as the sample, and were not the barrels he had bought, and that he would not have them. In answer the plaintiff wrote as follows: "Annexed you have invoice of the flour sold you last Friday. I am very much astonished at your finding fault with the flour; it was sold to you subject to your examining the bulk, and it was not until after you had examined it, and satisfied yourself both of quality and condition, that you confirmed the purchase. What was forwarded you was the same you saw. Under these circumstances you cannot therefore object to fulfil your agreement." The defendant replied as follows: "I beg to say the barrels I have received are not the same I saw. I took a sample with me from the sample I have, and the barrels I saw were quite as fine as I compared them with; nor were they lumpy. Now the barrels I have received are all very lumpy, and none of them so fine as the same. If you will take them back, and pay charges, I will with pleasure send them:—Held, that the letters did not constitute a sufficient note or memorandum of the contract. *Archer v. Baynes*, 5 Ex. 625; 20 L. J., Ex. 54.

Invoices.—An invoice of hops described the names of the seller and buyer; the latter, after the receipt of the invoice, wrote to say the hops had not as yet been received, and that if they did not arrive soon he must buy some elsewhere:—Held, that the invoice and the letter taken together did not constitute a sufficient memorandum. *Richardson v. Porter*, 6 B. & C. 437; 9 D. & R. 497.

A. ordered of B. two looking-glass frames, to be filled with the best plate-glass. He sent to A. an invoice enumerating the articles, without mention of the glass to be supplied, of which invoice A. acknowledged the receipt, without taking exception thereto in respect of any of the articles to be sold:—Held, that the invoice and answer together did not constitute a memorandum to satisfy the statute. *McLean v. Nicoll*, 7 Jur., N. S. 999; 4 L. T. 863; 9 W. R. 811.

The plaintiff sent to the defendant, with certain cheese and candles, an invoice, specifying the names of the plaintiff and of the defendant as seller and buyer respectively, the quantity of the goods and their price. The defendant returned the invoice with a signed memorandum on the back, saying that the cheese had arrived badly crushed, and therefore both the cheese and candles were returned:—Held, a sufficient memorandum of the bargain. *Wilkinson v. Evans*, 1 L. R., C. P. 407; 35 L. J., C. P. 224; 12 Jur., N. S. 600; 14 W. R. 963; 1 H. & R. 552.

Catalogue.—Where goods were sold by auction to an agent, and the auctioneer wrote the initials of the agent's name, together with

the prices, opposite the lots purchased by him, on the printed catalogue; and the principal afterwards in a letter to the agent recognized the purchase:—Held, that the entry in the catalogue and the letter coupled together, were a sufficient memorandum of the contract within the statute. *Phillimore v. Barry*, 1 Camp. 513.

— **Conditions of Sale.**—The plaintiff sent a mare to be sold by auction at the defendant's repository. The defendant advertised the mare for sale by auction on the 28th of March, 1872, and circulated a printed catalogue of the horses to be sold at his sale, with conditions of sale annexed, in which the plaintiff's mare was described as Lot 49. The defendant had a sales ledger, which was headed "Sales by auction 28th March, 1872," in which the plaintiff's mare was also numbered 49; but neither was the catalogue nor were the conditions of sale annexed to the sales ledger, nor were they referred to therein. On the 28th of March, 1872, the lots described in the catalogue were put up by the defendant for sale under the conditions. The plaintiff's mare was put up for sale and knocked down to M. for 33*l.*, and thereupon the defendant's clerk wrote in the columns of the sales ledger left blank for this purpose the name of M. as purchaser and the price. M. afterwards refused to take the mare:—Held, that the catalogue and the conditions of sale were not sufficiently connected with the entries in the sales ledger to make a note or memorandum in writing of a contract by M. to satisfy s. 17 of the Statute of Frauds. *Pierce v. Corf*, 9 L. R., Q. B. 210; 43 L. J., Q. B. 52; 29 L. T. 919; 22 W. R. 299.

Where, at a public sale of goods by auction, the conditions of sale were read by the auctioneer before the biddings commenced, but the printed catalogue did not refer to the conditions, nor were they attached to it, and the agent of the defendant was declared the highest bidder for a lot, and the auctioneer put down the price (103 guineas) and the name of the agent opposite the lot in the sale catalogue:—Held, that this was not a sufficient memorandum in writing of the bargain to satisfy the statute; but if the conditions of sale had been annexed to the catalogue, the putting down the agent's name would have been sufficient to bind his principal. *Kenworthy v. Schofield*, 4 D. & R. 556; 2 B. & C. 945.

Upon a sale by auction subject to conditions of sale, the auctioneer's entry in his book is void under the Statute of Frauds, unless the entry contains such reference to the conditions as to identify them upon production as being the conditions mentioned therein. *Rishton v. Whatmore*, 8 Ch. D. 467; 47 L. J., Ch. 629; 26 W. R. 827.

Other Documents.—Two distinct written instruments may be coupled together, so as to constitute a memorandum of a contract, to satisfy the statute. *Jackson v. Lowe*, 7 Moore, 219; 1 Bing. 9.

An order for goods, written and signed by the seller in a book of the buyer's but not naming the buyer, may be connected with a letter of the seller to his agent mentioning the name of the buyer, and with a letter of the buyer to the seller, claiming the performance of the order, to constitute a complete contract. *Allen v. Bennet*, 3 Taunt. 169.

A memorandum of a contract for the purchase of flour by the defendant of the plaintiff, a miller, taken by his rider in his common order-book in these terms:—"19th February, 1811, of John Smith, 64*l.*" (which was explained by the witness to mean, so much received of the defendant in satisfaction of a former order), "do. 40 of 3—58" (which was explained to mean a new order for 40 sacks of flour, called thirds, at 58*s.* a sack), and this, without any signature, is not a sufficient memorandum within the statute to bind the defendant, though it was read over to him by his desire at the time it was written. And such defective memorandum cannot be supplied by a letter written afterwards by the defendant, in which, though he recognized the order, yet he insisted that the flour had not been delivered in time, and therefore he was not bound to take it. And it was not competent for the plaintiff to prove, by the parol testimony of the person who took the order, that there was no such term in the contract as to deliver the flour within a given time. *Cooper v. Smith*, 15 East, 103.

A subsequent letter, written and signed by the vendor, referring to the order, may be connected with a bill of parcels having the vendor's name printed. *Saunderson v. Jackson*, 2 B. & P. 238; 3 Esp. 180.

3. PART PAYMENT.

A. being indebted to B. in 4*l.* 14*s.* 6*d.*, a parol bargain was made between them, for the sale, by sample, from A. to B. of goods, above the value of 10*l.*; and it was at the same time agreed, that the 4*l.* 14*s.* 6*d.* should be taken in part payment. The goods were accordingly afterwards delivered but were returned by the buyer, as not according with the sample:—Held, that these facts did not amount either to a part payment or a payment by way of earnest. *Walker v. Nussey*, 16 M. & W. 302; 16 L. J., Ex. 120; 11 Jur. 23.

The defendant, on the purchase of a horse, offered the plaintiff's servant a shilling to bind the bargain, which was returned:—Held, that this contract was not a sufficient compliance with the statute. *Blenkinsop v. Clayton*, 1 Moore, 328; 7 Taunt. 597.

The Statute of Frauds will prevent a parol agreement to buy goods, without either earnest or delivery, from giving the buyer any property in them. *Alexander v. Comber*, 1 H. Bl. 20.

4. ACCEPTANCE AND RECEIPT.

a. Generally.

The acceptance and actual receipt of goods, which make a written agreement unnecessary, are not such an acceptance and a receipt as will preclude the purchaser from questioning the quantity or quality of the goods, or in any way disputing the fact of the performance of the contract by the vendor. *Morton v. Tibbets*, 15 Q. B. 428; 19 L. J., Q. B. 382; 14 Jur. 669.

The effect of such statutory acceptance and receipt is merely to dispense with the necessity of a written memorandum of the contract. *Ib.*

But there can be no acceptance and actual receipt of goods within the statute, unless the vendee has had an opportunity of judging whether the goods sent correspond with the order. *Hunt v. Hecht*, 8 Ex. 814; 22 L. J., Ex. 293.

Sufficiency of.]—The defendant verbally agreed to purchase a specific quantity of barley from the plaintiff, on the terms that the bulk should be well dressed and equal to sample. The plaintiff accordingly delivered an instalment of the barley to the defendant, whose foreman received it and gave a receipt marked "Not equal to sample." Next morning the defendant himself inspected the bulk, and wrote immediately to the plaintiff refusing to accept on the ground that the barley was not well dressed nor equal to sample :—Held, in an action by the plaintiff for goods sold and delivered to the defendant, that there was evidence of an acceptance sufficient to satisfy s. 17 of the Statute of Frauds. *Kibble v. Gough*, 38 L. T. 204—C. A.

The plaintiff verbally sold to the defendant six bales of wool. On the 31st July the goods were sent off by the plaintiff, and delivered at a railway station, and were received there and taken to his own premises by the defendant, who then unpacked the wool, and wrote the same day to the plaintiff stating that two of the bales were inferior to sample, and adding, "Please say what is to be done in the matter." The plaintiff replied by a letter of 1st August denying that the bales were not equal to sample. On 4th August the defendant, who had been from home since 1st August, returned, and having seen the plaintiff's letter, sent the goods back to the railway station, and telegraphed to the plaintiff refusing to accept them. Between 31st July and 4th August the defendant offered the goods for sale in the market, stating, however (according to his own evidence), that he had not accepted the goods, and that he would have to make other arrangements before he could sell. The plaintiff having brought an action to recover the price of the goods from the defendant, the jury at the trial found that two of the bales were not equal to sample; and the judge thereupon directed a verdict, and gave judgment for the defendant :—Held, that judgment was rightly entered for the defendant, as there was no evidence of a sufficient acceptance and receipt of the goods within s. 17 of the Statute of Frauds to take the case out of the statute; and the defendant's conduct had not precluded him from rejecting the goods as not equal to sample. *Richard v. Moore*, 38 L. T. 841—C. A.

The plaintiff verbally agreed to sell to the defendant trees growing upon the plaintiff's land, "to be got away as soon as possible." The defendant thereupon cut down some of the trees, and lopped off the stumps and branches. The plaintiff afterwards countermanded the sale, but the defendant cut down the remaining trees and carried them away :—Held, that as the trees were to be felled forthwith after the agreement to buy them, the contract did not relate to an interest in land within s. 4 of the Statute of Frauds; that the contract was for the sale of goods, and that there had been a sufficient acceptance and actual receipt to satisfy s. 17 of the Statute of Frauds. *Marshall v. Green*, 1 C. P. D. 35; 45 L. J., C. P. 158; 33 L. T. 404; 24 W. R. 175.

In order to satisfy the statute, there must be both an acceptance of the goods, or part of them, and an actual receipt of them. *Cusack v. Robinson*, 1 B. & S. 299; 30 L. J., Q. B. 261; 7 Jur., N. S. 542; 4 L. T. 506; 9 W. R. 735.

But it is not necessary that the acceptance of the goods should follow or be contemporaneous with the receipt of them; an acceptance prior to the receipt will suffice. *Id.*

In order to satisfy the Statute of Frauds there must be an acceptance and actual receipt of the goods, or part of them, with the consent of the vendor; and if before such acceptance the vendor rescinds the contract, the assignees of the buyer, in the case of his bankruptcy, cannot claim them. *Smith v. Hudson*, 6 B. & S. 431; 34 L. J., Q. B. 145; 11 Jur., N. S. 622; 12 L. T. 377; 13 W. R. 683.

There must be such an acceptance of goods as to shew that the person to whom they have been delivered has received them under a contract of sale. *Barnett v. Farley*, 11 L. T. 107; 12 W. R. 748.

It is not necessary that the acceptance should be on all the terms of the contract of sale. *Tomkinson v. Staight*, 17 C. B. 698; 25 L. J., C. P. 85; 2 Jur., N. S. 354.

The bare acceptance of the goods by the vendee as owner is sufficient, although the vendee, immediately after accepting them, states that he does so on terms different from those on which the vendor delivered them. *Id.*

The acceptance must be by some act or conduct on the part of the buyer indicating an intention to retain the goods; or such as reasonably would lead the seller to think they are accepted, and this may be by retention of them for such a time as reasonably might lead to that conclusion. *Bowes v. Pontifer*, 3 F. & F. 739.

The acceptance of goods by the buyer, if they are above the value of 10*l.*, and there has been no written memorandum of the contract, must be clear and unequivocal; and the court will not allow a constructive acceptance to be sufficient. *Nicholls v. Plume*, 1 C. & P. 272.

Goods already Delivered.]—Under a parol contract for the sale of goods, within the Statute of Frauds, made with a party already in possession of the goods, there may be a sufficient acceptance to satisfy the statute without a re-delivery to the buyer. *Edan v. Dudfield*, 1 Q. B. 302; 4 P. & D. 656; 5 Jur. 317.

Where D. had been employed by E. to enter the goods at the custom-house, and sell them for him, and agreed by parol to buy certain portions of them from E., and afterwards sold them, and sent in an account of them to E. :—Held, that it was a question for the jury, whether D. had accepted and resold the goods as purchaser, and that parol evidence of such acceptance was admissible. *Id.*

Intention in Accepting.]—Where, by one of the printed conditions in a catalogue of a sale by auction, the purchaser was to pay 30*l.* per cent. upon being declared the highest bidder, and the residue before the goods were removed; and a person attending such sale bid for a lot, and, having been declared the highest bidder, the article was immediately delivered to him; but in a few minutes afterwards he returned it, stating that he had been mistaken in the price, and refused to take it, and no part of the price for which it was knocked down having been paid :—Held, that it was a question of fact for the jury, whether there had been such a delivery by the seller and acceptance of the article by the buyer, as would take the case out of the statute, so as to shew that it was the intention of both parties to be bound by the sale, no deposit upon the price having been made by the vendee, agreeably to one of the printed conditions in the

catalogue. *Phillips v. Bistoli*, 3 D. & R. 822; 2 B. & C. 511.

Vendor Agent for Vendee.]—The plaintiff bought of the defendant and paid for hops, which lay at the warehouse of F., having been placed there by a party who had sold them to the defendant. After the sale, the plaintiff was informed that the hops were at F.'s, had them weighed there, and took away part. Some days after he applied for the residue, but they had been taken away in the meantime by a creditor of the first seller. The defendant had not given the plaintiff a delivery order, nor had he demanded one:—Held, that F. had the residue of the hops in his possession as agent to the plaintiff, and that the defendant was not liable to the plaintiff for the non-delivery of them. *Wood v. Tassell*, 6 Q. B. 234.

User by Vendee.]—A. agreed to purchase of B. a carriage, then standing in the shop of B., A. at the same time desiring that certain alterations might be made in it. The alterations having been made, the carriage was, at A.'s request, placed in the back shop. On Saturday, the 14th November, A. called at the shop, and requested B. to hire a horse and a man for him, and to send the carriage to his house on the following day, in order that he might take a drive in it, A. having previously intimated his intention to take the carriage out a few times, in order that, as he was going to take it abroad, it might pass the custom-house as a second-hand carriage. The carriage was accordingly sent to and used by A. on the Saturday, A. paying for the hire of the horse and man. A. afterwards refused to take or pay for the carriage:—Held, that there was a sufficient acceptance of the carriage by A. before Sunday, the 15th November, to entitle B. to recover upon a count for goods bargained and sold. *Beaumont v. Brengert*, 5 C. B. 301.

— Sale of Furniture to Tenant.]—A., being himself yearly tenant of a house to B., underlet the house and furniture at a weekly rent to C. A. being desirous of getting rid of his tenancy at the end of the current year, offered to sell the furniture to C. for 50*l.*, which C. thought too much, but verbally agreed to have it valued, and to pay so much as it should be found worth, on B.'s agreeing to accept him as his tenant, instead of A. The furniture was valued at 80*l.*, which C. refused to give, but offered the 50*l.* Before the expiration of the year, an agent of A. took the key out of the door and gave it to C., telling him that he must settle with A. himself about the furniture; B. refused to accept C. as his tenant, and he continued to occupy the house and use the furniture as before, but continually giving notice to A. to take away the furniture, which he refused to do; and after the lapse of three months, C. sent it to a broker's:—Held, that there was no evidence of an acceptance by C. of the furniture under a contract of sale, to satisfy the Statute of Frauds. *Lillywhite v. Devereux*, 15 M. & W. 285.

And see cases *infra*, col. 814.

Agistment.]—The defendant verbally agreed to buy of the plaintiff some cattle then in his field. After the bargain was concluded, the defendant felt in his pocket for his cheque-book,

in order to pay for the cattle, but finding that he had not got it, he told the plaintiff to come to his house in the evening for the money. It was agreed that the cattle should remain in the plaintiff's field for a few days, and that the defendant should feed them with the plaintiff's hay, which was accordingly done:—Held, that there was no evidence of an acceptance of the cattle. *Holmes v. Hoskins*, 9 Ex. 753.

Setting apart for Vendee.]—A vendee agreed verbally at a public market with the agent of the vendor to purchase twelve bushels of tares, constituting part of a larger quantity in bulk, then in the possession of the vendor, and they were to remain with him till called for. The agent afterwards measured the quantity of twelve bushels, and set them apart for the vendee, but no memorandum in writing was made, nor was anything paid by way of earnest, or sample given:—Held, that this did not amount to an acceptance by the vendee, so as to take the agreement out of the statute. *Howe v. Palmer*, 3 B. & A. 321.

Goods on Land of Third Party.]—A. sold to B. a rick of hay, standing on land in the occupation of C., at an entire price, undertaking to deliver it to B. before a certain day, upon request, B. engaging to take it away on or before that day; C. having previously acknowledged the hay to be the property of A., and consented that it should remain on the premises until that day. A. gave an order to C. to permit B. to remove the hay, which C. refused to do:—Held, a sufficient delivery of the hay as between A. and B. *Salter v. Woollams*, 2 M. & G. 650; 3 Scott, N. R. 59.

On Agreement to Return.]—The plaintiff entered into a parol agreement to sell to the defendant a mare for 20*l.*, subject to the condition, that, if it should prove to be in foal, he should, on receiving 12*l.* from the plaintiff, return it on request. The plaintiff delivered the mare and received 20*l.* On its proving to be in foal, he tendered the defendant 12*l.*, and requested him to return the mare, which he refused to do:—Held, that the contract to return it on payment of 12*l.* was not a distinct contract of sale, but one of the conditions of the original sale to the defendant, and that the delivery of the mare to the defendant took the whole agreement out of the statute, so as to enable the plaintiff to sue for the refusal to return it. *Williams v. Burgess*, 10 A. & E. 499; 2 P. & D. 422.

Order to Wharfinger.]—A written order given by the seller of goods to the buyer, directing the person in whose care the goods are to deliver them, is a sufficient delivery within the Statute of Frauds. *Searle v. Keeves*, 2 Esp. 598.

Where goods above the value of 10*l.*, lying in the London Docks, were sold without any written contract, and a delivery order given to the buyer:—Held, that the buyer's acceptance of the delivery order was not an actual acceptance of the goods, so as to take the case out of the Statute of Frauds. *Bentall v. Burn*, 5 D. & R. 284; 3 B. & C. 423; R. & M. 107.

Acceptance of Warrant.]—The defendant verbally ordered goods of the plaintiff's agent in London, the price of which was 15*l.* The goods

were accordingly sent from abroad to the agent, who warehoused them with a wharfinger, and received from him a warrant, by which the goods were made deliverable to the agent or his assignees by indorsement, on payment of rent and charges from a certain day. This warrant the agent indorsed to and sent to the defendant; the defendant kept the warrant for ten months, and was repeatedly applied to for the charges and the price of the goods, which he did not pay, nor did he return the warrant, but said he had sent it to his solicitor, and meant to defend the action, as he had not ordered the goods, and the goods would remain at present in bond:—Held, that although there was sufficient evidence of the acceptance of the goods, if they had been delivered to the defendant, there was no evidence of the receipt of the goods sufficient to satisfy the Statute of Frauds. *Farina v. Home*, 16 M. & W. 119; 16 L. J., Ex. 73.

Delivery to Warehouse of Third Party.]—On the 19th March, 1842, W., a miller, residing near Hereford, gave a parol order to A., a manufacturer of iron goods at Bristol, for some mill machinery to be forwarded by the Hereford sloop, commanded by B., the usual mode of conveying goods by water from Bristol to Hereford. On the 23rd April the machinery was so forwarded, and on the 25th an invoice was sent, with a letter of advice, by the post, and a printed notice that the goods were supplied at three months' credit. On the arrival of the machinery at Hereford, it was put into a warehouse of B., and W. was informed of that fact. Six or seven months after, W. told the warehouseman that he did not intend to take the machinery, and it was taken back to Bristol:—Held, that there was evidence of an acceptance sufficient to satisfy the statute. *Bushel v. Wheeler*, 15 Q. B. 443, n.; 8 Jur. 532.

— Packing by Vendee.]—The defendant, having bargained with the plaintiff for the purchase of wool from the plaintiff at a certain price, removed it to a warehouse used by the defendant for that purpose, but belonging to a third party; there the wool was weighed and packed in sheeting of the defendant's. The course of dealing was, that the wool remained on these premises till paid for. The wool was not removed or paid for:—Held, that there was not a sufficient delivery and acceptance of the goods to ground an action for goods sold and delivered, though the seller retained a special interest in them (not properly a lien) in respect of the understood engagement not to remove them till paid for. *Dodsley v. Varley*, 12 A. & E. 632; 4 P. & D. 448.

Delivery to Carriers.]—Goods were delivered by the vendor, in Cornwall, on board a ship not named by the purchaser, and a bill of lading was signed by the captain, making them deliverable to carriers at Liverpool, named by the purchaser, for the purpose of receiving and forwarding the goods to him in Staffordshire. A copy of the bill of lading was sent to the carriers at Liverpool, and on the 25th April the purchaser received notice of the shipment of the goods, and did not repudiate the contract before the 6th May, when he received information from the vendor that the ship and the goods were lost before they reached Liverpool:—Held, that there

was no evidence of an acceptance and actual receipt of the goods by the purchaser. *Meredith v. Meigh*, 2 Bl. & Bl. 364; 22 L. J., Q. B. 401; 17 Jur. 649.

The defendant, a builder at Wallingford, gave the plaintiff, a timber merchant in London, a verbal order for timber, directing it to be sent to the Paddington Station of the Great Western Railway, to be forwarded to him at Wallingford, as had been the practice between the parties on previous dealings between them. The timber was accordingly sent, and arrived at the Wallingford station on the 19th April, and the defendant was informed by the railway clerk of its arrival, upon which he said he would not take it. An invoice was sent a few days after, which the defendant received and kept, without making any communication to the plaintiff himself until the 28th May, when he informed the plaintiff that he declined taking the timber:—Held, that although there might be a scintilla of evidence for the jury of an acceptance of the timber, yet that there was not sufficient to warrant them in finding that there was such an acceptance, and the court set aside a verdict found for the plaintiff, as not warranted by the evidence. *Norman v. Phillips*, 14 M. & W. 277; 14 L. J., Ex. 306; 9 Jur. 832.

Where a party in England refuses to accept goods which he has agreed to buy abroad, the delivery of them abroad, on board a ship chartered by him, is not a sufficient delivery to render a memorandum of the bargain in writing unnecessary. *Acebal v. Levy*, 10 Bing. 376; 4 M. & Scott, 217.

The defendant, an Irish tradesman, gave a verbal order for goods to the plaintiff, who carried on business in England, and the goods were sent by the route agreed upon by the parties. The invoice was forwarded at the same time, but was immediately returned by the defendant, with a letter stating that it did not correspond with the agreement, and notifying his refusal to take the goods:—Held, that there was no evidence of any receipt and acceptance of the goods by the defendant, and that an action against him for the price could not be maintained. *Hopton v. McCarthy*, 10 L. R., Ir. 266.

Where goods were ordered by parol by a country dealer of a London wholesale house, and the latter delivered them at a wharf to be forwarded to their place of destination by sea, and the ship in which they were sent was lost, and the goods were never received in the country:—Held, that the acceptance of the goods by the wharfinger was not such an acceptance as would satisfy the words of the 17th section of the statute, which, to make him liable in the absence of a written contract, requires an acceptance by the party himself. *Hanson v. Armitage*, 1 D. & R. 128; 5 B. & A. 557.

The defendant at Lancaster verbally ordered goods of the value of more than 10*l.* to be sent to him at Lancaster from London by the plaintiff, and he directed that the goods should be sent by sea from G.'s wharf, which was the only wharf in London whence goods were shipped for Lancaster; and from which wharf goods had previously been sent by the plaintiff to the defendant. The plaintiff sent the goods to G.'s wharf; whence the wharfinger sent them by a ship selected by himself for Liverpool; but the cargo was lost by the ship being wrecked on her

voyage from London to Liverpool; an invoice was sent, at the time of the shipment, by the plaintiff to the defendant, which he never received.—Held, that the defendant did not accept, and actually receive, the goods within the meaning of the statute. *Hart v. Bush*, El., Bl. & El. 494; 27 L. J., Q. B. 271; 4 Jur., N. S. 633.

Conduct of Consignee—Evidence of Assent.]—A written contract was entered into for the purchase of 200 or 300 tons of coals, to be sent by the Navigation or other vessel. The vendor residing at Stockton-on-Tees, on the 31st December, 1838, shipped 127 tons of coals by the *George and Henry*, and on that day wrote to the vendee at Southampton to state what he had done, and that he should draw on him for the amount. The *George and Henry* was sunk at sea on the 6th January, 1839, which fact the vendor, on the 10th January, communicated to the vendee. The vendor's bill was not presented to the vendee until after he knew of the loss, and he then refused to accept it, but he did not by any other act repudiate the contract as performed by the vendor.—Held, that this silence, after receiving the vendor's statement of the mode in which he had performed the contract, operated either as an admission by him that the contract was duly performed, or as evidence of acceptance of the substituted performance for that originally contracted for. *Richardson v. Dunn*, 1 G. & D. 417; 2 Q. B. 218.

The defendant, on 27th of September, 1855, verbally ordered of the plaintiffs, at Liverpool, goods of the value of more than 10*l.*, to be sent out to Constantinople, by a steamer named by the defendant, for the *Phoenix*, a ship of his then in the Black Sea. The plaintiffs selected the goods in accordance with the order, and sent them to the steamer, together with two barrels of flour belonging to the defendant, which he had sent to the plaintiff's warehouse for the purpose of being forwarded with the other goods. The defendant told the plaintiffs to make out, and they made out, the bill of lading for the goods in their own name, making the goods deliverable to H. & Co., or assigns, at Constantinople, to whom the plaintiffs had before consigned goods, and to whom the defendant, on that account, wished the goods to be made deliverable. The bill of lading included the two barrels of flour. On the 13th of October, 1855, the plaintiffs shipped the goods, including the flour, on the named steamer, and paid freight for the whole. On the 16th of October, the defendant repaid them the freight and received from them the bill of lading, which he forwarded to the captain of the *Phoenix*, who did not receive it till March, 1856, when, finding that the goods were not forthcoming at Constantinople, he returned it to the defendant. On the 5th of November, 1856, the defendant forwarded the bill of lading to the plaintiffs, inclosed in the following letter: "I inclose the bill of lading for stores sent out to the barque *Phoenix*. Please see after them. I think the master of the steamer must account for them:—Held, that there was ample evidence that the defendant had accepted and actually received the goods. *Currie v. Anderson*, 2 El. & El. 592; 29 L. J., Q. B. 87; 6 Jur., N. S. 442; 8 W. R. 274.

To Artificer.]—A. agreed to buy some articles

of plate of B., who was to get A.'s arms engraved on them, and to pay for the engraving:—Held, that a delivery to the engraver for that purpose was not a delivery to A., so as to defeat B.'s right of stopping the goods in transitu, the price of the goods not being paid by A. *Owenson v. Morse*, 7 T. R. 64.

Delivery at Inn named by Buyer.]—A. bought of B. 5 cwt. of clover seed, to be delivered at the Plough Inn, Banbury, on the 27th April. The seed was delivered on the 27th to one of the servants of the Plough Inn, at which A. was in the habit of putting up, and there remained till the 13th May, when he refused to take it:—Held, that as the place where the seed was delivered was a place appointed by the buyer, and was moreover the inn at which he generally put up, this was such an acceptance as would satisfy the words of the statute. *Harris v. Matthews*, 3 Jur. 1192.

Assent to Appropriation.]—The defendant, who had ordered a machine to be made, without any agreement as to price, paid money on account when he saw it was complete; admitted it was made to order; and requested the maker to send it home, but refused to pay the price demanded by him. The maker refused to deliver the machine without receiving the full amount; for which he ordered his attorney to proceed, when the defendant said he would endeavour to arrange, if they would give him time:—Held, a sufficient acceptance to entitle the maker to sue for goods bargained and sold. *Elliott v. Pybus*, 10 Bing. 512; 4 M. & Scott, 389.

b. Acts of Ownership by Purchaser.

Re-sale—When Sufficient.]—After a bargain and sale of a stack of hay between the parties on the spot, evidence that the vendee actually sold part of it to another person, by whom, though against the vendee's approbation, it was taken away, is sufficient to warrant the jury in finding a delivery to and acceptance by the vendee. *Chaplin v. Rogers*, 1 East, 192.

A., by parol, sold to B. the timber of certain growing trees at a price exceeding 10*l.*; B. gave directions for cutting the trees, and offered to sell the butts to C. A., by letter, required B. to pay for the timber. B., by letter, answered that he had bought the timber, but that it was conditioned to be sound, and was not so:—Held, that there had been no part acceptance or actual receipt of the goods to satisfy the statute, inasmuch as there was nothing to shew that the purchaser had divested himself of his right to object to the quality of the goods, or that the seller had lost his lien for the price. *Smith v. Surman*, 9 B. & C. 561; 4 M. & R. 455.

The plaintiffs, merchants at Dieppe, sold to the defendant, a merchant at Wisbeach, a quantity of oil-cake, which was delivered to him there in December, 1841. The defendant conceiving that the cargo did not answer the sample, landed a portion of it for the purpose of examination, and subsequently landed the whole, stored it in a public warehouse, and wrote to the plaintiffs, informing them that it lay there at their risk and costs; and requiring them to take it back, which they refused to do. After some correspondence, the defendant, in May, 1842, gave the plaintiffs notice that the cargo was lying at the warehouse

at their disposal; and that, if no directions were given by them, it would be sold, and the proceeds applied in part payment of the defendant's damages. The plaintiffs answered, that they considered the transaction at an end, and demanded payment of the price. The defendant thereupon offered the cargo for sale in his own name; and, in July, sold it, in his own name, to a third party:—Held, that these facts sufficiently shewed an acceptance of the goods by the defendant, after which he could not treat the contract as rescinded, and that he was not to be considered an agent of the plaintiffs from necessity, to dispose of the goods. *Chapman v. Morton*, 11 M. & W. 534; 12 L. J., Ex. 292.

— **Without Inspecting.**—The defendant purchased wheat of the plaintiff by sample, and directed that the bulk should be delivered on the next morning by a carrier named by himself, who was to convey it to the market town of W., and the defendant himself took the sample away with him. On the following morning the bulk was delivered to the carrier, and the defendant resold it at W. on that day by the same sample. The carrier conveyed the wheat by order of the defendant, who had never seen it, to the subvendee, who rejected it as not corresponding with the sample, and the defendant, on notice of this, repudiated his contract with the plaintiff on the same ground:—Held, that there was evidence to warrant a jury in finding an acceptance and actual receipt by the defendant. *Morton v. Tibbette*, 15 Q. B. 428; 19 L. J., Q. B. 382; 14 Jur. 669.

Weighing.—Hops were sold by sample, and before prompt-day the buyer's foreman attended at the warehouse of the seller's factors to see them weighed, compared each pocket with the sample, and adjusted allowances on some which he objected to:—Held, that this was a sufficient acceptance. *Simmonds v. Humble*, 13 C. B., N. S. 258; 9 L. T. 168.

Marking the Article.—If the purchaser of goods at the time of the sale writes his name upon a particular article, with the intent of shewing that he has purchased it, and appropriated it to his own use, it is enough to take the sale, as to the article written upon, out of the Statute of Frauds, but not as to other articles bought at the same time. *Hodson v. Le Bret*, 1 Camp. 233.

Where a person selected various articles in a tradesman's shop, some of which he marked with a pencil, and others were cut from piece goods, and laid aside for him (the whole amounting to more than 10*l.*), and he desired them to be sent to his house; and when sent he refused to take them:—Held, that there was no acceptance. *Baldecy v. Parker*, 3 D. & R. 220; 2 B. & C. 37.

Where a person agreed by parol to pay a certain price for several pipes of wine, and the seller's clerk cut off the spills and marked the purchaser's initials on the casks in the presence of both parties, held to amount to a delivery. *Anderson v. Scot*, 1 Camp. 235, n.

The marking by the vendor of casks of wine, lying in the docks, with the initials of the purchaser at his request, and in his presence, the terms of payment not having been settled at the time, and consequently the contract not being

complete, is not an acceptance. *Proctor v. Jones*, 2 C. & P. 532.

Package by Purchaser.—Goods were sold for ready money, and packed up at the seller's house in boxes furnished by the purchaser, who saw the packing, and requested the seller to keep them for him till he could call, pay for, and take them away:—Held, that, on a count for goods sold and delivered, the plaintiff was rightly nonsuited. *Boulter v. Arnott*, 3 Tyr. 267; 1 C. & M. 333.

If A. agrees to sell goods to B., who pays a certain sum of money as earnest, and the goods are packed in cloths furnished by B., and deposited in a building belonging to A. till B. shall send for them; but A. declares at the same time that they shall not be carried away till he is paid: this is not a delivery to B. *Goodall v. Skelton*, 2 H. Bl. 316.

— **Delivery to Packer.**—Where goods are delivered to the vendee's packer, to be forwarded to any part the latter may appoint, and they are opened and examined by his agent, the delivery is complete. *Leeds v. Wright*, 3 B. & P. 320; 4 Esp. 243.

The defendant having bargained with the plaintiff for the purchase of wool from the plaintiff at a certain price, removed it to a warehouse used by the defendant for that purpose, but belonging to a third party; there the wool was weighed and packed in sheeting of the defendant's. The course of dealing was that the wool remained on their premises till paid for. The wool was not removed nor paid for:—Held, that there was not a sufficient delivery and acceptance of the goods to satisfy the statute, though the seller retained a special interest in them (not properly a lien) in respect of the understood engagement not to remove them till paid for. *Doddsley v. Varley*, 12 A. & E. 632; 4 P. & D. 448.

The property of goods bought by an agent for the vendee, delivered by him to the vendee's packer, in whose hands they are attached by the vendee's creditors, reverts in the vendor, so as to avoid the attachment, by the vendee having countermanded the purchase by letter to his agent dated before such delivery, though not received till afterwards; the vendor assenting to take back the goods. *Salte v. Field*, 5 T. R. 211.

B. & Co. verbally agreed to purchase of A. four sacks of cotton waste, then in his warehouse, at 1*s.* 9*d.* per pound. B. & Co. sent their packer and sacks, and their cart, to remove it. The packer packed the waste into eighty-one sacks, twenty-one of which were weighed, and taken in B. & Co.'s cart to their premises, with a delivery order, stating the weight; the remainder was not weighed. On the same day they returned the twenty-one sacks to A., alleging that the waste was of inferior quality, and he replaced them in his warehouse:—Held, that there was evidence of an acceptance and actual receipt of part of the goods. *Kershaw v. Ogden*, 3 H. & C. 717; 34 L. J., Ex. 159; 11 Jur., N. S. 642; 12 L. T. 573; 13 W. R. 755.

Receiving Warehouse Rent.—If after goods are sold they remain in the warehouse of the vendor, and he receives warehouse rent for them, it amounts to a delivery of the goods to

the vendee, so as to put an end to the vendor's right of stopping them in transitu. *Hurry v. Mangles*, 1 Camp. 452.

So, where they are deposited in a warehouse for which the vendee pays warehouse rent, even though they may not have reached their ultimate destination. *Wright v. Lawes*, 4 Esp. 82.

But it is otherwise if anything remains to be done to the goods (for example, weighing, &c.), before the delivery can be perfected. *Withers v. Lys*, Holt, 18; 4 Camp. 237.

Depositing in Warehouse.—In *trover* the defendant pleaded that the assignees of a bankrupt were jointly interested with the plaintiff, and that the defendant converted by their licence. It appeared that the contract was between the plaintiff and the defendant, and that under this contract the goods, by the defendant's direction, were transferred from his name to the plaintiff in the warehouse where they were deposited:—Held, that the property in the goods passed to the plaintiff by the transfer, and that it was not competent to the defendant to prove that other parties were jointly interested with the plaintiff. *Kieran v. Saunders*, 1 N. & P. 625; 6 A. & E. 515.

Wheat purchased by sample was consigned from Peterborough to P., at a railway station in London. On the arrival of the wheat at the station, on the 4th May, P. received notice from the railway company that it had been warehoused at the company's warehouse, and entered in their books in the name of P. The company allowed consignees to use their warehouse for fourteen days without charge. On the morning of Saturday, the 9th May, the carman of P. brought a bulk sample from the station, and P. having examined it, and found it equal to sample, said, "Don't cart the wheat to the mill at present." In the afternoon, P. found himself in difficulties, and on Monday morning stopped payment. On Monday, P. gave the vendor an order for the wheat, which he took to the railway station. On an issue to try whether the wheat was the property of the assignees of P. or of the vendor:—Held, that there was no acceptance of the wheat by P. *Nicholson v. Bower*, 1 El. & El. 172; 28 L. J., Q. B. 97; 5 Jur., N. S. 246.

If a purchaser, receiving goods in his warehouse, and intending to examine into their quality, treats them in a manner which materially alters their condition (as by removing glue from hogsheads into bags), it is not necessarily to be inferred from that fact alone that he finally accepts the goods. *Curtis v. Pugh*, 10 Q. B. 111; 16 L. J., Q. B. 199.

The plaintiffs, wine and spirit merchants, kept a bonded warehouse, where they took in other persons' goods as well as their own, charging warehouse rent. Of this warehouse the plaintiffs had one key and the custom-house officer another. The defendant agreed to buy of the plaintiffs two puncheons of rum, which were to remain in bond till wanted, the defendant to have six months' further credit. The plaintiffs sent to the defendant an invoice describing the puncheons by marks and numbers with the words "free six months," which was explained to mean that they might remain in the warehouse without charge for six months. The plaintiffs entered in the rum book of their warehouse the puncheons of rum as sold to the defendant, and proved that after this entry they had no power

to get the goods out. The rum remained in the warehouse for two years, during which time the defendant on several occasions asked the plaintiffs to take back the goods or buy them of him:—Held, that there was evidence that the character in which the plaintiffs held the goods was changed; and that, if they held as warehousemen for the defendant, there was evidence of an acceptance and receipt of the goods by the defendant so as to satisfy the Statute of Frauds. *Castle v. Swooner*, 6 H. & N. 828; 30 L. J., Ex. 310; 8 Jur., N. S. 233; 4 L. T. 865; 9 W. R. 697—Ex. Ch.

In an action to recover the price of ten hogsheads of claret, it appeared that the defendants having verbally ordered certain hogsheads of the plaintiff, the latter in October sent them fifteen, whereupon the defendants by letter informed the plaintiff that they had ordered only ten, and that they could take that number only on their proving satisfactory, and that they would hold the other five on the plaintiff's account. The plaintiff replied describing the character of the wine, and concluding thus, "You will ascertain in the spring whether you have room for it, and you have seen that we are not stringent with old customers as to credit." The defendants placed the wine in a bonded warehouse in their own names, and shortly afterwards tasted the wine, disapproved of it, and gave the plaintiff notice in the early part of April that they would not take any part of it:—Held, that there had been no acceptance, inasmuch as the defendants, under the contract, had the option of rejecting the wine in the spring, and they had availed themselves of that option. *Cunliffe v. Harrison*, 6 Ex. 903; 20 L. J., Ex. 325.

User of Horse.—The plaintiff sold a horse to the defendant for 30l. by parol agreement; and the horse was to be fired and remain in the plaintiff's possession until he was fit to be sent to grass. At the end of twenty-two days the horse was, by the defendant's directions, sent to graze at Kimpton Park, and there entered in the plaintiff's name:—Held, that there was no delivery to or acceptance of the horse by the defendant. *Carter v. Toussaint*, 1 D. & R. 515; 5 B. & A. 855.

The defendant verbally agreed to purchase of the plaintiff a horse. Before there had been an actual delivery, the plaintiff requested the defendant to lend it to him for a short time, as he had to take two or three journeys; the defendant assented, and the horse remained with the plaintiff for a fortnight, during which time he went three journeys, and was then sent to the defendant, who refused to receive it. The jury found that the defendant, as owner of the horse, gave the plaintiff permission to keep it:—Held, that there was evidence of an acceptance and receipt of the horse to satisfy the Statute of Frauds. *Marvin v. Wallace*, 6 El. & Bl. 726; 25 L. J., Q. B. 369; 2 Jur., N. S. 689.

A. agreed to purchase a horse from B. for ready money, and to fetch him away on a given day. Two days before that day A. rode the horse, and gave directions as to his exercise and future treatment, &c., but requested that he might remain in B.'s possession for a further time, at the expiration of which he promised to fetch him away and pay the price; to which B. assented. The horse died before A. paid the price, or took him away:—Held, that there was no acceptance

of the horse, so as to make the bargain executed within the statute. *Tempest v. Fitzgerald*, 3 B. & A. 680.

User of Carriage.—A chariot was built to the plaintiff's order, and paid for by him; when finished in other respects the plaintiff ordered a front seat to be added; but the builder being slow in making this addition, the plaintiff sent for the chariot repeatedly, and the builder promised to deliver it. The plaintiff being afterwards dissatisfied, ordered the chariot to be sold, and while it was, according to the custom of the trade, standing in the builder's warehouse for that purpose, the front seat not having been added, the builder became a bankrupt, and his assignee seized the chariot:—Held, that the plaintiff had sufficient property to maintain trover. *Carruthers v. Payne*, 5 Bing. 270; 2 M. & P. 429.

The plaintiff built a waggon for the defendant. The latter employed a smith to affix thereon the iron work, and a tilt-maker to put on a tilt. The waggon remained in the possession of the plaintiff:—Held, that the affixing of these articles was not a sufficient acceptance of the waggon by the defendant to satisfy the statute. *Maberly v. Sheppard*, 3 M. & Scott, 436; 10 Bing. 99. See also *Beaumont v. Brengert*, ante, col. 809.

Examination.—The defendant verbally agreed to buy some sheep, which he selected from the plaintiff's flock, and directed them to be sent to a field of his, which was accordingly done. Two days afterwards he sent his man to remove the sheep from the field to his farm, which was some miles distant, and, on their arrival, he counted them over, and said, "It is all right:—Held, that this was evidence of his acceptance of the sheep, so as to satisfy the statute, notwithstanding he afterwards repudiated the purchase, and sent the sheep back to the plaintiff. *Saunders v. Topp*, 4 Ex. 390; 18 L. J., Ex. 374.

Unpacking.—Where goods have been sent on a contract for sale, and the jury finds they did not correspond with the sample contracted for:—Semble, that the mere unpacking of them by the vendee will not, under any circumstances, amount to an acceptance. *Curtis v. Pugh*, 10 Q. B. 111; 16 L. J., Q. B. 199.

Aliter, if the goods are kept by the vendee an unreasonable time. *Ib.*

The plaintiff sent twenty sacks of seed to the defendants in part performance of a verbal contract for the sale of seed to the value of more than 10*l.* On the same day, one of the defendants informed the plaintiff that he had heard the seed had arrived out of condition. The plaintiff asserted it was in condition. Immediately afterwards, the defendants wrote to the plaintiff, rejecting the seed, and in one of the letters, informed him that "the twenty sacks which you authorized us to receive for you, and to lay out thin, in consequence of its being hot and mouldy," would be returned. On the trial, the facts being proved by the plaintiff, who gave evidence that he gave no authority to spread it out, and that the seed was not hot and mouldy, the judge directed a nonsuit, with leave to enter a verdict if there was any evidence of an acceptance and actual receipt of part of the goods:—Held, by Lord Campbell, C. J., Erle and Crompton, JJ.;

dissentiente, Wightman, J.; that there being evidence to go to the jury that the seed was spread out thin neither because it was out of condition, nor by the plaintiff's authority, there was evidence that it was spread out thin as an act of acceptance; and, therefore, the nonsuit was wrong. But the court thought the evidence too slight to justify them in entering a verdict for the plaintiff, and directed a new trial. *Parker v. Wallis*, 5 El. & Bl. 21.

Taking to Goods after Repudiation.—It was verbally agreed, between the owner of goods and a person who was in possession of those goods as his tenant, that the tenant might, if he pleased, at the termination of his tenancy, purchase the goods for a sum exceeding 10*l.*, but was not to take them till the money was paid. At the expiration of the tenancy the buyer tendered the price, but it was refused by the vendor, who denied the validity of the bargain. After this the buyer proceeded to take away the goods; the vendor prevented him, and took possession of them. In trover by the buyer against the vendor:—Held, that there was no evidence of an acceptance and actual receipt to bind the bargain, as at the time when the buyer took to the goods the parol contract had been already disaffirmed by the vendor. *Taylor v. Wakefield*, 6 El. & Bl. 765; 2 Jur., N. S. 1086.

Requesting Retention for Special Purpose.—If a man bargains for the purchase of goods, and desires the vendor to keep them in his possession for an especial purpose for the vendee, and the vendor accepts the order, this is a sufficient delivery of the goods. *Elmore v. Stone*, 1 Taunt. 458.

Giving Security.—Giving a promissory note, together with an agreement by the seller, to let the goods stay for a certain time on his premises, and an affirmation of the sale afterwards:—Held, to be a complete sale and delivery to the purchaser, so as to enable him to maintain trover against the seller. *Atkinson v. Barnes*, Lofft, 325.

c. Part Delivery.

i. What is.

Of Sample.—If a sample is taken as a part of the bulk sold, it is a delivery within the statute. *Talver v. West*, Holt, 178.

Even if done by the agent of the purchaser. *Klinitz v. Surry*, 5 Esp. 267.

Where samples of sugar were produced at a sale by auction, and, after the biddings had closed, the samples were delivered to and accepted by the purchaser as part of the purchase, and a fire consumed the bulk before the delivery thereof to the purchaser:—Held, that the delivery to and acceptance by the buyer of the samples, as part of the sugars purchased, took the case out of the statute. *Hinde v. Whitehouse*, 7 East, 558; 3 Smith, 528.

So, where wool was sold for a bill at nine months, and weighed and sample taken, and several bags delivered, but no bill was drawn:—Held, that the delivery was complete. *Green v. Haythorne*, 1 Stark. 447.

A. gave B. a written order for ten firkins of butter, which were to be sent to A. by a par-

ticular carrier; B. sent by that carrier twelve firkins instead of ten; A. refused to receive more than ten firkins, and as the carrier would not deliver less than the whole he refused to take the butter at all: he, however, drew a sample from one of the firkins:—Held, that there had been neither an actual nor a constructive delivery of the butter to A., and consequently no acceptance by him, so as to satisfy the Statute of Frauds. *Gorman v. Boddy*, 2 C. & K. 145.

Where goods are sold by sample, the handing over the samples to the buyer does not, in the absence of evidence of a usage or a custom to the contrary, amount to a delivery and acceptance of a part of the thing sold, so as to take the case out of the 17th section of the Statute of Frauds; but it is otherwise where the buyer draws samples from the bulk after he has purchased the goods. *Gardner v. Grout*, 2 C. B., N. S. 340.

Class.]—Where a joint order is given for several classes of goods, the acceptance of one class is a part acceptance of the whole. *Elliot v. Thomas*, 3 M. & W. 170.

Appropriation.]—A. agreed by parol to sell to B. twenty hogsheads of sugar out of a larger quantity which he had in bulk. A. filled four hogsheads, and delivered them to B., who accepted them. A. afterwards filled sixteen other hogsheads, and requested B. to fetch them away, who promised to do so:—Held, that the property in the sixteen hogsheads thereby passed to B., that his acceptance of the four was an acceptance of part of the twenty within the exception of the Statute of Frauds, and that A. might recover the value of the whole from B. in an action for goods bargained and sold. *Rohde v. Thuaites*, 9 D. & R. 293; 6 B. & C. 688.

Where goods to the value of 144*l.* were made pursuant to order, but continued, by desire of the vendee, upon the premises of the vendor, excepting a part to the value of 2*l.* 10*s.* which the former took away:—Held, that there was no delivery and acceptance of the goods within the meaning of the statute. *Thompson v. Macironi*, 4 D. & R. 619; 3 B. & C. 1.

Where Vendor's Duties not Determined.]—A. contracted with B. to purchase of him the trunks of oak trees, then felled and lying at Hadnock, about twenty miles from Chepstow. The course was, for A.'s agent to select and mark those portions which he intended to purchase, and for B. to sever the tops and sidings, and float the trunks down the River Wye to A.'s wharf at Chepstow, and there deliver them. After a portion of the timber had been delivered, and the whole paid for, B. became bankrupt, whereupon A. sent his men to B.'s premises at Hadnock, and severed and carried away the marked portions of certain trees:—Held, that no property in the trees, or any portion of the trees, which had not been delivered by B., passed to A. by the contract; and that there was no delivery or acceptance; and, consequently, that the assignees of B. were entitled to recover the value in trover. *Acraman v. Morrice*, 8 C. B. 449; 19 L. J., C. P. 57; 14 Jur. 69.

Custom to Detain.]—Where it is the custom to detain until certain disbursements are paid, a

delivery of part is not a delivery of the whole. *Holderness v. Shackells*, 8 B. & C. 618.

Not Equal to Contract.]—A. bought wheat in value above 10*l.*, which wheat was to be reduced to a certain standard by dressing. After the making of the contract, A. sent for a portion of the wheat, which was sent to him, but not dressed, whereby it fell short of the standard agreed upon, but he retained it without objection:—Held, a part acceptance, and the retention of the portion sent amounted to a waiver of the full performance of the contract by the plaintiff as to such portion. *Gilliat v. Roberts*, 19 L. J., Ex. 410.

Goods of the value of more than 10*l.* were in the hands of a warehouseman; the purchaser having a delivery order, sent for a portion of them, which were duly removed to his premises, but, on examining them, he sent them back, as not being such as he had agreed for:—Held, a sufficient acceptance. *Baylis v. Lundy*, 4 L. T. 176; 9 W. R. 556.

Consumption of Part.]—A., by parol agreed to buy of B. all the potatoes in a field of his, at so much a ton, and to dig and remove them at his own expense. He employed and paid labourers to dig them, and sent his own sacks to the field, in which sacks the potatoes, as they were dug, were placed by his men, and the sacks were then carried to another part of the field, and the potatoes there emptied out of them in heaps, or clamped on the ground. During the digging one sackful of the potatoes was, by the buyer's authority, taken by one of the men employed, and consumed by him for food. Before the whole was dug, the seller refused to complete his contract, or to permit the residue of the potatoes to be dug, or those which had been dug to be removed from his field:—Held, that there was evidence of a part delivery and acceptance. *Smith v. Hudson*, 8 L. T. 253.

The plaintiff sold a hogshead of cider to the defendant by sample as being good draught cider. After the arrival of the cask the defendant, on the 21st May, wrote to the plaintiff: "The cider differs from the sample, and the little I have sold has been complained of in every instance; should this continue I shall be obliged to return it." The plaintiff in trying to sell it used 20 gallons, but finding it unserviceable, refused to pay for the rest, which he returned to the plaintiff. The 20 gallons were more than sufficient to enable the defendant to test the quality of the bulk:—Held, that the defendant had not so accepted the bulk as to be bound to pay for the whole. *Lucy v. Mowfet*, 5 H. & N. 229; 29 L. J., Ex. 110.

To Sub-Vendees.]—A., at Bristol, sold goods to B., to be paid for by B.'s acceptance of a bill to be drawn by A.; the goods were weighed, but remained in A.'s warehouse, who omitted to draw the bill. B. sold a specific and ascertained portion of these goods to C. in London, who paid for them, and transmitted B.'s order to A. for the delivery of them. On the fourth day after A.'s receipt of the order B. became bankrupt, and then, and not before, A. refused to deliver the goods to C., insisting that he had a lien upon them for the price:—Held, that C. might maintain trover against A., for he was bound, at all events, to notify his refusal immediately: and

semble, that having neglected to draw the bill, and having furnished B. with samples to go into the market with, and having obeyed several orders of B.'s for the delivery of portions of the goods to different sub-vendees, he could not have insisted upon any lien even if he had given immediate notice. *Green v. Haythorne*, 1 Stark. 447.

By Pawnor.]—A., being indebted to B. in 40l., entered into a written agreement with him, whereby B. should have his horse, van, cart, and two sets of harness, "for what he owed him," and should keep the articles until A. paid him the 40l.; and the agreement concluded thus: "B. has received into his possession the horse, van, cart, and two sets of harness." B. received into his actual possession the horse and van and one set of harness, but having no place to put them in, he left the cart and the other set of harness with A., with an understanding that he was to take them whenever he pleased. B. having become insolvent, A. got back the horse, van, and set of harness; but B.'s assignee seized the whole of the articles mentioned in the memorandum, and caused them to be sold by an auctioneer:—Held, that there had been a sufficient delivery of the goods to B., to vest the property in him, subject to the right of the pawnor to redeem; and that, consequently, A. was not entitled to recover. *Martin v. Reid*, 11 C. B., N. S. 730; 31 L. J., C. P. 126.

ii. Recovery of Price for.

In what Cases.]—One who has agreed for one hundred sacks of flour, cannot, after the delivery of part, recover for that part, the defendant being willing to receive and pay for the whole. *Walker v. Dixon*, 2 Stark. 281. But this ruling was set aside by the court. See 9 B. & C. 387.

A contract to deliver one hundred bags of hemp at a certain price by a certain time is entire and cannot be split. *Waddington v. Oliver*, 2 N. R. 61.

The seller of two hundred and fifty bushels of wheat, to be delivered within a certain time, delivering one hundred and thirty bushels only, which the purchaser accepts and retains after the expiration of the stipulated time of delivery, may recover the price of the part delivered. *Oxendale v. Wetherell*, 4 M. & R. 429; 9 B. & C. 386.

Where the defendant agreed to purchase a lot of trees, and pay for the same according to the conditions of sale, and he afterwards felled and carried away part of them without making such payment, and refused to do so until the remainder had been delivered:—Held, that the executors of the vendor, having failed to establish a count on the special contract, might recover the value of the trees taken by the defendant under a count for goods sold and delivered, as the latter by such taking had disaffirmed the entirety of the contract. *Bragg v. Cole*, 6 Moore, 114.

R. agreed to supply W. with straw, to be delivered at his premises, at the rate of three loads in a fortnight, during a specified time; and W. agreed "to pay R. 33s. per load for each load of straw so delivered on his premises" during the above period. After the straw had been supplied for some time, W. refused to pay for the last load delivered, and insisted on always keeping

one payment in arrear:—Held, that, according to the true effect of the agreement, each load was to be paid for on delivery, and that on W.'s refusal so to pay for them, R. was not bound to send any more. *Withers v. Reynolds*, 2 B. & Ad. 882.

If a person orders several articles from a tradesman at the same time, though at distinct prices, he will not be obliged to accept or pay for any particular article, unless all the rest are furnished according to the terms agreed on; but if he accepts of any one article, he is precluded from saying that the contract was entire, and he will be obliged to accept and pay for so many as are individually furnished according to the contract. *Champion v. Skott*, 1 Camp. 53.

See also cases ante, col. 775.

d. Refusal of Goods.

Of Part.]—Where the traveller of a mercantile house in London received an order from a country manufacturer for a cask of cream of tartar, and also an offer to purchase two chests of lac dye at a given price; and the traveller undertook to send both articles, but stipulated on the part of his principals, that they should be at liberty to refuse to fulfil the contract as to the lac dye, on the terms proposed, by writing to the vendee to that effect by return of post, or the post following; and no answer was sent back, but shortly after the goods were delivered; and the vendee accepted the cream of tartar, but refused to take the lac dye:—Held, that this was not an acceptance to take the case out of the statute, and render the vendee liable for the latter article; the contract not being entire. *Price v. Lea*, 2 D. & R. 295; 1 B. & C. 156.

A., upon one and the same occasion, bought several parcels of goods from B., one parcel consisting of chimney-glasses, amounting to 38l. 10s. 6d., for ready money, the rest on credit. The goods were sent to the purchaser at different times. The chimney-glasses being damaged in the carriage, he declined to receive them. A. afterwards, on an application by B. for payment of all the goods, wrote to him in substance as follows: "The only parcel of goods selected for ready-money was the chimney-glasses, which goods I have never received, and have long since declined to have, for reasons made known to you at the time; with regard to the rest I am ready to pay:"—Held, that the letter, inasmuch as it contained an admission of the bargain and of all the substantial terms of it, was a sufficient note or memorandum of the contract, notwithstanding the subsequent attempted repudiation of liability. *Bailey v. Sweeting*, 9 C. B., N. S. 843; 30 L. J., C. P. 150; 9 W. R. 273.

Of Whole.]—A. having sent to B. a bag of sponge (under a verbal order from the latter), for which he charged 11s. per pound, B. returned it, and at the same time wrote a letter to A. stating that he had examined the sponge, and finding that it was not worth more than 6s. per pound, he had sent it back:—Held, that this letter did not amount to such an acceptance of the goods as would take the case out of the statute. *Kent v. Huskinson*, 3 B. & P. 233.

Bulk samples, and invoice of some hops, were sent to a vendee by coach, pursuant to contract, but he returned them, as not answering to the samples by which he bought. The jury, in an

action for the price of the hops, found that the samples did not answer the contract:—Held, that there was no acceptance of the goods within the Statute of Frauds. *Johnson v. Dodgson*, 2 M. & W. 653.

Time for.]—A party to whom goods to the amount of 10l. and upwards are delivered, subject to approval under a parol order, must refuse to accept them within a reasonable time; if he does not, he is to be treated as having accepted them. *Coleman v. Gibson*, 1 M. & Rob. 168.

There may be actual receipt by acquiescence; and whenever such a case is set up, it is a question for the jury. *Bushel v. Wheeler*, 15 Q. B. 442.

Lapse of time before refusal or rejection is some evidence of acceptance. *Smith v. Hudson*, 34 L. J., Q. B. 145.

III. WHEN PROPERTY PASSES.

1. GENERALLY.

Completion of Sale.]—Where the sale has been completed within the statute, the property vests in the purchaser immediately, and is at his risk. *Phillimore v. Barry*, 1 Camp. 513.

There may be a complete contract, so as to pass the property in goods from the seller to the buyer, although the price has not been definitely agreed upon between them. *Joyce v. Swann*, 8 D. & R. 343; 5 B. & C. 583.

Validity of Title.]—The purchaser of a chattel takes it, as a general rule, subject to what may turn out to be informalities in the title. *Cundy v. Lindsay*, 3 App. Cas. 459; 47 L. J., Q. B. 481; 38 L. T. 573; 26 W. R. 406; 14 Cox, C. C. 93—H. L.

By a purchase in market overt the title obtained is good against all the world. *Id.*

If not so purchased, though purchased bona fide, the title obtained may not be good against the real owner. *Id.*

When the original owner has parted with the chattel to A. upon a de facto contract, though there may be circumstances which enable that owner to set aside that contract, the bona fide purchaser from A. will obtain an indefeasible title. *Id.*

The question, therefore, in many such cases will be, Was there a contract between the original owner and the intermediate person? *Id.*

Fraud—Mistake as to Parties.]—L. was a manufacturer in Ireland. Alfred Blenkarn, who occupied a room in a house looking into Wood-street, Cheapside, wrote to L., proposing a considerable purchase of L.'s goods, and in his letter used this address—"37, Wood-street, Cheap-side," and signed the letters (without any initial for a christian-name) with a name so written that it appeared to be "Blenkiron & Co." There was a respectable firm of that name, "W. Blenkiron & Co.," carrying on business at 123, Wood-street. L. sent letters, and afterwards supplied goods, the letters, the goods, and the invoices accompanying the goods, being all addressed to "Messrs. Blenkiron & Co., 37, Wood-street." The goods were received by Blenkarn at that place, and disposed of to a purchaser who was entirely ignorant of the fraud:—Held,

that no contract was made with Blenkarn; that even a temporary property in the goods never passed to him, so that he never had a possessory title which he could transfer to this purchaser, who was consequently liable to L. for the value of the goods. *Id.*

Merchants in London were in the habit of dealing with Reed Brothers, of Old Town-street, Plymouth. On receipt of an order from Joseph Reed & Sons, of Mincing-lane, Plymouth, they forwarded the goods asked for, under the mistaken belief that they were dealing with their old customers. The person trading as Joseph Reed & Sons was an uncertificated bankrupt, and his trustee at once seized the goods:—Held, that the trustee was bound to restore the goods, or to pay the amount due for them. *Barnett, Ex parte, Reed, In re*, 3 Ch. D. 123; 45 L. J., Bk. 120; 34 L. T. 664; 24 W. R. 904.

The plaintiff, a manufacturer, called at the place of business of Gandell & Co., for orders for goods. At that time the firm consisted of Thomas Gandell only, and the business was managed by Edward Gandell, a clerk. On inquiring for Messrs. Gandell, the plaintiff was directed to a counting-house, where he saw Edward Gandell, who led the plaintiff to believe that he was one of the firm of Gandell & Co.; and under that belief, at the request of Edward Gandell, the plaintiff sent goods to the place of business of Gandell & Co., and invoiced them to "Edward Gandell & Co." Edward Gandell, who, unknown to the plaintiff, carried on business with Todd, pledged the goods with the defendant, for advances bona fide made to Gandell and Todd; and the defendant afterwards sold the goods under a power of sale:—Held, that there was no contract of sale, inasmuch as the plaintiff believed that he was contracting with Gandell & Co., and not with Edward Gandell personally; and Gandell & Co. never authorized Edward Gandell to contract for them; consequently no property passed, and the defendant was liable in trover for the amount realized by the sale. *Hardman v. Booth*, 1 H. & C. 803; 32 L. J., Ex. 105; 9 Jur., N. S. 81; 7 L. T. 738.

Sale of Stolen Beasts in Market overt—Conviction—Claim for Keep.]—The bona fide purchaser of stolen beasts sold in market overt cannot, in answer to a claim for them by the original owner after the conviction of the thief, counterclaim for the cost of their keep while the beasts were in the possession of the purchaser, for they were his own property until, on the conviction, the property reverted in the original owner. *Walker v. Matthews*, 8 Q. B. D. 109; 51 L. J., Q. B. 243; 46 L. T. 915; 30 W. R. 338.

Effect of Conviction for False Pretences.]—By 24 & 25 Vict. c. 96, s. 100, if any person guilty (inter alia) of obtaining any chattel, money, or other property by false pretences "shall be indicted on behalf of the owner of the property and convicted, in such case the property shall be restored to the owner."—W. purchased and obtained delivery of certain sheep from the defendant by false pretences. The plaintiff purchased the sheep from W. and paid W. for them without knowledge of the fraud, the defendant having done nothing in the meantime to avoid the contract between himself and W. The defendant finding that the sheep were on the

plaintiff's premises retook possession of them. W. having been convicted of obtaining the sheep by false pretences on the prosecution of the defendant:—Held, that the effect of 24 & 25 Vict. c. 96, s. 100, was not to re-vest the property in the sheep in the defendant as against the plaintiff, who had acquired a good title to them before the conviction, and consequently that the defendant was liable in an action by the plaintiff for the value of the sheep. *Moyce v. Newington*, 4 Q. B. D. 32; 48 L. J., Q. B. 125; 39 L. T. 535; 27 W. R. 319.

Property re-vested by Pledge in Pledgor through Fraud of the Latter.—The plaintiffs made advances to D. & Sons on the security of certain flour, which was warehoused by D. & Sons in the plaintiffs' name, D. & Sons undertaking, in consideration of the plaintiffs' delivering to their order the flour as sold, to specifically pay plaintiffs the proceeds of all sales immediately on their receipt. The defendants subsequently made advances to D. & Sons on the security of a pledge of the flour, in ignorance of the prior transaction with the plaintiffs; and D. & Sons, by a fraudulent representation that they had sold the flour to the defendants, procured from the plaintiffs a delivery order for the flour, which they gave to the defendants. The defendants, in pursuance of the delivery order, obtained possession of the flour, and, the advances made by them not being repaid, sold it. The plaintiffs sued the defendants for the conversion of the flour:—Held, that (assuming that the plaintiffs had originally a special property in the flour), the intention of the plaintiffs must be taken to have been to re-vest the whole property in the flour in D. & Sons, in order that they might transfer it to the defendants as purchasers; and that, though the plaintiffs might have revoked the delivery order as being procured by fraud, as long as the flour remained in the hands of D. & Sons, yet when the property in the flour had been transferred by D. & Sons to bona fide transferees for good consideration, the title of the latter was indefeasible. *Babcock v. Lawson*, 4 Q. B. D. 394; 48 L. J., Q. B. 524; 27 W. R. 866. Affirmed, 5 Q. B. D. 284; 49 L. J., Q. B. 408; 42 L. T. 289; 27 W. R. 591—C. A.

Mistake as to Price.—Commission agents, having a chattel to sell at a fixed price, and their salesman having by mistake agreed to sell it at one-third of that price, and the mistake having been explained, and the contract repudiated, before the chattel was delivered:—Held, that the purchaser could not enforce its delivery. *Isaac v. Boulnois*, 12 W. R. 341.

Mistake in Telegram.—A. wrote to B. asking on what terms he could execute an order for fifty rifles. B. answered, stating terms. B. subsequently received a telegram from A. directing him to send "the" rifles. He accordingly forwarded fifty rifles. By a mistake of the telegraph clerk the word "the" was inserted instead of "three," which was the word used by A. in filling up the telegraph form. A. refused to accept more than three rifles:—Held, that he was not bound by the mistake of the clerk, and consequently an action was not maintainable against him for the price of the remainder.

Henchel v. Pape, 6 L. R., Ex. 7; 40 L. J., Ex. 15; 23 L. T. 419; 19 W. R. 106.

Goods paid for by Cheque, which is subsequently Dishonoured.—The right of property does not pass upon a sale of goods paid for by the purchaser's cheque, subsequently dishonoured, if the purchaser had not, at the time of drawing and giving the cheque, reasonable grounds for believing that there were funds to meet it as an instrument payable the instant after it was drawn. *Loughnan v. Barry*, 5 Ir. R., C. L. 538. See also *S. C.*, 6 Ir. R., C. L. 457.

When cattle were sold and paid for by the purchaser's cheque, which was subsequently dishonoured:—Held, in an action by the vendor for conversion, and for money had and received, that the proper question for the jury was—not whether the purchaser had reasonable grounds for believing, and did in fact believe, that the cheque would be dishonoured—but whether, at the time the cheque was drawn, he had reasonable grounds for believing that there were funds to meet it. *Id.*

If a vendee under terms to pay for goods on delivery, obtains possession of them by giving a cheque, which is afterwards dishonoured, he gains no property in the goods, if at the time of giving the cheque he had no reasonable ground to expect that it would be paid. *Hawse v. Crowe*, R. & M. 414.

Payment by Worthless or Fictitious Bills.—If goods are obtained by a party who knows himself to be insolvent, upon bills drawn upon others in the same circumstances, it will not render the contract of sale void, unless the bills are contrived for the express purpose of getting possession of the goods. *Noble v. Adams*, 2 Marsh, 366; 7 Taunt. 59; Holt, 248.

Where goods were sold on the terms "to be paid for by E.'s bill on P., without recourse to the buyer in case of its not being paid," although the vendee knew the bill to be worth nothing, he is not liable to an action for the price of the goods; the action should be trover or deceit. *Read v. Hutchinson*, 3 Camp. 352.

Sham Sale.—The plaintiff, being in difficulties, and fearing that some of his creditors would issue execution against his goods, agreed with the defendant, who was also a creditor, that there should be a pretended sale of them to him. For this purpose an invoice was made out, and a receipt given to the defendant for a sum therein stated to be the purchase-money, and possession of the goods was delivered to the defendant. Afterwards the defendant sold the goods as his own; whereupon the plaintiff brought trover:—Held, that no property in the goods passed to the defendant, and that the plaintiff was not precluded from shewing that no payment was in fact made, and that the transaction was not a real, but a pretended sale. *Bowes v. Foster*, 2 H. & N. 779; 27 L. J., Ex. 262; 4 Jur., N. S. 95.

Bills of Lading accompanying Bills of Exchange.—P. shipped a cargo of amber on board a ship chartered for the plaintiff. The bills of lading stated that the cargo was shipped by P., to be delivered "to order or assigns." P. drew a bill of exchange on the plaintiff, and handed it to the vendor of the amber, who discounted it with

the defendants, and handed them the bills of lading, to be given up to the plaintiff on payment by him of the bill of exchange at maturity. The plaintiff refused to accept the bill of exchange without receiving the bills of lading. A new bill of exchange was substituted for the former bill, and forwarded to the defendants' agents with directions to give up the bills of lading when it was paid. The ship and the bill of exchange arrived on the same day. The plaintiff did not then accept the bill; and the cargo was entered at the Custom-house in the defendants' name. The plaintiff afterwards offered to pay the bill of exchange, and receive the bills of lading, and give a guarantee for the freight, but the defendants refused, and sold the cargo:—Held, that the property in the cargo had passed to the plaintiff, and he was entitled to recover. *Mirabita v. Imperial Ottoman Bank*, 3 Ex. D. 164; 47 L. J., Ex. 418; 38 L. T. 597—C. A.

When a bill of lading, and a bill of exchange to cover the goods included in the bill of lading, are sent in a letter to a vendee of the goods, it is a well understood rule that the bill of exchange must be accepted, or the bill of lading cannot be retained. *Shepherd v. Harrison*, 5 L. R., II. L. 116; 40 L. J., Q. B. 148; 24 L. T. 857; 20 W. R. 1.

Transfer of Bill of Lading.—When goods are at sea the parting with the bill of lading, which is the symbol of the goods, is parting with the ownership of the goods themselves. *Barber v. Meyerstein*, 4 L. R., H. L. 317; 39 L. J., C. P. 187; 22 L. T. 808; 18 W. R. 1041.

A bill of lading is not a necessary instrument of the transfer of property in goods consigned to the owner. *Meyer v. Sharpe*, 5 Taunt. 74; 2 Rose, 124.

Where from all the facts it may fairly be inferred that it was the intention of the seller to pass the property in goods shipped to order, the mere circumstance of the bill of lading being taken in the name of the seller, and remaining undorsed, will not prevent its passing. *Joyce v. Swann*, 17 C. B., N. S. 84.

A bill of lading for the delivery of goods to order and assigns is a negotiable instrument, which by indorsement and delivery passes the property in the goods to the indorsee, subject only to the right of the unpaid vendor to stop them in transitu. *Pease v. Gloaghec*, 1 L. R., P. C. 219; 35 L. J., P. C. 66; 15 L. T. 6; 15 W. R. 201.

Where the plaintiffs, having received an order from the defendant for goods, shipped them, and transmitted to him the bill of lading indorsed, making the goods deliverable to order or assigns; and on their arrival the captain withheld the goods, in consequence of the defendant having refused to accept a bill drawn on him for the price, and thereupon the defendant recovered in trover against the captain:—Held, that the plaintiffs might maintain an action for goods sold and delivered, for the delivery of the goods was complete as between them and the defendant, by the delivery on board the ship. *Groning v. Mendham*, 5 M. & S. 189.

Payment against Bills of Lading.—Coals were sold at Hull, and shipped on board a vessel chartered by the buyer, to be paid for in cash against bill of lading in the hands of the seller's

agent, in London:—Held, that no property passed to the buyer until the condition was fulfilled, and that, the price being unpaid, the seller was entitled to intercept the delivery. *Moakes v. Nicolson*, 19 C. B., N. S. 290; 34 L. J., C. P. 273; 12 L. T. 573.

Held, also, that a third person, who had agreed with the vendee to purchase the coals of him, by a verbal contract entered into before the quantity was ascertained and shipped, could be in no better position than the original vendee. *Ib.*

A. sold goods to B., to be delivered free on board at Liverpool for Trieste. The goods were placed by A. on board a steamer, to be delivered to the order of B. By the custom of the trade, where goods are sold, to be delivered free on board, the price is not payable until production of a bill of lading, or some other document, giving evidence of their being on board. The owners of the steamer refusing to give out the bill of lading until a greatly-increased amount of freight was paid, and B., when informed of that fact, declining to have anything to do with the matter, A. was unable to comply with the custom by producing the bill of lading:—Held, that B., by his conduct, dispensed with the strict compliance with the custom, and that consequently A. was entitled to maintain an action for the price of the iron without producing a bill of lading. *Green v. Sichel*, 7 C. B., N. S. 747; 29 L. J., C. P. 213; 6 Jur., N. S. 827; 8 W. R. 663.

Sub-Contracts—Retention of Inferior Article.]

—The plaintiffs, being under contract to sell waggons, employed L. to make them according to sample at a certain price. L. then employed a waggon company to make them according to sample at a lower price. The company afterwards proposed to receive payment direct from the plaintiffs, who consented, and were authorized by L. to pay them. Some waggons were delivered by the waggon company to a railway company to the order of the plaintiffs. The plaintiffs sent a complaint to the waggon company that the waggons were unequal to sample, but did not reject them; and they informed L., and also the waggon company, that they would dispose of the waggons at the best price obtainable, and hold L. responsible for loss. L. rejected the waggons. The plaintiffs gave notice to the railway company not to deliver the waggons without their order, but the railway company nevertheless delivered them to the waggon company, who refused to give them up. In an action against both companies:—Held, that the property in the goods and the right to possession of them having passed to the plaintiffs, both parties were liable. *Johnson v. Lancashire and Yorkshire Railway Company*, 3 C. P. D. 499; 39 L. T. 448; 27 W. R. 459.

Sale of Illegal Manufacture.]—The plaintiff, having a quantity of apples, by contract in writing, agreed with the defendant to sell him his cider at 35s. per hogshead, to be delivered at T. at a future time, and to lend what casks he had empty for the cider, to be manufactured on the plaintiff's premises, to be paid for before it was taken away. The plaintiff pounded his apples, and delivered the juice to the defendant's servant, who proceeded to manufacture the cider. Before the manufacture was complete, the cider

and the casks, some of which belonged to the plaintiff, were seized by the excise officers for being in an unentered place, and condemned in the Exchequer as the defendant's property. In Devonshire, where the parties lived, cider means the juice as expressed from the apples:—Held, that the contract was for the sale of juice, not manufactured cider; that the delivery of the juice to the defendant's servant vested the property in the defendant; that it was his duty to have entered the premises; that his neglecting to do so rendered the plaintiff's delivering the cider at T. impossible, and therefore unnecessary; and that the plaintiff, therefore, was entitled to recover the price, both of the cider and of the casks. *Suddy v. Saunders*, 8 D. & R. 403; 5 B. & C. 628.

Immediate or Future Sale.—A. on the 4th of January agreed to sell to B. a stack of hay for 145*l.*, to be paid on the 4th of February, the same to be allowed to stand on A.'s premises until the 1st of May. B. stipulated that the hay should not be cut until it was paid for:—Held, that this was a contract for an immediate and not for a future sale, and that the property in the hay passed by it immediately to the vendee, and that the same having been subsequently destroyed by fire, the loss fell upon him. *Tarling v. Baxter*, 6 B. & C. 360; 9 D. & R. 272.

Agreement for Hiring—Payment of Instalments.—By a written agreement, R. hired furniture of the value of 63*l.* from L. & Co. R. was to pay for it by monthly instalments. In the event of non-payment of any instalment, L. & Co. might seize and remove the furniture and retake possession of it. On payment of all the instalments, the furniture was to become his property, but until such payment it was to remain the sole property of L. & Co. This agreement was not registered as a bill of sale. The furniture comprised in the agreement was in the possession of R. at the commencement of his bankruptcy:—Held, that the property in the furniture did not pass to him until all the instalments had been paid; that neither the agreement nor the licence to seize the furniture amounted to a bill of sale by R., and therefore that registration was unnecessary. *Robertson, In re, Lewin, Ex parte*, 9 Ch. D. 419; 47 L. J., Bk. 94; 39 L. T. 12; 26 W. R. 733—C. A.

Payment down of all future Instalments—Right to demand Transfer.—The defendants agreed to hire forty-four waggons from the plaintiffs, paying in respect of twenty specified waggons an annual rent of 285*l.* for five years, and in respect of the other twenty-four an annual rent of 249*l.* for three years. It was agreed that the said waggons should, at the expiration of the respective terms of the demise, and after payment of the rents reserved during the said terms respectively, become the absolute property of the lessees without any further payment whatsoever; and that until full payment of the several rents respectively reserved should be actually made, the ownership of the said waggons respectively should remain and continue in the lessors. The defendants having paid the first two years' rent in respect of the twenty-four waggons, sent to the plaintiffs the whole of the remaining one year's rent with a letter stating

that this sum was paid in discharge of all rent or other payment due in respect of the twenty-four waggons. The rent in respect of the other twenty waggons was then in arrear. The plaintiffs' agent declined to receive the payment upon the terms of the letter, and entered it in the plaintiffs' ledger as a payment in respect of the entire number of waggons:—Held, that the contracts in respect of the twenty-four waggons and the twenty were several, and the hirers were entitled to the property in the twenty-four waggons upon payment of all the instalments that remained to be paid in respect of them, notwithstanding that there were unpaid instalments in respect of the twenty, and that the contract being in effect one of sale, and the provision for payment by instalments a provision solely in favour of the purchaser, he was entitled to anticipate the time fixed for the transfer of the property in the waggons by anticipating the time for payment. *Lancashire Waggon Company v. Nuttall*, 42 L. T. 465; 44 J. P. 536—C. A.

Conditional Sale of a Horse—Death of the Horse before Sale absolute.—A horse was sold by the plaintiff to the defendant upon condition that it should be taken away by the defendant and tried by him for eight days, and returned at the end of eight days if the defendant did not think it suitable for his purposes. The horse died on the third day after it was placed in the defendant's stable, without fault of either party:—Held, that the plaintiff could not maintain an action for the price, as for goods sold and delivered. *Elphick v. Barnes*, 5 C. P. D. 321; 49 L. J., C. P. 698; 29 W. R. 139; 44 J. P. 651.

2. APPROPRIATION OF SPECIFIC GOODS.

Intention of Parties.—By the law of England, under a contract of sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shewn that such was not the intention of the parties. If the seller is to do something to the goods sold, the property will not be changed until he has done it, or waived his right to do it. *Gilmour v. Supple*, 11 Moore, P. C. C. 551.

The plaintiff, a salt merchant at Liverpool, was in the habit of shipping cargoes of salt there for De M., a merchant, in London, on board vessels chartered by De M., charging him a commission in addition to the price, and getting bills of lading making the salt deliverable to his order, which bills of lading he sent, with the invoice and a draft at four months, to De M. In November, 1863, De M. chartered the ship S. F., belonging to the defendants, to carry a cargo of salt from Liverpool to Calcutta; freight to be paid one-third by freighter's acceptance, at four months from the sailing of the vessel, the remainder on delivery of the cargo at Calcutta. Pursuant to instructions from De M., the plaintiff proceeded to load the S. F., and had shipped 1007 tons (for which he took the mate's receipts in his name), when he learned that De M. had stopped payment. He thereupon refused to load any more, and the defendants filled up the loading themselves. The plaintiff then produced to the defendants the mate's receipts for the 1007 tons, and demanded a bill of lading for that quantity, making it deliverable to his order,

This the defendants refused, and the vessel sailed with the salt on board.—Held, that it was properly left to the jury to say whether or not the plaintiff put the salt on board the S. F., with the intention of passing the property therein to De M.; and that (the jury having found that the plaintiff did not intend to pass the property to De M.) the sailing from Liverpool without giving the plaintiff a bill of lading in exchange for the mate's receipts, as demanded, was a conversion; and that the proper measure of damages was, the value of the salt at Liverpool at the time of sailing. *Falk or Falke v. Fletcher*, 18 C. B., N. S. 403; 34 L. J., C. P. 146; 11 Jur., N. S. 176; 13 W. R. 346.

If, upon a contract for the sale of goods, anything remains to be done by the buyer, such as weighing, measuring, or testing the goods, if it appears by the terms of the contract that it was the intention of the parties that the property should pass to the buyer, it will pass though he has not done the act. *Turley v. Bates*, 2 H. & C. 200; 33 L. J., Ex. 43; 10 Jur., N. S. 368; 10 L. T. 35; 12 W. R. 438.

Appropriation by Vendor.—It depends on the intention of the parties whether the property in goods, to which something remains to be done before they are ready to be delivered, passes to a buyer at the time of the sale or on the completion of the goods. *Young v. Matthews*, 2 L. R., C. P. 127; 36 L. J., C. P. 61; 15 L. T. 182.

A, a brickmaker, who was in embarrassed circumstances, sold to B, to whom he was largely indebted, a large quantity of bricks. B. sent an agent to the brick-field with an order for the delivery of the bricks, and A's foreman told him he was ready to commence delivering them if a man, who was in possession under a distress put in by the landlord, was paid out, and he pointed out three clamps—one consisting of finished bricks, a second of bricks still burning, and a third of bricks moulded but not burnt—as those from which he should make the delivery. A. having become bankrupt, the landlord sold some of the bricks, and B. sold the remainder to C., who removed them. In an action of trover by the assignees of A. against C. for the bricks:—Held, that the conduct of A's foreman was a sufficient appropriation of the bricks, and that the property in the whole of them, though unfinished, passed to B. at the time, such having been apparently the intention of the parties. *Id.*

The plaintiff had effected a "floating" policy of marine insurance on "goods," upon which he sued an underwriter under the following circumstances:—By contract of the 7th of January, D. & Co., sugar merchants in London, agreed to sell to B. & Co. 200 tons of sugar of a certain description, to be shipped from Hamburg to Bristol at the price of 11. 1s. 9d. per cwt. net f. o. b. at Hamburg; payment to be by cash, in London, in exchange for bill of lading. By contract of the 12th of January, D. & Co. agreed to sell a similar quantity of sugar to the plaintiff upon the same terms. B. & Co. entered into the contract of the 7th of January in order to enable themselves to execute a contract previously made by them with the plaintiff for the sale of the same quantity of sugar. Until after the loss hereinafter mentioned D. & Co. were not aware of B. & Co.'s contract with the plaintiff, nor was the plaintiff aware that D. & Co. were the shippers of the 200 tons contracted to be sold to

him by B. & Co. The requirements of the Statute of Frauds had been complied with in the case of the above-mentioned contracts of the 7th and 12th of January, but not in the case of the contract between B. & Co. and the plaintiff, there being no sufficient memorandum of that contract within the statute.—D. & Co. advised their forwarding agents at Hamburg, that they had sold 400 tons of sugar for Bristol, and in pursuance of such advice, 3,900 bags of sugar were shipped at Hamburg, consigned to "order, Bristol," by such agents who forwarded the bills of lading for the sugar indorsed in blank to bankers in London with instructions to deliver them to D. & Co. against payment of amounts advanced in respect of the price of the sugar paid to the manufacturer in Germany. The sugar so shipped was of the description specified by the above-mentioned contracts, but was insufficient in quantity by 100 bags to satisfy the two contracts of the 7th and 12th of January. No appropriation of specific bags to each of the two contracts respectively was made by D. & Co. or their agents at the time of shipment. The ship on which such shipment was made was lost with her cargo on the voyage. Before the news of the loss reached them, D. & Co. took up the bills of lading in due course, and they then apportioned the bags of sugar shipped between the contracts of the 7th and 12th of January, appropriating certain specific bags to the number of 2,000 to the former and the remainder to the latter, and made out separate invoices in respect of each contract to B. & Co. and the plaintiff respectively, setting out the marks and numbers of the bags. The invoices were then posted by D. & Co. to B. & Co. and the plaintiff respectively, but before they were so posted the news of the loss of the ship had reached D. & Co. and the plaintiff. The plaintiff, on learning of the loss, anticipating that sugar destined for him might have been shipped on board the ship, although without specific advice of any such shipment, declared on the ship in respect of 200 tons of sugar under the floating policy before mentioned. The plaintiff and B. & Co. subsequently, on receipt of the invoices, respectively paid the contract price of and obtained the bills of lading for the sugars specified in their respective invoices. B. & Co. then forwarded the invoice received by them to the plaintiff, who thereupon paid them for the sugar included in that invoice and received the bills of lading in respect thereof. The plaintiff then further declared under the floating policy in respect of this last-mentioned sugar:—Held, that there was no appropriation of goods so as to pass the property from D. & Co. to the plaintiff. *Stock v. Inglis*, 9 Q. B. D. 708; 52 L. J., Q. B. 30; 47 L. T. 416; 31 W. R. 455; 4 Asp. M. C. 596. Overruled, but not on this point, 12 Q. B. D. 564—C. A.

Assent of Vendee.—A sale of a given number of bales out of a larger number, does not vest the property in the vendee, until there has been a specific appropriation by the vendor, assented to by the vendee or by his agent. *Campbell v. Mersey Docks and Harbour Board*, 14 C. B., N. S. 412; 8 L. T. 245; 11 W. R. 596.

A person at a fair orally contracted to sell at a given price per cwt. two pockets of hops which were on the spot, and which were there inspected and approved of by the intended buyer, and also

two other pockets, of which samples were shewn, but which were lying in a warehouse in London. The buyer took away with him, and afterwards paid for, the first two pockets, but the last two were to be forwarded to him at a future time. On his return to London the seller went to the warehouse and selected two out of three pockets which he had there, and directed the warehouse-keeper to mark them "to wait the buyer's order;" but no alteration was made in the warehouse-keeper's books, and he continued to hold the seller liable for the rent. He in a few days afterwards sent the buyer an invoice describing the numbers, the weight and the prices of the two pockets delivered at the fair, and also of the two which had been set apart at the warehouse, and at the same time inclosed a draft for acceptance. The buyer sent back the draft unaccepted, and refused to receive the last two pockets:—Held, that there was no evidence of the appropriation of the two pockets in the London warehouse being either originally authorized or subsequently assented to by the buyer, and that consequently the property in them did not pass by the contract. *Jenner v. Smith*, 4 L. R., C. P. 270.

Tea in Specified Chests—Warrants still in Vendor's Possession.—A policy expressed the insurance to be on "merchandise the assured's own, in trust, or on commission for which they are responsible," in or on certain specified warehouses, vaults, cellars, wharves, yards, or quays. Whilst the policy was in force certain chests of tea, on a wharf included in the policy, were destroyed by fire. These teas had been deposited in bond by the importer with the wharfinger; the assured had purchased them from the importer, and the warrants had been indorsed in blank by him to the assured. Before the fire occurred the assured had resold the teas in specified chests to customers, and had been paid for them; they held, however, the warrants on behalf of the customers, but merely for the convenience of paying, if required, the charges necessary for clearing the teas payable by such customers:—Held, that the policy applied only to goods belonging to the assured, or for which they were responsible, and the property in the teas having, at the time of the fire, passed to the purchasers, they were then at the purchasers' risk, and were consequently not covered by the policy. *North British and Mercantile Insurance Company v. Moffatt*, 7 L. R., C. P. 25; 41 L. J., C. P. 1; 25 L. T. 662; 20 W. R. 114.

Timber—Advance in respect of certain Deliveries.—A. & Co. contracted with B. & Co. for the purchase of a large quantity of railway sleepers, to be delivered at intervals at the wharf of A. & Co., and to be paid for on delivery. The sleepers arrived at the wharf of B. & Co. in timbers of length sufficient, when sawn asunder, to make each two sleepers. After several deliveries had taken place, one of the firm of B. & Co. called at the office of A. & Co., and obtained from A. an advance of 600*l.* on account of the last cargo of timber, which he represented to be, and which then was, at the wharf of B. & Co., and a portion of which had already been sawn into sleepers:—Held, that this was such a specific appropriation of the timber and sleepers to A. & Co. (who had possessed themselves of them), as to entitle them to retain them as

against the assignees of B. & Co., who had become bankrupt after the advance. *Langton v. Waring*, 18 C. B., N. S. 315; 11 L. T. 633; 13 W. R. 347.

More Goods Sent than Ordered—No Appropriation.—In an action to recover the price of ten hogsheads of claret, it appeared that the defendants having verbally ordered certain hogsheads of the plaintiff, the latter, in October, sent them fifteen, whereupon the defendants, by letter, informed the plaintiff that they had requested ten only should be shipped, and that they could take that number only on their proving satisfactory, and that they would hold the other five on the plaintiff's account. In answer to this the plaintiff replied by letter, which, after stating that he regretted that any misunderstanding as to the defendants' order should have taken place, and after stating that other vintages were inferior, and that the wine sent was of superior character, concluded thus: "You will ascertain in the spring whether you have room for it, and you have seen that we are not stringent with old customers as to credit." The defendants placed the wine in a bonded warehouse in their own names, and shortly afterwards tasted the wine, and disapproved of it, and gave the plaintiff notice in the early part of April that they would not take any part of it:—Held, that, supposing there was a written contract by which the defendants were bound to take ten hogsheads of claret, that contract was not executed, as fifteen and not ten hogsheads had been delivered, and no particular ten had been selected out of the fifteen. *Cunliffe v. Harrison*, 6 Ex. 903; 20 L. J., Ex. 325.

Appropriation to Buyer—Approximate Price Paid—Weighing.—In a contract of sale where the goods have been ascertained and appropriated to the buyer, and an approximate price has been paid in respect of them, although they have not been weighed, it is a question of intention whether the property or the risk in the goods passes to the buyer. *Martineau v. Kitching*, 7 L. R., Q. B. 436; 41 L. J., Q. B. 227; 26 L. T. 836; 20 W. R. 769.

The plaintiffs, sugar refiners, were in the habit of selling to brokers the whole of each filling of sugar, consisting of from 200 to 300 loaves or titlers each, the terms always being "prompt at one month; goods at seller's risk for two months," the "prompt" day being the Saturday next after the expiration of one month from the sale. The titlers in each filling were stored on the plaintiffs' premises, and were from time to time fetched away by the purchasers or their sub-vendees, being weighed on their removal, each titler weighing from thirty-eight to forty-two pounds. If the whole of the lots contained in one sale-note had not (which was frequently the case) been taken away on the prompt day payment was made by the purchaser by bill or cash at an approximate sum calculated on the probable weight, the actual price being afterwards adjusted on the whole filling being cleared. The defendant, who was an old customer of the plaintiffs, had bought four fillings, consisting of specific titlers, each marked, on the above terms, and had paid the approximate price of the four lots, and had fetched some of each lot away. A fire occurred on the plaintiffs' premises after the expiration of two months from the dates of sale

to the defendant, destroying the whole contents of the warehouses. At the time of the fire the plaintiffs had floating policies of insurance which covered goods on the premises "sold and paid for, but not removed;" but they had no agreement or understanding with their customers as to any insurance; and the amount insured, which the plaintiffs received from the underwriters, was not sufficient to cover the loss of their own goods, exclusive of the titlers undelivered which they had sold to the defendant:—Held (by Cockburn, C. J., on the ground that the property in the titlers undelivered had passed to the defendant; by Blackburn, Lush, and Quain, JJ., whether it had passed or not), that, by the terms of the contract of sale, the risk, after the lapse of the two months, was in the buyer, and the loss was, therefore, his. *Id.*

See also cases post, col. 849, et seq.

Goods Mixed with Vendor's after Appropriation.—Agreement between the plaintiff and K. for the exchange of part of a quantity of barley, which the plaintiff had seen in K.'s granary, for a number of bullocks; the plaintiff to send his own sacks, and K. to fill them with the barley, take them to a railway, and place them upon trucks. The plaintiff delivered the bullocks to K., and sent 200 sacks, and a few days after K. filled 155 of them with the barley from his granary. A delay occurred in sending the barley, and the plaintiff demanded it. K. becoming embarrassed, the barley was by his orders turned out of the sacks on to the heap from which it had been taken. Soon after K. was adjudicated bankrupt, and the assignees took possession of the barley and removed it:—Held, that the property in the barley put into the sacks passed to the plaintiff by reason of the authority of appropriation conferred on K. by the agreement, as well as by the subsequent assent of the plaintiff. *Aldridge v. Johnson*, 7 El. & Bl. 885; 26 L. J., Q. B. 296; 3 Jur., N. S. 913.

Held, also, that the property in the barley was not divested by the act of K. in mixing it again with the bulk; and that there was evidence of a conversion by the assignees, notwithstanding the prior conversion by K. *Id.*

Sale of Crop of Oil—Bottling.—In January, 1858, C. agreed to sell to the plaintiff all the crop of oil of peppermint grown on his farm in the year at 21s. per pound. In September C. wrote to the plaintiff for bottles to put the oil in. The plaintiff sent the bottles, and C., having weighed the oil, put it in those bottles, labelled them with the weight, and made out invoices. Before, however, he had completed the filling of the bottles, he sold and delivered several of them to the defendant. The plaintiff had for many years past bought of C. his crop of oil of peppermint, and it was usual for C. when the bottles were filled, to deliver them to a carrier to take to a railway station. In detinue for the plaintiff against the defendant for the bottles of oil of peppermint delivered to him:—Held, that the putting the oil in the bottles was an act of appropriation which vested the property in the plaintiff. *Langton v. Higgins*, 4 H. & N. 402; 28 L. J., Ex. 252.

Sale of Goods "on Arrival."—On a contract

for the sale of goods to be paid for after conclusion of the landing, "to be delivered by the seller to the purchaser on safe arrival" of the ship, at the time of the contract on her passage from Calcutta to London:—Held, that no property in the goods passed to the purchaser by the sale. *Hale v. Rawson*, 4 C. B., N. S. 85; 27 L. J., C. P. 189; 4 Jur., N. S. 363.

Vendor cannot dispute Sub-Vendee's Title after Recognition.—Where on a contract of sale of a portion of a large quantity of goods in a warehouse of the vendor, the vendee has resold the goods to a third person, whose title to them the vendor has recognized, he cannot afterwards dispute the title of such third person, although the specific goods have never been appropriated to him. *Woodley v. Coventry*, 2 H. & C. 164; 32 L. J., Ex. 185; 9 Jur., N. S. 548; 8 L. T. 249; 11 W. R. 599.

Implied Condition as to Refusal of Deliveries.—In an action on a contract by the defendant to deliver goods at the wharf of third parties, in equal portions, in four months, to be made to the satisfaction of an inspector of such parties, and if not so made to be removed by the defendant, and others substituted in the time named; averments of performance on the plaintiff's part and breach that the goods were delivered not made to the satisfaction of the inspector, whereby they were rejected and the plaintiff lost the benefit of a contract with the third parties mentioned. Pleas, denying the contract, and the breach, and alleging that the contract was subject to a condition that the disapproval of each portion should be notified in a reasonable time after delivery. The contract as stated, being proved in fact, and it not appearing that there was any such condition in fact:—Held, that there was no such condition implied in law from the contract as stated or proved; nor that the disapproval should be notified within the time named, or the four months. *Coulson v. Attwood*, 26 L. J., Ex. 244.

3. DELIVERY TO CARRIERS.

Named or not Named by Vendee.—Where a vendee of goods orders a particular mode of conveyance, he must stand to the loss if any happens. *Vale v. Bayle*, Cowp. 294.

A delivery of goods by the vendor on behalf of the vendee, to a carrier not named by the vendee, is a delivery to the vendee. *Dutton v. Solomonson*, 3 B. & P. 582.

A. in London received an order from B., living in Bristol, to send goods to him by any conveyance which would reach Bristol (as B. lived only six miles from thence), informing B. when he sent them, that B. might know when to expect them. A. sent the goods to a wharf, whence vessels for Bristol sailed, and informed B., as he was told at the wharf, that the goods would come by the ship Commerce; in fact the goods were not sent on board the Commerce, which happened to be fully laden, but some time afterwards were sent by another vessel. B., after the arrival of the Commerce at Bristol without the goods, made no further inquiry for the goods, and A. did not know till after he had been sent by another ship, which he then communicated to B.:—Held, that B. was liable for

any loss of the goods. *Cooke v. Ludlow*, 2 N. R. 119.

The plaintiff residing at Naples ordered goods of M. at Birmingham, "to be dispatched on insurance being effected. Terms, three months' credit from the time of arrival." M. effected an insurance, declaring the interest to be in the plaintiff, and having marked the goods with the plaintiff's initials, sent them to Liverpool, where they were delivered by M.'s agent to the owner of a vessel loading for Naples, by whose negligence they were damaged:—Held, that the property in the goods vested in the plaintiff as soon as they left Birmingham; that he was liable to pay for them whether they arrived or not; and therefore that he was entitled to sue the shipowner for the damage done to them by his negligence. *Fragano v. Long*, 6 D. & R. 283; 4 B. & C. 219.

Where a person in Aberystwith gave an order for goods to a traveller of the plaintiff, resident in London:—Held, that it must be presumed that such goods were to be sent in the usual way, and that, on their delivery to a carrier in London, a cause of action arose there. *Copeland v. Lewis*, 2 Stark. 33.

See also CARRIERS (Actions against).

4. DELIVERY ON BOARD SHIP.

Cargo to be Loaded.—A. contracted for the purchase of rice in the following terms: "Bought for account of A., of B. and Co., the cargo of new crop Rangoon rice, per Sunbeam." The day after making this contract, A. insured the rice at and from Rangoon to the United Kingdom, "as interest may appear." The ship proceeded to Rangoon, and after the greater part of the cargo had been shipped, she suddenly sank at her anchors, in fine weather, and the rice already shipped was wholly lost. In an action on the policy:—Held, that A. had no insurable interest in the rice, it not being at his risk till the cargo was completed. *Anderson v. Morice*, 1 App. Cas. 713; 46 L. J., C. P. 11; 35 L. T. 566; 25 W. R. 14—H. L. Affirming 10 L. R., C. P. 609; 44 L. J., C. P. 341; 32 L. T. 355; 24 W. R. 30—Ex. Ch.

Acceptance against Bills of Lading—Cargo not on Board.—T., a corn-merchant at Longford, who had been in the habit of consigning cargoes of corn to the plaintiffs, as his factors, for sale at Liverpool, and obtaining from them acceptances on the faith of such consignments, on the 31st of January obtained from the masters of two canal boats (No. 604 and No. 54), receipts signed by them for full cargoes of oats, therein stated to be shipped on board the boats, deliverable to the agent of T., in Dublin, in care for and to be shipped to the plaintiffs at Liverpool. At that time boat 604 was loaded, but no oats were then actually shipped on board 54. On the 2nd February, T. indorsed these receipts to the plaintiffs, and drew a bill on them against the value of the cargoes, which the plaintiffs accepted on the 7th, and paid when due. On the 6th February, W., an agent of the defendant, who was factor for sale in London, arrived at Longford, and pressed T. for security for previous advances. T., on that day, gave W. an order on T.'s agent in Dublin, to deliver to W. the cargoes boats 604 and 54, on their arrival there. Boat

604 had then sailed from Longford, but boat 54 was only partially loaded. The loading was completed on the 9th, and T. then transmitted to W., in Dublin, a receipt signed by the master of the boat (in the same form as those sent to the plaintiffs), making the cargo deliverable to W. W. received this on the 10th. On their arrival in Dublin, W. took possession of both cargoes for the defendant:—Held, that the property in the cargo of boat 604 vested in the plaintiffs, on their acceptance of the bills, and that they were entitled to maintain trover for it, but that they could not maintain trover for the cargo of boat 54, since none of it was on board, or otherwise specifically appropriated to the plaintiffs when the receipt for the cargo of that boat was given by the master. *Bryans v. Nix*, 4 M. & W. 775; 1 H. & H. 480.

—Bill of Lading taken to Order of Vendors.]

—P. shipped a cargo of umber on board a ship chartered for the plaintiff. The bills of lading stated that the cargo was shipped by P., to be delivered "to order or assigns." P. drew a bill of exchange on the plaintiff, and handed it to the vendor of the umber, who discounted it with the defendants, and handed them the bills of lading, to be given up to the plaintiff on payment by him of the bill of exchange at maturity. The plaintiff refused to accept the bill of exchange without receiving the bills of lading. A new bill of exchange was substituted for the former bill, and forwarded to the defendants' agents with directions to give up the bills of lading when it was paid. The ship and the bill of exchange arrived on the same day. The plaintiff did not then accept the bill; and the cargo was entered at the custom-house in the defendants' name. The plaintiff afterwards offered to pay the bill of exchange, and receive the bills of lading, and give a guarantee for the freight, but the defendants refused, and sold the cargo:—Held, that the property in the cargo had passed to the plaintiff, and he was entitled to recover. *Mirabita v. Imperial Ottoman Bank*, 3 Ex. D. 164; 47 L. J., Ex. 418; 38 L. T. 597—C. A.

—Condition Precedent.]—B., a merchant

in England, in June and July, 1830, sent orders for the purchase of corn to the plaintiffs, in Russia, desiring them to draw upon H. & Co., in London, for the amount, and he chartered a ship belonging to the defendants, in Russia, to be freighted. On the 28th July, B. wrote a letter cancelling the orders he had given. Upon the 8th of August, 1830, the plaintiffs informed B. that they had purchased a cargo for the ship, and would dispatch it as soon as possible, addressed to H. & Co., London, expressing a hope that he would approve of what they had done, notwithstanding his last-mentioned communication. The cargo was afterwards shipped, and the plaintiffs by letter informed B. that they had shipped it on his account, and that they had forwarded an indorsed bill of lading to H. & Co., drawing upon them for part of the price, and upon him (B.) for the residue; and they inclosed an undorsed bill of lading to B., and an invoice of the wheat, in which it was stated to be bought for his order and on his account. The bills of exchange inclosed in this letter were dishonoured, whereupon the plaintiffs' agent, in London, delivered the indorsed bill of lading to H. & Co. On

the 2nd of October, B. confirmed the revocation of his order, and on the 24th November the agent of the plaintiffs in England gave notice to the agent of B. that he should retain the whole of the wheat for the plaintiffs. B. afterwards became desirous of having the wheat, and the master of the vessel in which the wheat was shipped delivered it to B.'s orders, and not to H. & Co., pursuant to the bill of lading. In an action brought against the shipowners, for not delivering pursuant to the plaintiffs' orders, it was contended that the plaintiffs were entitled to recover nominal damages only, because the property in the wheat had actually vested in B. by the shipment:—Held, however, that the property did not vest in B. absolutely upon the shipment, but only subject to a condition, that the bills were accepted, and that, in default of acceptance, it never did vest in him; and consequently that the plaintiffs were entitled to recover the value of the wheat, at the time when it was delivered to B.'s order. *Brunt v. Bowley*, 2 B. & Ad. 932.

When a bill of lading, indorsed in blank, was sent to the consignee, accompanied by a bill of exchange drawn against the cargo, for acceptance by him:—Held, that it was the duty of the consignee, either to approve or reprobate the transaction in toto; and that he could not accept the bill of lading and the cargo, unless he also accepted the bill of exchange for its value. *Shepherd v. Harrison*, 5 L. R., H. L. 116; 40 L. J., Q. B. 148; 24 L. T. 857; 20 W. R. 1.

Held, also, that it was not necessary for the shipper to advise the consignee expressly that he was not to use the bill of lading unless he accepted the bill of exchange. *Id.*

— **Where Goods Delivered.**—A. consigned goods to B. abroad, and ordered a cargo in return, for which he sent his own ship. The return cargo was delivered to A.'s captain, B. stating it to be delivered to A. The return cargo consisting of more goods than the proceeds of those consigned to B., B. drew bills on A. for the difference, which he sent to his agent, with a bill of lading drawn in blank, and desiring the agent, in case of A.'s refusal to accept the bills, to indorse the bill of lading to C. A. refused to accept the bills, and the bill of lading was accordingly indorsed to C. The ship arrived, and C. demanded the cargo, as indorsee of the bill of lading; the captain, however, refused, and delivered them to A., who deposited them with D. as his warehouseman. D. then received notice from B. to hold the goods for B. as his property; in consequence of which D. refused to re-deliver them to A. In an action of trover by A. against D.:—Held, that A. having rested his claim on the supposition that the property had vested in him, could not, if he failed in that defence, set up his lien on the goods for freight. But that though the goods might have been delivered to the captain, on condition of A.'s accepting the bills, yet, that as such condition was imposed at the time of the delivery, that delivery was complete, and vested the property absolutely in A. *Ogle v. Atkinson*, 1 Marsh. 323; 5 Taunt. 759.

Payment of Part Price—Guaranteeing Remainder.—In a contract for the sale of a quantity of tobacco, then on board a vessel bound from A. to B., it was stipulated "that one-fifth

of the contract price should be paid in ready money on a specified day; and that for the other four-fifths the sellers were to look to their correspondents abroad, to whom the property was consigned." It was, nevertheless, understood between the parties, that interest was to be calculated as if the sale was made at two and three months from final delivery; the buyers to have the benefit of the sellers' policy in case of average. One-fifth of the contract price was paid in ready money; and on the arrival of the tobacco at B. it met with an unfavourable sale, and a loss of two-fifths of the estimated value took place:—Held, that the buyer was liable to the seller upon this contract for the amount of such loss. *Hoffman v. Heyman*, 2 D. & R. 74; 1 B. & C. 7.

Payment upon Handing over Documents.—A. bought of B. "300 tons old bridge rails, at 5*l.* 1*s.* 6*d.* per ton, delivered at Harburgh, cost, freight, and insurance; payment by net cash in London, less freight, upon handing bill of lading and policy of insurance, or dock company's weight note, or captain's signature for weight, to be taken by buyers as a voucher for the quantity shipped:—Held, that B. did not undertake to deliver the iron at Harburgh, but that when he put it on board a ship bound for that place, and handed to A. the policy of insurance and other documents, his liability ceased, and the goods were at the risk of the purchaser. *Tregellen v. Sewell*, 7 H. & N. 574—Ex. Ch.

Special Indorsement to Vendee.—A contract was entered into, through a broker, between vendors at R. and vendees at B., for the sale of goods, to be shipped free on board at R. in September, to be paid for on delivery to the vendees of the bills of lading; and the vendees, on the 3rd September, wrote, desiring the vendors to send part of the goods by the first vessel leaving R., which part was accordingly shipped by the vendors on a ship answering that description. The bill of lading made the goods to be delivered unto shippers' order, or their assigns, and was indorsed by the vendors, "deliver the contents to the order" of the vendees. The vendors inclosed the invoice, bill of lading, and bill of exchange for the price, to be accepted by the vendees, according to the contract, to the broker; but the ship, with the goods on board, was lost before the documents reached the vendees:—Held, that under these circumstances, the property in the goods had passed to the vendees by the shipment, and that the loss must fall upon them. *Hare v. Browne*, 4 H. & N. 822; 29 L. J., Ex. 6; 5 Jur., N. S. 711; 7 W. R. 619. Affirming 3 H. & N. 484; 27 L. J., Ex. 372.

Receipt of Bill of Lading and Policy.—Contract between A. and a company for the sale of coals: A. to supply the company with 1,000 tons of coals delivered at Rangoon, alongside craft steamer, floating dépôt, or piers, as might be directed by the company's agent at that port. The price to be 45*s.* per ton of 20 cwt., delivered at Rangoon. Payment, one-half of invoice value by bill at three months on handing bills of lading, and policies of insurance to cover the amount, or in cash under discount at the rate of five per cent. at A.'s option, the balance by the company's Rangoon agent's drafts on the company in London on completion at Rangoon. A., in

pursuance of the contract, shipped on board a ship, chartered by him for the purpose, a cargo of 1,166 tons of coals, and handed over to the company the bill of lading and a policy of insurance, and received from them a payment in cash of half the invoice price less discount. The ship having encountered bad weather on the voyage, and being unfit to proceed, the captain chartered another vessel to carry the coals on to Rangoon, and shipped on board this vessel 850 tons, part of the original cargo. On the arrival of this vessel at Rangoon, the master declined to deliver up the coal to the company's agent unless his freight was first paid, and, payment being refused, he proceeded to sell the coals by auction, when the whole was bought by the company, who were the only bidders, at 11. 5s. per ton:—Held, that the property in the coals passed to the company upon the same being put on board, and the handing of the bill of lading and policy of insurance. *British and India Steam Navigation Company v. De Mattos*, 33 L. J., Q. B. 214; 10 L. T. 246; 12 W. R. 560—Ex. Ch.

“Free on Board a Foreign Ship.”—Where in a contract for the sale of sugar there was the following term—“free on board a foreign ship:”—Held, that the seller was not bound to deliver it into the hands of the purchaser, or to transfer it into his name in the books of the warehouse where it was, but only to put it on board a foreign ship, which it was the duty of the purchaser to name. *Wackerbarth v. Masson*, 3 Camp. 270; *S. P.*, *Wetherell v. Coape*, 3 Camp. 272, n.

5. DELIVERY ORDERS.

a. Nature of.

Negotiability.—An iron-master gave to his vendee a note in these words: “I will deliver 1,000 tons of iron when required, after the 18th September next, to the party lodging this document with me:”—Held, that this document was not a negotiable instrument of mercantile exchange. *Dixon v. Bovill*, 3 Macq. H. L. Cas. 1; 2 Jur., N. S. 933.

If A. gives an iron scrip note to B., and B. sells it to a third party, that third party may prove that the document has, in the usage of trade, an import not expressed on the face of it. *Mackenzie v. Dunlop*, 3 Macq. H. L. Cas. 22; 2 Jur., N. S. 957.

But such third party cannot put a special construction on the document by proving that in the contract between A. and B. there was a specialty not actually appearing on the face of the document. *Id.*

By the usage of the iron trade warrants for goods “deliverable (f. o. b.) to A. B., or their assigns, by indorsement hereon,” are considered to pass to the holders for value free from any vendor's lien. *Merchant Banking Company of London v. Phoenix Bessemer Steel Company*, 5 Ch. D. 205; 46 L. J., Ch. 418; 36 L. T. 395; 25 W. R. 457. See also cases *infra*, sub tit. RIGHTS OF UNPAID VENDOR.

Title Conferred by—Custom.—By the custom of trade in Liverpool, the transfer of a delivery order from the vendor to the vendee of goods, enables the latter to go into the market and dis-

pose of such goods. Where the vendee had thus disposed of part which had been delivered according to his order, and then became bankrupt, the rest of the goods remaining in the warehouse of the vendor:—Held, that the latter was entitled to retain them; the giving of the delivery order not operating as between the original vendor and vendee as a complete transfer of the goods. *Townley v. Crump*, 5 N. & M. 606; 4 A. & E. 58; 1 H. & W. 564.

The mere possession of goods, with no other indicium of title than a delivery order, is not sufficient to entitle the bona fide pawnee of the person fraudulently obtaining possession from the true owner, to resist the claim of the latter in trover. *Kingsford v. Merry*, 1 H. & N. 503; 26 L. J., Ex. 83; 3 Jur., N. S. 68—Ex. Ch.

Purchaser taking Order without Payment or Consent of Vendor.—A., having a quantity of rape oil at Humphery's wharf, contracted to sell five tons thereof to B. The bought note was as follows: “Bought for account of B., of Mr. A., five tons of first quality foreign refined rape oil, at 53s. per cwt.; usual allowances; to be free, delivered, and paid for in fourteen days, in cash, less 2½ per cent. discount.” A. sent an order to the wharf, directing the wharfinger to transfer into B.'s name five tons of oil; and the wharfinger's clerk made the usual entry in his book, and gave A.'s clerk a transfer order addressed to B., acknowledging to hold the five tons for him. A.'s clerk took the invoice and transfer order to B.'s counting-house, and offered them to him, at the same time demanding a cheque for the amount. B., without (as the jury found) the consent of A.'s clerk, took the transfer order, but refused to give a cheque. The clerk thereupon returned to the wharf, and gave notice to the wharfinger not to deliver the oil to B. In defiance, however, of this notice, the oil was afterwards delivered. In trover by A. against B. for the oil and the transfer order:—Held, that, under the circumstances, neither the property nor the right to the possession thereof passed to B. *Godts v. Rose*, 17 C. B. 229; 25 L. J., C. P. 61; 1 Jur., N. S. 1173.

Sub-sale.—A. purchased from D. goods lying at D.'s bonded warehouse under the charge of D.'s warehouse-keeper, and entered at the custom-house in D.'s name. A. paid D. by bills at three months. On the same day A. sold part of the goods, still lying at D.'s warehouse, to P., and gave him a delivery order on D. for specific goods. D., on receiving it, placed it on the file, and, unknown to P., put P.'s name as purchaser opposite the entry of the specified goods in the sale-book in which he had originally entered A.'s name as purchaser. P. afterwards, on several occasions, gave to D. delivery orders for portions of the goods. D. thereupon signed a delivery order to his warehouse-keeper, and those portions were delivered to P., he paying the duty. Without a delivery order by D., and payment of duties, goods would not be delivered from the warehouse. A. afterwards and before the bills given by him were due became insolvent, and the bills were dishonoured. D. refused to deliver the remainder of the goods to P., alleging that he was entitled to detain them till A.'s debt to him was paid:—Held, that he had no such right; that by accepting the delivery order given by A. to P. without giving notice to P. of any

contingent claim upon the goods in respect of A., D. must be held to have recognized P. as entitled to the absolute right in the property and the possession of the goods, and could not, as against P., set up any subsequent claim in respect of A. *Pearson v. Dawson*, El., Bl. & El. 448; 27 L. J., Q. B. 248; 4 Jur., N. S. 1015.

Vendor Paying Warehouse Rent.—By the usage of Liverpool, the vendor of goods was to pay warehouse rent for two months after the sale, if the goods remained there so long:—Held, however, that where the vendor of such goods had, within the two months, given the usual order for delivery to the purchaser, the property in the goods from that time vested in the latter, and that he became responsible for all accidents which might happen to them, and that the circumstance of the goods having within that time been distrained for warehouse rent was an accident which must fall on the vendee, and such rent having been paid by the vendee's agent in order to redeem the goods:—Held, that the latter could not recover the same from the vendor as money paid to his use. *Greaves v. Heyke*, 2 B. & A. 131.

As to Effect under Statute of Frauds.—*See ante*, col. 810.

b. To Wharfingers.

Effect of.]—The lodging a delivery order with a wharfinger is sufficient to transfer the property in goods lying at a wharf, without any re-weighing or re-housing. *Tucker v. Ruston*, 2 C. & P. 86.

An order sent by the vendor to the wharfinger to deliver the goods to the vendee is sufficient to pass the property to the vendee, provided nothing remains to be done but to make the delivery; but if anything remains to be done, for example, weighing, &c., the property does not pass, and the right of stoppage in transitu is not defeated till that is done. *Withers v. Lys*, Holt, 18; 4 Camp. 237.

Acknowledgment of.]—A warehouseman, who on receiving an order from the seller of malt to hold it on account of the purchaser, gives a written acknowledgment that he so holds it, cannot set up as a defence for not delivering to the purchaser, that, by the usage of trade, the property in malt sold is not transferred till it is re-measured, and that before the malt in question was re-measured the seller became bankrupt. *Stonard v. Dunkin*, 2 Camp. 344.

Transfer in Books.]—Where the purchaser of goods has lodged an order to deliver them with the wharfinger in whose warehouse they lie, and the latter has transferred them in his books into the name of the purchaser, the vendor's right to stop them in transitu is gone, and the wharfinger is bound to hold them as the agent of the purchaser. *Hammond v. Anderson*, 1 N. R. 69; 2 Camp. 243.

And the same effect is produced by the delivery note being lodged with the wharfinger without a transfer in his books. *Lucas v. Dorrrien*, 7 Taunt. 278; 1 Moore, 29.

Stoppage in transitu.]—A., of London, being

in danger of insolvency, went to Glasgow, and obtained goods from B., for which he paid by a bill on a house in London, which he knew to be insolvent; the goods were shipped at Leith (the invoice and receipt from the shipowners being made out to A.), and were delivered to C., a wharfinger in London, who afterwards received notice to hold them for B.; A. became bankrupt; in an action of trover by A. against C. for the benefit of the assignees:—Held, first, that the receipt, being made out to A., operated as a delivery to him, and therefore that B.'s right of stoppage in transitu was gone; and secondly, that there was not such conclusive evidence of fraud on the part of A. as to avoid the contract. *Noble v. Adams*, 2 Marsh. 366; 7 Taunt. 59; Holt, 248.

Where a consignee, on the arrival of goods at a wharfinger's, said he would not have them, and directed an attorney to do what was necessary to stop them, and the attorney, on the 3rd November, gave the wharfinger an order not to deliver them to the consignee, which order the consignee wrote to confirm on the 6th; upon the goods being claimed on the 7th by an execution creditor of the consignee:—Held, that such acts amounted to a rescinding of the contract of sale, and that the transitu was not ended by the arrival of the goods at the wharf and the order given by the consignee, and that therefore the consignor had a right to stop them in transitu. *Bartram v. Farebrother*, 4 Bing. 579; 1 M. & P. 515.

The vendor of goods having ascertained whilst they were in the hands of a wharfinger, that the purchaser to whom they had been originally consigned had stopped payment, indorsed the bill of lading to the plaintiff, and directed him to take possession of the goods, and he accordingly demanded them from the wharfinger:—Held, that the plaintiff had a sufficient special property in the goods to enable him to maintain trover, on the ground that the right of stoppage in transitu by the vendor was not at an end when the plaintiff made the demand. *Morison v. Gray*, 9 Moore, 484.

Where A. on the 26th September sold to B. by contract 100 casks of tallow, then lying at a wharf, at so much per cwt., and on the same day gave him a written order to the wharfingers "to weigh, deliver, transfer, and re-house" the same; and, on the next day, B., who had previously entered into a contract with C. & Co. for the sale of 300 casks of tallow, in part fulfilment of that contract, obtained from the wharfingers, and sent to C. & Co. the following acknowledgment: "Messrs. C. & Co., we have this day transferred to your account (by virtue of an order from B.) 100 casks of tallow, &c., with charges from the 10th October:" and upon the receipt of this, C. & Co. paid B. the full amount of the tallow; and shortly afterwards the wharfingers delivered twenty-one of the casks to the order of C. & Co.; and on the 11th October, B. stopped payment, and, on the 14th, A., the original vendor, sent notice to the wharfingers not to deliver the remainder of the tallow to B. or his order, although the tallow had not been weighed:—Held, in trover by C. & Co., against the wharfingers, that after their acknowledgment that they had transferred the tallow to their account, they held it as the agents of C. & Co.; and therefore were estopped, and could not set up as a defence, a right in A. to stop it in transitu. *Hawes v.*

Watson, 4 D. & R. 22; 2 B. & C. 540; R. & M. 6. *S. P., Hammond v. Anderson, supra.*

Custom—About the Quantity.]—Under a contract to sell and deliver goods in a warehouse in Liverpool, the giving a delivery order of about the quantity is a sufficient delivery, evidence of a known usage of warehouse-keepers not accepting delivery orders in any other form being admissible. *Moore v. Campbell*, 10 Ex. 323; 23 L. J., Ex. 310.

Bill of Lading in several Parts—Delivery Order to Third Party.]—Goods shipped to C., as owner, were before arrival pledged by him to the plaintiffs as security for an advance. The bill of lading was, as is customary, in three sets, "the one being accomplished the rest to stand void," and made the goods deliverable to "C. or assigns," freight payable in London. C. indorsed one copy of the bill of lading marked "first," to the plaintiffs, and also gave them a letter of charge, making the bill of lading a collateral security for the advance, and empowering them to sell the goods represented by the bill of lading should default be made in the repayment of the advance. The vessel went, on arrival, into the dock of the defendants. C. duly entered the goods at the custom-house, and they were afterwards, at the request of C., landed and deposited with the defendants, the freight being unpaid. The manifest, a copy of which the captain lodged with the defendants, authorized the defendants to deliver the goods to the holders of the bill of lading. On the following day, the captain lodged with the defendants a stop order for freight, pursuant to the Merchant Shipping Act, 1862. C. then produced and gave to the defendants, unindorsed, the second part of the bill of lading; the defendants then entered C. as the proprietor of the goods. C. paid the freight, the stop was taken off, and the defendants delivered the goods to W., on the production by him of a delivery order from C. C. shortly after went into liquidation, when the plaintiffs, producing the indorsed bill of lading, in vain demanded the goods of the defendants. In an action for conversion:—Held, that the Dock Company had not been guilty of a conversion, and that the bank could not maintain any action against them. *Glyn, Mills & Co. v. East and West India Dock Company*, 7 App. Cas. 592; 52 L. J., A. B. 146; 47 L. T. 309; 31 W. R. 201; 4 Asp. M. C. 580—H. L. (E.).

6. DOCK WARRANTS.

Nature of Instrument.]—The defendant bought a quantity of iron of the plaintiff. The iron was in the possession of H. & Co., who had signed a warrant undertaking to deliver the same to the plaintiff's order on the presentation of such warrant, duly indorsed by the plaintiff. At the time of the sale the plaintiff indorsed the warrant to the defendant:—Held, that presentation had in this case the meaning of "delivery over," and that therefore, before the iron was delivered, the defendant was to deliver over to H. & Co. the warrant indorsed by the plaintiff. *Bartlett v. Holmes*, 13 C. B. 630; 22 L. J., C. P. 182; 17 Jur. 868.

Held, also, in an action for the price of the iron, that a refusal by H. & Co., after an action

brought, to deliver the iron at all, could not be given in evidence in reduction of damages. *Id.*

The warrants of the West India Dock Company are equally negotiable as bills of lading, and when indorsed for a bona fide consideration are deemed equivalent to a delivery of the goods in the company's warehouse. *Zwinger v. Samuda*, 1 Moore, 12; 7 Taunt. 265; Holt, 395.

Delivery obtained by Fraud.]—S. was the agent of L., a wine merchant in Spain, and was induced by the fraudulent representations of three persons acting in collusion to enter into separate contracts with them for the sale of wine. S. transmitted the orders for the wine to L., who shipped the wines, and sent the bills of lading to S.; the bills of lading were handed by S. to the three persons respectively on account of the contracts entered into with them. The wine so obtained was deposited with a dock company, who issued warrants for the same; some of the wine therein mentioned was made deliverable to the order of one of the three persons, and the rest to the order of another of them. The warrants were then pledged with the plaintiff to secure advances. L. afterwards served notice upon the dock company not to part with the wine; thereupon the company refused to give up the wine when it was demanded of them by the plaintiffs, who commenced actions claiming damages in addition to the value of the wines:—Held, that as the wine had been obtained by fraud from S., the agent of L., with a power to sell, the property in it passed to the three persons who before the fraudulent contract was annulled could confer a title upon the plaintiffs, and that L. must be barred upon the plaintiffs undertaking to account to him for the value of the wine after deducting his advances. *Attenborough v. London and St. Katharine's Dock Company*, 3 C. P. D. 450; 47 L. J., C. P. 673; 38 L. T. 404; 26 W. R. 583—C. A. Reversing 3 C. P. D. 373; 38 L. T. 404.

Transfer of.]—Goods being entered in the books of the West India Dock Company in the name of A., he received a check for them, which, having sold the goods to B., he indorsed and delivered to him. B. sold the goods, and delivered the check to C. on credit. On C.'s insolvency A. could not take possession of the goods, although they continued to stand in his name, and the check had not been lodged with the dock company. *Spear v. Travers*, 4 Camp. 251.

A., having entered goods in the books of the West India Dock Company, received two dock warrants or delivery orders in blank for them, which he delivered to B. on a sale of the goods to him, and B. having sold the goods to C., delivered the dock warrants to that person, and C. employed D. as his broker to effect a sale of the goods, and delivered over the dock warrants, one of which was signed by C., but the blank intended for the name of the purchaser remained, and D., after having effected a sale on credit, delivered the dock warrants to the purchaser, one of which (viz., the one in which the blank for the name of the purchaser remained) the purchaser deposited with E. as a security for money advanced on the faith of that warrant:—Held, that C. had no right to put a stop upon the goods in the event of the purchaser not paying for them, since the transfer of the warrant by D., his broker, operated as a constructive delivery of the goods,

so as to defeat C.'s right of stoppage in transitu. *Keyer v. Suse, Gow, 58.*

7. ASCERTAINING QUANTITY OR QUALITY.

Where a Necessary Preliminary.—By a bargain and sale of twenty tons of oil out of a merchant's stock, consisting of several large quantities of oil, in divers cisterns, in divers places, no property passes; there must be a separation of the part sold from the rest of the stock. *White v. Wilks, 5 Taunt. 176; 1 Marsh. 2.*

The defendant contracted to sell to K. fifty hogsheds of sugar, called double loaves, at 100s. per cwt., to be delivered free on board a British ship; K. sold to the plaintiff by the same description, and the defendant assented to the re-sale; the sugar not having been delivered or weighed:—Held, that the plaintiff could not recover for it in trover against the defendant, the first vendor. *Austen v. Cawson, 4 Taunt. 644; 1 Marsh. 4, n.*

A., having a quantity of hemp in the hands of B., sold part of it to C. at a certain price, payable by C.'s acceptance at a stated time, fourteen days allowed for delivery, and gave to C. an order upon B. to weigh and deliver the hemp so sold to C., or bearer; before the fourteen days expired, A. gave B. notice not to deliver the hemp to C., the hemp not having been weighed off, and no bill of exchange having been given in payment for it:—Held, that the sale of it to C. was incomplete, and that B. was liable for it in an action of trover by A. *Shepley v. Davis, 1 Marsh. 252; 5 Taunt. 617.*

Where the plaintiff sold ten out of eighteen tons of flax, then lying in mats at a wharf, at so much per ton, to be paid for by the vendee's acceptance at three months, and gave the vendee an order on the wharfingers, to deliver ten tons to vendee or order, which they entered in their books; but the quantity to be delivered was to be ascertained by the wharfingers weighing it, the mats being of unequal quantities, so that a fraction of a mat might be required, and an allowance for tare and draft was to be made by the weight:—Held, that the sale was not complete to pass the property, those acts not having been done by the wharfingers, nor any delivery made, and that the plaintiff, upon the insolvency of the vendee, might countermand the delivery. *Bush v. Davis, 2 M. & S. 397; 1 Marsh. 258, n.; 5 Taunt. 622, n.*

On a contract for the sale of goods lying in a warehouse, the handing of a delivery order to the vendee, and transfer of goods to him in the warehouseman's book, will not vest the property in him, if something remains to be done for the purpose of ascertaining the identity or quantity of the goods; as the weighing of an article forming part of a bulk, and sold by weight. *Sandwich v. Sothorn, 9 A. & E. 895; 1 P. & D. 648.*

But if the identity and quantity are ascertained, as where the oats in a particular bin, which contains nothing else, are sold, and a bill accepted at the same time for the price, the property vests, and the vendor cannot afterwards stop in transitu; although the delivery order describes the goods by the weight as well as the bin ("1028 bushels of oats in bin 40"), and directs the warehouseman to weigh them over. *Id.*

— **Custom to Measure.**—Where a sale note

for the purchase of fifty tons of Greenland oil was delivered by the sellers' broker to the purchasers, to be paid for by their acceptance payable at a future day, and they afterwards received from the sellers an order on their wharfingers for the delivery of the fifty out of ninety tons of their oil, yet as the custom of the trade was for the casks to be searched by the sellers' cooper, and for a broker on behalf of both parties to ascertain the foot-dirt and water in each (for which allowance was to be made), and then the casks were to be filled up by the sellers' cooper at their expense, all which was to precede the delivery to the buyers:—Held, that the sale was not complete to pass the property, but that the sellers, on the insolvency and subsequent bankruptcy of the buyers before such acts done and delivery made, might countermand it. *Wallace v. Breeds, 13 East, 522; 1 Rose, 109.*

Sub-sale.—A., having forty tons of oil secured in the same cistern, sold ten tons to B., and received the price, and B. sold the same to C., and took his acceptance for the price at four months, and gave him a written order for delivery on A., who wrote and signed his acceptance upon the order, but no actual delivery was made of the ten tons, which continued mixed with the rest in A.'s cistern:—Held, that this was a complete sale and delivery in law of the ten tons by B. to C., nothing remaining to be done on the part of the seller, though, as between him and A., it remained to be measured off, and therefore that the seller could not, upon the bankruptcy of the buyer before his acceptance became due, countermand the measuring off and delivery in fact of the ten tons to the buyer, nor were the goods in transitu so as to enable the seller to stop them. *Whitehouse v. Frost, 12 East, 614.*

Acceptance of Smaller Quantity.—On the 14th of April the defendant signed the following bought note:—"I have this day bought you the following: 500 piculs China cotton, at 17d. per lb., June or July delivery, 1864. To be delivered in merchantable condition to the buyer; the damaged, if any, to be rejected, provided that it cannot be made merchantable." On the 24th of June, the plaintiff bought from W. 420 piculs China cotton ex Queensbury, and on the 25th sent to the defendant a declaration of the names and marks of those 420 piculs, and also 80 ex Princess Royal. The defendant sold the cotton to C. The plaintiff received from W. notice that the 420 piculs would be weighed, which he sent to the defendant. The 420 piculs were afterwards weighed, the price ascertained, and an invoice made out, but neither the defendant nor the plaintiff attended the weighing. The plaintiff received a sampling order from W., and forwarded it to the defendant:—Held, that there was evidence that he had accepted the 420 piculs, and that the property in them passed to him, so that the plaintiff was entitled to recover the price in an action of goods bargained and sold. *Morgan v. Gath, 3 H. & C. 748; 34 L. J., Ex. 165; 11 Jur., N. S. 654; 11 L. T. 96; 13 W. R. 756.*

Completed in Part.—Where turpentine in casks was sold by auction at so much per cwt., and the casks were to be taken at a certain marked quantity, except the two last, out of

which the seller was to fill up the rest before they were delivered to the purchasers, on which account the two last casks were to be sold at uncertain quantities, and a deposit was to be paid by the buyers at the time of the sale, and the remainder within thirty days of the goods being delivered, and the buyers had the option of keeping the goods in the warehouse at the charge of the sellers for those thirty days, after which they were to pay the rent, and the buyers having employed the warehouseman of the sellers as their agent, he filled up some of the casks out of the two last, but left the bungs out in order to enable the custom-house officer to gauge them, but, before he could fill up the rest, a fire consumed the whole in the warehouse, within the thirty days:—Held, that the property passed to the buyers in all the casks which were filled up, because nothing further remained to be done to them by the seller, for it was the business of the buyers to get them gauged, without which they could not have been removed, and the act of the warehouseman in leaving them unbunged after filling them up, which was for the purpose of the gauging, must be taken to have been done as agent for the buyers, whose concern the gauging was; but the property in the casks not filled up remained in the seller, at whose risk they continued. *Rugg v. Minett*, 11 East, 210.

Upon a contract of sale whereby the vendee agreed to purchase all the starch of the vendor then lying at the warehouse of a third person, at so much per cwt., by bill at two months, which starch was in papers, but the exact weight not then ascertained, but was to be ascertained afterwards, and fourteen days were to be allowed for the delivery, and the vendor gave a note to the vendee, addressed to the warehouse-keeper, directing him to weigh and deliver to the vendee all his starch:—Held, that under this contract the absolute property in the goods did not vest in the vendee before the weighing, which was to precede the delivery, and to ascertain the price; and that part of the starch having been weighed and delivered to the vendee by his direction, the vendor might, notwithstanding such part delivery, upon the bankruptcy of the vendee, retain the remainder, which still continued unweighed in the warehouse, in the name and at the expense of the vendor. *Hansom v. Meyer*, 6 East, 614; 2 Smith, 670.

Where the owner of a stack of bark entered into a contract to sell it at a certain price per ton, and the purchaser agreed to take and pay for it on a day specified, and a part was afterwards weighed and delivered to him:—Held, that the property in the residue did not vest in the purchaser until it had been weighed, that being necessary in order to ascertain the amount to be paid, and that, even if it had vested, the seller could not, before that act had been done, maintain an action for goods sold and delivered. *Simmons v. Swift*, 5 B. & C. 857; 8 D. & R. 693.

Vendor's Duty to Count.]—Goods sold remain at the risk of the seller, while anything is to be done to them by him, to ascertain the amount of the price. Therefore where 289 bales of skins (stated in the contract to contain five dozen in each bale) were sold at 57s. 6d. a dozen, and it was the duty of the seller to count over the skins to see how many each bale actually contained; but before any enumeration took place the whole

was consumed by fire:—Held, that an action could not be maintained against the purchaser for the value of the skins, and the loss fell entirely upon the seller. *Zagury v. Furnell*, 2 Camp. 240.

— And Deliver.]—If the terms of a contract of sale do not shew an intention of immediately passing the property until something is done by the seller before delivery of possession, then the sale cannot be deemed perfected, and the property does not pass until that thing is done. And although, where the sale was of a specific chattel for a fixed price, assuming it to contain a certain quantity, and the price was paid, but, according to the terms of the contract, the seller was to retain possession, to carry the chattel to a certain place, there to deliver it at a certain time, and that if, upon measurement, the quantity should turn out more than as assumed, the surplus was to be paid for at a fixed rate by the purchasers on delivery, but that, should it fall short, the difference was to be refunded by the sellers:—Held, that, until measurement and delivery, the sale was not complete; and that part of the property having been lost by a storm, the risk remained with the sellers. *Logan v. Le Mesurier*, 6 Moore, P. C. C. 116; 11 Jur. 1091.

After the day stated in the contract of sale for the delivery of goods, and before delivery, a storm dispersed the goods (timber), and the purchasers took possession of a large portion of them which were saved, and paid salvage:—Held, that this taking possession of a part could not be considered as shewing, by the parties' admission, that the property in the goods had passed to the purchasers before the loss, where the terms of the contract shewed that it did not so pass. *Id.*

Where Prior Public Measurement.]—A. entered into a contract for the sale to B. of "a raft of timber now at Carouge, in Canada, containing white and red pine, the quantity, about 71,000 feet, to be delivered at India Cove Booms. Price, for the whole, 7½d. per foot. Payment, one-third cash, one-third sixty and ninety days after date." Shortly before the contract was signed, the raft had been measured by a public officer, appointed under a Canadian act, and the number of pieces of timber and the contents of each piece were set down in a specification, which made a total of 71,446 feet, and this specification was delivered by A. before the execution of the contract to B., and sent by him to the place where the raft was to be delivered. The raft was towed to the Indian Cove Booms, the appointed place for delivery, where it arrived in the afternoon, and notice of its arrival given to the servants of B., who assisted in fastening the raft outside the Booms. This was done at the instance of B.'s servant, as, from the state of the tide, the raft could not be placed inside the Booms. During the night a storm arose, by which the raft was carried away, broken to pieces, and dispersed, and a great portion of it lost. B. employed his servants in collecting as much of the wood as was saved, and that was put into B.'s Booms:—Held, that as A. had ascertained the price of the raft by the measurement previously made, the specification of which was in B.'s possession, and as the contract did not shew that any future measurement of the raft was necessary, no act

then remained to be done by A., or by B., and that the raft, upon delivery at the Indian Cove Booms, had wholly passed to B., and the loss incurred must be borne by him. *Gilmour v. Supple*, 11 Moore, P. C. C. 551.

IV. WARRANTIES AND SALE BY SAMPLE.

1. WARRANTIES.

a. Implied.

i. Generally.

As to Title.]—The purchaser of a chattel takes it, as a general rule, subject to what may turn out to be informalities in the title. *Cundy v. Lindsay*, 3 App. Cas. 459; 47 L. J., Q. B. 481; 38 L. T. 573; 26 W. R. 406; 14 Cox, C. C. 98—H. L.

In the case of goods sold in an open shop or a warehouse, there is an implied warranty on the part of the seller that he is the owner of the goods, and if it turns out otherwise, as, where the goods are claimed by the true owner, from whom they have been stolen, the buyer may recover back the price as money paid upon a consideration which has failed. *Eichholtz v. Bannister*, 17 C. B., N. S. 708; 34 L. J., C. P. 105; 11 Jur., N. S. 15; 12 L. T. 76; 13 W. R. 96.

The doctrine of caveat emptor does not make it incumbent on a vendee to inquire into the vendor's title to the goods. *Allen v. Hopkins*, 13 M. & W. 94; 13 L. J., Ex. 316.

— Specific Chattel.]—There is no implied warranty of title on the sale of a specified ascertained chattel; in order to render the seller liable for a bad title he must have given either an express warranty or an equivalent to it by declarations or conduct; or have practised fraud, as by concealing from the purchaser that he had no title. *Morley v. Attenborough*, 3 Ex. 500; 18 L. J., Ex. 148; 13 Jur. 282.

Such express warranty may be inferred from usage of trade proved in fact; or from the nature of a trade being such as to lead to the conclusion that the person carrying it on must be understood to engage that the purchaser shall enjoy that which he buys as against all persons; as, for instance, when goods are bought in a shop professedly carried on for the sale of goods. *Id.*

— Sheriff's Auctioneer.]—To an action founded on the implied promise, that the vendor of goods did not know his title to them was bad, it is no defence that the vendor was a sheriff's auctioneer, and desired the plaintiff to give him a written notice not to pay over the proceeds, and that the plaintiff having omitted to give such notice, the defendant paid over. *Peto v. Blades*, 5 Taunt. 657.

— Purchase at Sheriff's Sale.]—The defendant having bought goods at a sale under an execution by the sheriff, for 18*l.*, the plaintiff, who had equal knowledge with the defendant of the sale and of the title to the goods, and who was present at the sale, bought from the defendant his purchase for 23*l.* The goods were afterwards

claimed and taken under a superior title, and the plaintiff was prevented from keeping possession:—Held, that there was no implied warranty of title by the defendant, and that the plaintiff could not recover his money as paid on a consideration that had failed. *Chapman v. Speller*, 14 Q. B. 621; 19 L. J., Q. B. 239; 14 Jur. 652.

Sale of Fixtures.]—On a contract for the transfer by a lessee of "all his interest in a house, with the fixtures, as held by him," for an entire sum, an action for falsely warranting the fixtures to be the lessee's, is maintainable, on evidence that the seller, at the time of the agreement, handed the purchaser an inventory of them, and afterwards, being taxed with selling them, said he "thought they were his." *Snell v. Dickley*, 2 F. & F. 56.

A boiler set in brickwork, and capable, if taken to pieces, of being removed without injury to the premises, had been seized and sold under a distress for a poor-rate due from the occupier, and bought at a public auction by the defendant, and resold by him to the plaintiffs at an advanced price, with notice of the circumstances under which the defendant had bought it, the plaintiffs to remove it at their own expense. The mortgagees of the premises upon which the boiler stood having prevented the plaintiffs from carrying it away, they brought an action against the defendant, relying upon an alleged implied warranty that he had good title to the boiler, and that they should be permitted to remove it:—Held, that there was no evidence of a warranty. *Bagueley v. Hawley*, 2 L. R., C. P. 625; 36 L. J., C. P. 328; 17 L. T. 116.

Existence of Subject-Matter of Sale.]—A cargo of corn was shipped by A. at Salonica in February, 1848, for delivery in London. On the 15th of May it was sold by a factor, who made the sale on a del credere commission. The contract described the corn as of average quality when shipped, and the sale was made at 27*s.* per quarter, "free on board, and including freight and insurance to a safe port in the United Kingdom, payment at two months, or in cash less discount, upon handing shipping documents." In fact, the corn had, in a short time before the date of the contract, been sold at Tunis, in consequence of getting so heated in the early part of the voyage as to render its being brought to England impossible. The contract in England was entered into in ignorance of this fact. When the English purchaser discovered it, he repudiated the contract, and in an action for the price brought against the factor:—Held, that the contract contemplated that there was an existing something to be sold and bought and capable of transfer, which not being the case at the time of the sale by the factor, he was not liable. *Couturier v. Hastie*, 5 H. L. Cas. 673; 25 L. J., Ex. 253; 2 Jur., N. S. 1241.

— Sale of Specific Crop.]—When from the nature of a contract the parties must from the beginning have known that it could not be fulfilled unless when the time of fulfilment arrived some particular specified subject-matter continued to exist, no warranty that the subject-matter should so continue to exist is to be implied from the fact that the subject-matter was not in existence at

the time of making the contract. The contract in such a case is therefore subject to the implied condition that the parties shall be excused if, before breach, performance becomes impossible by the perishing of the subject-matter without default of the contractor. *Howell v. Coupland*, 1 Q. B. D. 258; 46 L. J., Q. B. 147; 33 L. T. 832; 24 W. R. 470—C. A.

And see CONTRACT (Impossible Contracts).

That Goods are of Vendor's make, if he be a Manufacturer—Evidence of Custom.]—On the sale of goods by a manufacturer of such goods, who is not otherwise a dealer in them, there is, in the absence of any usage in the particular trade or as regards the particular goods to supply goods of other makers, an implied contract that the goods shall be those of the manufacturer's own make. The plaintiffs, who were manufacturers but not dealers in iron, by a written contract, on the margin of which was their trade-mark (a crown with their initials), contracted to sell to the defendants, who thereby contracted to buy of the plaintiffs, 2,000 tons of ship-plates of the quality known as "crown," to pass Lloyd's survey, to be delivered monthly at the defendants' shipyard. The contract contained a strike clause by which the supply of the iron contracted for might be suspended during the continuance of any strike of workmen; but it had no express stipulation that the plates should be of the plaintiffs' manufacture. Before the contract was completed the plaintiffs closed their works, and proposed to complete the contract by delivery of ship-plates of the quality mentioned in the contract made by another firm. The defendants having refused to accept these, the plaintiffs sued them for breach of contract. At the trial the defendants tendered evidence to shew that in the iron trade there is a custom that, under a contract between a manufacturer of iron plates and a customer for the supply of them, the seller must, in the absence of stipulation to the contrary, supply plates of his own make, and that the purchaser is entitled to reject other plates if tendered, though of the quality contracted for. The judge at the trial rejected this evidence, and gave judgment for the plaintiffs:—Held, that such evidence was improperly rejected. *Johnson v. Raylton*, 7 Q. B. D. 438; 50 L. J., Q. B. 753; 45 L. T. 374—C. A.

Held, also, by Brett and Cotton, L. J. (Bramwell, L. J., dissenting), that without such evidence the defendants were entitled to succeed, as the contract implied that the plates to be supplied should be of the manufacture of the plaintiffs, and that, therefore, the plaintiffs could not require the defendants to accept plates not of their own manufacture, even though of the quality contracted for and as good as those made by the plaintiffs themselves. *Ib.*

Readiness for Delivery.]—Where there is a contract for a sale of goods, although described as lying in the possession of wharfingers or carriers, subject to their lien for charges, yet there is an implied undertaking on the part of the seller that they shall be delivered to the purchaser, on his application, within a reasonable time, and readiness to pay the charges thereon; and if the delivery is refused, the seller will be liable for damages to the purchaser. *Buddle v. Green*, 27 L. J., Ex. 33.

Merchantable.]—In every contract to furnish manufactured goods, however low the price, it is an implied term that the goods shall be merchantable. *Laing v. Fidgeon*, 6 Taunt. 108; 4 Camp. 169.

On 14th of April the defendant signed the following bought note:—"I have this day bought from you the following: 500 piculs China cotton, at 17d. per lb., June or July delivery, 1864. Guaranteed fair marks to be given when the cotton is ready for delivery. In case of dispute arising out of this contract, the matter to be referred to two respectable brokers for settlement, who shall decide as to quality, and the allowance, if any, to be made. The cotton to be taken from the warehouse with customary allowances of tare and draft, and the invoice to be dated from the date of the notice being given that the cotton is ready for delivery. To be delivered in merchantable condition to the buyer; the damaged, if any, to be rejected, provided that it cannot be made merchantable. Payment within ten days from date of invoice, or before delivery if required, equal to cash in ten days and three months." On the 24th of June, the plaintiff bought from W. 420 piculs China cotton ex Queensbury, and on the 25th sent to the defendant a declaration of the names and marks of those 420 piculs, and also of eighty ex Princess Royal. The defendant sold the cotton to C. The plaintiff received from W. notice that the 420 piculs would be weighed, which he sent to the defendant. The 420 piculs were afterwards weighed, the price ascertained, and an invoice made out, but neither the defendant nor the plaintiff attended the weighing. The plaintiff received a sampling order from W., and forwarded it to the defendant. C. objected that the cotton was not merchantable, and required an arbitration, which resulted in the allowance of one-eighth of a penny per lb., and the invoice was altered accordingly, and returned to the defendant. On the 27th of July, W. not having been paid, put a stop-order on the cotton. The plaintiff was never in a position to deliver the eighty piculs:—Held, that according to the true construction of the contract, the defendant was not bound to accept the cotton unless it was in a merchantable condition at the time the plaintiff was ready to deliver it, notwithstanding it might be made merchantable. *Morgan v. Gath*, 3 H. & C. 748; 34 L. J., Ex. 165; 11 Jur., N. S. 654; 11 L. T. 96; 13 W. R. 756.

And see cases infra, sub tit. FITNESS FOR PURPOSE.

On Exchange of Goods.]—There is no implied warranty upon an exchange of goods. *La Neuville v. Nourse*, 3 Camp. 351.

If money and a horse are given in exchange for another horse warranted sound, which was unsound at the time, an action for money had and received is not a proper action to try the warranty; nor will trover lie for the horse given in exchange, because the property is altered. *Power v. Wells*, Cowp. 818; 1 Dougl. 24, n. And see *Cooke v. Munstone*, 1 N. R. 151.

The plaintiff exchanged a watch with the defendant for a pair of candlesticks, which the latter warranted to be silver:—Held, that the plaintiff could not maintain trover for the watch, on proof that the candlesticks were of base metal. *Emanuel v. Dane*, 3 Camp. 299.

ii. *Fitness for Purpose.*

Condition or Warranty.—A representation is a statement, or an assertion, made by one party to the other, before or at the time of a contract, of some matter or circumstance relating to it. *Behn v. Burness*, 3 B. & S. 751; 32 L. J., Q. B. 204; 9 Jur., N. S. 620; 8 L. T. 207—Ex. Ch.

Although a representation is sometimes contained in the written instrument, it is not an integral part of the contract; and, consequently, the contract is not broken though the representation proves to be untrue; nor (with the exception of the case of policies of insurance, at all events marine policies, which stand on a peculiar anomalous footing) is such untruth any cause of action, nor has it any efficacy whatever, unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, with a reckless ignorance whether it was true or untrue. *Id.*

With respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine is that, generally speaking, if the descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty, that is to say, a condition on the failure or non-performance of which the other party may, if he is so minded, repudiate the contract in toto, and so be relieved from performing his part of it, provided it has not been partially executed in his favour. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak perhaps more properly, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word; viz., a stipulation by way of agreement, for the breach of which a compensation must be sought in damages. *Id.*

In April and July, 1843, B. purchased of A. a material called oropholithe, of which A. was the patentee. The portion purchased in April was described in the invoice as roofing, and was put on a building belonging to B. by A.'s workmen. That supplied in July was described as material, and was put on by B.'s workmen. There had been a previous purchase in October, 1842, which had been described as flooring, and was so applied, and as to which money was paid into court. In an action upon a bill of exchange given by B. in payment of the goods, B. pleaded that he accepted the bill in consideration of goods called oropholithe, which A. had warranted fit for the roofing of buildings, but which proved to be useless. At the trial B. proved that, in September, 1842, his agent had a conversation with A.'s agent about roofing premises he was building with the patent article; on which occasion the latter gave the former a prospectus, which described it as fit for external roofing. The judge ruled that there was no evidence to be left to the jury in support of the plea:—Held, that the direction was right, inasmuch as there was no evidence to shew that the contract for the goods subsequently supplied was made with reference to the treaty for roofing, which took place in September, 1842; or, at all events, nothing to shew that the material sold in July, 1843, was sold for roofing, rather than flooring; and that the plea, failing as to part, failed alto-

gether. *Camac v. Warriner*, 1 C. B. 356; 9 Jur. 162.

Upon a treaty for the sale of hops (by sample), the proposed buyer asked the seller if any sulphur had been used in the growth or treatment of them, adding that he would not ask the price if sulphur had been used. The seller thereupon asserted that no sulphur had been used. After the hops had been inspected, weighed, and delivered, the buyer discovered that sulphur had been used in the cultivation of a portion of the hops, five acres out of 300. The whole growth, however, was so mixed up together that it was impossible to separate the sulphured from the unsulphured hops. The jury having found that the representation had been made, and was false (but without fraud), and that the buyer had entered into the contract entirely on the faith of that representation:—Held, that the representation amounted to a condition, and therefore that the buyer was entitled to repudiate the contract. *Bannerman v. White*, 10 C. B., N. S. 844; 31 L. J., C. P. 28; 8 Jur., N. S. 282; 4 L. T. 740; 9 W. R. 784.

Where One Purpose Known.—The production of garrancine is known to be the only purpose for which spent madder can be used. The defendant bought of the plaintiff a boat-load of spent madder, and it proved insufficient in the production of garrancine. On an action for the price:—Held, that the judge rightly asked the jury to find whether the article sold could reasonably be said to be spent madder, and rightly refused to ask whether it was fit to make garrancine. *Turner v. Mucklow*, 8 Jur., N. S. 870; 6 L. T. 690; 10 W. R. 668.

Where Express Warranty also.—The plaintiffs having entered into an agreement with the East India Company for the conveyance of troops to Bombay, the defendant undertook to supply the plaintiffs with troop stores, "guaranteed to pass survey of the East India Company's officers:"—Held, that this express warranty did not exclude the warranty implied by law that the stores should be reasonably fit for the purpose for which they were intended. *Digge v. Parkinson*, 7 H. & N. 955; 31 L. J., Ex. 301; 8 Jur., N. S. 1014; 7 L. T. 92; 10 W. R. 349—Ex. Ch.

By Description.—A count setting out a memorandum of agreement for the sale by the defendant to the plaintiff of a stack of "Cumberland and small Welsh coal, mixed," then lying in a certain yard of the defendant, and alleging as a breach that the stack was not in fact a stack of Cumberland and small Welsh coal, but was in a great part composed of material inferior in value either to Cumberland or small Welsh coal, and almost worthless to the plaintiff, is bad, as not showing that the admixture of the inferior substance rendered the stack essentially different from the description of it contained in the document. *Kirkpatrick v. Gowan*, 9 Ir. R., C. L. 521.

When, on the sale of goods, the quality of the subject-matter of the sale is ascertainable, irrespectively of any general description, as where such goods are stored in a certain place and are open for inspection, to entitle the purchaser to recover damages for alleged inferiority in the state of the articles supplied, it must be shewn

that the description was of the essence of the contract. *Ib.*

If an article sold is described, the description amounts to a warranty or a condition precedent that it shall be an article of the kind described. *Boyes v. Shand*, 2 App. Cas. 455; 46 L. J., Q. B. 561; 36 L. T. 857; 26 W. R. 730—H. L.

Where goods are sold under a certain description the buyer is entitled to have goods delivered to him that come within that description as used in commercial circles, though he may have bought after inspection and without a warranty. *Josling v. Kingsford*, 13 C. B., N. S. 447; 32 L. J., C. P. 94; 7 L. T. 790; 11 W. R. 377.

Upon a contract to supply goods of a specified description which the buyer has no opportunity of inspecting, the goods must not only in fact answer the specific description, but must be saleable or merchantable under that description. *Jones v. Just*, 3 L. R., Q. B. 197; 37 L. J., Q. B. 89; 18 L. T. 208; 16 W. R. 643; 9 B. & S. 141.

Whether a descriptive statement in a written instrument is a mere representation or a substantive part of the contract is a question of construction which the court, and not the jury, must determine. *Behn v. Burness*, *supra*.

[Latent Defects.]—On the sale of an article for a specific purpose there is a warranty by the vendor that it is reasonably fit for the purpose, and there is no exception as to latent undiscussible defects. *Randall v. Newson*, 2 Q. B. D. 102; 46 L. J., Q. B. 259; 36 L. T. 164; 25 W. R. 313—C. A. Reversing 45 L. J., Q. B. 364; 34 L. T. 527.

The limitation as to latent defects introduced by *Readhead v. Midland Railway Company* (4 L. R., Q. B. 379; 38 L. J., Q. B. 169) does not apply to the sale of a chattel. *Ib.*

The plaintiff ordered and bought of the defendant, a coach builder, a pole for the plaintiff's carriage. The pole broke in use and the horses became frightened and were injured. In an action for the damage, the jury found that the pole was not reasonably fit for the carriage, but that the defendant had been guilty of no negligence:—Held, that the plaintiff was entitled to recover the value of the pole, and also for damage to the horses, if the jury, on a second trial, should be of opinion that the injury to the horses was the natural consequence of the defect in the pole. *Ib.* And see succeeding cases.

[Bill of Exchange.]—An unstamped bill of exchange, indorsed in blank, purporting to be a foreign bill, was sold, without recourse, by the holder, who was not a party to the bill. It proved to have been drawn in this country, and was therefore unavailable for want of a stamp, and could not be enforced against the parties. The vendor and purchaser at the time of the sale were both alike ignorant of this defect:—Held, that the purchaser was entitled to recover back the price from the vendor, on the ground that the article sold as a foreign bill did not answer the description by which it was sold. Though it would have been otherwise (the sale being without any warranty, and there being no fraud) had the latent defect been one consistent with the article being a foreign bill. *Gompertz v. Bartlett*, 2 El. & Bl. 849; 2 C. L. R. 395; 23 L. J., Q. B. 65; 18 Jur. 266.

[Particular Purpose.]—If an article is sold

for a particular purpose, and at the usual market price, and it turns out to be defective, an action is maintainable against the seller, though there was no warranty at the time of the sale. *Gray v. Cox*, 6 D. & R. 200; 4 B. & C. 108; 1 C. & P. 184; And see *S. C.*, 8 D. & R. 220; 5 B. & C. 458.

But where upon a contract for the sale of copper sheathing, the vendor undertook that it should be good, sound, substantial and serviceable copper, and there was no proof that he had given a warranty such as that declared upon:—Held, that he was not liable for any latent defects in the sheathing, although it was sold as "copper sheathing." *Ib.*

Where a person manufactures an article and sells it for a particular purpose, the law implies a warranty that it is fit and proper for that purpose; therefore, where the defendant supplied copper sheathing for the plaintiff's vessel, which turned out to be defective in a short time after it was used, and the jury found that the decay was by some intrinsic defect in the quality:—Held, that the plaintiff was entitled to recover damages, although no fraud was imputed to the defendant; for as he manufactured the copper, and knew the purpose for which it was to be applied, and said, "he would supply the plaintiff well," it amounted to a warranty that it should be fit for the purpose. *Jones v. Bright*, 3 M. & P. 155; 5 Bing. 533.

Upon a sale of a barge by a builder, a warranty of fitness for the purpose for which it is known by the builder to be purchased is implied, notwithstanding a written instrument containing the terms of the sale is silent as to any warranty. *Shepherd v. Pybus*, 4 Scott, N. R. 434; 3 M. & G. 68.

A., a wine merchant, ordered a crane-rope of B., a dealer in, and who represented himself as a manufacturer of, ropes; B.'s foreman thereupon ascertained the nature and dimensions of the rope required, and being told that it was wanted to raise pipes of wine from the cellar, said that a rope must be made on purpose. B. did not make the rope himself, but sent the order to his manufacturer, who employed a third party to make the rope:—Held, in an action by A. against B., to recover damages resulting from the insufficiency of the rope, that B., as between him and A., was to be considered as the manufacturer of the rope; and that an implied warranty arose out of the contract, that the rope was a fit and proper one for the purpose for which it was ordered. *Brown v. Edgington*, 2 M. & G. 279; 2 Scott, N. R. 496; 1 Drink. 106.

If an order be given for the manufacture or supply of an article to satisfy a required purpose, the purpose and not any specific article being the essential matter of the contract, the seller is then bound, as a condition of the contract, to supply an article reasonably fit for the purpose, and is considered as warranting that it is so. *Oliphant v. Bailey*, 5 Q. B. 288; 1 D. & M. 373; 13 L. J., Q. B. 34; 7 Jur. 1190.

The plaintiff having heard that the defendant had some barley to sell went to his counting-house, when his agent produced a sample which he said was "seed barley," offered to the defendant at 39s., and if the plaintiff would take it at 40s. he might have it. The plaintiff looked at the barley, and said it was a good sample of seed barley, and agreed to buy it. At the plaintiff's

request, the defendant wrote to the person who had offered it to him, saying that he would accept it, and asking what it was, as it would do well for seed. The plaintiff afterwards sold it under a warranty in writing, as "Chevalier seed barley." It turned out that it was "barley bigg," a species of barley unfit for malting purposes; and the person to whom the plaintiff had sold it recovered damages against him for the breach of warranty:—Held, first, that there was no warranty by the defendant that the barley was "seed barley." *Carter v. Crick*, 4 H. & N. 412; 28 L. J., Ex. 238.

Held, secondly, that the contract was satisfied by the delivery of barley fit for sowing; and that if the term "seed barley" meant barley fit for malting purposes, that ought to be shewn by clear and irresistible evidence. *Ib.*

In an action by a tradesman against the manufacturers of an iron safe for the breach of an alleged warranty that it was strong enough to resist all attempts that might be thereafter made to force it open, it having, in fact, been broken up by burglars more than six years after the sale and delivery, and there being evidence that it was broken open easily, and that it was far less strong and secure than it ought to have been:—Held, that the warranty was an absolute warranty of perfect security for all time to come, was one so extensive, even if it would be valid, that it required cogent evidence of express warranty to that extent, and was not sustained by proof of mere representations that the safe would be strong enough to resist burglars. *Walker v. Milner*, 4 F. & F. 745.

A., after inspection of the separate parts, bought of B. soap frames, which were, by the contract, warranted to be "new frames, with all the nuts and bolts complete." The declaration alleged that the plaintiff warranted the frames to be fit for the purpose of making soap; and it was proved, and found by the jury, that though new, and having the proper number of nuts and bolts, the frames were not reasonably fit for the purpose of making soap:—Held, that the evidence sustained the declaration. *Mallan v. Radcliff*, 17 C. B., N. S. 588; 10 Jur., N. S. 1132; 11 L. T. 381; 13 W. R. 139.

The plaintiff, a master mariner, contracted with the defendants, for a lump sum to be paid him by the defendants, to take a certain specified steam-tug of the defendants, towing six sailing barges, from Hull to the Brazils, the plaintiff paying the crew and providing provisions for all on board for seventy days. The engines of the steam-tug were damaged and out of repair at the time of the contract, but neither the plaintiff nor defendants were then aware of this. The consequence, however, of the engines being so defective was that the time occupied in the voyage was increased, and the plaintiff's gain in performing his contract was much less than it would otherwise have been:—Held, by Brett and Cotton, L. J.J., that as the contract related to a specified vessel, there was no implied undertaking by the defendants that it should be reasonably efficient for the purposes of the voyage, and that therefore the defective state of the engines gave the plaintiff no cause of action, it not appearing that the engines were in a worse state when the plaintiff took possession of the vessel than they were at the time of the contract. *Robertson v. Amazon Tug and Lighterage Company*, 7 Q. B. D. 598;

51 L. J., Q. B. 68; 46 L. T. 146; 30 W. R. 308; 4 Asp. M. C. 496—C. A.

Held, contra, by Bramwell, L. J., that the defective state of the engines gave the plaintiff a cause of action, as there was an implied undertaking by the defendants that the engines were not so defective. *Ib.*

Steam Engine.—The plaintiffs agreed with the defendants to manufacture for them locomotive engines, under the following contract: "Each engine and tender to be subject to a performance of a distance of 1,000 miles, with proper loads; during which trial Messrs. S. & Co. are to be liable to any breakage which may occur, if arising from defective materials or workmanship; but they are not to be responsible for nor liable to the repair of any breakage or damage, whether resulting from collision, neglect, or mismanagement of any of the company's servants, or any other circumstances, save and except defective materials or workmanship. The performance to which each engine is to be subjected, to take place within one month from the day on which the engine is reported ready to start; in default of which, Messrs. S. & Co. shall forthwith be released from any responsibility in respect of the engine; the balance to be paid on the satisfactory completion of the trial, and release of Messrs. S. & Co. from further responsibility in respect of such engine." It was also agreed, that the fire-boxes should be made of copper, of the thickness of 7-16ths of an inch (and they were accordingly so made); and that the best materials and workmanship were to be used. The engines were accordingly delivered to the defendants, and performed the distance of 1,000 miles within the month of trial, but nine months afterwards the fire-box of one of them burst, when it was discovered that the copper had been considerably reduced in thickness:—Held, in an action against the defendants for the balance from them, that they could not give evidence of an inherent defect in the copper (no fraud being alleged), since, by the terms of the contract, the month's trial, if satisfactory, was to release them from all responsibility in respect of bad materials and bad workmanship. *Sharp v. Great Western Railway Company*, 9 M. & W. 7; 2 Railw. Cas. 722.

— **After Approval.**—Where a contract between A. & B. was, the one to deliver, and the other to accept, a steam-engine of fourteen-horse power, and the foreman of B. went over to the premises of A., and there saw a steam-engine in pieces, which he approved of, and which steam-engine was afterwards delivered by A.:—Held, that this was the case of the sale of a specific chattel, and that, upon action brought for the price, it was no answer to say, that the power of the engine was not a fourteen-horse power, although that fact might be given in evidence for the purpose of reducing the damages. *Parsons v. Scotton*, 4 C. B. 899; 16 L. J., C. P. 181; 11 Jur. 849.

Inspection.—If a person purchases an article which is to be manufactured for him, and the manufacturer delivers it with a patent defect which may render it worthless, if the purchaser has had an opportunity of inspecting it, but has neglected to do so, the manufacturer is not guilty of fraud in not pointing out the defect.

Horsfall v. Thomas, 1 H. & C. 90; 31 L. J., Ex. 322; 8 Jur., N. S. 721; 6 L. T. 462; 10 W. R. 650.

Upon a sale (not by sample, and without warranty) of merchandise which the buyer has no opportunity of inspecting, it is an implied condition that the article shall fairly and reasonably answer the description in the contract. *Wieler v. Schilizzi*, 17 C. B. 619; 25 L. J., C. P. 89.

Under a contract to supply goods of a specified description, which the buyer has no opportunity of inspecting, the goods must not only, in fact, answer the specific description, but must be saleable or merchantable under that description. *Jones v. Just*, 3 L. R., Q. B. 197; 37 L. J., Q. B. 89; 18 L. T. 208; 16 W. R. 643; 9 B. & S. 141.

The maxim of caveat emptor does not apply to a sale of goods where the buyer has no opportunity of inspection. *Id.*

Although a vendor is informed of the purpose for which a material is required, yet, if the vendee inspects it, its unsoundness or unfitness for the purpose, in the absence of any express warranty, is no defence to an action for the full price. *Fitzgerald v. Iveson*, 1 F. & F. 410.

After Carriage of Goods.—Where a contract was entered into in the month of December for the manufacture of iron hoops in Staffordshire, to be delivered at Liverpool by canal, and the iron sweated by reason of its detention on the canal during a long frost:—Held, in an action against the vendee for not accepting the iron, that though the contract implied a warranty that the iron, when delivered at Liverpool, should be merchantable, yet that the deterioration necessarily consequent on its passage to Liverpool was at the risk of the vendee, and that the question for the jury under the circumstances was not simply whether the iron was merchantable when tendered at Liverpool, but whether it was merchantable, reference being had to the necessary consequences of transit, and to the mode of passage selected by the vendee himself. *Bull v. Robinson*, 10 Ex. 342; 2 C. L. R. 1276; 24 L. J., Ex. 165. See also *Beer v. Walker*, *post*, col. 869.

Warranty where Sale by Sample.—See *post*, col. 881.

Liability for Consequences of Breach.—The defendant sold a cow to the plaintiff, a farmer, with a warranty that she was free from foot and mouth disease. The plaintiff placed the cow (which had the disease) with other cows, and some of these became infected with the disease, and died, as also did the cow in question:—Held, that the defendant was liable in damages for the entire loss, if when he sold the cow he knew that the plaintiff was a farmer and that he would or probably might place the infected cow with others. *Smith v. Green*, 1 C. P. D. 92; 45 L. J., C. P. 28; 33 L. T. 572; 24 W. R. 142. But see *Ward v. Hobbs*, *post*, col. 870.

Injury to Third Persons.—A declaration stated that the father of the plaintiff, bought of the defendant a gun for the use of himself and his sons; and the defendant, by falsely warranting the gun to have been made by Nock, and to be a sound gun, sold the gun to the father, for

the use of himself and his sons, for 24l., whereas the gun was not made by Nock, nor was a sound gun, but was made by an inferior maker to Nock, and was a dangerous gun, and wholly unsound and of inferior materials, of which the defendant at the time of the sale had notice; and that the plaintiff, knowing and confiding in the warranty, used the gun, which, but for the warranty, he would never have done; and that the gun, being in the hands of the plaintiff, by reason of its dangerous and insufficient construction and materials, burst, whereby he was severely injured:—Held, after verdict, that the action was maintainable, the damage being a consequence of the fraud, whilst the instrument was in the possession of a party, to whom the defendant's representation was either directly or indirectly communicated, and for whose use he knew the instrument was purchased. *Levy v. Langridge*, 2 M. & W. 519. Affirmed in error, 4 M. & W. 337; 1 H. & H. 325.

A tradesman who sells an article which he at the time of sale believes to be sound, but which is actually unsound, is not liable for an injury subsequently sustained by a third person not a party to the contract of sale, in consequence of such unsoundness. *Longmeid v. Holliday*, 6 Ex. 761; 20 L. J., Ex. 430.

A declaration by husband and wife stated, that the defendant, who was the maker and seller of lamps called "Holliday's lamps," sold to the husband one of these lamps, to be used by his wife and himself in his shop, and fraudulently warranted that it was reasonably fit for that purpose; that the wife, confiding in that warranty, attempted to use it, but that in consequence of the insufficient materials with which it was constructed it exploded and burnt her. At the trial the jury found that the accident had been caused by the defective nature of the lamp, but that the defendant was ignorant of this unsoundness, and had sold the article in good faith:—Held, that the fraud on the part of the defendant having been negatived, the action was not maintainable by the wife, who was not a party to the contract. *Id.*

The vendor of an article manufactured by himself of ingredients known only to himself is liable to the person for whose use he knows it is bought if damage results to that person in consequence of the article being, through the vendor's negligence, unfit for the purpose for which he professed to sell it. *George v. Skivington*, 5 L. R., Ex. 1; 39 L. J., Ex. 8; 21 L. T. 495; 18 W. R. 118.

A declaration by husband and wife alleged that the defendant was a chemist, and sold to the husband, to be used by the wife, a compound, the ingredients of which were known only to himself, and which he professed was fit for washing the hair, and could be used without personal injury; but that he acted so unskillfully, negligently and improperly in and about making the compound that it was not fit to be used for the purpose, and through his negligence the wife's hair was destroyed:—Held, that the wife had a cause of action, and that the declaration was good. *Id.*

Whenever one person is by circumstances placed in such a position with regard to another, that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause

danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger. *Heaven v. Pender*, 11 Q. B. D. 503; 52 L. J., Q. B. 702; 49 L. T. 357; 47 J. P. 709—C. A. Reversing 9 Q. B. D. 302; 51 L. J., Q. B. 465; 47 L. T. 163; 30 W. R. 749; 47 J. P. 87.

iii. On Sale of Cargo.

Bills of Lading—Mistake and Misdescription as to Weights.—In an action for freight, the master is at liberty, notwithstanding the terms of the 18 & 19 Vict. c. 111, s. 3 (the Bills of Lading Act), to shew that the cargo actually received by him differs in weight from that signed for in the bill of lading; at all events where the weight mentioned in the bill of lading is a mere matter of measurement. *Blanchet v. Powell's Atlantic Collieries Company*, 9 L. R., Ex. 74; 43 L. J., Ex. 50; 30 L. T. 28; 22 W. R. 490.

— **Effect of Signing by Master.**—Bills of lading signed by the master are *prima facie* evidence that the quantities named therein were received on board by him; the onus of rebutting this presumption, and of shewing that a less quantity than that specified was received, lies on the shipowner. *M'Lean v. Fleming*, 2 L. R., H. L. (Sc. App.) 128; 25 L. T. 317.

A shipowner is not estopped by the signature of the bill of lading by the master from shewing that the goods or some of them were never actually put on board. *Brown v. Powell Duffryn Steam Coal Company*, 10 L. R., C. P. 562; 44 L. J., C. P. 289; 32 L. T. 621; 23 W. R. 549.

By a charterparty for the conveyance of a cargo of coal from Cardiff to Buenos Ayres, it was stipulated that the master should "sign bills of lading for the cargo put on board as presented to him by the charterers, without prejudice to the terms of the charterparty." On arrival at the port of discharge, it was found that the coal delivered to the consignees was less by thirty-two tons than the quantity mentioned in the bills of lading, and the owners were called upon to pay, and paid, the difference of value to the consignees. In an action by the owners against the charterers to recover the amount so paid:—Held, that, inasmuch as the owners were under no legal liability, either at common law or under the Bills of Lading Act, to pay for such deficiency, the action was not maintainable. *Id.*

— **Effect of Signing "Quantity and Quality Unknown."**—A bill of lading stating that goods were shipped in good order and condition, but also containing an indorsement by the master, "quantity and quality unknown," does not admit, as against the shipowners, that the goods were shipped in good order and condition. *The Prosperio Palasso*, 29 L. T. 622.

Evidence of the condition of goods on delivery tending to shew that the damage sustained could not be accounted for by any damage existing at the time of shipment, and that such damage, had it existed, must have been noticed by the master or officer in charge of the ship at the time of shipment, will not, where goods are shipped under a bill of lading indorsed "quantity and quality unknown," satisfy the onus cast upon the plaintiff seeking to recover against shipowners for damage to the goods. Positive

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evidence of the condition of the goods when shipped must be given. *Id.*

A bill of lading, stating goods to have been shipped in good order and condition, but indorsed by the master with the words "quantity and quality unknown," does not admit as against the shipowner that the goods were shipped in good order and condition. *The Ida*, 32 L. T. 541—P. C.

There is no rule of law by which the consignee of goods under a bill of lading, stating goods to have been shipped in good order and condition, but containing the words "quantity and quality unknown," is bound to shew that the goods were shipped in good order and condition, or fail in his suit against the shipowner for damage done to the cargo; but failing proof of the condition of the cargo when shipped, the consignee is bound to shew that the damage which it sustained is traceable to causes for which the shipowner is responsible. *Id.*

"**Say about.**"—"**Say about**" are words of estimate only, and do not amount to a warranty. *McConnell v. Murphy*, 5 L. R., P. C. 203; 28 L. T. 713; 21 W. R. 609. See also cases ante, col. 769.

B. contracted to sell to S. "about 500 tons nitrate of soda in bags, of good merchantable quality," to be ready for delivery for a given day at a certain price upon certain terms. The contract proceeded: "It is understood that the nitrate of soda is to form the full and complete cargo of the John Phillips."—Held, that the contract did not amount to a warranty that the John Phillips should be of capacity to carry the whole 500 tons. *Bourne v. Seymour*, 16 C. B. 337; 24 L. J., C. P. 202; 1 Jur., N. S. 1001.

"**Fair average Quality.**"—In an action on a contract for so many tons of pitch pine, to arrive per the Ion from Savannah, warranted of a fair average quality (the action being for a breach of this warranty), it appeared that pitch pine came from another place as well as from Savannah, but that such as came from that other place was superior to that which came from Savannah, and that the cargo was of a fair average quality of Savannah pitch pine, although it was not a fair average of that which came from the other place:—Held, that the contract meant a fair average quality of such as came from Savannah. *Jones v. Clark*, 2 H. & N. 725; 27 L. J., Ex. 165.

The defendant, having chartered a ship, the Severn, from Australia to Akyab, to load there, and to proceed thence to Calcutta, at the charterer's option, and expecting to have shipped for him at Akyab a cargo of rice, made the following contract with the plaintiff: "Sold" to the plaintiff "the following cargo of Arracan rice, per Severn, now on her way to Akyab via Australia; the cargo to consist of fair average Nicranzi rice, the price of which is to be 11s. 6d. per cwt., with a fair allowance for Larong or any other inferior description of rice, if any; but the seller engages to deliver what is shipped on his account, and in conformity with his invoice. . . . This contract to be void provided the vessel makes the intermediate voyage between Akyab and Calcutta, agreeably with the conditions of the charterparty. Payment to be made in cash on arrival of the vessel at the port of call, in full, less freight:—"—Held, that the de-

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fendant, by this contract, undertook, that unless the vessel made the intermediate voyage to Calcutta, he would ship a cargo of rice, and bring it home for the plaintiff, to whom it was sold, and he warranted that such cargo should be of fair average Nicranzi rice. *Simond v. Braddon*, 2 C. B., N. S. 324; 26 L. J., C. P. 198; 3 Jur., N. S. 719.

The plaintiffs and the defendant, by their agent contracted as follows: "Sold, for W., to H., 400 tons, provided the same be shipped for seller's account, more or less, Arracan Nicranzi rice, at 11s. 6d. per cwt. for Nicranzi, or 11s. per cwt. for Larong, the latter quantity not to exceed 50 tons, or else, at the option of buyers, to reject any excess; to be paid for by cash on arrival of the vessel at the port of call, on delivery of the bill of lading, charterparty, and policy of insurance; insurance effected to the full amount of the invoice." The vessel loaded 285 tons of Larong and 150 tons of Latoorie rice:—Held, first, that the contract did not contain a warranty that the rice should consist of Arracan Nicranzi rice, but that the contract was conditional upon a cargo of Arracan Nicranzi rice being shipped on seller's account. *Vernede v. Weber*, 1 H. & N. 311; 25 L. J., Ex. 326.

Held, secondly, that the buyers were not entitled to the delivery either of the whole cargo or of the Larong rice, because the contract was for an entire cargo which would substantially satisfy the description of Arracan Nicranzi rice. *Id.*

"On Passage."—A. contracted to sell to B. 1,170 bales of gambier, "now on passage from Singapore, and expected to arrive in London, viz. per Ravenscraig, 805 bales; per Lady Agnes Duff, 365 bales:—Held, a warranty that the goods were then on passage. *Gorrisaen v. Perrin*, 2 C. B., N. S. 681; 27 L. J., C. P. 29; 3 Jur., N. S. 867.

"To Arrive."—Action on the following bought and sold note: "Sirs.—We have this day bought, for your account, from M. & Co., a hundred tons of nitrate of soda, at 18s. per cwt., duty paid, to arrive ex Daniel Grant, to be taken from the quay at landing weights, with the customary allowance of tare and draft; payment, four months' acceptance from the date of delivery," signed by the buyer's brokers; and, after their signature, at the bottom of the note, was the following memorandum: "N. B. Should the vessel be lost, this contract to be void:—Held, that this did not amount to a warranty, that the nitrate of soda should arrive by the Daniel Grant, but that it was a contract of sale in the double event of the ship's arrival with the nitrate of soda on board. *Johnson v. Macdonald*, 9 M. & W. 600; 12 L. J., Ex. 99; 6 Jur. 264. See also cases ante, col. 771.

iv. Sale of Ship.

Conditions—"Ship now at Rangoon."—In an action by the vendors against their vendees for refusal to accept, evidence was given to shew the circumstances under which the contract was made, and that it was of vital importance that the vessel should be in the port named at the time of making the contract. The jury found, that the condition "ship now at Rangoon," had not been fulfilled, and that it was a condition

absolutely vital:—Held, that it was rightly left to the jury to say under what circumstances the contract was made, and that the words "ship now at Rangoon" amounted to a warranty justifying the defendants in saying that there had been a failure of performance of a condition precedent and in refusing to carry out the contract. *Oppenheim v. Fraser*, 34 L. T. 524.

Held, also, that the finding of the jury was rightly taken as an element in enabling the court to say that the words amounted to a condition precedent. *Id.*

Age.]—A vendor of a ship represented her to have been built in 1816, when, in fact, she had been launched a year before:—Held, that the vendee was entitled to recover damages, as it was a false representation, although it was agreed that the ship should be taken with all faults. *Fletcher v. Bowsher*, 2 Stark. 561.

Fitness.]—Upon a sale of a barge by the builder, a warranty of fitness for the purpose for which it is known by the builder to be purchased is implied, notwithstanding a written instrument containing the terms of the sale is silent as to any warranty. *Shepherd v. Pybus*, 4 Scott, N. R. 434; 3 M. & G. 68.

But if the vendee declares as upon a warranty, that the barge was reasonably fit for use, and assigns a breach in the barge not being reasonably fit for use, the breach is not supported by evidence that the barge was not fit for a special purpose for which builders knew that it was designed. *Id.*

Documents Incorporated.]—An owner of a ship advertised it for sale, describing it as "The fine teak-built barque Intrepid, A 1, and well adapted for a passenger ship." The plaintiff having read the advertisement, negotiated for its purchase, and a contract was signed by the plaintiff and the owner, whereby the former agreed to buy, and the latter to sell, "the barque Intrepid, as she now lies in the St. Katharine Dock, agreeable to the inventory annexed." The inventory commenced by describing the ship in the same terms as the advertisement; under that was the word "Inventory," which was followed by a list of the ship's stores and tackle, and in the margin opposite to this list the owner signed his name. The document concluded thus: "The vessel and her stores to be taken with all faults as they now lie, without any allowance for deficiency in length, weight, quantity, quality, or any defect or error whatsoever." The vessel proved not to be teak-built, nor of class A 1, nor adapted for a passenger ship:—Held, first, that the whole of the document was incorporated with the contract of sale, and not merely the list of stores headed "Inventory." *Taylor v. Bullen*, 5 Ex. 779; 20 L. J., Ex. 21.

Held, secondly, that there was no warranty of the vessel. *Id.*

An advertisement of a ship for sale described her as copper-fastened, and afterwards contained an enumeration of masts, &c., which was headed "Inventory." The contract for the sale of the ship referred to the "inventory":—Held, that this reference had not the effect of entitling the vendee to consider the description in the advertisement as forming part of the contract, though

it was shewn to be usual to designate the whole advertisement by the name of "inventory." *Freeman v. Baker*, 2 N. & M. 446; 5 C. & P. 475; 5 B. & Ad. 797.

— **Copper-fastened.**—Where an advertisement for the sale of a ship described her as "a copper-fastened vessel," adding, that she was to be taken with all faults, without any allowance for any defects whatsoever, and it appeared that she was only partially copper-fastened:—Held, that notwithstanding the words "with all faults, without allowance for any defects whatsoever," the vendor was liable for the breach of the warranty. *Shepherd v. Kain*, 5 B. & A. 240.

A bill of sale in the usual form contained no warranty that the vessel sold was copper-fastened, but there had been a previous written representation that she was copper-fastened:—Held, that this prior representation formed no part of the contract, and was not a warranty. *Kain v. Old*, 2 B. & C. 627.

"With all faults."—The seller of a ship "with all faults" is bound to disclose to the buyer a latent defect known to himself, and which the buyer could not possibly discover. *Mellish v. Motteux*, Peake, 115.

But it was afterwards held that a seller of a ship "with all faults" was not liable for latent defects, unless he had used some artifice to conceal them from the buyer. *Baglehole v. Walters*, 3 Camp. 154.

Although a ship is sold "to be taken with all faults," the vendor cannot avail himself of that stipulation, if he knew of secret defects in her, and used means to prevent the purchaser from discovering them, or made a fraudulent representation of her condition at the time of the sale. *Schneider v. Heath*, 3 Camp. 506.

v. Sale of Provisions.

Food.—On a contract to supply goods for food, there is an implied warranty that the goods shall be fit to be used and consumed. *Beer v. Walker*, 46 L. J., C. P. 677; 37 L. T. 278; 25 W. R. 880.

Such warranty is not satisfied by delivery of the goods in the state so warranted to a railway company as the agent of the purchaser, to be forwarded to the purchaser, but is a warranty that the goods shall be fit to be used and consumed upon delivery to the purchaser himself in the ordinary course of transit. *Ib.*

B., an importer of Ostend rabbits, carrying on business in London, entered into a contract with W., a retail cheesemonger at Brighton, to send him weekly from London by railway a certain number of rabbits, the cost of carriage from London to be paid by W. Under this contract two half-casks of rabbits were forwarded from London to Brighton by rail. Shortly after arrival the rabbits in one of the casks were found to be putrid. These rabbits on their arrival in London from Ostend at 6 P.M. in the evening had been examined by B. and his assistants and found to be in good condition, and were at once sent to the London terminus of the Brighton railway. They arrived at W.'s house in Brighton at about 9 A.M. the next morning, when he accepted them, but without examination. The above took place in the ordinary way of business

and in accordance with the usual and previous course of dealing between B. and W.:—Held, that there was an implied warranty by B. that the rabbits should be in a merchantable condition and fit for consumption within a reasonable time after reaching W. at Brighton in the absence of anything exceptional in the transit. *Ib.*

In Market—Diseased Animals.—Sheep apparently healthy and sound in every respect were sold warranted sound; two months afterwards a great part of them died. There was nothing to connect the disease of which they died with their previous condition, but it was in the opinion of farmers and breeders an hereditary disease called the "goggles," and incapable of discovery until its fatal appearance:—Held, that this disease was an unsoundness existing at the time of the sale, the jury being of opinion that "it existed in the constitution of the sheep at that time." *Joliff v. Bendell*, R. & M. 136.

The Contagious Diseases (Animals) Act, 1869, s. 57, does not render the sending of diseased animals to a public market an actionable wrong, in the absence of any warranty of soundness or of any evidence of fraud or misrepresentation. *Ward v. Hobbs*, 4 App. Cas. 13; 48 L. J., C. P. 281; 40 L. T. 73; 27 W. R. 114.

A number of pigs was sold by auction in a public market, subject to conditions of sale which proved that no warranty would be given, and that the animals should be removed "with all faults." Shortly after the sale it was found that the pigs were infected with typhoid fever, from which the greater portion of them died:—Held, that the seller of the pigs had not been guilty of misrepresentation by his conduct, and was not liable in an action for misrepresentation at the suit of the purchaser. *Ib.*

Meat.—A salesman, who sells, in a public market, meat which is afterwards found to be unfit for human food, but which he had no means of knowing, or reason to suspect, was other than good and wholesome meat, is not liable to an action upon an implied warranty, or for money had and received; nor is he liable, though the market is within the city of London, to an action upon a local statute regulating the sale of provisions in London. *Emmerton v. Mathews*, 7 H. & N. 586; 31 L. J., Ex. 139; 8 Jur., N. S. 61; 5 L. T. 681; 10 W. R. 346.

A salesman who sells in a public market meat which has no defect discoverable by an ordinary inspection, but which is afterwards found to be unfit for human food, to a purchaser who selects it himself, does not impliedly warrant that the meat is good, and is not liable to refund the price to the purchaser. *Smith v. Baker*, 40 L. T. 261.

Supply of Liquor.—Where a party enters into an agreement with another to purchase from him all the liquor to be consumed on certain premises, the law implies a condition that the liquor supplied shall be fit to be drunk, and an action may be maintained for a breach of this implied agreement; but such a breach does not justify the other contracting party in transferring his general custom, although on each particular occasion when bad liquor is supplied he has a right to return it and demand better, and, in the event of non-compliance, may for that occasion procure liquor elsewhere. *Clarke*

v. *Stanceliffe*, 7 Ex. 439; 21 L. J., Ex. 129; 16 Jur. 430.

Dealers in Victuals.]—Victuallers, brewers, and other common dealers in victuals, who in the course of their trade sell provisions unfit for the food of man, are liable civilly to the vendee without any fraud on their part or warranty of the soundness of the thing sold; but a private person not following any of these trades, who sells an unwholesome article for food, is not liable under such circumstances. *Burnby v. Rollitt*, 16 M. & W. 644; 17 L. J., Ex. 190; 11 Jur. 827.

Resale.]—On the sale of any commodity to be resold as an eatable or drinkable, the seller cannot recover if it is utterly uneatable or undrinkable, and so unsaleable. *Harman v. Bennett*, 1 F. & F. 460.

Refuse Oil.]—Seed crushers, who sold their refuse oil cake to graziers, without describing it or selling it as fit for the food of cattle, nor even knowing that it was bought as such, are not liable, on an implied warranty that it was so, for the consequences of the cattle being fed with it. *Jackson v. Harrison*, 2 F. & F. 782.

Wine fit to be laid down.]—The defendant's traveller agreed, without sample, to sell to the plaintiff a pipe of superior port wine, fit to be laid down. The wine was afterwards bottled by the defendant, and when delivered to the plaintiff, was described in the invoice as "superior old port." The wine afterwards proved to be sour, owing to there being a deficiency of spirit at the time of bottling. A verdict having been found for the plaintiff:—Held, per Kelly, C. B., that the defendant did absolutely contract to sell wine fit to be laid down, and was bound to supply wine suitable for that purpose:—Per Martin, Pigott and Cleasby, BB., that there was evidence for the jury that the defendant had warranted the wine to be fit to be laid down:—Per Martin, B., as words of commendation do not amount to a warranty, the general rule of law is that the maxim caveat emptor applies to the sale of specific goods whenever the buyer has an opportunity of inspecting the chattel sold. *Osborne v. Hart*, 23 L. T. 861; 19 W. R. 331.

Sale of Specific Crop.]—In March, 1872, the defendant agreed to sell to the plaintiff 200 tons of potatoes, grown on land belonging to the defendant at W. to be delivered in the following September and October. The defendant served a sufficient quantity to meet the contract in the ordinary course of husbandry. Before the time of the performance of the contract a large portion of the crop was destroyed by disease without any default on the part of the defendant, and the remainder was insufficient to meet the contract. In an action for non-delivery:—Held, that the contract was for the sale of a specific crop, without any warranty that the crop should continue to exist at the time of performance. *Howell v. Coupland*, 1 Q. B. D. 258; 46 L. J., Q. B. 147; 33 L. T. 832; 24 W. R. 470—C. A.

vi. Sale of Patented Articles.

Specified Purpose.]—Where a person orders a

machine, previously known and ascertained, for which the seller has a patent, it is no answer for the price of the machine, that it did not answer the purpose specified in the patent, although it is not shewn that the buyer has had previous opportunities of exercising his judgment as to the usefulness of the machine. *Oliphant v. Bayley*, D. & M. 373; 5 Q. B. 288; 13 L. J., Q. B. 34; 7 Jur. 1130.

— Evidence of Knowledge.]—The defendant sent to the plaintiff (the patentee of an invention known as Chanter's Smoke-consuming Furnace) the following written order: "Send me your patent hopper and apparatus, to fit up my brewing copper, with your smoke-consuming furnace: patent right 15l. 15s.; iron work not to exceed 5l. 5s.; engineer's time fixing, 7s. 6d. per day." The plaintiff put up accordingly on the defendant's premises one of his patent furnaces, but it was found not to be of any use for the purpose of a brewery, and was returned to the plaintiff:—Held (no fraud being imputed to the plaintiff), that there was not an implied warranty on his part that the furnace supplied should be fit for the purposes of a brewery; but that the defendant having defined by the order the particular machine to be supplied, the plaintiff performed his part of the contract by supplying that machine, and was entitled to recover the whole 15l. 15s., the price of the patent right. *Chanter v. Hopkins*, 4 M. & W. 399; 1 H. & H. 377; 3 Jur. 58.

Held, also, that parol evidence was inadmissible to shew, that, at the time of making the contract, the plaintiff was aware of the purpose for which the furnace was to be used. *Id.*

— Definition no Warranty.]—The defendant sent to the plaintiff, the patentee of an invention called "Prideaux's Patent Self-closing Valve," and who carried on business under the name of "The Smoke Prevention Company," the following written order: "Please prepare us a smoke-preventing valve," giving the dimensions of the furnace-door to which it was to be applied. The plaintiff accordingly sent the defendant one of his patent self-closing valves, but it was found not to be of any use for the purpose for which it was designed. No fraud was imputed to the plaintiff; but the defendant, on being sued for the price of the article, relied on the statements contained in a circular which had been sent to him by the plaintiff, to the effect that the patent article would consume smoke, and effect a considerable saving in fuel, as amounting to a warranty that it should be fit for the purpose to which it was to be applied:—Held, that no such warranty could be implied, but that the defendant having defined by the order the particular machine to be supplied, the plaintiff performed his part of the contract by supplying that machine, and was entitled to recover. *Prideaux v. Bunnett*, 1 C. B., N. S. 613.

When a man purchases a patented article, with a known title, there is no implied warranty that it will answer any particular purpose, but it is for the jury to say whether there was an express warranty, and the mere fact that in printed invoices or prospectuses the invention is described as effecting an object, is not in itself conclusive evidence of a warranty. *Prideaux v. M'Murray*, 2 F. & F. 225.

A farmer having by letter inquired of an agent

for the sale of agricultural machines, the lowest price for which he could furnish a corn machine, the agent replied by letter as follows: "I happen to have a very good second-hand Wood's reaper, which I can offer you at 16*l.* 16*s.* It belonged to a gentleman who has retired from farming; he paid me 35*l.* for it a little time ago; it has only cut about fifty acres, and it is not one penny the worse—in fact you would hardly know it from a new one. I inclose drawings. I have sold more than thirty of these machines in this part, all of which are doing well, so that I can confidently recommend it. I do not recommend it for cutting meadow grass, but it will cut wheat, barley, oats, clover, French grass, or any grain crop efficiently." In an action to recover damages for breach of warranty, the machine having failed to perform the desired work:—Held, that the letter did not amount to a warranty or a contract that the particular machine would do the specified work, but was a mere representation and a description of Wood's patent reapers generally. *Chalmers v. Harding*, 17 L. T. 571.

Sale of Patent—Warranty as to Title.—An agreement, after reciting that the plaintiff had invented a method for the prevention of boiler explosions, and had obtained a patent for it, and assigned away half of his interest in it, and that the plaintiff was desirous of taking out patents for other countries, provided that the defendant should proceed to take out such patents, and should pay 2,500*l.* in such manner as should be mutually agreed upon, in consideration whereof the plaintiff transferred to the defendant the half of those patents when they should be obtained, and the remaining half of the English patent. To a declaration on this agreement, that the defendant had refused to pay the money on request, or to enter into any agreement as to the manner of payment, the defendant pleaded that the invention was not new in England, and was worthless, and the plaintiff was not the first inventor:—Held, that there was in the agreement no warranty, expressed or implied, that the patent was indefeasible; and, no fraud being alleged, and the defendant having the same means of knowledge as to the novelty and value of the patent as the plaintiff, that the plea was bad. *Hall v. Conder*, 2 C. B., N. S. 22; 26 L. J., C. P. 138; 3 Jur., N. S. 366. Affirmed on appeal, 2 C. B., N. S. 53; 3 Jur., N. S. 963—Ex. Ch.

Trade Mark.—H. & Co. carried on business as iron manufacturers, having succeeded to a firm of S. & H. The defendant asked for iron marked "S. & H." but was told of the change in the firm. He then ordered a quantity of "S. & H. crown common bars." H. & Co. supplied the defendant with iron marked "H. & Co." but of the same quality as "S. & H.;" the defendant rejected it on account of the difference of brand. The jury found that there was no value in the brand:—Held, that there was no stipulation that the iron to be supplied should be of a particular brand, but of the particular quality, known by the letters "S. & H." *Hopkins v. Hitchcock*, 14 C. B., N. S. 65; 32 L. J., C. P. 154; 9 Jur., N. S. 896; 8 L. T. 204; 11 W. R. 597.

vii. Sale of Pictures.

Name of Artist.—The putting down the name

of an old artist in a catalogue as the painter of a particular picture is not such a warranty as will subject the seller to an action. *Jedwine v. Slade*, 2 Esp. 572.

But if the agent of the vendor of a picture, knowing the vendee labours under a delusion with respect to the picture, which materially influences his judgment, permits him to make the purchase without removing that delusion, the sale is void. *Hill v. Gray*, 1 Stark. 434.

Upon a sale of pictures, a bill of parcels of "four pictures, views in Venice, Canaletti, 160*l.*," is evidence of a warranty that the pictures were the production of that artist. *Power v. Barham*, 6 N. & M. 62; 7 C. & P. 356; 1 H. & W. 683; 4 A. & E. 473; 1 M. & Rob. 507.

But the mere description of a picture as being the work of a particular master, in an invoice, is not a warranty that the picture was painted by that master. *Id.*

If, in an action on a warranty of pictures, it appears that, before the sale, the vendor stated to the vendee that they were the works of a particular master, it will be for the jury to consider whether the vendor made this representation as a part of the contract of sale, or whether the vendor made the representation as matter of opinion only. *Id.*

A. sold to B. for 95*l.* two pictures, representing them as "a couple of Poussin's;" they were, in fact, not originals, but very excellent copies; B. did not offer to return them:—Held, that, if the jury thought that B. believed, from the representation of A., that they were originals, he was not bound to pay the price agreed upon; but that, as he kept them, he was liable to pay whatever sum the jury might consider to be the value. *Lomi v. Tucker*, 4 C. & P. 15.

A. sold a picture to B. as a Rembrandt; there was contradictory evidence in an action on an accommodation bill given for the price, as to whether there was a warranty, or only a representation. The picture was kept:—Held, that, if the jury thought there was a warranty, and that it was broken, then they should find their verdict for that sum which they considered to be the actual value of the picture. *De Sewhanberg v. Buchanan*, 5 C. & P. 343.

viii. Sale of Seeds.

Adulteration.—A. undertook to supply B. with certain parcels of linseed, which he warranted should be "Calcutta linseed," and supplied him with linseed containing 15 per cent. of other seeds. Calcutta linseed, at the time the contract was made, contained, usually, from 2 to 3 per cent. of other seeds. The jury was asked, whether this was such an adulteration or admixture of foreign substances as to alter the distinctive character of the article, and prevent its being saleable as "Calcutta linseed;" and whether this adulteration was such as might reasonably be expected:—Held, no misdirection. *Wieler v. Schilizzi*, 17 C. B. 619; 25 L. J., C. P. 89.

The defendant, by his agent, sold the plaintiffs a parcel of turnip seed, and gave the following sold-note: "Mr. T. C. R." (the defendant's agent) "sold to Messrs. B. & Co." (the plaintiffs), "for Mr. C. L." (the defendant), "fourteen quarters Skirving's Swedes, at 17*s.* per bushel." The defendant's agent afterwards sold the plaintiffs a second parcel of turnip seed, stating that

it was "of the same stock" as the first parcel. No sold-note was given; the invoices described it as "24 $\frac{1}{2}$ quarters of turnips."—Held, as to the first parcel, that the jury was properly directed that the description of it in the sold-note amounted to a warranty that it was Skirving's Swedes. As to the second parcel, that the statement of the defendant's agent that it was "of the same stock" as the first, on the subsequent sale to the plaintiffs, was evidence of a warranty that the second parcel also was Skirving's Swedes. *Allan v. Lake*, 18 Q. B. 660.

An action is maintainable by a seed merchant against seed brokers for falsely warranting turnip seed to be rape seed, although sold by sample and of greater value than turnip seed, the purchaser having sustained actual loss and injury in his business, having resold it as rape seed, and having had to compensate his customers. *Lovegrove v. Fisher*, 2 F. & F. 128.

b. Express.

What Amounts to.—["Received from A. the sum of 60*l*. for a black horse, rising five years, quiet to ride and drive, and warranted sound up to this date, or subject to the examination of a veterinary surgeon:"—Held, not to be a warranty that the horse was quiet to ride and drive. *Anthony v. Hulstead*, 37 L. T. 433.

See cases sub tit. HORSE.

The defendant, living at Cardiff, on the 9th November, 1874, wrote to the plaintiff, living in London offering to sell him a second-hand locomotive engine, in good working order, for 385*l*., and asking if the plaintiff would get it inspected, and see if he could take it, to which the plaintiff, on the 10th, replied, saying, "Tell me who are the makers, what material are the fire-box and tubes made of, and how old is the engine." The defendant's answer of the 12th was as follows: "England & Co. are the makers of the locomotive, age about thirteen and a-half years, fire-box and tubes are copper. Can you let someone inspect her?" In reply to which the plaintiff, on the 14th, wrote as follows: "If you can assure me that the loco. is in good working order I will, on the faith of that, send an engineer down to look at it." The defendant having on the 16th written, saying, "The engine is now in good order," the plaintiff thereupon sent an engineer to Halifax, where the engine was, to inspect and give him an estimate of the value, with particulars of the size, and diameter of the cylinder and wheels, and their condition. The engineer inspected the engine, and in the course of his examination he cleared away the soot and smoke from one of the tubes, and, finding it to be of brass, he took for granted that all of them were of that material, and carried his examination in that respect no farther. He then sent his report, giving a detailed description of the engine to the plaintiff, stating, amongst other particulars, "copper fire-box and brass tubes," and specifying the repairs necessary to be done. Upon this the plaintiff, on the 27th November, wrote to the defendant saying, "The condition of the engine, and all things considered, I cannot offer you more than 300*l*. for it, and if you like to accept that I will take the engine." That offer the defendant accepted, and the bargain was thereupon concluded between them. Upon taking

the engine to pieces some months afterwards, the plaintiff found that only five of the boiler tubes were of brass, the remaining 131 being of iron, and thereupon, on the strength of the defendant's representation, in his letter of the 12th November, that the tubes were copper, he claimed compensation from the defendant for the difference in value between the two metals, which the defendant, denying his liability, refused to make. The plaintiff then brought an action, at the trial of which a verdict was formally entered for him, with leave to the defendant to move to enter the verdict on the ground that, on the true construction of the correspondence, the defendant did not warrant as alleged, and that the representation therein contained did not enter into or form part of the subsequent contract:—Held, first, that the defendant's letter of the 12th November amounted to an express warranty by the defendant, on the faith of which the plaintiff acted in concluding the bargain, that the tubes of the engine were of brass or copper; and, secondly, that the subsequent inspection by the plaintiff's engineer, which was intended only to apply to the ascertaining the engine's working condition and state of repairs, and not to the material of the tubes, did not do away with or in any way affect such previous warranty. *Cowdy v. Thomas*, 36 L. T. 22.

Timber of Specified Assortment as Classified by Official Surveyors at Port of Shipment.]—

The defendants, who were timber merchants at Miramichi, N. B., contracted in writing to sell to the plaintiff "wood goods of the under-mentioned assortment, as classified by the official surveyors of timber at port of shipment." After containing provisions as to shipment at St. John's, and as to the mode of payment, &c., the contract provided thus:—"Assortment and prices above referred to. About 270 St. Petersburg standards of bright fresh spruce deals, and assorted about as follows." Several dimensions were specified, and bracketed opposite to these were the words "averaging second quality." In an action to recover damages for breach of the contract, the plaintiff in his statement of claim set out the contract, and alleged that until their arrival in Ireland he had no opportunity of examining them, and as a breach of the contract alleged that the standards of deal delivered were in fact materially different from the goods contracted to be sold, in that the same were not bright or fresh, nor did they average second quality, but were of inferior quality to second quality, nor were they of merchantable quality at all. Defence: That the goods were shipped from the port of Miramichi, and at the said port there were at the date of the contract official surveyors of timber duly appointed by competent authority, and whose duty it was to assort and classify all wood goods shipped from said port, to determine their quality and description, and also whether the same were bright and fresh, for the purpose of such classification. Averment: that the wood goods, the subject-matter of the action, were before shipment duly assorted and classified, and their quality and description determined, by such official surveyors of timber; and the wood goods delivered by the defendants to the plaintiff were, according to such assortment and classification, bright and fresh, and otherwise of the quality and description mentioned in the contract. Reply:

That the goods were not in fact, when shipped, bright or fresh, nor did they average second quality, nor were they of merchantable quality:—Held, on demurrer to the reply, that the contract sued on was upon its true construction not a contract to deliver to the plaintiff bright fresh spruce deals, averaging second quality, absolutely, but wood goods consisting of bright fresh spruce deals of the average quality, as classified by the official surveyors, that the contract was that the goods should be of the assortment mentioned as so classified, and that, therefore, the reply was no answer to the defence. *McClelland v. Stewart*, 12 L. R., 1r. 125.

See also cases ante, cols. 770, 771.

c. Authority to Warrant.

Scope of Agency.]—Where a principal employs an agent or a servant to sell for him, what such agent says as a warranty or a representation at the time of the sale, respecting the thing sold, is evidence against the principal; but not what he has said at another time. *Helgear v. Hawke*, 5 Esp. 72.

Although a warranty given by a person intrusted to sell *prima facie* binds the principal, the warranty of a person intrusted merely to deliver the thing sold is not *prima facie* binding on the principal, but an express authority must be shewn. *Woodin v. Burford*, 2 C. & M. 391; 4 Tyr. 264.

If A. constitutes B. his agent for the sale of a certain article, B. is thereby invested with authority to do all that is usual in the trade to do on the sale of the article; he may, therefore, have authority to warrant the goodness of the article, so as to bind A., though A. never gave him any express authority to that effect. *Dingle v. Hare*, 7 C. B., N. S. 145; 29 L. J., C. P. 143; 6 Jur., N. S. 679.

A principal is liable to an action for the fraudulent misrepresentation of his agent, acting in the course of his business. *Barwick v. English Joint Stock Bank*, 2 L. R., Ex. 289; 36 L. J., Ex. 147; 16 L. T. 461; 15 W. R. 877—Ex. Ch.

A baker was desirous of disposing of his shop and the goodwill of his business, and in consequence an advertisement was inserted in a newspaper, stating that the house was doing twelve sacks a week. The advertisement was inserted by a broker, in consequence of a conversation with the baker's wife, who managed the business for him; in which conversation she told the broker that they did between nine and ten sacks a week, upon which the latter said, "We must make it twelve for the paper." In consequence of the advertisement, a person desirous of purchasing went to the wife, and said to her, "Are you really doing anything like this business?" to which she replied, "Yes, we are doing eleven sacks;" and appealed to the man in the shop, who confirmed her statement. The baker himself did not appear at all in any part of the transaction, except that he received the purchase-money, and paid the broker his commission. In an action brought by the purchaser on the representation contained in the advertisement:—Held, that the baker was personally and individually answerable in damages, inasmuch as though he did not make any representation himself, yet he made his wife his agent, and was bound by her statements. *Taylor v. Green*, 8 C. & P. 316.

See also PRINCIPAL AND AGENT.

Discounting Bill.]—If an agent, employed by the indorsees of a bill to get it discounted, warrants it to be a good one, his employers are bound by this act, and are liable to refund if the bill is afterwards dishonoured by the acceptor. *Fenn v. Harrison*, 4 T. R. 177.

Otherwise, if the warranty was beyond the scope of the agent's authority, by the principal having, at the time of employing him, said he would not warrant or indorse the bill. *Tb.*

Sale of a Horse.]—A servant of a private owner, intrusted on one particular occasion, not at a fair or other public mart, to sell and deliver a horse, is not, therefore, by law authorized to bind his master by a warranty; but the buyer who takes a warranty in such a case takes it at the risk of being able to prove that the servant had his master's authority to give it. *Brady v. Tod*, 9 C. B., N. S. 592; 30 L. J., C. P. 223; 7 Jur., N. S. 827; 4 L. T. 212; 9 W. R. 483.

2. SALE BY SAMPLE.

Questions for Jury.]—The plaintiff offered to sell to the defendant oats, and exhibited a sample; the defendant took the sample, and on the following day wrote to say that he would take the oats at the price of 3s. per quarter. He afterwards refused to accept the oats on the ground that they were new, and he thought he was buying old oats; nothing, however, was said at the time the sample was shewn as to their being old; but the price was very high for new oats. The judge left to the jury the question whether the plaintiff had believed the defendant to believe, or to be under the impression, that he was contracting for old oats, and if they were of opinion that he had so believed, he directed them to find for the defendant. The jury having found for the defendant:—Held, that there must be a new trial:—Per Cockburn, C. J., on the ground that the passive acquiescence of the seller in the self-deception of the buyer did not entitle the latter to avoid the contract:—Per Blackburn, J., on the ground that there is no legal obligation in a vendor to inform a purchaser that the latter is under a mistake not induced by the act of the vendor; and that the direction did not bring to the minds of the jury the distinction between agreeing to take the oats under the belief that they were old, and agreeing to take the oats under the belief that the plaintiff contracted that they were old:—and per Hannen, J., on the ground that the direction did not sufficiently explain to the jury that, in order to relieve the defendant from liability, it was necessary that they should find, not merely that the plaintiff believed the defendant to believe that he was buying old oats, but that he believed the defendant to believe that he, the plaintiff, was contracting to sell old oats. *Smith v. Hughes*, 6 L. R., Q. B. 597; 40 L. J., Q. B. 221; 25 L. T. 329; 19 W. R. 1059.

In pursuance of an advertisement which announced that "purchasers are required to examine bulk for themselves, as sellers accept no responsibility," a corn-broker, on the plaintiff's instructions, put up for sale a quantity of maize, which was stored at a distance from the auction-room. One of the conditions of sale, which were read at the commencement of the auction, but which the defendant was not clearly proved to have heard, and which were not referred to in

the auctioneer's ledger, declared that the maize would be "sold as it now lies in store (sellers being irresponsible)." Small bags labelled "ex Emma Peasant" (that being the name of the vessel whose cargo the plaintiff had directed the broker to sell), and containing samples of sound maize, were exhibited at the auction; and the defendant, who had not inspected the bulk, became the purchaser, the biddings being signed by the auctioneer under the heading in his ledger—which was not shewn to the defendant—"Sale of mixed maize, ex 'Emma Peasant,' by order of (the plaintiff's firm)." There was no other evidence of a written contract between the parties. The defendant having subsequently refused to accept delivery of the cargo of the Emma Peasant, which was of an inferior quality, on the ground that it was not that which had been sold, the plaintiff effected a resale and sued him for the loss thereon, when the judge left to the jury the sole question, whether the sample shewn at the auction had been taken from the bulk of the Emma Peasant, or from that of the Jessie Parker, a superior cargo belonging to the plaintiff, which had lain in the same store. The jury having found that the sample was in fact taken from the latter bulk, a verdict for the amount claimed was directed for the plaintiff, leave being reserved for the defendant to have the verdict entered for him if the judge should have so directed:—Held, that as the plaintiff intended to sell one bulk, and the defendant to buy another, there was no contract between them, or (per Christian, L. J.) if there was, it was a contract as to the bulk of which a sample had been exhibited at the auction; that the exhibiting of the sample amounted to a representation by the sellers that it was taken from the bulk which was about to be sold; that the meaning of the condition as to the irresponsibility of the sellers was that they guaranteed the sample was taken, though not necessarily fairly taken, from the bulk to be sold; that the heading in the auctioneer's ledger, not having been shewn to the defendant before the sale, could not bind him; and that the auctioneer had no authority to sign the defendant's name to any but the real contract. *Megaw v. Molloy*, 2 Ir. L. R. 530—C. A.

Nature of Guarantee.—On the 13th January A. wrote to T. inquiring the terms on which he would supply him with Peruvian guano, and adding, "a sample, with guaranteed analysis, to accompany your offer." On the 23rd T. replied by letter as follows: "I shall be glad to do the best I can for you; I may say that my guano contains 18 per cent. of ammonia; this is the highest analysis this year." On the 1st February T. forwarded three samples of guano to A. with a letter, offering them at certain prices, viz.: "No. 1, at 14*l.* 2*s.* 6*d.*; No. 2, at 13*l.* 10*s.*; and No. 3, at 12*l.* 5*s.* per ton;" and he inclosed a copy of a printed analysis, headed, "Analysis of Government Peruvian Guano, ex Mindano, now lading at Whitehaven," and said he could send three more in a day or two. This analysis T. described as "the mean of three eminent chemists, who were furnished with an average sample of the bulk of the cargo." It set out the specific proportion per 100 of the various constituent parts, and at its foot was the following note: "containing nitrogen, 14·31—equal to ammonia, 17·37," and it was signed by T. On the 4th February A. wrote informing T. that

he agreed to accept his tender, according to the conditions named in his letter; and on the 8th March he wrote an order to T. for a quantity of "the best Peruvian guano, No. 1, price 14*l.* 2*s.* 6*d.*, delivered, conditions and analysis as per yours of the 1st February." The guano was delivered according to order; and after the bulk had been broken, A. had a sample of it analysed by his own analytical chemist, when it was found to contain much less ammonia than mentioned in the analysis sent, whereupon he claimed a deduction from the price, which the seller refused to allow. In an action to recover the price:—Held, that the correspondence contained not merely a guarantee that the bulk was equal to the sample; but also a guarantee that the analysis, at the time it was made, fairly represented and was a fair analysis of the bulk of the cargo out of which the goods were supplied; and that that circumstance should be taken into account so far as it might appear fairly to bear upon the question of price. *Towerson v. Agricultural Aspatia Co-operative Society*, 27 L. T. 276—Ex. Ch.

On the sale of an article used in a certain manufacture by a person not the manufacturer or original producer, and who sells it by sample, the purchaser carrying on a particular manufacture in which the article is used, semble there is no implied warranty that the article is fit to be used in that manufacture, even although the sample was found to be so, and the only undertaking is that the sample was fairly taken from the bulk; but it is no defence in an action for the price, that a portion of the bulk turned out wholly unfit for the manufacture, for non constat that the bulk generally will be so, or that, even if it is so, the sample was unfairly taken. *Sayers v. London and Birmingham Flint Glass Alkali Company*, 27 L. J., Ex. 294; S. C., at nisi prius, 1 F. & F. 63.

When a contract is for merchantable goods, and the sale is by sample, which represents to the buyer a merchantable article and discloses no defect, and the goods are accepted as according with the sample, there is still an implied warranty of their being merchantable, in respect of all such matters as cannot be judged of by the sample, just as there would be if bulk had been inspected, and defects could not thereby be ascertained. *Mody v. Gregson*, 4 L. R., Ex. 49; 38 L. J., Ex. 12; 19 L. T. 458; 17 W. R. 176—Ex. Ch.

Upon a sale of hops by sample, with a warranty that the bulk of the commodity answered the sample, the law does not raise an implied warranty that the commodity should be merchantable, though a fair merchantable price was given; and, therefore, if there is a latent defect then existing in it, unknown to the seller, and without fraud on his part (but arising from the fraud of the grower from whom he purchased), such seller is not answerable, though the goods turned out to be unmerchantable. *Parkinson v. Lee*, 2 East, 314.

Where, before or at any time of sale, a specimen of the goods is exhibited to the buyer, if there is a written contract which merely describes the goods as of a particular denomination, this is not a sale by sample; but there is an implied warranty that they shall be of a merchantable quality of the denomination mentioned in the contract. *Gardiner v. Gray*, 4 Camp. 144.

Where, upon a sale of goods, the seller produces a sample and represents that the bulk is of equal value, if there is a sale note which does not refer to the sample, this is not a sale by sample; and if the goods turn out to be of inferior quality, the purchaser's remedy is by an action for a deceitful representation. *Meyer v. Everth*, 4 Camp. 22.

Condition of Sample.]—Sembles, that if a manufacturer agrees to furnish goods according to sample, the sample is to be considered as if free from any secret defect of manufacture not discoverable on inspection, and unknown to both parties. *Heilbutt v. Hickson*, 7 L. R., C. P. 438; 41 L. J., C. P. 228; 27 L. T. 336; 20 W. R. 1035.

"Equal to Report and Samples."]—A contract for the sale in London of a cargo of Taganrog wheat then lying afloat at Queens-town in Ireland contained the following provisions: "In case of any dispute, this contract not to be void, it being agreed by buyers and sellers to leave the same to two London corn-factors mutually chosen, or their umpire, and to be bound by their decision. The cargo is accepted on the report and samples of Scott & Co. of Queenstown:"—Held, that this latter stipulation amounted to a warranty that the bulk was equal to the report and samples, and was not merely a representation, and the report was the genuine report of Scott & Co., and the samples taken by them. *Russell v. Nicolopulo*, 8 C. B., N. S. 362; 8 W. R. 415.

Description or Sample.]—Where goods are sold by a written contract, which contains a description of their quality, without referring to any sample, if the goods do not correspond with that description it is not material for the vendor to shew that they correspond with a sample exhibited at the time of the sale to the purchaser, who was well skilled in the commodity, this not being a sale by sample, but by the description in the written contract. *Tye v. Finmore*, 3 Camp. 462.

The sale of an article by sample, but by a particular description, does not necessarily import a warranty, if all the circumstances shew that it was understood as a mere expression of opinion or belief. *Carter v. Crick*, 4 H. & N. 412; 28 L. J., Ex. 238.

An agreement for the sale and delivery of oil, described as "foreign refined rape oil, warranted only equal to samples," is not complied with by the tender of oil which is not "foreign refined rape oil," although it is equal to the quality of the samples. *Nichol v. Godts*, 10 Ex. 191; 23 L. J., Ex. 314.

Waiver.]—Where the defendant bought of the plaintiff a quantity of rice per sample, according to the conditions of sale, to be put up by the proprietors, if required, at a certain price therein mentioned, and it did not correspond with the sample, but the defendant, after seeing fresh samples, inferior in quality to the original purchase sample, put it up for sale at a limited price, and no bidding taking place to that extent, he bought it in:—Held, that he could not afterwards repudiate the contract. *Parker v. Palmer*, 4 B. & A. 317.

— Acquiescence of Vendor in further Trial.]

—The plaintiff sold a hogshead of cider to the defendant by sample as being good draught cider. After the arrival of the cask, the defendant, on the 28th of May, wrote to the plaintiff, "The cider differs from the sample, and the little I have sold has been complained of in every instance: should this continue, I shall be obliged to return it." The plaintiff did not answer this letter till the 24th of June. The defendant, in trying to sell it, used twenty gallons, but finding it unserviceable, refused to pay for the rest, which he returned to the plaintiff. The twenty gallons were more than sufficient to enable the defendant to test the quality of the bulk:—Held, that the omission of the defendant to answer the letter of the 28th of May was evidence from which a jury might presume that the plaintiff acquiesced in the further trial of the cider, and that the defendant had not so accepted the bulk as to be bound to pay for the whole. *Lucy v. Mouflet*, 5 H. & N. 229; 29 L. J., Ex. 110.

Statute of Frauds.]—Where goods are sold by sample, the handing over the samples to the buyer does not, in the absence of evidence of a usage or a custom to the contrary, amount to a delivery and acceptance of a part of the thing sold, so as to take the case out of the 17th section of the Statute of Frauds; but it is otherwise where the buyer draws samples from the bulk after he has purchased the goods. *Gardner v. Grout*, 2 C. B., N. S. 340. And see cases ante, col. 820.

Right to inspect Bulk.]—Where the defendant entered into a contract for the purchase of wheat, and the bought-note stated that the corn was sold "according to sample, and that it should be paid for in bankers' bills, if required:" and the usage of the Bristol market was to sell by sample, subject to the buyer's inspection and approval of the bulk; and, a week after the contract, the defendant applied to see the bulk, but was told by the plaintiff that he would either send for a bushel on the spot, or would send him a load home the next day for his inspection, but that he could not shew him the bulk, as it was in another warehouse, and he did not like to let him into his connexion; and in a few days afterwards the plaintiff sent to the defendant to inform him that the wheat was ready for delivery on producing bankers' bills; but, in the meantime, the market had fallen, and the defendant repudiated the contract:—Held, that he was not liable for the breach, as he had a right to inspect the whole in bulk at any proper and convenient time after the contract was made. *Lorimer v. Smith*, 2 D. & R. 23; 1 B. & C. 1.

Satisfaction.]—A count stated, that, in consideration that the plaintiff would buy and receive, the defendant promised to make and deliver certain iron rails, to be inspected and certified as agreed upon, and to be in quality equal to any rails made in Staffordshire. Breach, that the rails, which were made and delivered, were not of that quality. Plea, that the rails were by the contract to be inspected before delivery by an agent of the plaintiff, to be appointed for that purpose, who was to be at liberty to approve and accept any of the rails, if he should think fit, and that the rails were

accordingly so inspected and approved, and accepted, in performance of the agreement, by an agent of the plaintiff:—Held, that the stipulation in the contract for quality was distinct from the stipulation as to inspection and approval by an agent of the plaintiff; also, that if the effect of the contract was, that approval and acceptance by the agent should establish that the stipulation for quality had been performed, or that the defendant had been relieved from the performance thereof, the plea was not well pleaded. *Bird v. Smith*, 12 Q. B. 786; 17 L. J., Q. B. 309; 12 Jur. 916.

Action for Recovery of Price—Actual Value.]

—If, after a sale by sample at a specific price, goods of an inferior quality are supplied, and not corresponding with the sample, the vendor cannot recover more than the actual value of the goods sold. *Germaine v. Burton*, 3 Stark. 32.

Customs of Trade relating to Sales by Sample.]

—Where goods are sold by sample, evidence of a custom of trade as to returning or making an allowance for such of the goods as do not answer the sample is receivable. *Cooke v. Riddellien*, 1 C. & K. 561.

But in such a case the vendee cannot claim the benefit of the custom, if he has not elected to comply with it within a reasonable time. *Id.*

In an action for the price of tobacco sold, evidence is admissible to shew that by the established usage of the tobacco trade all sales are by sample, although not so expressed in the bought and sold notes. *Syers v. Jones*, 2 Ex. 111.

A custom of the Liverpool corn market, that, when corn is sold by sample, if the buyer does not, on the day the corn is sold, examine the bulk and reject it, he cannot afterwards reject it or refuse to pay the whole price, is a reasonable custom. *Sanders v. Jameson*, 2 C. & K. 557.

It being usual in the sale by auction of drugs, if they are sea-damaged, to express it in the broker's catalogue, and drugs which are re-packed, or the packages of which are discoloured by sea-water, bearing an inferior price, although not damaged; the defendants, who had purchased some sea-damaged pimento, re-packed and advertised it in catalogues, which did not notice that it was sea-damaged or re-packed, but referred it to be viewed, with little facility however of viewing it; they exhibited impartial samples of the quality, and sold it by auction:—Held, that this was equivalent to a sale of goods as and for goods that were not sea-damaged, and that an action lay for the fraud. *Jones v. Bowden*, 4 Taunt. 847.

If in the sale of goods by sample, the bulk does not accord with the sample, the purchaser is not bound to accept or pay for them, even on an allowance being made for the inferiority, though that is the usage in the trade. *Hibbert v. Shee*, 1 Camp. 113.

3. REJECTION AND BREACH.

a. Rights on Breach.

Sale of Specific Chattel—Conditions for Return within limited Time in Case of Breach of Warranty.]—The plaintiff bought a horse by public auction at a repository, warranted to be a good worker, subject to the condition that "horses warranted good workers, whether sold by private

treaty or public auction, not answering such warranty, must be returned before five o'clock of the day after the sale; and shall then be tried by a person to be appointed by the auctioneer, and the decision of such person shall be final." The horse was not returned within the stipulated time:—Held, on demurrer in an action on the warranty that the plaintiff's only remedy was under the condition, and that he could not maintain the action. *Hinchcliffe v. Barwick*, 5 Ex. D. 177; 49 L. J., Ex. 495; 42 L. T. 492; 28 W. R. 940; 44 J. P. 615—C. A.

Time limited for Rejection—Latent and Patent Defects.]

—In a contract for the sale of goods, where the vendor has stipulated with the purchaser that no allowance shall be made for imperfections unless notice be given by first post after receipt of the goods, the stipulation is a general one and applies to all defects or imperfections whether latent or patent. But held on appeal that as the goods supplied were unmerchantable the condition did not apply. *Gorton v. Macintosh*, 31 W. R. 232. Reversed in C. A., W. N. 1883, 103.

Right to Return.]—The right to return a chattel sold with a warranty which proves incorrect is not taken away by the fact that the buyer before removing the chattel might have found out that the warranty was untrue, or by the fact that the chattel whilst it is in the buyer's possession is injured without his default by an accident arising from a defect inherent in the chattel. *Head v. Tattersall*, 7 L. R., Ex. 7; 41 L. J., Ex. 4; 25 L. T. 631; 20 W. R. 115.

The plaintiff bought of the defendant a mare warranted to have been hunted with certain packs of hounds. According to the terms of the sale, the mare if objected to was to be returned within a specified time. The plaintiff paid for the mare, but before removing her from the defendant's establishment he was informed by some person that the warranty was incorrect. The mare, whilst she was being taken away by the plaintiff's groom, became restive and received serious injury. The plaintiff returned her to the defendant within the specified time. The warranty was in fact untrue:—Held, in an action to recover the price of the mare, that nothing that had happened took away the plaintiff's right to return the mare, and that he was entitled to succeed. *Id.*

—Goods not Equal to Sample.]—B. engaged to supply shoes to C., to be according to sample and to be inspected and paid for by C. before shipment, it being known that the shoes were intended for the French army; a large quantity of shoes was inspected, approved, and delivered, and a portion then sent by C. to Lille. It was subsequently discovered by C. that some of the shoes contained paper in the soles which the French authorities would not allow, and after various communications B. engaged to take back the shoes returned because they contained paper, but not a larger quantity if only a few were so defective. The French authorities rejected all, and on cutting open a large number most were found to contain paper, which was also found in the sample; the shoes both delivered and undelivered were inferior to sample, and the defect could not be discovered by any reasonable in-

spection. C. gave notice that he rejected the shoes delivered and would receive no more, and brought an action:—Held, that C. was entitled to reject the shoes delivered, and throw them back on B.'s hands at Lille and in England respectively, to refuse to receive more, and to recover as damages the whole money paid, the expense of sending to and keeping at Lille, and the loss of profit on all shoes delivered or not. *Heilbutt v. Hickson*, 7 L. R., C. P. 438; 41 L. J., C. P. 228; 27 L. T. 336; 20 W. R. 1035.

Held, also, that the shoes could not have been thrown back on B.'s hands at Lille but for the second engagement. *Id.*

In England, if goods are sold by sample, and they are delivered, and accepted by the purchaser, he cannot return them; but if he has taken the delivery conditionally, he has a right to keep the goods for a sufficient time to enable him to give them a fair trial, and if they are found not to correspond with the sample, he is then entitled to return them. *Couston v. Chapman*, 2 L. R., H. L. (Sc.) 250.

In England, if a horse is sold with a warranty of soundness, and it turns out to be unsound, the purchaser cannot return the horse unless there is a stipulation that if the horse does not answer to the warranty the purchaser shall be at liberty to return it. But in Scotland, as I understand the law of that country, there would be an absolute right to return the horse upon the discovery of its unsoundness, without any specific stipulation to that effect—per Lord Chelmsford. *Id.*

Upon the sale of specific goods, with a warranty that they are equal to sample, the vendee cannot, it seems, refuse to receive them on the ground that they do not correspond with the sample, unless there is an express condition to that effect; but must resort to a cross action, or rely on the non-correspondence with the samples as a ground for reduction of damages. *Dawson v. Collis*, 10 C. B. 523; 2 L., M. & P. 14; 20 L. J., C. P. 116.

If a party purchases an article at a certain price, pursuant to a specimen exhibited, and on delivery it is found to be of inferior performance, the party cannot, in an action for goods sold, set up the inferiority to the specimen: he should have returned it, and so have rescinded the contract. *Grimaldi v. White*, 4 Esp. 95.

A person bought at a price named, "413 bales of wool, to arrive ex Stige, or any vessel they may be transhipped in, the wool to be guaranteed about similar to samples in the selling brokers' possession; and if any dispute arises it shall be settled by the selling brokers, whose decision shall be final." On the arrival of the wool, it turned out not about similar to sample, and the brokers awarded that the vendee should take it with a certain abatement:—Held, that as the contract was for the sale of specific goods, the guarantee was not a condition, but only a warranty, and that the buyer could not reject the wool on account of its inferiority. *Hayzorth v. Hutchinson*, 2 L. R., Q. B. 47; 36 L. J., Q. B. 270.

Not Bound to return Rejected Goods.—When goods sold by sample are, when delivered, found to be not equal to sample, the purchaser has a right to reject them, and it is sufficient if he gives the seller notice that he rejects them, and that the goods are at the seller's risk, and he is not bound to return them to the seller or to offer to do so, or to place them in neutral custody.

Grimolby v. Wells, 10 L. R., C. P. 391; 44 L. J., C. P. 203; 32 L. T. 490; 23 W. R. 524.

Where Goods kept.—Semble, that the purchaser of a specific chattel, under warranty, having once accepted it, can in no instance return the chattel, or resist an action for the price, on the ground of breach of warranty, unless in case of fraud, or express agreement, authorizing the return or consent of the vendor. But where the contract is executory only, when the chattel is received, as where goods are ordered of a manufacturer, and he contracts to supply them of a certain quality, or fit for a certain purpose, the vendee may rescind the contract, if the goods do not answer the warranty, provided he has not kept them longer than was necessary for the purpose of trial, or exercised the dominion of owner over them, as by selling them. *Street v. Blay*, 2 B. & Ad. 456.

Trial.—If a party buys a specific cargo of goods, expected by a particular ship, and which are warranted to be of a particular quality, he has a right, on the arrival of the ship, to inspect such cargo before it is delivered to him, in order to ascertain whether the warranty has been complied with; and, if it has not, he may reject the cargo altogether. But if the cargo is once delivered to him, he has no right to return it, on the ground that it does not correspond with the warranty. *Toulmin v. Hedley*, 2 C. & K. 157.

A., as agent of B., sold a mare to C., and having no express authority from B. to warrant her, refused to do so, but, at the time of the sale, told C. that "if the mare was not all right, she was not his." C. thereupon paid the price, which was received by B. The mare proved unsound. C. returned her to A., and sued B. in the county court for a return of the money. The judge left the following questions to the jury: first, was the mare sound or unsound at the time of the sale? secondly, was there a warranty given by A. to C.? thirdly, was the warranty given by the authority of B.? and fourthly, when the mare was sent back to A., was she received by him for B. or for C.? The jury answered the first and third questions in the negative, and the second in the affirmative, and to the last, that the mare was not received back by A. on B.'s account. The judge thereupon entered a verdict for B. The court directed a new trial, on the ground that the proper question to leave to the jury was, whether it was part of the contract that the mare should be returned if she proved unsound. *Foster v. Smith*, 18 C. B. 156.

Goods used.—A vendee of goods who has used or sold a portion of them after he has discovered that they do not answer the contract, cannot repudiate the contract and recover back the price. *Harnor v. Groves*, 15 C. B. 667; 3 C. L. R. 406.

The plaintiff bought saffron of an inferior quality, and having kept it six months, and sold part, he then objected that the article was not saffron:—Held, in an action for a breach of warranty, that, from the length of time and inferior price given, it was such an article as the plaintiff intended to purchase. *Prosser v. Hooper*, 1 Moore, 106.

A party bought a ship under a representation

that she was copper-fastened. He ascertained in the course of a few days that she was not, but did not make any complaint to the seller till several months afterwards, when she had been on a voyage and returned:—Held, that this delay would not prevent his recovering in an action for the misrepresentation, provided the action was in other respects maintainable. *Freeman v. Baker*, 2 N. & M. 446; 5 C. & P. 475; 5 B. & Ad. 797.

Where A. agreed to sell to B. a quantity of prime bacon which B. weighed and examined, and paid for by a bill at two months, but before the bill became due gave notice to A. that the bacon did not answer the contract:—Held, that B. could not give in evidence a custom that the buyer was bound to reject the contract, if at all, at the time of examining the goods. *Yeats v. Pim*, 2 Marsh. 141; 6 Taunt. 446; Holt, 95.

A soap-boiler using barilla warranted of a particular quality, in eight successive boilings, without complaint, must pay the full price. *Hopkins v. Appleby*, 1 Stark. 477.

Where utensils to be used in trade have been contracted for and delivered at a stipulated price, it is a question for the jury whether the vendee, who complains that they are unfit for the purpose for which they were intended, had used them further than was necessary, in order to give them a fair trial. And if not, the things being bulky, and, after a reasonable trial, found unfit for such purpose, the vendor, upon notice, is bound to take them away; but if the vendee retains them, without giving such notice, he is liable to pay for the value of the materials. *Okell v. Smith*, 1 Stark. 107.

If one orders a certain machine, e. g., a thrashing-machine, which when sent to him turns out to be unfit for use, he should either return it immediately, or else give immediate notice to the vendor to fetch it away; for if he keeps it a long time without doing either, he will be taken to have waived all objections to its goodness. *Cash v. Giles*, 3 C. & P. 407; *S. P., Street v. Blay*, 2 B. & Ad. 456.

As soon as goods are discovered not to answer the order given, they should be sent back, or notice given to the vendor to take them back, or an action cannot be maintained on the ground of unfitness of the article. *Fisher v. Samuda*, 1 Camp. 190.

Recovery of Price on Breach.—It will be a good defence to an action for the price of goods sold under a warranty that such goods were not of the same description as those warranted. *Poulton v. Lattimore*, 4 M. & R. 208; 9 B. & C. 259.

In an action on a bill given for the price of goods sold under a warranty, the breach of the warranty is an answer to the plaintiff's demand if the defendant has tendered back the goods, although the plaintiff did not accept them. *Lewis v. Cosgrave*, 2 Taunt. 2.

In an action for the value of goods ordered by the defendant from the plaintiff, but returned, it is incumbent on the plaintiff to prove that they were made agreeably to the order. *Hayden v. Hayward*, 1 Camp. 180.

— **Failure of Consideration.**—If goods are delivered generally of the sort ordered, but of bad quality and quite unfit for use, the price

cannot be recovered back as upon a total failure of consideration. *Fortune v. Lingham*, 2 Camp. 416.

Sale by Order of Court.—In an action for the breach of warranty of a horse, an order may be made for the sale of the horse, as "goods which for some just and sufficient reason it may be desirable to have sold at once." *Bartholomew v. Freeman*, 3 C. P. D. 316; 38 L. T. 814; 26 W. R. 743.

b. Pleadings in Action.

Claim—Scienter.—In an action for the breach of an express warranty of goods, the scienter need not be charged or proved. *Williamson v. Allison*, 2 East, 446.

In an action for a breach of an express warranty that a horse was quiet, if the declaration alleges that the defendant well knew him to be unquiet, this is an unnecessary averment, and need not be proved. *Gresham v. Postan*, 2 C. & P. 540.

But in an action for the deceit when there is no warranty, it is necessary both to allege and prove a scienter. *Dowding v. Mortimer*, 2 East, 450, n.

A declaration on a warranty alleging that seed was good, which the defendant could warrant, is sufficient after verdict. *Button v. Corder*, 7 Taunt. 405; 1 Moore, 109.

The plaintiff bought of the defendant the household furniture, fixtures, utensils in trade, &c., of a public-house, as per inventory taken by W. W., for 262*l.*, upon a representation by the defendant that the receipts of the house were 80*l.* per month, which representation turned out to be false. The declaration alleged the agreement to be for the purchase of the goodwill, furniture, fixtures, &c.:—Held, that it substantially stated the true nature of the agreement. *Cater v. Wood*, 19 C. B., N. S. 286.

Pleas.—A declaration alleged that the plaintiff bargained with the defendant to buy his interest in a lease and fixtures and the goodwill of a business; and that the defendant, by falsely, fraudulently, and deceitfully pretending and representing to the plaintiff that the amounts received for commission in the course of the business, and the net profits of the trade, were of a certain amount, sold to the plaintiff the lease and fixtures and the goodwill of the business: and it then went on to allege, that the representation was false, and occasioned a consequent damage to the plaintiff:—Held, that, under not guilty, the plaintiff was bound to prove a sale, by production of the agreement between the parties, which appeared to be in writing, as well as a false and fraudulent representation; and that it was not enough to prove an assignment of the lease, fixtures and goodwill. *Mummery v. Paul*, 1 C. B. 316; 2 D. & L. 582; 14 L. J., C. P. 9.

Where a declaration alleged that the defendant falsely represented himself as an agent of the master of a vessel, and so entered into a charterparty with the plaintiff:—Held, that, under the plea of not guilty, the contract must be proved by the plaintiff, and not the misrepresentation only. *Brink v. Wingard*, 2 C. & K. 656.

A defendant in an action for goods bargained and sold at a specific price will not be allowed to shew, either in bar of the action or in mitigation of damages, that there was a false representation of the quality of the goods, unless specially pleaded. *Woodhouse v. Swift*, 7 C. & P. 310.

In an action on an agreement, in which fraud is pleaded, the plea is not supported unless some wilful misrepresentation has been made. *Stevens v. Webb*, 7 C. & P. 60.

c. Evidence.

Representations.]—Where representations, which may amount to a warranty, are contained in letters which constitute a contract of sale, evidence is admissible of the surrounding circumstances for the purpose of shewing that no warranty was contemplated by the parties. *Nucley v. Baily*, 1 H. & C. 405; 31 L. J., Ex. 483; 10 W. R. 720.

On a sale of goods, a sale-note having been given, with a certain description relied on as a warranty, evidence is not admissible to shew that they were to be bought as they were. *Schweir v. Thorne*, 3 F. & F. 243.

In an action for a breach of warranty on the sale of goods upon a written contract, parol evidence is not admissible to shew that the seller's agent, at the time of the sale, represented the goods to be of a particular quality. *Harnor v. Groves*, 15 C. B. 667; 24 L. J., C. P. 53.

In an action for false representations on the sale of a ship, whereby she was classed lower in Lloyd's books than she would have been had she been built of the materials described:—Held, that, although the sale took place under a written contract, setting forth the build and dimensions of the vessel (but omitting all mention of the materials), the plaintiff was at liberty to give in evidence verbal statements and declarations made by the defendant touching the ship, pending the negotiations for the purchase, and before the written contract was entered into, amounting to a warranty that her frame was of a particular description of timber. *Wright v. Crookes*, 2 Scott, N. R. 685.

In an action by a farmer against a chemist for vending a sheep-wash, which killed his sheep, the evidence being that it was used according to the chemist's directions, and that the sheep died from the absorption of arsenic contained in it, although it was also shewn that the same mixture had been sold by the chemist for many years, and used with impunity, the jury was directed that they might find for the plaintiff upon this evidence. *Black v. Elliot*, 1 F. & F. 595.

Custom.]—A contract was made for the sale of a quantity of "Scott & Co.'s mess-pork," and it appeared by the evidence of mercantile men that Scott & Co. were accustomed to prepare and manufacture pork of a superior quality, which insured it a premium in the market:—Held, that the evidence of the mercantile men was properly received. *Powell v. Horton*, 2 Hodges, 12; 2 Bing. N. C. 668; 3 Scott, 110.

Where timber was sold, warranted "sound," and an issue was taken as to whether it was sound or not, evidence was allowed to be given, with a view of shewing that in the timber trade the

word "sound" had a technical and conventional meaning. *Woodhouse v. Swift*, 7 C. & P. 310.

Effect of Invoice.]—The description in the invoice of goods is sufficient proof of a warranty that they should be of that particular description. *Bridge v. Wain*, 1 Stark. 504.

d. Damages.

Weak Carriage Pole.]—The plaintiff bought a pole for his carriage from the defendant, a coach-builder. The pole broke in use and the horses became frightened and were injured. In an action for the damage, the jury found that the pole was not reasonably fit for the carriage, but that the defendant had been guilty of no negligence:—Held, that the plaintiff was entitled to recover the value of the pole, and also for damage to the horses, if the jury on a second trial should be of opinion that the injury to the horses was the natural consequence of the defect in the pole. *Randall v. Newson*, 2 Q. B. D. 102; 46 L. J., Q. B. 259; 36 L. T. 164; 25 W. R. 313—C. A.

Diseased Cattle.]—The defendant sold a cow to the plaintiff, a farmer, with a warranty that she was free from foot-and-mouth disease. The plaintiff placed the cow (which had the disease) with other cows, and some of these became infected with the disease, and died, as also did the cow in question:—Held, that the defendant was liable in damages for the entire loss, if when he sold the cow he knew that the plaintiff was a farmer and that he would or probably might place the infected cow with others. *Smith v. Green*, 1 C. P. D. 92; 45 L. J., C. P. 28; 33 L. T. 572; 24 W. R. 142.

The defendant, who was a cattle dealer and a butcher, knowing that a cow which he had recently bought was a foreign cow, and that she was suffering from an infectious disease, but not knowing that the disease was the cattle plague, from which she died shortly afterwards, sold her to the plaintiff, a farmer, warranting her to be sound, and falsely representing that she was an English cow which had come from his father's farm, and that she was free from disease. The plaintiff having placed her in a cowhouse with five of his other cows, they became infected by the cattle plague, from which the cow, which he had bought, was in fact suffering and died:—Held, in an action, containing counts on the warranty and for the false representation, first, that under the latter count, as well the value of the five cows as that of the cow, which the plaintiff had bought, was recoverable, his loss in respect of both those grounds of damage being the direct and natural result of the defendant's representation. *Mullett v. Mason*, 1 H. & R. 779; 1 L. R., C. P. 559; 35 L. J., C. P. 299.

But see *Ward v. Hobbs*, ante, col. 870.

Sale of Picture—Sub-Sale.]—A. sold a picture to B., warranting it a Claude; B. sold it to J., and warranted it a Claude to him. The picture was not a Claude, and J. brought an action against B. on the warranty. B. defended the action, and J. recovered damages and costs against him. B. then brought an action against A. upon the first warranty:—Held, that B. was

in that action entitled to recover against A. the amount of the damages and costs that B. had paid to J., and also the costs incurred by B. in defending the first action; but that, if the jury should be of opinion that the sale from B. to J. was not a real sale of the picture in the ordinary course of business, but merely a colourable sale, on the usurious discount of a bill, they ought to disallow these sums. *Pennell v. Woodburn*, 7 C. & P. 117.

Sale of Seed—Loss of Crop.—A declaration alleged that the defendant sold to the plaintiff seed barley, warranting it to be of a particular quality, but delivered seed barley of an inferior quality; and it alleged, as special damage, that the plaintiff, relying on the warranty, sold the seed barley with a similar warranty to A., who had sown it, and had thereby obtained a crop inferior to that which would have been produced by seed barley of the quality warranted, and so incurred damages which the plaintiff was liable to make good. The defendant having suffered judgment by default, it was proved, on the execution of a writ of inquiry for damages, that the sale by the plaintiff had taken place as alleged, and evidence was given of the pecuniary amount of the value of the crop obtained and the crop which would have been produced by seed barley of the quality warranted. The plaintiff's vendee claimed from him compensation, which the plaintiff had agreed to make, but no sum had been agreed upon, and no payment actually made:—Held, that, in assessing the damages, the jury ought to include the amount to which they considered the plaintiff had become liable to his vendee in respect of the difference of the crops. *Randall v. Raper*, EL. & EL. 84; 27 L. J., Q. B. 266; 4 Jur., N. S. 662.

Amount.—The damages for breach of warranty may be the whole value the plaintiff would have received had the defendant performed his contract. *Bridge v. Wain*, 1 Stark. 504.

How Calculated.—In an action for breach of a contract, by delivering goods of a quality inferior to those contracted for, the proper measure of damages is the difference between the value of goods of the quality contracted for, at the time of the delivery, and the value of the goods then actually delivered, or their value as ascertained by a resale within a reasonable time; and the fact of the goods having been previously paid for, cannot be taken into consideration in estimating the damages. *Loder v. Kekulé*, 3 C. B., N. S. 128; 27 L. J., C. P. 27; 4 Jur., N. S. 93.

A., at Liverpool, entered into a contract with B. for the purchase of a quantity of Manilla hemp, to arrive from Singapore by certain ships. The ships arrived, and the hemp was delivered to A. and paid for; on examination of the bales it was found that they had been wetted through with salt water, and afterwards unpacked and dried, and then repacked and shipped at Singapore. The hemp was not damaged to such an extent as to make it lose its character of hemp; but it was not merchantable. B. did not know of the state in which the hemp had been shipped at Singapore. A. sold the hemp by auction as "Manilla hemp with all faults," and it realized 75 per cent. of the price which similar hemp

would have fetched if undamaged:—Held, that there was an implied warranty, on the part of B., to supply Manilla hemp of the particular quality of which the bales consisted in a merchantable condition; and that A. was entitled, as damages, to the difference between what the hemp was worth when it arrived and what the same hemp would have realized had it been shipped in a state in which it ought to have been shipped. *Jones v. Just*, 3 L. R., Q. B. 197; 37 L. J., Q. B. 89; 18 L. T. 208; 16 W. R. 643.

On Sub-Sale.—If one merchant sells goods to another, who he knows buys them in order to sell again, the first is liable for all the ordinary natural consequences of selling an inferior article, if, upon the second merchant disposing of the article to his customers, it turns out to be of bad quality. Therefore, where A. sells manure to B., who sells it again to various customers, by one of whom it is discovered to be bad, but not complained of by the others up to the time of the trial, the proper measure of damage, in an action by B. against A. for the breach of A.'s contract, is the difference between the real value of the bad manure and the price at which it was sold to B. *Dingle v. Hare*, 7 C. B., N. S. 145; 29 L. J., C. P. 143; 6 Jur., N. S. 679; 1 L. T. 38.

Although a vendor of a commodity has purchased and resold with a warranty, he may recover in respect of liabilities to his vendees, yet the question of such liability will depend upon the opinion of the jury, on the whole case, as to the breach of the original warranty. *Henley v. Woodcock*, 1 F. & F. 532.

Breach of Warranty of Authority.—The plaintiff being in the occupation of a house and shop, as assignee of a term which would expire on the 25th of March, 1867, at a rent of 65*l.* a year, the defendant (who had for several years acted as agent for the freeholder, in the receipt of the rents of the property), on the 16th of November, 1863, agreed in writing, "on behalf of his brother" (the freeholder), to grant the plaintiff, at the expiration of the existing term, a renewed lease for twenty-one years at a rent of 70*l.* a year, and upon terms slightly varying from those of the former lease, the plaintiff contracting in the meantime to modernize the house by putting in a new shop-front at her own expense. The plaintiff put in a new shop-front at an expense of 50*l.*, and expended 10*l.* more in permanently improving the premises; and on the 28th of June, 1865, she contracted with B. to sell him all her interest in the existing and future leases for a premium of 150*l.*. B. taking the shop-fittings and stock at a valuation. B. was let into possession under this agreement, and paid the premium. Neither the defendant nor his brother had notice of this agreement. The defendant had no authority from his brother to make the agreement of November, 1863; and the latter refused to ratify it. The plaintiff, who had no notice of the defendant's want of authority to make the agreement, thereupon (in conjunction with B.) filed in equity a bill against the defendant's brother for a specific performance. The brother in his answer denied all knowledge of the agreement; and the defendant, when before the examiner, swore that he was not authorized by him to enter into it; the plaintiff's bill was consequently dismissed with costs, which were paid by her. B.,

who had been turned out of possession, brought an action against the plaintiff upon her contract with him, and on a reference recovered damages to the amount of 280*l.*, which was made up as follows:—205*l.* assessed by the arbitrator as the value of the lease; 22*l.* 10*s.* for the loss incurred by B. on the resale of fixtures which he had brought upon the premises; 35*l.* for loss of business by removal; 17*l.* 10*s.* for solicitor's charges. These damages, together with the costs of the action and reference, were paid by the plaintiff:—Held, that the plaintiff was entitled to recover against the defendant all the costs paid and incurred by her in the chancery suit, and also the value of the lease which she had lost through the non-performance of the agreement of November, 1863 (assumed to be 205*l.*); but not the damages and costs which arose out of her agreement for the resale of the lease to B., these not necessarily or naturally resulting from the wrongful act of the defendant, and consequently being too remote. *Spedding v. Newell*, 4 L. R., C. P. 212; 38 L. J., C. P. 133.

See DAMAGES FOR BREACH OF CONTRACT, *post*, col. 938.

V. PERFORMANCE OF CONTRACT.

1. TIME OF DELIVERY.

Hour.—A tender of goods to the purchaser himself at his warehouse, at an hour which leaves time enough for completing the delivery before twelve o'clock at night, is sufficient. *Startup v. Macdonald*, 6 M. & G. 593; 7 Scott, N. R. 269; 12 L. J., C. P. 477—Ex. Ch.

Secus, if, by reason of the lateness of the hour, the purchaser has left his warehouse before the arrival of the goods. *Id.*

A party who undertakes to deliver goods within a given time performs his part of the contract if he delivers the goods within that time; the only effect of his delaying the delivery to a late hour at night is, to expose him to the risk of not being able to deliver at all. *Id.*

Goods to be Delivered by Instalments—Failure as to one Instalment.—The defendant in October, 1879, sold to the plaintiff, and the plaintiff bought of the defendant, 2,000 tons of pig-iron at 42*s.* a ton, to be delivered to the plaintiff free on board at the maker's wharf, at Middlesbrough, "in November, 1879, or equally over November, December, and January next, at 6*d.* per ton extra." The plaintiff failed to take delivery of any of the iron in November, but claimed to have delivery of one-third of the iron in December and one-third in January. The defendant refused to deliver these two-thirds, and gave notice that he considered that the contract was cancelled by the plaintiff's breach to take any iron in November:—Held, in an action by the plaintiff for damages, in respect of the defendant's refusal (Brett, L. J., dissenting), that by the plaintiff's failure to take one-third of the iron in November, the defendant was justified in refusing to deliver the other two-thirds afterwards. The decision in *Hoare v. Rennie* (5 H. & N. 19) held to be right by Bramwell and Baggallay, L. JJ., and wrong by Brett, L. J. *Honck v. Muller*, 7 Q. B. D. 92; 50 L. J., Q. B. 529; 45 L. T. 202; 29 W. R. 830—C. A.

A. bought of B. 667 tons of Swedish iron, the

iron to be shipped from Sweden in the months of June and July, August and September, in about equal portions each month, at 15*l.* 10*s.* per ton, delivered in London. The seller shipped only 21 tons of iron in June, which arrived in London after the expiration of the month:—Held, that the buyer was not bound to accept the smaller quantity, or any subsequent quantity tendered, and that therefore a plea shewing the non-payment of any larger quantity within the specified time, was an answer to an action for not accepting the iron, or any part of it. *Hoare v. Rennie*, 5 H. & N. 19; 29 L. J., Ex. 73.

The defendant agreed to supply, during twelve months, the plaintiff with coals, to be accepted at the rate of not less than 500 tons a month. The plaintiff during the first month accepted only 158 tons. The defendant refused to supply the plaintiff with coal after the first month:—Held, that the plaintiff might maintain an action for the refusal of the defendant to supply coals after the first month. *Simpson v. Crippin*, 8 L. R., Q. B. 14; 42 L. J., Q. B. 28; 27 L. T. 546; 21 W. R. 141.

—Non-Payment excusing further Delivery.]

—Under a contract for the sale of merchandize, a certain quantity of the goods was to be delivered in each of eleven months, payment to be by cash fourteen days after delivery:—Held, that the true meaning of the contract was that the vendor might cease delivering in any month if the purchaser neglected to pay for the previous month's delivery. *Chalmers, Ex parte, Edwards, In re*, 42 L. J., Bk. 2. Affirmed on appeal, 8 L. R., Ch. 289; 42 L. J., Bk. 37; 28 L. T. 325; 21 W. R. 349.

Delivery went on under the contract for ten months, and all the lots but the tenth were paid for. On the 22nd of December, the last month of the contract, a meeting was held of the purchaser's creditors, and he was then insolvent. On the 23rd, the vendors wrote that they refused to deliver any more goods, giving no reasons. The goods had greatly risen in value, and in January the purchaser claimed the difference in price on the December lot. In February he was adjudicated bankrupt on a declaration of insolvency. On a claim by the trustee for the difference on the December lot on account of the refusal:—Held, that the refusal was justified by the non-payment, and that the case was strengthened by the fact that the purchaser could not, at the time, make a valid payment. *Id.*

—Repudiation of Contract.]

—There is no absolute rule to shew whether the breach of a contract by one of the contracting parties is to exonerate the other party from his liability to further perform the contract. The true test in each case is, whether the acts and conduct of the one party evince an intention to abandon and be no longer bound by the contract—and this is a question of evidence. Non-payment for a parcel of goods supplied, or non-delivery of a parcel of goods contracted to be supplied, is not of itself necessarily evidence of any such intention. Nor is any distinction to be drawn between a contract not performed at all and one that has been part performed. The question is not as to the right to rescind a contract, but as to the right to treat a wrongful rescission of a contract as a complete renunciation of it. *Mersey Steel & Iron Com.*

pany v. Naylor, 9 Q. B. D. 648; 51 L. J., Q. B. 576; 47 L. T. 369; 31 W. R. 80—C. A. Affirmed in *H. L.*, W. N. 1884, p. 97.

The defendants in October, 1870, contracted to sell to the plaintiffs 2,000 tons of iron "delivery in monthly quantities [of 166½ tons] over 1871, or sooner if required;" payment by four months' acceptance from the 10th of the month following delivery. In January, 1871, 101 tons were delivered, but the plaintiffs did not then demand the delivery of the balance of the monthly quantity. In February, 1871, and at several periods between that date and December 1871, the plaintiffs requested the defendants to forbear from delivery of more iron under the contract, and the defendants accordingly only made partial deliveries during the several months of 1871, up to and including November. In December the plaintiffs required delivery of the residue of the whole 2,000 tons. The defendants refused it, and denied that they were liable to deliver any more iron under the contract, except what was due on the monthly balance. The plaintiffs then brought an action for non-delivery:—Held, that, without deciding whether the defendants could be required to deliver in December at once the whole balance of the 2,000 tons, they remained liable to deliver it at some reasonable time, and not having asked for such reasonable time, but having repudiated their liability, they had no defence to the action. *Tyers v. Rosedale and Ferryhill Iron Company*, 10 L. R., Ex. 195; 44 L. J., Ex. 130; 33 L. T. 56; 23 W. R. 871—Ex. Ch. Reversing 8 L. R., Ex. 305; 21 W. R. 793.

— **Bankruptcy of Vendor.**—A manufacturer of iron contracted, in May, 1871, to sell to a company 150 tons of iron at a specified price per ton, delivery to be 20 tons per month. The deliveries were not duly made under the contract. In January, 1872, the vendor filed a petition for liquidation by arrangement. At that time a considerable quantity of iron remained to be delivered, and the market price of iron had risen very much. It appeared that in some cases the company had bought iron in the market to supply the deficiency in the monthly deliveries. It did not appear that any actual request had been made by the vendor for the postponement of the deliveries:—Held, that the company could prove in the liquidation only for the differences between the contract price of the iron and the market prices of the days when the respective deficient deliveries were made. *Llan-samlet Tin Plate Company, Ex parte, Voss, In re*, 16 L. R., Eq. 145.

Contract to deliver for Shipment during Two Months.—Under a contract to deliver maize "for shipment in June and [or] July, 1869, sellers' option:"—Held, that the maize must be on board so that the shipment might be complete in June and July, and that the whole cargo need not actually be put on board in those months. *Alexander v. Vanderzee*, 7 L. R., C. P. 530; 20 W. R. 871—Ex. Ch.

Two contracts, each for the sale of 300 tons of rice, were made in London. The first contract (which the second exactly followed) was for 300 tons "of Madras rice, to be shipped at Madras, or coast, for this port, during the months of

and
March — April, 1874, per Rajah of Cochin."

or

The 600 tons filled 8,200 bags. The vessel arrived at Madras in February, and on the 23rd of that month 1,780 bags were put on board, and on the 24th of February a like number; on the 28th of February 3,560 bags were put on board, and bills of lading were given for those amounts on the days mentioned. A bill of lading for the remaining 1,080 bags was given on the 3rd of March, but all, except fifty bags, had been put on board before that day. In an action for refusing to accept the rice, the defence was that it had not been shipped during the months of

and
March — April:—Held, that the contract had

or
not been complied with; that its words must be construed in their plain and ordinary sense; that evidence of any usage in the particular trade must, to affect their meaning, be very clear and consistent, and such evidence not having been given in this case, the vendors could not recover on the contract. *Bowes v. Shand*, 2 App. Cas. 455; 46 L. J., Q. B. 561; 36 L. T. 857; 25 W. R. 730—H. L. Reversing 2 Q. B. D. 112; 46 L. J., Q. B. 201; 36 L. T. 161; 25 W. R. 291; and affirming 1 Q. B. D. 470; 45 L. J., Q. B. 507; 34 L. T. 795; 24 W. R. 734.

The defendant agreed to buy from the plaintiff a quantity of cotton, "to be delivered at seller's option in August or September, 1864; payment within ten days from date of invoice." The plaintiff afterwards gave notice to the defendant that the cotton was ready for delivery on a certain day in August, and that the invoice would be dated from that day:—Held, that the plaintiff having exercised his option, was bound to deliver the cotton in August, and that the non-delivery in that month was a good equitable defence to an action against the defendant for not accepting the cotton. *Gath v. Lees*, 3 H. & C. 558.

— **Express Stipulation.**—Where, by the terms of a contract for making steam-boilers, and delivery, on approval by C., at the defendant's works, when the plaintiff's liability was to cease, it was expressly stipulated that the engines should be completed within two months:—Held, that time was of the essence of the contract, and that an action might be maintained for the non-delivery within that time. *Wims-hurst v. Deeley*, 2 C. B. 253.

— **Sub-Contract for Supply as soon as Possible—Notice.**—The plaintiff contracted with J. to manufacture a pile-driving machine within two months. Shortly afterwards the defendant contracted with the plaintiff to make a portion of that machine "as soon as possible." The terms of the plaintiff's contract with J. were known to the defendant. The defendant did not fulfil his contract with the plaintiff until after the expiration of the time specified in the contract between the plaintiff and J., and J. refused to accept the machine:—Held, that the contract between the plaintiff and the defendant was to be performed within a reasonable time, to be measured, not by the particular existing staff and appliances of the defendant's business, but by the time in which a reasonably diligent manufacturer of the same class as the defendant would take in carrying out the contract. *Hydraulic Engineering Company v. McHaffie*, 4 Q. B. D. 670; 27 W. R. 221—C. A.

— "During next Two Months"—Custom.]

A contract was entered into between the plaintiffs and the defendants, on the 17th June, 1872, whereby the latter agreed to supply the former with a certain quantity of puddled iron, "for immediate delivery, or say during the next two months." The defendants did not deliver any iron in June or July, but on the 15th August they sent a small portion of iron to the plaintiffs, and on the 21st of the latter month the plaintiffs, acting on the notion that under the contract the time for the delivery had expired on the 17th of that month, wrote to the defendants that as the time for delivery had expired, they would receive no more iron, and they afterwards commenced the present action for breach of contract in not delivering the iron on or before the 17th August. At the trial the judge received evidence that in the iron trade a usage or custom prevails whereby the entire months of July and August would be included in the terms "during the next two months."—Held, that the evidence was properly admissible. *Bissell v. Beard*, 28 L. T. 740.

— During Four specified Months.]—A company contracted to buy from the plaintiff from 5,000 to 6,000 tons of iron ore, to be delivered at Cardiff "during the months of June, July, August, and September." From the correspondence between the parties which led to the contract the plaintiff had arranged with correspondents at Carthage for the supply and shipment of the ore. By the 28th of July, 4,623 tons of ore were delivered to and accepted by the company, and on the 29th of July the *Nero* arrived with 767 tons more, notice at the same time being given to the company of her readiness to discharge. There was considerable delay in discharging the *Nero*, she having made an exceptionally short voyage, and for her detention beyond the lay days, the plaintiff had to pay demurrage to the extent of 150*l.*, which he sought to recover from the company. The jury found that the tender was a reasonable one, but the company contended that the quantity ought to have been distributed rateably over the four months, and that, not being bound to accept the *Nero's* cargo till September, they were not liable to pay the demurrage sued for:—Held, that the contract gave the option to either party to deliver or to demand the amount contracted for; and as no provision was made for exercising the option at any given time, whether in the first month or the last, the plaintiff could not tell, until the option was exercised, how many tons should be delivered in any month; also, that the circumstances shewed that the parties could not have contemplated equal monthly quantities. *Calaminus v. Dowlais Iron Company*, 47 L. J., Q. B. 575.

— Day of Month.]—The plaintiffs contracted to supply the defendants with goods, "delivering on April 17th, complete 8th May." The plaintiffs made no delivery on the 17th, and the defendants on the following day rescinded the contract, and refused subsequent tenders of the goods. The plaintiffs having brought an action for non-acceptance:—Held, that, if on the true construction of the contract the plaintiffs were bound to commence the delivery on the 17th of April, the defendants were entitled to rescind for the failure to deliver on that day. *Coddington*

v. Paleologo, 2 L. R., Ex. 193; 36 L. J., Ex. 73; 15 L. T. 581; 15 W. R. 961.

Delivery at Intervals—Payment—Course of Dealing.]—The defendant agreed to sell to the plaintiff 200 tons of potatoes, to be delivered at T. station, and consigned to the plaintiff at N., in such quantities and at such intervals as the plaintiff should direct. The defendant delivered 16 tons 15 cwt. in five different quantities, and received the plaintiff's cheques in payment after the arrival of the potatoes, but he refused to deliver any more unless he was paid upon delivery at T. station. He also refused to deliver more than 50 tons under any circumstances. There was no agreement in writing, and it was admitted that there was no stipulation as to the time of payment:—Held, that in an action to recover damages for non-delivery, it was no misdirection on the part of the judge to tell the jury that they might accept, as evidence of what the intention of the parties was as to the time of payment, the course pursued in that respect; upon the five deliveries under the contract. *King v. Rodman*, 49 L. T. 473.

Fine for Delay in Delivery, how Calculated.]

—The defendant entered into the following contract:—Sold to the plaintiff 5,000 tons of iron rails at 11*l.* 5*s.* per ton, delivered f. o. b., Newport, the delivery to commence by the 15th of January, and to be completed by the 15th of May. In the event of the defendant exceeding the time of delivery he shall pay by way of fine 7*s.* 6*d.* per ton per week. In the event of ships not being ready within fourteen days, notice being given, then payment to be made against wharf warrants for each 500 tons stacked and being to buyer's order. The defendants made default in the delivery of the iron, which was delivered during the months of May, June, July, August, and completed in September:—Held, that the fine to be paid for delay in delivery ought to be calculated from the time at which the contract was to be completed, viz., the 15th of May. *Bergheim v. Blaenavon Iron and Steel Company*, 10 L. R., Q. B. 319; 44 L. J., Q. B. 92; 32 L. T. 451; 23 W. R. 618.

Necessity of Notice.]—A contract, under seal, recited that a railway company was desirous of being supplied with 350,000 sleepers of Dantzic or Memel timber. This contract was based upon a specification prepared by the company, in which it was stated that the number of sleepers required under this specification was 350,000; that one-half would have to be delivered in 1847, and the other half by Midsummer, 1848; that the deliveries were to be made either by stacking the sleepers upon a wharf or properly loading them into a boat, or barge or other vessel, as might be directed by the resident engineer; and that the payments were to be made upon the engineer certifying the due delivery of each cargo. The plaintiff covenanted to supply the company with 350,000 sleepers, of the quality and description mentioned, and to deliver them within the times mentioned in the specification, as and when, and in such quantities and in such manner, as the engineer of the company should, by order or requisition in writing, from time to time within the period limited by the specification direct or require. The engineer was to be at liberty, at any time before the complete exe-

cution of the contract by the delivery of the whole number of the sleepers, to alter their size, form or construction, or alter the times of delivery of any of the sleepers which should not have been delivered; and the company covenanted to pay to the plaintiff, for or in respect of the sleepers contracted to be supplied, a certain price, upon their engineer certifying the due delivery of each cargo; and it was further agreed, that 2,000*l.* of the price should be retained by the company until two months after their engineer should have certified that the whole of the sleepers agreed to be supplied by the contractor should have been supplied:—Held, that this was a positive contract of the plaintiff to supply, and by the company to take and to pay for, the whole number of the sleepers, and that the plaintiff was entitled to notice of the times when the sleepers would be required. *Great Northern Railway Company v. Harrison* (in error), 12 C. B. 576; 22 L. J., C. P. 815—Ex. Ch.

To an action for not delivering iron sold by the defendant to the plaintiff under a contract to be delivered as required, the defendant pleaded that the plaintiff did not within a reasonable time request him to deliver the iron:—Held, that the plea was bad, since the defendant was bound to inquire of the plaintiff whether he would have the iron before he could rescind the contract on the ground that he was not within a reasonable time required to deliver it. *Jones v. Gibbons*, 8 Ex. 920; 22 L. J., Ex. 347.

In an action for not accepting oil, the declaration stated a contract to purchase forty tons of oil, the last ten tons whereof "to be delivered in all December, to be paid for on delivery," with an averment of readiness to deliver "in the month of December," and a traverse of that averment. The contract was not for any specific oil, no particular oil had been appropriated, and the brokers on each side had arranged for the previous deliveries. On the 11th of December the defendant's brokers wrote to him to know when he would receive the last ten tons. He directed a delivery to certain parties; but this was not communicated to the plaintiff, and on the 22nd of December the defendant stopped payment (towards the end of the month), upon which the defendant's brokers wrote to the plaintiff to the effect that the oil would not be received; and he then, before the end of the month, resold at a loss, and wrote to the defendant, demanding the difference:—Held, that he was entitled to recover, the jury finding that he would have been ready to deliver the oil contracted for if the defendant or his brokers had required it and offered the money. *Baker v. Firminger*, 28 L. J., Ex. 130.

In a contract of sale of goods to be delivered "ex quay or warehouse," there is an implied condition that notice shall be given to the buyer of the time when the goods are ready, and of the place in which they are. *Davies v. McLean*, 28 L. T. 113; 21 W. R. 264.

Tender of Goods in accordance with Contract after abortive Tender.—The defendants agreed to buy of the plaintiffs a cargo of maize. The plaintiffs tendered the cargo of the C., which the defendants refused to accept, upon the ground that the shipping documents were not tendered with it. The plaintiffs insisted that the tender

was valid. This dispute was referred to an arbitrator, who decided that the tender was invalid. The plaintiffs thereupon, and within the time limited by the contract, tendered the cargo of the M., which the defendants refused to accept upon the ground that they were not bound to accept any cargo in substitution for that of the C., the tender of which the arbitrator had decided to be invalid:—Held, that the defendants were bound to accept the cargo of the M., and might be sued by the plaintiffs to recover any loss which the latter might have sustained by the refusal to accept it. *Borrowman v. Free*, 4 Q. B. D. 500; 48 L. J., Q. B. 65—C. A.

Vendors, before the expiration of the time for the delivery of cotton, tendered marks of cotton that was not in accordance with the terms of the contract, and, on the vendee rejecting the same, they, before the expiration of the time fixed for delivery, tendered marks of cotton that was in accordance with the contract:—Held, that they had not, by the first delivery, broken the contract so as to justify S. in refusing to accept the cotton subsequently tendered. *Tetley v. Shand*, 25 L. T. 658; 20 W. R. 206.

A buyer entered into two contracts, each of which was for the purchase from the seller of 4,500 quarters of Russian oats, more or less, "shipment by steamer or steamers during February. Should ice at loading port prevent shipment within stipulated time, shipment to be made immediately after reopening of the navigation." The seller shipped on board one steamer 4,511 quarters to answer the first contract, and 1,139 quarters to answer in part the second contract. He also shipped on board another steamer a sufficient quantity of oats to complete the second contract. The shipment on the first steamer was made in time; that on the second steamer was made too late:—Held, that the buyer was bound to accept the 1,139 quarters in part fulfilment of the second contract, notwithstanding that the other shipment on account of that contract was made too late. *Brandt v. Lawrence*, 1 Q. B. D. 344; 46 L. J., Q. B. 237; 24 W. R. 749—C. A.

Goods sent to Depot.—In an action on a contract to deliver pheasants on the 12th October, it is sufficient to support such action if they are sent on that day to a coach-office, though they do not arrive till afterwards. *Honeywood v. Stone*, 1 Chit. 142.

Reasonable Time.—On a contract to deliver goods generally, the vendor must prove a readiness to deliver within a reasonable time. *Macdonald v. Longbottom*, 1 F. & F. 538.

Readiness and Willingness.—The plaintiff declared on a contract by the defendant to purchase iron of the plaintiff, alleging a promise by the defendant, that if the delivery of the iron should not be required by the defendant on or before the 30th April, 1845, the iron was to be paid for by the defendant on the day and year aforesaid; and averring that the plaintiff had always been ready and willing to deliver the iron in terms of the contract; that the 30th April was past before action, but the defendant had not paid for the iron:—Held, that, under the averment of readiness and willingness to deliver the iron, the plaintiff was not bound to shew that any specific iron had been appropriated by him

for that purpose. *Dunlop v. Grote*, 2 C. & K. 158.

Postponement of Delivery.—By a written contract the plaintiff agreed to deliver, and the defendants to accept, a certain quantity of iron, of greater value than 10*l.*, in the month of June. On the 2nd of June, and again in the middle of June, one of the defendants saw the plaintiff, and verbally requested him to allow the delivery of the iron to stand over, and the plaintiff verbally consented to his request. On the 1st of August the plaintiff pressed the defendants to take delivery, and they, after some correspondence, wrote on the 9th of August asking for further time. The plaintiff again waited, but without result. On the 20th of October the plaintiff brought an action for non-acceptance of the goods in accordance with the terms of the written contract. It was contended by the defendants that by reason of the arrangement to postpone delivery and acceptance made before any breach of the contract, the plaintiff could not recover upon the original contract, there never having been readiness and willingness to deliver or any tender of delivery on the plaintiff's part under such contract; and that the plaintiff could not rely on any new or substituted contract to accept at a later date, such contract being verbal only:—Held, that the true effect of what took place between the parties being that the plaintiff voluntarily withheld delivery at the request of the defendants, no new contract being substituted for the original written contract, the plaintiff was entitled to maintain his action; and that the damages must be estimated according to the market price of iron at a reasonable time after the last request of the defendants to withhold delivery. *Hickman v. Haynes*, 10 L. R., C. P. 598; 44 L. J., C. P., 358; 32 L. T. 873; 23 W. R. 872.

On the 15th of June, 1874, the defendant bought of the plaintiffs 100 tons of pig iron, to be delivered "25 tons at once, and 75 tons in July next." By the end of July 75 tons in all had been delivered. There was no evidence of any request by him to the plaintiffs before the end of July to delay the delivery of the last 25 tons; but it was proved that in October he verbally requested the plaintiffs' manager to deliver them, in consequence of which they were forwarded in the course of the same month to the defendant, but he declined to receive them. In an action against the defendant for refusing to accept the 25 tons, he pleaded that the plaintiffs were not ready and willing to deliver the iron according to the contract:—Held, that inasmuch as the vendors were not shewn to have withheld the delivery of the 25 tons in consequence of a request by the vendee before the expiration of the agreed time, viz., in July, the action was not maintainable upon the original contract; and that the subsequent conversation with the vendors' manager could not be relied upon either as a new contract or as an arrangement for an altered time of delivery. *Plevins v. Downing*, 1 C. P. D. 220; 45 L. J., C. P. 695; 35 L. T. 263.

On the 27th of April, A., who sold flour on commission for the defendant, a miller, verbally contracted to sell to the plaintiff 150 sacks, at 29*s.* per sack, no time being named for the delivery. The defendant repudiated A.'s authority on the ground that his instructions to

him limited him to 30*s.* per sack. Disputes arose between the parties, and eventually on the 8th of June, the defendant agreed to deliver the flour, which he accordingly did, and sued for and recovered the price. The plaintiff afterwards commenced an action against the defendant in a county court to recover the difference between the contract price and the price at which he had been obliged to purchase other flour on the defendant's default. The judge found that the flour had not been delivered within a reasonable time, but he held that either the plaintiff must be considered to have allowed the defendant an extension of time for the performance of the original contract, or that the delivery of the flour had relation to a new contract taking effect from the time when the defendant signified his intention to execute the order, and that the defendant was entitled to judgment:—Held, that the decision of the county court judge was correct. *Williams v. Wheeley*, 8 C. B., N. S. 299.

Clauses entitling Vendor to suspend, or excusing him from Deliveries.—By agreement between the plaintiffs and the defendants, the plaintiffs, who were merchants at Bilbao, undertook to supply the defendants at Workington, Cumberland, with about 30,000 tons of Sommorostro ore at the price of 25*s.* 6*d.* per ton, cost, freight and insurance, payment to be made by cash on delivery of each shipment, "Deliveries to be made at the rate of from 800 to 1,300 tons per month, provided we (plaintiffs) are able to procure tonnage at or under the rate of 16*s.* 6*d.* per ton. No responsibility to attach to us should we be prevented from delivering all or any portion of the ore, through any dangers and accidents of the mines, railway shoots, rivers, seas, and navigation of whatever nature or kind, or through any circumstances beyond our own control:—"Held, first, that the plaintiffs were entitled to deliver quantities of the ore which they had previously withheld while freights were above the limits, provided such deliveries were made within a reasonable time, having regard to the contemplated duration of the contract, the means which they had to make up arrears, &c.; secondly, that they were not entitled to deliver quantities which they had previously been prevented from delivering from dangers and accidents of the mines, &c., such quantities being as much struck out of the contract as if they had been actually delivered. *De Oleaga v. West Cumberland Iron and Steel Company*, 4 Q. B. D. 472; 48 L. J., Q. B. 753; 41 L. T. 342; 27 W. R. 870.

2. QUANTITY AND QUALITY OF GOODS.

"Say about."—M., on behalf of the firm of M. & Co., merchants in Quebec, of which he was a member, entered into the following contract with R. M.:—"R. M. sells, and Messrs. M. & Co. buy, all of the spars manufactured by R. M., say about 600 red pine spars, averaging by culler's measurement in Quebec sixteen inches, at the sum of, &c., delivered free of charge in Quebec. The above spars will be out of the lot manufactured by B., the lengths of which, according to his specification, I am satisfied with." The lot manufactured by B. was found to consist of 603 spars, of which only 496 averaged sixteen inches:—Held, that M. & Co. were bound to ac-

cept the 496 spars at the rate agreed on, the words "say about 600 red pine spars," being words of expectation and estimate only, and not amounting to a warranty. *M'Connell v. Murphy*, 5 L. R., F. C. 203; 28 L. T. 713; 21 W. R. 609.

"About"—"More or less."—The plaintiffs agreed to purchase of the defendants "about 300 quarters, more or less," of foreign rye, shipped on board the A. E. at Hamburg, at a certain price, subject to the vessel's safe arrival with the goods on board, and being unsold at Hamburg. The ship brought 350 quarters, and the defendants refused to deliver any part unless the plaintiffs would accept the whole. The plaintiffs abandoned the contract and brought an action to recover back a sum of money which they had paid for 300 quarters:—Held, by Lord Tenterden, C. J., and Littledale, J., that, by the words "about" and "more or less," the parties could not be taken to have contemplated so large an excess as fifty over 300 quarters: by Parke, J., and Patteson, J., that at all events it lay on the defendants to shew that such an excess above the quantity named was in contemplation; and if from the obscurity of the contract they were unable to do so, their defence failed. *Cross v. Eglin*, 2 B. & Ad. 106.

"Say not less."—A declaration on the following contract:—"J. S. sold to L. & Co. what he may pull, up to 6th January, say not less than 100 packs, of combing skin, at 7½d. per lb., delivered in M., allowing three months' interest for cash, in clean and dry condition. B. Dec. 12/48." Averments, that J. S. was a puller or preparer for sale of combing skin, which is a kind of wool. Breach, that he did not deliver 100 packs:—Held, that the words "say not less than 100 packs" were not mere words of expectation, shewing what the parties supposed the quantity would prove to be, but amounted to a contract to deliver at least that quantity, and that the breach was well assigned. *Leeming v. Snaith*, 16 Q. B. 275; 20 L. J., Q. B. 164; 15 Jur. 988.

"Any less number that may arrive."—B. contracted to buy of P. "115 bales containing 18,440 (or any less number that may arrive) East India hides, shipped per Ontario, Calcutta to Hamburg, and to be delivered in London, at 11½d. per pound round, but the wrappers to be charged at 8d. per pound." The ship having been compelled by stress of weather to put back to Calcutta, 18 of the bales were found to be damaged, and were sold. The remaining 97 bales arrived, but the buyer refused to accept them:—Held, that the words "or any less number that may arrive," applied to the number of bales, and not merely to the number of hides, and consequently that the buyer was liable for not accepting the 97 bales. *Beckh v. Page*, 5 C. B., N. S. 708; 28 L. J., C. P. 164; 5 Jur., N. S. 735. Affirmed, 7 C. B., N. S. 861; 28 L. J., C. P. 341; 5 Jur., N. S. 1405—Ex. Ch.

Several Contracts—Amount arriving deliverable.—The plaintiffs, who expected to receive 576 bales of cotton from Madras, contracted to sell 202 bales thereof to C.; then 123 to the defendants; then, again, 154 to the defendants; and then 97 to G. By these contracts the buyers

were to take what arrived deliverable. Only 275 bales arrived deliverable. The plaintiffs delivered 60 to C., 30 to G., and 33 to the defendants under their first contract; they then tendered the remaining 152 to the defendants, in fulfilment of their second contract, which the defendants refused to accept:—Held, that this second contract with the defendants meant, that the plaintiffs were to deliver and the defendants to accept the residue (up to 154) beyond 123; and that though the plaintiffs had broken their first contract with the defendants, they had fulfilled their second, and were entitled to succeed. *Arbuthnot v. Strecheisen*, 35 L. J., C. P. 305.

"Cargo."—A. ordered of B. "a small cargo (of lathwood) of about the following lengths, &c., in all about sixty cubic fathoms," and B. accepted the order. B., not being able to procure a vessel of the exact size, chartered a vessel loaded with eighty-three fathoms. On the arrival of the vessel B.'s agent unloaded, measured and set apart timber to answer the order, and tendered A. a bill of lading for that quantity, and a draft for acceptance; but he declined to accept on the ground that the cargo was in excess of the order:—Held (per Kelly, C. B., and Cleasby, B., Martin, B., dissentiente), that "cargo" meant a whole cargo, and not a parcel of a cargo, and that B. had not complied with the order so as to entitle him to maintain an action for non-acceptance of the cargo. *Kreuger v. Blanck*, 5 L. R., Ex. 179; 39 L. J., Ex. 160; 23 L. T. 123; 18 W. R. 813.

The plaintiff sold to the defendant "a cargo of from 2,500 to 3,000 barrels (seller's option) American petroleum . . . to be shipped from New York . . . and vessel to call for orders off coast for any safe floating port in the United Kingdom, or on the Continent between Havre and Hamburg, both inclusive (buyer's option)." The plaintiff chartered a vessel, on which were placed 3,000 barrels of petroleum, and a bill of lading was signed making them deliverable to the plaintiff; but as this quantity did not constitute a full cargo, 300 additional barrels were placed on board, which were marked with a different mark, and for which a separate bill of lading was signed. The plaintiff gave notice to the defendant of the shipment of the 3,000 barrels, and as ready to order the vessel from its port of call to any port of delivery within the contract, and there to deliver to the defendant the 3,000 barrels and to take the 300 barrels himself, or to deliver to the defendant at any such port 2,750 barrels as the mean between 2,500 and 3,000, but the defendant refused to accept either the 3,000 barrels or any other quantity. The plaintiff having brought an action for non-acceptance:—Held, that, on the true construction of the contract, "cargo" meant the entire load of the vessel which carried it; that the defendant was therefore not bound to accept part of a cargo and that the action was not maintainable. *Borrowman v. Drayton*, 2 Ex. D. 15; 46 L. J., Ex. 273; 33 L. T. 727; 25 W. R. 194.

Absolute Contract.—B. contracted to sell to S. "about 500 tons nitrate of soda, in bags, of good merchantable quality," to be ready for delivery by a given day, at a certain price, and upon certain terms and conditions. The contract then proceeded: "It is understood that the

nitrate of soda is to form the full and complete cargo of the John Phillips, 345 tons register, now on her passage to Sydney, to proceed thence, without undue delay, to the west coast of South America, there to load the above. In the unexpected event of the John Phillips getting ashore, or being unable to prosecute her voyage from any casualties of the sea, then the seller agrees to deliver, and the buyer agrees to take, in lieu thereof, another cargo or cargoes of about equal quantity, to be named at the earliest practicable period prior to the arrival off the coast. The only ground on which the seller is to be excused delivery of the above nitrate of soda, is, the loss of the vessel on her homeward voyage: in which case this contract is to be considered void, but in no other event whatever:—Held, that this was an absolute contract for the sale of 500 tons, and not of a quantity limited by the capacity of the vessel named. *Bourne v. Seymour*, 16 C. B. 337; 24 L. J., C. P. 202; 1 Jur., N. S. 1001.

Held, also, that the contract did not amount to a warranty that the John Phillips should be of capacity to carry the whole 500 tons. *Id.*

—**Contract within certain Limits.**—The defendants, employed by the plaintiffs as their brokers, made a contract for the sale by the plaintiffs to D., the principal of the defendants, of a cargo of wheat, to be shipped in any ship the sellers might select of a specified class, "of about 2,000 quarters—say 1,800 to 2,200 quarters—at the price of 52s. per delivered quarter of 492 lbs., to any safe port in the United Kingdom, calling for orders as usual. The measure, for the sake of invoice, to be calculated at the rate of 100 chetwerts, equal to 72 quarters. Sellers guarantee delivery of invoice weight, sea accidents excepted. Buyers to pay for any excess of weight, unless it be the result of damage or heating. Payment, cash in London in exchange for usual shipping documents." While the cargo was on board ship at sea the shipping documents were tendered to D., and in them the cargo was stated to consist of 3,077 chetwerts, making, at the rate of 72 quarters to 100 chetwerts, 2,215 quarters. The invoice stated that the cargo consisted of 2,200 quarters, and the cargo was more than 1,800, and less than 2,200. In an action against the defendants, D., having refused to accept the shipping documents, and to pay for the cargo:—Held, that D. was justified in such refusal, inasmuch as the agreement was, that the cargo should not exceed 2,200 quarters, and by accepting the shipping documents he would have been liable to pay for the excess, if there had been any. *Tamvaco v. Lucas*, 1 El. & El. 581; 28 L. J., Q. B. 150; 5 Jur., N. S. 731; 1 L. T. 161.

A contract was entered into between the defendants and the plaintiffs for the sale to the former of a cargo of wheat not shipped. In the contract the cargo was described as consisting "of about 2,000 quarters, say from 1,800 to 2,200 quarters, at the price of 50/, say 50s. per delivered quarter of 492 lbs. The measure, for the sake of invoice, to be calculated at the rate of 100 chetwerts, equal to 72 quarters. Sellers guarantee delivery of invoice weight, sea accidents excepted. Buyers to pay for any excess of weight, unless it be result of sea damage or heating. Payment, cash, in London, in exchange for usual shipping documents, as soon as the ship has got out of the sea

of Azoff." The cargo was at the time it was shipped, and at all times subsequent, less than 1,800 quarters both according to the measure of 100 chetwerts, equal to 72 quarters, and according to the measure that each quarter was to weigh 492 lbs. In an action for the price:—Held, that inasmuch as, according to the contract, the cargo was to be between the limits of 1,800 and 2,200 quarters, and the cargo of which the shipping documents were tendered was less than 1,800 quarters, the defendants were not liable. *Tamvaco v. Lucas*, 1 El. & El. 581; 28 L. J., Q. B. 301; 5 Jur., N. S. 1258; 7 W. R. 568.

On Board Ships.—A. agreed to sell to B. 50 tons St. Petersburg sound clean hemp, at 59l. per ton, to be shipped from St. P. in June or July following, and the ship's name declared as soon as known. If the ship should not arrive by the 31st of December the contract to be void. On the 5th of September A. gave B. notice that the 50 tons were shipped in the Lively, but on the 20th claimed the right (which B. denied) of supplying the deficiency, if any, from another ship. The Lively arrived on the 20th of September with 44 tons, 20 only of which were delivered to B., the rest being shipped at St. P. to other persons. The remaining 30 tons arrived in another ship on the 4th of October:—Held, first, that A. was not confined by the contract to one ship; secondly, that the notice of the 5th September having proceeded on mistake, he was not precluded from supplying the deficiency by another vessel; and, thirdly, that he was only bound to deliver to B. from the Lively so much as was ascribed to B. *Thornton v. Simpson*, 2 Marsh. 267; 6 Taunt. 556; Holt, 164.

A. sold to B. all the hemp that might be shipped on board certain vessels at Riga, not exceeding 300 tons, by C. the agent of the concern. C. shipped on board these vessels only 71 tons of hemp on account of A., but upwards of 300 tons on account of other persons:—Held, that the contract must be confined to such hemp as C. should ship as agent to A., and that A. was not answerable to B. for more than 71 tons. *Hayward v. Scougall*, 2 Camp. 56.

An agreement to sell a certain quantity of goods on arrival by a particular vessel, is a conditional contract dependent on the arrival of the goods. *Hawes v. Humble*, 2 Camp. 327, n. And see *Boyd v. Siffin*, 2 Camp. 326. Compare cases ante, cols. 771, 772.

Right to return whole Quantity when part not in compliance with Order.—The defendant gave to the plaintiff a joint order for a quantity of ready-made clothing, consisting of coats, vests, trousers, and knickerbockers, to be according to prescribed measurements and directions; some of the goods were already made, and others had to be manufactured; no particular time was mentioned for delivery; one bale, value for 25l. 7s. 6d., was sent according to order, and was accepted and taken into stock by the defendant; another bale, value for 21l. 8s., was sent about a fortnight afterwards; it contained vests, trousers, and knickerbockers, value for 11l. 12s., which were according to order, but the coats in the bale were much smaller than those ordered; the defendant, on discovering this, returned the whole of the second bale to the plaintiff:—Held, that the defendant was not bound to select and ac-

cept, and was not liable for the value of such part of the second bale as corresponded with the order, and that he was entitled to return the entire bulk, notwithstanding that he had accepted the bale first sent. *Tarling v. O'Riorden*, 2 Ir. L. R. 82—C. A.

Sale of Goods not divisible.—The plaintiffs contracted to sell to the defendants 25 tons (more or less) Penang pepper, October ^{and} November shipment, name of vessel or vessels, marks and particulars to be declared within sixty days from date of bill of lading. Within the stipulated time the plaintiffs declared 25 tons by a vessel called the B., only 20 tons of which complied with the terms of the contract as to shipment, and made no further declaration. The defendants declined to accept any portion of the pepper:—Held (by Cotton and Thesiger, L. J.J., Brett, L. J., dissenting), that the contract was entire, and that the defendants were not bound to accept the 20 tons, but were entitled to insist upon the delivery of 25 tons according to the contract. *Reuter v. Sala*, 4 C. P. D. 239; 48 L. J., C. P. 492; 40 L. T. 476; 27 W. R. 631—C. A.

When Bound to accept Part.—A buyer entered into two contracts, each of which was for the purchase from the seller of 4,500 quarters of Russian oats, more or less, "shipment by steamer or steamers during February. Should ice at loading port prevent shipment within stipulated time, shipment to be made immediately after re-opening of the navigation." The seller shipped on board one steamer 4,511 quarters to answer the first contract, and 1,139 quarters to answer in part the second contract. He also shipped on board another steamer a sufficient quantity of oats to complete the second contract. The shipment on the first steamer was made in time; that on the second steamer was made too late:—Held, that the buyer was bound to accept the 1,139 quarters in part fulfilment of the second contract, notwithstanding that the other shipment on account of that contract was made too late. *Brandt v. Lawrence*, 1 Q. B. D. 344; 46 L. J., Q. B. 237; 24 W. R. 749—C. A., and see *cases ante*, col. 895.

Tender of larger Quantity than Ordered.—The plaintiffs, at New York, contracted to sell and deliver 1,000 quarters of wheat to the defendants at Bristol, upon the terms, "cost, freight, and insurance." Through a mistake the plaintiffs shipped, by a sailing vessel, a cargo of 2,000 quarters of wheat to K. at Bristol. They also forwarded to K. by steamer a bill of lading and a policy of insurance of the whole cargo of wheat shipped. This policy was "free from particular average." K., at the request of the plaintiffs, accepted a bill of exchange drawn upon him by them for the price of the 2,000 quarters. The defendants afterwards refused to accept the 1,000 quarters from K.:—Held, that in an action against the defendants for breach of a contract to accept the 1,000 quarters, the plaintiffs were not ready and willing to deliver the 1,000 quarters to the defendants within the terms of their contract. *Hickox v. Adams*, 34 L. T. 404—C. A.

A contract for the sale of cotton of a given quality is not performed on the part of the seller, by a tender of a larger quantity, out of which the buyer is required to select those bales

which answer the description of the cotton contracted for. *Rylands v. Kreitman*, 19 C. B., N. S. 351.

A person having ordered of a wine merchant two dozen of port, and the same quantity of sherry, to be returned if not approved of, the merchant sent four dozen of each; the buyer returned all but thirteen bottles, objecting to the quality:—Held, that more wine having been sent than was ordered, he was entitled to return the whole, and was not bound to pay for more than he retained. *Hart v. Mills*, 15 M. & W. 85; 15 L. J., Ex. 200.

The defendant ordered of the plaintiffs specified quantities of particular kinds of crockery, to be sent to him by railway. They sent a crate containing a smaller quantity of the particular goods, also other goods not ordered, and of such a nature as to be distinguishable from the others; and they sent one invoice debiting the defendant with the contents of the whole crate. He refused to receive them, assigning as his reason that they were out of time. At the trial of an action for their price, an objection was taken that the defendant was not bound to take any part of the goods because of the manner in which they were sent, accompanied by goods not ordered:—Held, that the vendors had not furnished the goods so that the vendee was bound to accept them. *Lery v. Green*, 1 El. & El. 969; 28 L. J., Q. B. 319; 5 Jur., N. S. 1245; 7 W. R. 486—Ex. Ch.

Held, also, that the vendee might have taken his own goods, and rejected the excess. *Ib.*

Tender of Higher Price than Ordered.—The defendant, a Liverpool cotton merchant, on 2nd April, 1872, authorized the plaintiffs, merchants at Liverpool and Bombay, to purchase 100 bales Salem's cotton at 8d. per lb., to be shipped by sailing vessel, and to draw for invoice amount at six months' sight; which drafts the defendant engaged to accept, with shipping documents attached, and to pay same. On the 22nd April, the plaintiffs wrote from Bombay that the Salem's cotton would be shipped as soon as it arrived there. On the 14th June they wrote again from Bombay, inclosing invoice of 100 bales Salem's cotton, at 8½d. per lb., and informing the defendant that they had drawn upon him at six months' sight for the amount. On the 2nd July, before receiving the letter and invoice of 14th June, the defendant wrote to the plaintiffs' Liverpool house that he had waited more than a reasonable time, and that he declined to have anything more to do with the cotton. On the 10th July the defendant received the letter and invoice of the 14th June, and wrote again to the plaintiffs' Liverpool house, calling attention to the price charged in the invoice, and refusing acceptance of their draft. The following day the plaintiffs apologized for what they called the clerical error in the price, said they were prepared to rectify the mistake, and also tendered other cotton shipped at the time the defendant wished. The defendant refused to have anything more to do with the matter:—Held, that the plaintiffs could not recover for the price of the cotton. *Jefferson v. Querner*, 30 L. T. 867.

Custom—Gross or Net Weight.—The plaintiffs, merchants in London, ordered of the defendant, a merchant at Singapore, two parcels, of 25 tons and 150 tons respectively, of terra japonica,

"provided it can be laid down here, all charges included, at 18s. per cwt." The defendant sent to the plaintiffs invoices and bills of lading, representing that two parcels, respectively of those weights, had been shipped to their order, and at the same time drew bills upon them for the price, which the plaintiffs, upon the faith of the representation contained in the invoices and bills of lading, accepted and duly paid. Upon the arrival of the goods in London, the net weight, exclusive of packages, which consisted of baskets and leaves, proved to be 24 tons and 132½ tons only. The plaintiffs took the goods, and sold them; and brought an action to recover back the sum overpaid, as upon a partial failure of consideration. Upon a special case, stating it to be the custom at Singapore to purchase terra japonica by gross weight as packed, and in London to sell it net:—Held, that the plaintiffs were entitled to recover. *Deane v. Conolly*, 8 C. B. 640; 19 L. J., C. P. 71.

Contract to take all Goods required.—By a contract between a railway company and the defendant, it was provided that he should supply, and the company should purchase, subject to the terms and to the extent thereafter mentioned, all the coke that should be required by the company for working their railways between London and Cambridge, and London and Colchester. By the fourth clause, the company engaged to take from the defendants 550 tons and 100 tons of coke weekly, during seventeen years; and they further agreed, that, if they should require more than those quantities for working their railways, they should take the same from the defendant, with a proviso, that if they should require less than the stipulated quantities, the supply should be reduced accordingly, upon giving the defendant three months' notice. And the company engaged that "so long as the defendant should punctually and duly supply the coke, and so long as the same should be of the best quality, they should abstain from making purchases of coke from any other persons:—Held, that the readiness and willingness of the company to take from the defendant all the coke they required for the purpose of their railways was not a condition precedent to their right to insist upon being supplied with the quantities expressly stipulated for; and, consequently, that the fact of the company having bought coke from other persons afforded no answer to an action by the company against the defendant for a failure to deliver the quantities contracted for. *Eastern Counties Railway Company v. Philipson*, 16 C. B. 2; 24 L. J., C. P. 140.

W. undertook to supply a gas company, for a period of three years, with all such pipes as should from time to time during the period be required by the company, at rates specified in the agreement. The company ordered large quantities of pipes, and, when the contract expired, had in stock many thousand yards of pipes which W. had supplied, and for which he sought to recover the difference in price between the current value and the price paid according to the contract:—Held, that the contract could not be limited to orders for pipes required for use at the time of the orders, but that he was bound to supply all pipes ordered by the company for works which they were carrying on and autho-

rized to undertake by their act of parliament. *Whitehouse v. Liverpool Gas Company*, 5 C. B. 798; 17 L. J., C. P. 237.

Quality—Special Denomination.—In a contract for delivery in this country of a raw material, the produce of a foreign country, and described by certain epithets in themselves indefinite, as long or white, the buyer is prima facie entitled to delivery of the article which passes in the market under that designation; and if the epithet has acquired in the trade a definite meaning, as the usual or average length or quality, then the buyer is entitled to an article of such usual or average length or quality; and it is no sufficient excuse for not delivering it that it is a fair average of the growth of the year. *Frith v. Mitchell*, 4 F. & F. 464.

Where goods are sold under a certain denomination, the buyer is entitled to have such goods delivered to him as are commercially known under this denomination, though he may have bought after inspection of the bulk, and without warranty. *Josling v. Kingsford*, 13 C. B., N. S. 447; 32 L. J., C. P. 94; 9 Jur., N. S. 947; 7 L. T. 790; 11 W. R. 377.

A contract for the sale of oxalic acid is not complied with by the delivery of an article which the jury finds not to come in commercial language properly within the description of oxalic acid, even where the seller is not the manufacturer of the article, and at the time of contracting expressly declines all responsibility as to the quality, and the buyer has had an opportunity of inspecting it, and no fraud is suggested. *Id.*

In an action for the price of coal sold as "Haswell Wallsend," without any warranty of quality or size:—Held, that the only question was, whether it was that kind of coal. *Taylor v. Dalton*, 3 F. & F. 263.

—Special Mark—Falsa demonstratio.—A. received an order from a correspondent at Bremen to purchase for him bar iron of a description known there as S. & H. crown iron. Upon inquiry, he found that the firm of Snowden & Hopkins, whose mark that was, had ceased to exist, and had been succeeded by a firm of Hopkins & Co. (the plaintiff); and he accordingly, through a broker, bought of the plaintiff 67 tons of iron, which was described in the bought and sold notes as "S. & H. (crown) common bars." The iron when tendered was found to bear the mark of the new firm "H. & Co." with a crown, and was rejected by A. In an action for refusing to accept the iron, the jury found that the mark "S. & H." was not a material part of the bargain, and that the article tendered was substantially what A. bargained for:—Held, that, construing the contract by the surrounding circumstances, the mark S. & H. might, if necessary, be rejected as falsa demonstratio, and that the contract was complied with by the tender of iron marked "H. & Co." *Hopkins v. Hitchcock*, 14 C. B., N. S. 65; 32 L. J., C. P. 154; 9 Jur., N. S. 896; 8 L. T. 204; 11 W. R. 597.

—Sale of Rice "in Double Bags."—The defendant contracted to deliver to the plaintiff rice "in double bags," to be shipped for New York. There was evidence that rice in single bags would

not readily sell in the American market, and that in New York double bags were considered essential for transit to the west:—Held, that, as the packing in double bags affected the quality and description of the rice sold, the plaintiff was entitled to reject it if sent in single bags. *Makin v. London Rice Mill Company*, 20 L. T. 705; 17 W. R. 768.

—“To meet convenience and taste.”—A. having applied to R., a coachmaker, to build for him a carriage of a particular description, the latter, at his request, sent him a drawing, which A. returned, with objections. B. thereupon wrote to A., expressing his regret that the drawing sent did not meet his approval, adding, “If you order, every attention shall be paid to any particulars you may think proper.” A., in reply, wrote, “I have duly received your reply to my last, and can only continue to wonder at your disinclination to furnish me with so simple a drawing as I then requested, with the view of obviating as far as possible the chance of any misconception which might otherwise arise in respect to my order, which I can now, of course, give in general terms only, and on the assumption that you undertake to execute it in a manner which shall meet my approval, not only on the score of workmanship, but also that of convenience and taste.” The carriage was thereupon built, and forwarded to A., who found many faults in it, and rejected it:—Held, that the order having been given and accepted on the express condition that the carriage should meet with the approval of A., “on the score of convenience and taste,” the latter was entitled (acting *bonâ fide*, and not from mere caprice) to reject it. *Andrews v. Belfield*, 2 C. B., N. S. 779.

Allowance—Difference of Kind.—Parties, through a broker, bought “the following cotton, viz. ^{p.c.} 128 bales, at 25*d.* per lb., expected to arrive in ^{c.} London per Cheviot from Madras. The cotton guaranteed equal to sealed sample in our (the brokers’) possession. Should the quality prove inferior to the guarantee, a fair allowance to be made.” The sample was of Long-staple Salem cotton. The 128 bales marked ^{p.c.} which arrived by the Cheviot contained Western Madras cotton. The cotton was not in accordance with the sample; Western Madras cotton is inferior to Long-staple Salem, and requires machinery for its manufacture different to that which is used for Long-staple Salem; and the market price of Western Madras was at the date of the contract only 23*d.* per lb.:—Held, that the cotton tendered was not that which the buyers bargained for, and that they were not bound to accept it; for that the allowance clause had reference only to inferiority of quality, and not to difference of kind. *Acemar v. Casella*, 2 L. R., C. P. 431; 36 L. J., C. P. 124. Affirmed, 2 L. R., C. P. 677; 36 L. J., C. P. 263; 16 L. T. 571; 15 W. R. 998—Ex. Ch.

A person bought at a price named, “413 bales of wool, to arrive ex Stige, or any vessel they may be transhipped in. The wool to be guaranteed about similar to samples in the selling brokers’ possession; and if any dispute arises it shall be decided by the selling brokers, whose decision shall be final.” On the arrival of the

wool, it turned out not about similar to sample, and the brokers, after protest from the buyer, awarded that he should take it at a certain abatement in the price of different bales:—Held, that, as the contract was for the sale of specific goods, the guarantee was not a condition but only a warranty, and the buyer could not reject the wool on account of its inferiority; that the brokers had power to award as they had, and the buyer was bound to take the wool accordingly. *Hayworth v. Hutchinson*, 2 L. R., Q. B. 447; 36 L. J., Q. B. 270.

Under a contract to purchase 300 tons of Campeachy logwood, at 35*l.* per ton, &c., to be of real merchantable quality; and such as might be determined to be otherwise by impartial judges to be rejected; the vendee is bound to take so much of the wood tendered as turned out to be of the sort described, at the contract price, though it appeared at the time that a part, which was afterwards ascertained to be sixteen out of the 300 tons, was of a different and inferior description. *Graham v. Jackson*, 14 East, 498.

3. OTHER POINTS AS TO DELIVERY.

Mode of Tender—In Closed Casks.—An allegation of a tender of goods is not supported by proof of a delivery or an offer to deliver closed casks, said to contain them; but they should be tendered in such a way that the party may have a reasonable opportunity of inspecting them, and of ascertaining whether what he has bargained for is presented for his acceptance. *Isherwood v. Whitmore*, 11 M. & W. 347; 2 D., N. S. 548; 12 L. J., Ex. 318; 7 Jur. 535.

Insufficient Casks.—A declaration set out a contract for the purchase of oil, with a breach, that the defendant refused to accept the oil. He pleaded, that the casks in which the oil was contained were not well seasoned:—Held, a bad plea. It admitted the good quality of the oil, and did not state that the oil was rendered of no use or value in consequence of the insufficiency of the casks. *Gover v. Von Dadelzen*, 3 Bing. N. C. 717; 4 Scott, 453; 3 Hodges, 94; 1 Jur. 285.

Natural Deterioration.—The plaintiff agreed to sell to the defendant hoop iron to be manufactured in Staffordshire, and delivered in January and February at Liverpool. The iron was to be forwarded by canal boats, vessels, and carts. Iron so forwarded, at the period of the year in question, necessarily suffers some deterioration by being rusted. The iron, which was clean and bright when put on board, arrived at Liverpool in a rusty state, and acceptance of it was refused by the defendant:—Held, that the defendant was bound to accept the iron if it was only so far deteriorated as it would necessarily be in its transit from Staffordshire to Liverpool, and that the judge misdirected the jury in saying that the defendant was entitled to have it delivered to him at Liverpool in a merchantable condition. *Bull v. Robison*, 10 Ex. 342; 24 L. J., Ex. 165.

In two Deliveries.—The plaintiff contracted to sell to the defendant 200 tons of brimstone, “to be delivered ex the first parcel of brimstone we have in the Tyne on our account.” A ship

arrived in the Tyne with a cargo of brimstone. The plaintiff, having obtained leave from the owner to dispose of fifty tons on his own account, tendered the fifty tons to the defendant, who wished to cancel the contract, and refused to receive them. Another vessel having subsequently arrived in the Tyne with brimstone, the plaintiff, having in like manner obtained permission of the owner to dispose of it on his own account, tendered 150 tons to the defendant in fulfilment of the contract. This portion also the defendant declined to accept. The defendant never objected to the brimstone being offered to him in two deliveries:—Held, that the plaintiff had sufficiently tendered the brimstone pursuant to his contract to entitle him to recover against the defendant for refusing to accept. *Leidemann v. Gray*, 26 L. J., Ex. 162; 3 Jur., N. S. 219—Ex. Ch.

Constructive Delivery.—Goods shipped at Liverpool for Quebec were taken on their arrival to the examining warehouse, and were entered as consigned to M. & S. and were marked "M. & S." By the regulations of the warehouse, consignees were entitled to possession on payment of freight and duty. M. & S. having obtained an advance on the goods from Y. & Co., signed a request note directed to the officer of the warehouse, directing him to "hold their goods subject to their order, they paying duty and storage charged before removal." The officer wrote across the note "accepted," and signed it:—Held, that by the express agreement of the parties, followed by the acceptance of the officer of the warehouse, there was a valid constructive delivery of the property in the goods to Y. & Co., sufficient for the purposes of the pledge. *Young v. Lambert*, 3 L. R., P. C. 142; 39 L. J., P. C. 21; 22 L. T. 499; 18 W. R. 497; 6 Moore, P. C. C., N. S. 406.

Sending Vessels to Receive.—By two contracts, entered into at different times, the defendants engaged to ship at Cronstadt for the plaintiffs 250 tons and 350 tons of rye meal, each contract stipulating that the shipment should be made at the first open water, allowing a fair and reasonable time for the arrival out of the vessel and getting the goods down to Cronstadt; that payment should be made one-third at three months, from the date of bill of lading, but that should the vessel not arrive in time for the goods to be shipped before the 30th June, or the sellers not be able to procure a ship by that date, the sellers should draw for the remainder as specified above. In an action by the buyers against the sellers for the breach of these two contracts, the defendants pleaded, that the plaintiffs were not, at and after the arrival of the vessels at Cronstadt, and thence at and until a fair and reasonable time had elapsed for getting the goods down to Cronstadt, ready and willing to buy and accept and pay for the meal in manner and form as alleged, and that the plaintiffs had not performed the contracts in all things on their part to be performed in manner and form as alleged:—Held, that the circumstance of the buyers having sent out three vessels, neither of which was of capacity sufficient to take on board the quantity mentioned in either contract, and which arrived at the port of loading at different times, did not entitle the defendants to a verdict upon these issues; but that the buyers were entitled to maintain an action against the sellers, although

they had not sent out one vessel to receive the quantity mentioned in each contract. *Roade v. Meniacoff*, 7 C. B. 152; 18 L. J., C. P. 145.

Place of Delivery.—Although the consignor of goods directs a carrier to deliver them to the consignee at a particular place, the carrier may deliver them wherever he and the consignee agree. *London and North-Western Railway Company v. Bartlett*, 7 H. & N. 400; 31 L. J., Ex. 92; 5 L. T. 399; 10 W. R. 109.

A. contracted to sell to B. 500 bales of cotton at a given price, to arrive at Liverpool, per ship or ships, from Calcutta. The contract contained provisions as to quality, and for a reference in case of dispute; and then followed these words: "The cotton to be taken from the quay; customary allowances of tare and draft, and the invoice to be dated from date of delivery of last bale:—Held, that the stipulation as to the place of delivery was not a condition precedent, but a mere stipulation in favour of the seller, and that the contract amounted, in effect, to a contract to deliver the cotton at a reasonable time, and under reasonable circumstances, the article to be at the buyer's charge from the time of its landing on the quay. *Neill v. Whitworth*, 18 C. B., N. S. 435; 34 L. J., C. P. 155; 11 Jur., N. S. 158; 11 L. T. 677; 13 W. R. 461. Affirmed, 1 L. R., C. P., 684; 35 L. J., C. P. 304; 12 Jur., N. S. 761; 14 L. T. 670; 14 W. R. 844—Ex. Ch.

Selecting Port for.—In an action by vendors against purchasers for not accepting one of several cargoes of Indian corn, sold "with privilege of having shipment to a direct port in the United Kingdom" (subject to certain exceptions), "port to be named on signing bills of lading," the defendants pleaded that the plaintiffs were bound, under the contract of sale, to consult the defendants, and to give them the privilege of selecting any direct port in the United Kingdom, save as excepted, for the destination of each cargo before the signing the bills of lading, and that the cargo which they refused to accept had been shipped, and the bills of lading signed, without affording them the option of exercising such privilege. The plaintiffs having taken issue in fact, the jury found that the defendants had not been given the option of selecting a direct port for the destination of the cargo:—Held, first, that the contract was subject to the term pleaded. *Knor v. Mayne*, 7 Ir. R., C. L. 557.

Held, secondly, that on the record the defendants were entitled to judgment, irrespectively of the question whether the observance of the term was a condition precedent to the plaintiff's right of action. *Id.*

Consolidating several Contracts.—In an action by the sellers against the buyers, for the breach of two contracts for the shipment at a foreign port of two several quantities of rye meal, the declaration stated, that "after the making of the contracts, and before the performance of them or any part thereof, it was agreed between the plaintiffs and the defendants, that the two contracts should be deemed and taken to be and to operate as one contract, and should be performed as if the same had been one contract for the amount of the two quantities of meal:—Held, that this allegation was

not sustained by proof that the buyers had sent out three vessels to receive the meal, the first of which was not of capacity sufficient to take on board the quantity mentioned in the first contract, and that they had received a separate bill of lading of the cargo brought home by that vessel, and accepted a bill drawn on them for the stipulated proportion of that particular cargo. *Meniaeff v. Reade*, 7 C. B. 139.

Tender of Two out of a Set of Three Bills of Lading.—Where by the terms of the contract of sale of goods to be shipped, payment is to be made in exchange for bills of lading of each shipment, the purchaser is bound to pay when a duly-indorsed bill of lading, effectual to pass the property in the goods, is tendered to him, although the bill of lading be drawn in triplicate, and all the three are not then tendered or accounted for; and, if he refuses to accept and pay, he does so at his own risk as to whether it may turn out to be the fact or not that the bill of lading tendered was an effectual one, or whether there was another of the set which had been so dealt with as to defeat the title of the purchaser as indorsee of the one tendered. *Sanders v. Maolean*, 11 Q. B. D. 327; 52 L. J., Q. B. 481; 49 L. T. 462; 31 W. R. 698—C. A.

Per Brett, M. R.: The seller of such goods should make every reasonable exertion to forward the bills of lading to the purchaser as soon as possible after the shipment, but there is no implied condition in such a contract that the bills of lading shall be delivered to the purchaser in time for him to send them forward so as to be at the port of delivery either before the arrival of the vessel with the goods, or before charges are incurred there in respect of them. *Ib.*

VI. DISCHARGE AND BREACH OF CONTRACT.

1. IMPOSSIBILITY OF PERFORMANCE.

Destruction of Specific Crop.—When, from the nature of a contract, the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment arrived some particular specified subject-matter continued to exist, no warranty that the subject-matter should so continue to exist is to be implied from the fact that the subject-matter was not in existence at the time of the making of the contract. The contract in such a case is therefore subject to the implied condition that the parties shall be excused if, before breach, performance becomes impossible by the perishing of the subject-matter without default of the contractor. *Houell v. Coupland*, 1 Q. B. D. 258; 46 L. J., Q. B. 147; 33 L. T. 832; 24 W. R. 470—C. A.

In March, 1872, the defendant agreed to sell to the plaintiff 200 tons of potatoes, grown on land belonging to the defendant at W., to be delivered in the following September and October. The defendant sowed a sufficient quantity of potatoes on lands belonging to him at W. to meet the contract in the ordinary course of husbandry. Before the time for the performance of the contract a large portion of the crop was destroyed by disease without any default on the part of the defendant, and the remainder was

insufficient to meet the contract. In an action for non-delivery:—Held, that the contract was for the sale of a specific crop, without any warranty that the crop should continue to exist at the time of performance. *Ib.*

Where Delivery Impossible.—The agents of M. at Chili having purchased a quantity of nitrate of soda, and chartered the vessel Precursor to convey it to England, M. contracted to sell to S. "600 tons, more or less, being an entire parcel of nitrate of soda, expected to arrive at port of call per Precursor. . . Should any circumstance or accident prevent the shipment of the nitrate, or should the vessel be lost, the contract to be void." At the date of the sale the greater part of the nitrate of soda intended for shipment had been destroyed by an earthquake. The charterparty was subsequently cancelled, and notice of this fact was in due course forwarded to S. M.'s agents afterwards purchased a like quantity of nitrate of soda on his account, and obtained a transfer of a second charterparty made between the vendors and the owners of the Precursor for the conveyance of the second parcel of nitrate of soda to England. Upon the arrival of the cargo in this country, S. laid claim to it under his contract:—Held, that the contract related only to the nitrate of soda which was then expected to be carried by the particular voyage, and that upon this voyage being rendered impossible, the liability of M. was terminated, and S. had no claim to the cargo subsequently purchased. *Smith v. Myers*, 7 L. R., Q. B. 139; 41 L. J., Q. B. 91; 26 L. T. 103; 20 W. R. 186—Ex. Ch. Affirming 5 L. R., Q. B. 429; 39 L. J., Q. B. 210; 23 L. T. 240; 18 W. R. 1086.

Delivery prevented through Strikes.—The plaintiffs, on the 13th September, 1873, contracted in writing with the defendant to sell 4,000 parcels of Kibbles coal at 15s. 6d. per parcel of 2,240 lbs., loaded into the defendant's trucks at the average rate of two trucks per day, a truck consisting of eight tons, in the event of a colliers' strike or accident the vendors not binding themselves to keep up the daily supply. Coal was delivered under this contract up to the 28th March, 1874, but on that day, in consequence of the plaintiffs' men refusing to accept a lower rate of wages proposed by the plaintiffs, in pursuance of a combination entered into by the plaintiffs with other masters in the district, the pits were closed by the plaintiffs, and remained closed until the 28th July, other pits in the neighbourhood being also closed by their owners for a like reason. During that time no coal was in consequence delivered; but at the end of the strike the plaintiffs called upon the defendant to take the amount of coal which still remained undelivered under the contract. In an action for not accepting this coal:—Held, that the strike was equally a strike within the meaning of the contract, though brought about by the plaintiffs lowering the wages of their men; that the effect of the strike was merely to postpone the daily deliveries, and that the defendant was bound to accept the coal remaining undelivered. *King v. Parker*, 34 L. T. 887.

Held, also, that under the circumstances the delay was not of such a nature as to entitle the defendant to consider the contract at an end in a commercial sense, and so repudiate the performance of it. *Ib.*

Conditional Contract.]—Where there is an agreement to deliver goods on a condition which, without any default in the vendor, never happens, he will not be liable for a non-delivery; but where the agreement is absolute or conditional on an event which happens, the vendor will be liable for a breach, though without default on his part; for it is his own heedlessness if he runs the risk of undertaking to perform an impossibility when he might have provided against it by his contract. *Hale v. Rawson*, 4 C. B., N. S. 85; 27 L. J., C. P. 189; 4 Jur., N. S. 363.

Contract in London for the sale of tallow from a particular ship, to be taken from the king's landing scale, if it should not arrive on or before a given day the bargain to be void; the ship was wrecked off the coast of Scotland, but the cargo was saved, and might have been forwarded to the port of London by the given day. The vendors resold the tallow in Scotland. The purchaser did not offer them any indemnity if they would bring the tallow to London:—Held, that the vendors were not answerable for the non-delivery of the tallow. *Idle v. Thornton*, 3 Camp. 274.

Restraint of Princes.]—It is no answer to an action against the vendor of goods to be shipped at St. Petersburg on a particular day, in certain ships, that such goods were seized by the Russian government on board lighters for the purpose of loading the ships, and that the ships cut their cables and put to sea to avoid an embargo. *Splidt v. Heath*, 2 Camp. 57, n.

Sale of a Horse—Death of Horse before Sale Absolute.]—A horse was sold by the plaintiff to the defendant upon condition that it should be taken away by the defendant and tried by him for eight days, and returned at the end of eight days if the defendant did not think it suitable for his purposes. The horse died on the third day after it was placed in the defendant's stable, without fault of either party:—Held, that the plaintiff could not maintain an action for the price, as for goods sold and delivered. *Elphick v. Barnes*, 5 C. P. D. 321; 49 L. J., C. P. 698; 29 W. R. 139; 44 J. P. 651.

2. INSOLVENCY.

Of Vendee.]—In the beginning of February, 1872, the plaintiffs agreed to buy and the defendants agreed to sell 200 tons of iron, to be forwarded in quantities of 25 tons per month, the first delivery to be in April. At the time of making the contract the plaintiffs were insolvent, and upon the 12th of March they determined to suspend payment. They forthwith informed the defendants of their insolvency. Upon the 5th of April there was a meeting of the plaintiffs' creditors; the contract with the defendants was not mentioned in their written statement of affairs. The iron was not forwarded by the defendants in April or the early part of May, nor did the plaintiffs require it to be delivered, nor did they offer payment for it. The plaintiffs' creditors ultimately accepted a composition of five shillings in the pound. The plaintiffs took new partners; and on the 13th of May they called upon the defendants to supply iron according to the contract of the preceding Feb-

ruary; the defendants forthwith repudiated liability to fulfil the contract. The plaintiffs having sued for breach of the contract:—Held, that there was evidence upon which a jury might find that the contract had been rescinded, and could not be enforced upon the 13th of May. *Morgan v. Bain*, 10 L. R., C. P. 15; 44 L. J., C. P. 47; 31 L. T. 616; 23 W. R. 239.

By a contract dated the 27th of October, 1874, the C. company contracted to sell to the P. company 2,500 tons of pig-iron, to be delivered over the next ten months in about equal monthly quantities. Payment by four months' bill net, or cash less 2½ per cent. discount, on the 10th of the month next following each delivery. In performance of this contract the C. company, in November and December, 1874, and in January and February, 1875, made deliveries amounting to 852 tons. On the 24th of February the P. company, requiring further capital to carry on their business, called a meeting of the principal creditors, with a view to an arrangement being made for an extension of credit, and laid a statement of affairs before them, shewing that out of a nominal capital of 100,000*l.*, of which 80,000*l.* was paid up, the company had sustained losses to the extent of 40,000*l.* The creditors did not accept the propositions submitted to them, and the C. company, considering the statement to be a declaration of insolvency, declined to make any further deliveries except for cash, and thereupon the P. company cancelled the contract. Three months afterwards the P. company was ordered to be wound up. Upon a claim by the C. company for damages in respect of breach of the contract:—Held, that the statement of affairs laid before the creditors on the 24th of February did not amount to a declaration of insolvency which justified the C. company in refusing to deliver without cash payments, and the claim was disallowed. *Phoenix Bessemer Steel Company, In re, Carnforth Hamatite Iron Company, Ex parte*, 4 Ch. D. 108; 46 L. J., Ch. 115; 35 L. T. 776; 25 W. R. 187—C. A.

The rule laid down in *Chalmers, Ex parte, Edwards, In re* (8 L. R., Ch. 289; 42 L. J., Bk. 2, 37; 28 L. T. 325; 21 W. R. 349), only applies where there is something amounting to a declaration on the part of the purchasers that they will be unable to meet their engagements. *Ib.*

Bankruptcy of Purchaser before Delivery of Goods Sold on Credit.]—When the purchaser of goods sold on credit becomes bankrupt before the vendor has parted with the possession of the goods, the trustee in the bankruptcy has a right to elect to complete the contract by paying the agreed price in cash within a reasonable time. But, if he does not do so, the vendor is entitled to treat the contract as broken, and to resell the goods, without first tendering them to the trustee. And the vendor is entitled to prove in the bankruptcy for damages for the breach of contract, the measure of damages, if the market is falling, being the difference between the contract price and the price obtained on the resale. *Stapleton, Ex parte, Nathan, In re*, 10 Ch. D. 586; 40 L. T. 14; 27 W. R. 327—C. A.

3. FRAUD.

Election to Rescind.]—To support a plea of rescission of a contract on the ground of fraud, it is not necessary to prove that the circumstances

of the fraud were known to the defendant, and the contract rescinded before action brought. The election to rescind may be made at any time, unless there has been a previous election to affirm the contract. *Clough v. London and North-Western Railway Company*, 7 L. R., Ex. 26; 41 L. J., Ex. 17; 25 L. T. 708; 20 W. R. 189—Ex. Ch.

A. purchased goods of a company, not intending to pay for them. The company delivered them to a carrier to deliver them according to his instructions to C. The carrier afterwards held the goods for C, at his request, as a warehouseman. A. becoming bankrupt, the company demanded the goods, and the carrier re-delivered them, under the mistaken supposition that the transitus was not determined. In an action of trover against him:—Held, that an equitable plea of rescission of the contract, on the ground of A.'s fraud, to which C. was privy, would raise a good defence to the action, although the fraud was not discovered till the cross-examination of C. at the trial of the action. *Ib.*

Examination.—It is no defence to an action for rescission of a contract on the ground of fraud that the plaintiff inquired to a certain extent whether the representation made to him was true, but did it so carelessly and ineffectually as not to observe the fraud. *Redgrave v. Hurd*, 20 Ch. D. 1; 51 L. J., Ch. 113; 45 L. T. 485; 30 W. R. 251—C. A.

If a maker of a chattel makes it with a patent defect so serious as to render it worthless, and the person for whom it is made has an opportunity of inspecting it before it is delivered, the maker is not guilty of a fraud if he does not point out the defect. *Horsfall v. Thomas*, 1 H. & C. 90; 31 L. J., Ex. 322; 8 Jur., N. S. 721; 6 L. T. 462; 10 W. R. 650; at nisi prius, 2 F. & F. 785.

What Amounts to Fraud.—A. sold goods to B. to be paid for by a bill at two months, and not being able to obtain it from B., and doubting his solvency, A. employed his broker to repurchase them in his own name, which was done, although at a great loss. B. afterwards became a bankrupt, without knowing that the goods had been repurchased by the broker on the account of A. In an action of trover by the assignees of B. against A. for the goods:—Held, that they were not entitled to recover, as the transaction was not fraudulent on the part of A. *Harris v. Lunell*, 4 Moore, 10.

If A., under the pretence of a purchase, obtains possession of B.'s goods, and absconds to avoid a suit for their value, and the sheriff seizes such goods in execution immediately after the delivery to A., it seems that B. may lawfully rescue them out of the hands of the sheriff, even by stratagem; but the validity of the purchase by A. is a question for the jury, viz. as to whether the purchaser had obtained possession of the goods with a pre-conceived design not to pay for them. *Bristol (Earl) v. Wilmore*, 2 D. & R. 755; 1 B. & C. 514.

Intention.—In order to set aside a sale of goods quoad a purchaser, on the ground that it was made with the intention of defrauding the creditors of the seller, it must be shewn that the purchaser was aware of that intention, and that he conspired with the seller to carry it into effect. *Bentliff v. Garnett*, 1 C. & K. 326.

A. bought goods from B. with the fraudulent intention of never paying for them, and kept them until his bankruptcy:—Held, that they did not pass to his assignees under his bankruptcy, as having been in his possession, order and disposition, as the reputed owner thereof, with the consent of the true owner. *Lead v. Green*, 15 M. & W. 216; 15 L. J., Ex. 113; 10 Jur. 163.

Knowledge.—Where cotton was sold by sample, upon a representation that the bulk corresponded with the sample, but no warranty was taken by the purchaser, and the bulk of the cotton turned out to be of inferior quality, and to have been falsely packed, though not by the seller:—Held, that an action for a false and fraudulent representation was not maintainable without shewing that such representation was false to the knowledge of the seller, or that he acted fraudulently or against good faith in making it. *Ormrod v. Hutch*, 14 M. & W. 651; 14 L. J., Ex. 366.

Effect of Fraud.—A contract for the sale of goods, obtained by fraud on the part of the purchaser, is void only at the election of the vendor; and it is too late to declare such election after the goods have passed into the hands of a bona fide purchaser. *White v. Garden*, 10 C. B. 919; 20 L. J., C. P. 166; 15 Jur. 630.

A man cannot recover for the price of goods sold under a fraud. *Lewis v. Cosgrave*, 2 Taunt. 2.

On Property.—The established principle is, that fraud only gives a right to avoid a purchase, that the property vests until avoided, and that all mesne dispositions to persons not parties to, or at least not cognizant of the fraud, are valid. *Stevenson v. Newnham*, 13 C. B. 285; 22 L. J., C. P. 110; 17 Jur. 600—Ex. Ch.

A sale of goods effected by fraud does not change the property in them. *Abbotts v. Barry*, 5 Moore, 98; 2 B. & B. 369.

Where a vendee, who has made a false and fraudulent misrepresentation, obtains, by means of it, possession of a chattel from a vendor who intended to transfer both the property and the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction; and therefore if, before the disaffirmance, the fraudulent vendee has assigned or transferred the chattel to an innocent transferee, the title of such transferee is good against the vendor. *Kingsford v. Merry*, 1 H. & N. 503; 26 L. J., Ex. 83—Ex. Ch.; *S. C.*, 11 Ex. 577; 25 L. J., Ex. 166. See also cases ante, col. 825.

Waiver.—If a party is induced to purchase an article by the fraudulent misrepresentations of the seller of it, and, after discovering the fraud, continues to deal with the article as his own, he cannot recover back the money from the seller. *Campbell v. Fleming*, 3 N. & M. 834; 1 A. & E. 40.

The right to repudiate the contract is not afterwards revived by the discovery of another incident in the same fraud. *Ib.*

Estoppel—Party Liable.—An action lies for the value of goods which the defendant has by his fraud induced the plaintiff to sell to a third person who is unable to pay for them. *Hills v. Perrott*, 3 Taunt. 274; *Biddle v. Levy*, 1 Stark. 20.

As against Third Parties.]—Where an owner of goods suffers another to have possession of them, or of the documents which are the evidence of property therein, on a sale to him obtained by means of fraudulent representations, and avoidable at the option of the owner, a sale or a pledge by such party before the owner has exercised his option, and without notice to the subsequent purchaser, is binding; but this is not so when a party has merely obtained the goods by means of false pretences, without any contract of sale to himself, as when he falsely and fraudulently represents that another person has authorized him to purchase the goods, and in such case the original owner can recover the goods from a party to whom they have been sold or pledged by the person who fraudulently obtained them, before any notice of the fraud, or any disaffirmance of the transaction, by the real owner. *Higgins v. Burton*, 26 L. J., Ex. 342.

A coachbuilder let a brougham for a year, and, according to the custom of the trade, the hirer's arms were painted on the panels. The hirer put the brougham up for sale by auction at Aldridge's, and it was purchased by a commission agent and horsedealer:—Held, in an action of trover by the owner against the purchaser of the brougham, that, by allowing the arms to be painted on the panels, the owner did not render himself responsible for the fraudulent sale by the hirer, and therefore the purchaser must be the loser in the transaction. *Marnier v. Banks*, 17 L. T. 147; 16 W. R. 62.

Fraudulent Sale of a Horse—Keep.]—The plaintiff sold for the defendant a horse, and received the price. The purchaser afterwards rescinded the contract on the ground of fraud, and was repaid the purchase-money. In an action by the plaintiff for the keep of the horse:—Held, that the defendant could not set off the price as money received for his use, it having ceased to be so when the contract was defeated by the purchaser, although the defendant was ignorant of the fraud. *Murray v. Mann*, 2 Ex. 539; 17 L. J., Ex. 256; 12 Jur. 634.

4. REFUSAL TO PERFORM.

Right to Cancel Contract where Goods to be Delivered by Instalments.]—The defendant in October, 1879, sold to the plaintiff, and the plaintiff bought of the defendant, 2,000 tons of pig iron, at 42s. a ton, to be delivered to the plaintiff, f. o. b., at the maker's wharf, in November, December, and January next, at 6d. per ton extra. The plaintiff failed to take delivery of any of the iron in November, but claimed to have delivery of one-third of the iron in December, and one-third in January. The defendant refused to deliver these two-thirds, and gave notice that he considered that the contract was cancelled by the plaintiff's breach to take any iron in November:—Held, in an action by the plaintiff for damages in respect of the defendant's refusal, by the majority of the Court of Appeal, that by the plaintiff's failure to take one-third in November, the defendant was justified in refusing to deliver the other two-thirds afterwards. *Hinch v. Muller*, 7 Q. B. D. 92; 50 L. J., Q. B. 529; 45 L. T. 202; 29 W. R. 830—C. A.

There is no absolute rule to shew whether the breach of a contract by one of the contracting

parties is to exonerate the other party from his liability to further perform the contract. The true test in each case is, whether the acts and conduct of the one party evince an intention to abandon and be no longer bound by the contract—and this is a question of evidence. Non-payment for a parcel of goods supplied, or non-delivery of a parcel of goods contracted to be supplied, is not of itself necessarily evidence of any such intention. Nor is any distinction to be drawn between a contract not performed at all and one that has been part performed. The question is not as to the right to rescind a contract, but as to the right to treat a wrongful rescission of a contract as a complete renunciation of it. *Mersey Steel & Iron Company v. Naylor*, 9 Q. B. D. 648; 51 L. J., Q. B. 576; 47 L. T. 369; 31 W. R. 80—C. A. Affirmed in *H. L.*, W. N. 1884, p. 97.

Tender of Two of a Set of Three Bills of Lading.]

—If by the terms of a contract of sale payment is to be made in exchange for bills of lading, the purchaser is bound to pay when a duly indorsed bill of lading effectual to pass the property is tendered, although the bill be drawn in triplicate and all three are not accounted for, and if he refuses to accept and pay, he does so at his own risk as to whether the bill of lading tendered was an effectual one. *Sanders v. Maclean*, 11 Q. B. D. 327; 52 L. J., Q. B. 481; 49 L. T. 462; 31 W. R. 608.

For Accepting too Little.]—The defendants agreed to supply the plaintiffs with from 6,000 or 8,000 tons of coal, to be delivered into the plaintiffs' waggons at the defendants' collieries, in equal monthly quantities during the period of twelve months, at 5s. 6d. per ton. During the first month the plaintiffs sent waggons to receive only 158 tons. Immediately after the first month had expired, the defendants informed the plaintiffs that, as the plaintiffs had taken only 158 tons, the defendants would annul the contract. The plaintiffs refused to allow the contract to be annulled, but the defendants declined to deliver any more coal:—Held, that the breach by the plaintiffs in taking less than the stipulated quantity during the first month did not entitle the defendants to rescind the contract. *Simpson v. Crippin*, 8 L. R., Q. B. 14; 42 L. J., Q. B. 28; 27 L. T. 546; 21 W. R. 141. See also *Hoare v. Rennie*, ante, col. 894.

Non-Payment of Instalment.]—When there is a contract for the sale of goods to be delivered by instalments, the price of each instalment being payable on delivery, and the buyer does not pay for one instalment under such circumstances as to give the seller reasonable ground for believing that he will be unable to pay for the instalments to be delivered in future, and that he does not intend to go on with the contract, the seller is justified in repudiating the contract. *Bloomer v. Bernstein*, 9 L. R., C. P. 588; 43 L. J., C. P. 375; 31 L. T. 306.

The defendant contracted to sell to the plaintiffs 260 tons pig-iron at 56s. per ton, half to be delivered in two, remainder in four, weeks; payment, net cash fourteen days after delivery of each parcel. The market was rising, and, notwithstanding urgent demands by the plaintiffs, the delivery of the first 125 tons was not completed for nearly six months. They refused to

pay for the first parcel, claiming a right to set off the loss they had sustained from being obliged to procure other iron in consequence of the defendant's default; but they still urged the delivery of the second parcel. The defendant, treating the refusal to pay as a breach and an abandonment of the contract by the plaintiffs, declined to deliver any more. There was no suggestion of inability on the part of the plaintiffs to pay, and the price of the first parcel was ultimately paid:—Held, that the mere refusal to pay for the first parcel did not, under the circumstances, warrant the defendant in treating the contract as abandoned and refusing to deliver the remainder, and that the plaintiffs were entitled to damages for the breach. *Freeth v. Burr*, 9 L. R., C. P. 208; 43 L. J., C. P. 91; 29 L. T. 773; 22 W. R. 370.

When a contract was entered into to deliver a quantity of barley by delivery in certain portions, each portion to be paid for on its arrival at the port of destination, some of the portions delivered were delivered short in weight; the purchaser refused to pay for any more, unless a reduction was allowed for the price of the deficiency, and also for re-weighing the barley:—Held, that such a refusal did not amount to a rescission of the contract by the purchaser. *Corcoran v. Proser*, 22 W. R. 222—Ir. Ex. Ch.

Time for Payment on Sale of Specific Chattel.]

—On a contract for the sale of a specific chattel on credit, time, without express stipulation, is not of the essence of the contract; and the vendee, on tender of the price, though after the expiration of the period of credit, may maintain trover against the vendor to recover such chattel. The vendor cannot rescind the contract on non-payment at the day. *Martindale v. Smith*, 1 G. & D. 1; 1 Q. B. 389; 5 Jur. 932.

Resale—Non-Payment.]—If after the sale of a chattel, but before actual delivery, the vendor resells the property while the purchaser is in default, the resale will not authorize the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist paying any balance of it which may be still due. *Page v. Cowasjee Eduljee*, 1 L. R., P. C. 127; 12 Jur., N. S. 361; 14 L. T. 176.

A fortiori, where there has been a delivery, and the vendor takes it out of the possession of the purchaser, and resells it. *Id.*

Where the resale is wrongful, the purchaser's remedy is by an action of trover. *Id.*

Time of Shipment.]—A. contracted to sell to B. a specific cargo of wheat, described in a bought and sold note as "shipped per Diletta Mimbella, as per bill of lading dated September or October," and which was all on board at the date of the contract:—Held, that this did not amount to a condition so as to entitle the buyer to rescind the contract, on its turning out that the wheat was not shipped at the time mentioned. *Gattorno v. Adams*, 12 C. B., N. S. 560. See cases ante, col. 895.

Declaration of Inability to Perform.]—The defendant by his agent contracted to deliver 300 casks of oil during the season to the plaintiff's customers on receipt of orders from the plaintiff; on complaint by the plaintiff of irregularity in the delivery of the oil, the defendant's agent

stated that the defendant had no oil to give him:—Held, that this statement by the agent of his inability to perform was a breach of contract upon which the plaintiff might sue. *Lesson v. North British Oil and Candle Company*, 8 Ir. R., C. L. 309.

Breach of Warranty.]—The purchaser of a mare at an auction was induced to buy her by the description that she had been hunted with certain hounds. The conditions of sale provided that horses not answering the description must be returned before a specified time, otherwise the purchaser must keep them with all faults. The purchaser paid the price, and was casually told that the description was untrue. Nevertheless, he removed the mare to his own stables, and while being so removed, she ran away and injured herself severely, without any negligence on the purchaser's part. The description was, in fact, untrue, and on that ground the purchaser returned her to the seller within the specified time:—Held, that since the purchaser had in removing her done no more than he was entitled to do under the contract, and since the injuries were not owing to any negligence on his part, he had not lost his right to rescind the contract, and could recover the price from the seller as money had and received. *Head v. Tattersall*, 7 L. R., Ex. 7; 41 L. J., Ex. 4; 25 L. T. 631; 20 W. R. 115.

Sale upon Condition—Seller prevented from fulfilling Condition by Buyer.]—If, in the case of a contract of sale and delivery, which makes acceptance of the thing sold and payment of the price conditional on a certain thing being done by the seller, the buyer prevents the possibility of the seller fulfilling the condition, the contract is to be taken as satisfied. By a written contract A. agreed to buy of B. a digging-machine, if it fulfilled certain conditions, one of which was that it should be capable of excavating a given quantity of clay in a fixed time on a "properly opened-up face" at the C. railway cutting. The machine failed at another cutting to excavate the required quantity, and on its being removed to the "C." cutting and tried at a face not a "properly opened-up one," and breaking down, after a few days' work, A. refused to give it any further trial or to pay the price of the machine:—Held, that B. was entitled to a decree against A. for payment of the price of the machine. *Mackay v. Dick*, 6 App. Cas. 251—H. L. (Sc.).

Seller hindering Buyer—Fraud.]—To a declaration on a contract for the sale of growing trees, alleging for breach, that although the defendant had permitted the plaintiff to fell and carry away certain of the trees, he refused to permit him to fell and carry away the residue, the defendant pleaded, that after the promise, and before breach, the plaintiff fraudulently felled and carried away trees which were not sold to him, exceeding in number and value the residue; which trees, so fraudulently felled and carried away, were taken by the plaintiff in fraudulent substitution of the trees purchased by him; and that the defendant kept the trees so fraudulently felled and carried away by him, and that therefore the defendant refused to permit him to fell and carry away the residue of the trees contracted for:—Held, that the plea

was bad, inasmuch as it shewed not a rescission or an abandonment of the contract by the plaintiff, but a mere act of trespass or wrongful act, for which the defendant might have a remedy; and that there was no estoppel. *Lewis v. Clifton*, 14 C. B. 245; 23 L. J., C. P. 68; 18 Jur. 291.

And see CONTRACT.

Sale of Cargoes—Neglect to Fetch—Delay.]—Declaration on an agreement by the plaintiff to sell and deliver to the defendant, and by the defendant to purchase, as many of the plaintiff's gas coals, equal in quality to a cargo before shipped on trial, as one steam vessel to be sent by the defendant could fetch in nine months from S. to L. Breach, that the defendant refused to send a steam vessel to fetch divers cargoes of coals. A plea, that, before any breach by the defendant, the plaintiff broke the contract by delivering coal which was not gas coal equal in quality to the cargo shipped on trial, but was inferior thereto, and wholly unfit for the defendant's purposes, as the plaintiff well knew. Another plea, that, before any breach by the defendant, the plaintiff broke the contract by detaining an unreasonable time, and beyond the time permitted by the contract, the vessel sent by the defendant to receive the coal:—Held, that neither of the pleas was an answer to the declaration. *Jonassohn v. Young*, 4 B. & S. 296; 32 L. J., Q. B. 385; 11 W. R. 962.

Bought and Sold Notes—Time for.]—Where a broker sold on a Saturday goods of the defendant to the plaintiff for a stipulated price, subject to the plaintiff's approval of the quality upon the Monday following, and sent the sold-note to the plaintiff on the Saturday, marked with the words "quality to be approved on Monday," but did not send the bought-note to the defendant then, because he had met and informed him of the contract on the same day; but the plaintiff not having signified his disapproval of the contract on the Monday, the broker sent the sold-note to the defendant on the Friday, with the words "quality to be approved on Monday" struck out, which note the defendant returned within twenty-four hours, which, by the custom of the trade, signified his disaffirmance of the contract, so far as in him lay; yet, held, that at any rate the defendant could no longer disaffirm it after the Monday, when the plaintiff, not having signified his disapproval, was also bound by it. *Humphries v. Carvalho*, 16 East, 45.

Mistake as to Parties.]—Where the broker makes a mistake in the contract, describing on the bought and sold notes goods to be sold by A., B. and C., which he believed to be the real names of the firm which employed him, which firm, in fact, from a recent alteration that the broker was not privy to, consisted of A., D. and E. only:—Held, that the purchaser of the goods was not at liberty to avoid the contract on this account, after having treated the contract as subsisting upon a subsequent communication from the plaintiffs, unless he could shew that he had been prejudiced, or had lost the benefit of a set-off. *Mitchell v. Lapage*, Holt, 253.

5. AGREEMENT TO RESCIND.

Verbal.]—The plaintiff agreed with the defendants, in writing, signed by them, to sell and

deliver, at a future day, goods above 10*l.* in value. Afterwards, and before breach, the time for performing the contract was verbally extended for a fortnight:—Held (there being neither acceptance nor payment under the verbal arrangement), that the verbal arrangement was void, and could not rescind the written contract, which the plaintiff might therefore enforce. *Noble v. Ward*, 1 L. R., Ex. 117; 35 L. J., Ex. 81; 12 Jur., N. S. 167; 13 L. T. 639; 14 W. R. 397; 4 H. & C. 149. Affirmed, 2 L. R., Ex. 35; 36 L. J., Ex. 91; 15 L. T. 672; 15 W. R. 520—Ex. Ch.

In an action for goods sold and delivered, it is no plea that the sale and delivery were in pursuance of a contract, which it was agreed should be wholly rescinded. *Edwards v. Chapman*, 4 D. P. C. 732; 1 M. & W. 231; 1 Gale, 376.

Waiver.]—Where a seller of goods, upon the buyer's refusal to accept them, requested the buyer to sell them for him, which the buyer agreed to do if he could, but did not:—Held, that, in an action by the seller for the price, the jury, in considering whether the request made by the seller was a waiver of the contract of sale, could not take into their consideration whether such request was made under an ignorance of the law, and impression that his remedy was gone. *Gomery v. Bond*, 3 M. & S. 378.

As to Third Persons.]—A contract of sale may be rescinded by the consent of the vendor and vendee, before the rights of other persons are concerned. *Smith v. Field*, 5 T. R. 402.

But where the vendee wished to return the goods, and the vendor instituted an attachment to attach the goods in the hands of a packer, as the property of the vendee, it was considered as an election by the vendor not to rescind the contract; and the vendee having since become a bankrupt:—Held, that the vendor could not recover the goods from the packer in trover. *Id.*

Evidence.]—The plaintiff agreed to buy 13 tons of oil from the defendant, and paid a deposit for the price. Five tons were delivered, when the plaintiff said they were of inferior quality, and required the defendant to take them back or return the deposit-money. The defendant sold the other eight tons, but it did not appear whether he had thus rendered himself incapable of completing the contract, before or after the plaintiff refused to receive any more of the oil:—Held, in the absence of such evidence, that, on an action to recover back the money, the jury was properly directed, first, whether there was fraud on the part of the defendant in the inception of the contract, and, if not, whether, secondly, there was sufficient evidence that the defendant had agreed to rescind the contract. *Pitt v. Cassanet*, 4 M. & G. 898; 5 Scott, N. R. 902; 12 L. J., C. P. 70; 6 Jur. 1125.

Effect.]—Where the vendor of a horse rescinds the contract for the sale, he is liable to the purchaser for the keep during the time he kept the horse, from the day of the contract. *King v. Price*, 2 Chit. 416.

6. BREACH.

a. Action for.

i. Generally.

Credit unexpired at Time of Action.]—The

plaintiffs contracted to deliver iron of a certain quality to the defendants, and agreed to receive payment for each delivery, either in cash for discount within a month, or by bills at four months, according to the defendants' option. Upon application by the plaintiffs in July for payment for iron delivered in June the defendants elected to pay by bill. Before, however, the bill was given, the defendants discovered that the iron which had been worked up into plates was of inferior quality to the sample, and useless to them. They therefore refused to accept any more bills, and the plaintiffs immediately, in August, brought an action to recover the contract price of the June delivery:—Held, that the contract having been broken by the plaintiffs delivering iron of inferior quality, and it being consequently their fault that the bill for the invoiced price was not given, and yet both parties having at the time, and up to the discovery of the quality of the iron, treated the delivery as made under the contract, and to be paid for under it, the period of credit had not expired, and the plaintiffs were not entitled to sue either for the contract price or on a quantum valebant for the reduced value of the goods. *Wayne's Merthyr Steam Coal and Iron Company v. Morewood*, 46 L. J., Q. B. 746.

On a sale of goods the invoice expressed that they should be paid for in "from six to eight weeks." The sale took place on the 1st of May, and the action for the price was commenced on the 18th of June. At the trial the judge left it to the jury to say what was the mercantile meaning of the expression "from six to eight weeks;" and the jury found that the action had not been brought prematurely. The judge, being of the same opinion, directed a verdict for the plaintiff:—Held, that the question was properly left to the jury, and the verdict right. *Ashforth v. Redford*, 9 L. R., C. P. 20; 43 L. J., C. P. 57.

If the agreed terms of payment for goods sold are by a three months' bill, the buyer to have the option of paying cash at 2½ discount, the buyer is not bound to accept a bill for a larger amount than his debt, and even if he refuses to accept a bill correctly drawn the seller cannot sue for goods sold and delivered before the end of three months from the date of the bill drawn by him. *Anderson v. Carlisle Horse Clothing Company*, 21 L. T. 760.

If, however, the agreed terms are cash, with buyer's option of a bill, the seller can sue immediately upon the buyer's refusal to accept. *Ib.*

Credit unexpired is no defence to an action for not accepting goods, if they have not been accepted according to the contract. *Foster v. Eades*, 2 F. & F. 103. See also cases ante, col. 828.

Tender—Estoppel by.—When a declaration shews substantially a contract, and a tender in compliance with it, the plaintiff is not estopped from contending for the true interpretation of the contract by the fact that he has also set out in his declaration an alternative case of a tender which would not have been a compliance. *McConnell v. Murphy*, 5 L. R., P. C. 203; 28 L. T. 713; 21 W. R. 609.

Parties to Sue—Consignee.—A consignee of goods has such a right of property in the goods consigned to him as to maintain an action against the shipowner for non-delivery of the goods. *Tromson v. Dent*, 8 Moore, P. C. C. 420.

A. agreed, verbally, to buy of B. all the whale-

bone he could procure, at a certain price, to be sent by a particular railway, A. agreeing to pay the carriage. Some whalebone, to an amount exceeding 10l., having been delivered at the railway station by B., consigned to A., and having been duly invoiced to him, was lost in the transit. B. then wrote, requesting A. to make a claim against the company:—Held, that there having been no acceptance and receipt of the goods within the Statute of Frauds, A., the consignee, was not entitled to sue the railway company for the loss. *Coombs v. Bristol and Exeter Railway Company*, 3 H. & N. 510; 27 L. J., Ex. 401. See also cases ante, col. 838.

Principal or Agent.—Where a factor, having a del credere commission, sold goods for the plaintiffs to the defendant without disclosing their names, the defendant knowing that he was factor, and the plaintiffs, according to the settled course of dealing between them, drew on the factor for the amount, who, before the bills became due, stopped payment, and afterwards became bankrupt:—Held, that notwithstanding the del credere commission, the plaintiffs might sue the defendant for the price of the goods, the balance of the account current between the factor and the defendant being, at the time he stopped payment, in favour of the factor, but at the time of action brought in favour of the defendant. *Hornby v. Lacy*, 6 M. & S. 166.

F., a broker in London, having some rum for sale, made a contract with L., and gave him a sale-note in these terms:—"Mr. L., London, January 15, 1861,—I have this day bought, in my own name, for your account, of T., 259 puncheons of Cuba rum, sold at 1s. 9d. per gallon. Landing charges 5s. per puncheon, to be paid by the buyer; landing gauge; prompt 23rd March; brokerage half per cent. Money on delivery, or 5l. per cent." (Signed by him.) A portion of the price of the rum was afterwards paid to T. and received by him:—Held, that the broker could not maintain an action for goods sold and delivered against L. for the residue of the price of the rum, but that the action should be brought by the principal. *Fawkes v. Lamb*, 31 L. J., Q. B. 98; 8 Jur., N. S. 385.

Parties Liable—Representatives.—A., a publisher, had for some years supplied a periodical work to W. as fast as the numbers came out. W. died, and A., not knowing of his death, continued sending the numbers of the work by the stage-coach, addressed to W. These numbers were received by B., who had succeeded to the property of W., and there was no evidence that B. had ever offered to return them:—Held, that A. might maintain an action for goods sold and delivered against B., though at the time of the deliveries A. was not aware of the death of W. *Weatherby v. Banham*, 5 C. & P. 228.

A. agreed with B. that B. should have his (A.'s) farm for his life, for 20l. a year rent, and the whole of A.'s keep and maintenance, B. to take off the stock at 75l. 10s. B. having taken the stock and had possession of the land for his life:—Held, that his executor might be sued for the 75l. 10s. in an action for goods sold and delivered. *Stone v. Rogers*, 2 M. & W. 443.

Chapel-wardens.—Where goods were ordered by one of two chapel-wardens for the use of the chapel:—Held, that the warden giving

the order might be sued separately, without joining his brother-officer. *Shaw v. Hislop*, 4 D. & R. 241.

— **Bankrupt's Assignees.**—M. ordered certain goods; subsequently M. became insolvent and executed a deed for the benefit of his creditors, under which inspectors were appointed. Afterwards they wrote a letter confirming the order of M., but signed as his agents:—Held, that the fact, did not make them personally liable to pay for the goods which M. had ordered. *Redpath v. Wigg*, 4 H. & C. 432; 35 L. J., Ex. 211; 12 Jur., N. S. 903; 14 L. T. 764—Ex. Ch.

— **Volunteer Officers.**—The plaintiff, a tailor, sued the defendant, the commandant, and a member of a committee of a volunteer rifle corps, for uniforms supplied to the corps. The evidence was conflicting. According to the plaintiff's statement, he attended a meeting of the committee, when the defendant used expressions which implied that he undertook to pay for the uniforms. This was denied by the defendant, who gave in evidence the plaintiff's day-book and ledger, in which the uniforms were debited to the corps. The defendant admitted his liability to pay for his own uniform and those of the band, which he had ordered. The judge told the jury, first, that if the contract was with the defendant alone for the whole corps, he was liable. Secondly, if with the defendant jointly with the committee (there being no plea in abatement), he was liable. Thirdly, so, if with the defendant jointly with the whole corps. Fourthly, but if by the defendant for his own uniform and those which he specially agreed to pay for, he was not liable:—Held, that the case was properly left to the jury, and that there was no foundation for a new trial on the ground of misdirection. *Cross v. Williams*, 7 H. & N. 675; 31 L. J., Ex. 145; 6 L. T. 434; 10 W. R. 302.

Estoppel—Fraud.—An action lies for the value of goods which the defendant had by fraud procured the plaintiff to sell to an insolvent, and which the defendant had gotten into his own possession; for he could not set up the sale, because his own fraud had procured it, and the mere possession, unaccounted for, raises an assumpsit to pay. *Hill v. Perrott*, 3 Taunt. 274.

Where goods were supplied to a minor upon a fraudulent representation by his father that he was about to relinquish his business in favour of his son:—Held, that the father was responsible for goods sold and delivered. *Biddle v. Levy*, 1 Stark. 20.

— **By Conduct.**—A person may, by his acts, in causing another to believe that he is the purchaser of goods, be precluded from disputing that he was not, in fact, the purchaser, although his acts were not intended to induce that belief. *Cornish v. Abington*, 4 H. & N. 549; 28 L. J., Ex. 262.

— **Principal or Agent.**—B., foreman of A., attended, on behalf of A., at a sale by auction of the plaintiff's goods, at which the plaintiff, who knew B. to be A.'s foreman, was present, but took no part. A lot was knocked down to B., and the auctioneer, who did not know him, asked his name, and he gave his own name, which was entered as the name of the purchaser. The goods were taken away in A.'s carts, and con-

sumed by him:—Held, per Channell and Wilde. BB., that B. was liable for the purchase-money; but per Pollock, C. B., and Bramwell, B., that he was not. *Williamson v. Barton*, 7 H. & N. 899; 31 L. J., Ex. 170; 8 Jur., N. S. 341; 10 W. R. 321.

Where a trader arranged with his paid servant to set up in the name and style of a supposed firm as a merchant, and there was evidence to shew that the latter had an interest in the concern:—Held, that, whether they were partners or not, they might be jointly liable as contractors for goods ordered by the servant in the name of the supposed firm in the way of its apparent business, the employer as the real principal, the servant as holding himself out as partner. *Kirkwood v. Cheetham*, 10 W. R. 670.

When a man purchases goods through the medium of an agent, and ignorant that he is dealing with an agent, the seller is not precluded from afterwards suing the principal, unless he has by words or conduct induced him to alter his condition; as, for instance, induced him to pay the agent on the supposition that the agent has settled with the seller. *Heald v. Kenworthy*, 10 Ex. 739; 24 L. J., Ex. 76; 1 Jur., N. S. 70.

A vendor, who sells to a person known to be the agent of an unknown principal, must elect to proceed against the principal within a reasonable time after discovering him, otherwise he loses his right to treat the principal as vendee, if the state of the accounts between the latter and his agent has been altered to the prejudice of the principal, before he makes his election. *Smeithurst v. Mitchell*, 1 El. & El. 623; 28 L. J., Q. B. 241; 5 Jur., N. S. 978; 7 W. R. 74.

A merchant, A., purchases goods of B. for the use of C., who is present and selects the goods, and stipulates with B. the price and other terms of the purchase, and A. credits B. with the amount, and debits C. with the amount and a commission, and B. debits A. in his books and invoices; B. cannot recover the price of the goods against C. *Addison v. Gandasequi*, 4 Taunt. 374.

The defendant, who had been in the habit of dealing with B., sent a written order for goods directed to B.; the plaintiff, who, on the same day had bought B.'s business, executed the order without giving the defendant any notice that the goods were not supplied by B.:—Held, that the plaintiff could not maintain an action for the price of the goods against the defendant. *Boulton v. Jones*, 2 H. & N. 564; 27 L. J., Ex. 1117; 3 Jur., N. S. 1156.

A., a foreign merchant, employed B. to purchase goods on commission; the vendors (with the knowledge that the purchases were made on account of A.) made out the invoices to B., and took in payment his acceptances, payable at six months:—Held, first, that there was no contract of sale as between A. and B.; and, secondly, that if any such contract existed, B. could maintain no action against A. before the six months expired. *Seymour v. Psychlau*, 1 B. & A. 14.

See also PRINCIPAL AND AGENT.

ii. Action for Goods Bargained and Sold.

When Maintainable.—To support an action for goods bargained and sold, there must be either an actual sale of goods existing at the time of the contract, or a specific appropriation of goods afterwards assented to by the buyer. *Atkinson v. Bell*, 2 M. & R. 292; 8 B. & C. 277.

The plaintiffs in London entered into the following contract with the defendants: "October 11, 1833. Sold to G. and Son for account of Messrs. A. & Co., 200 firkins of M. & Co.'s Sligo butter, at 71s. 6d. per cwt. free on board. Payment, bill at two months from the date of landing. To be shipped this month." &c. The butters were not shipped until the following month, but the defendants had waived that condition, and they accepted the invoice and the bill of lading, which was indorsed to them. The butters were afterwards lost on the voyage:—Held, that an action for such goods bargained and sold was maintainable to recover the price of the butters. *Alexander v. Gardner*, 1 Scott, 281, 630; 1 Bing. N. C. 671; 3 D. P. C. 146; 1 Hodges, 147.

Although goods are stopped in transitu, the vendor, after the credit has expired, may recover for them in an action for goods bargained and sold, if he is ready to deliver them on the price being paid. *Kymer v. Suwercropp*, 1 Camp. 109.

An action for goods bargained and sold is a good action against a vendee for refusing to take them on a false allegation that they were damaged. *Hankey v. Smith*, Peake, 42, n.

— **Resale.**—After a resale an action for goods bargained and sold will not lie. *Hore v. Milner*, Peake, 42, n.; *S. P., Lamond v. Deval*, 9 Q. B. 1030; 16 L. J., Q. B. 136.

In an action for not taking away goods sold at a public auction, and for a loss on the resale, the plaintiff may recover on the count for goods bargained and sold; and it is no objection to his right to recover, that he has not the goods then to deliver in case he had a verdict. *Mertens v. Adcock*, 4 Esp. 251.

— **Possession.**—It is not essential, in order to a plaintiff maintaining an action for goods bargained and sold, that he should have possession of the goods or chattels at the time of the contract of sale; for all that is necessary is, that there should be a contract for the sale of specific goods and chattels at a fixed price, so that the plaintiff could have maintained trover for them. *Scott v. England*, 2 D. & L. 520; 14 L. J., Q. B. 43; 9 Jur. 87.

— **Where Goods not fit for Delivery.**—By the English law, if there is a contract for sale by weight or measure, and acts are to be done in order to identify the thing to be delivered before it is in a fit state for delivery, no action for goods bargained and sold can be maintained to recover the price. The only remedy open to the vendor (if the circumstances of the case give him a right to complain of a breach of contract) is by an action for non-acceptance. *Bonwell v. Kilborn*, 15 Moore, P. C. C. 309; 8 Jur., N. S. 443; 6 L. T. 79; 10 W. R. 517.

K. & Co., by an agreement in writing, contracted to sell and deliver to B. five tons weight of hops for 1855, 1856, 1857, the hops to be good and merchantable, and of the growth of each respective year; to be paid for on delivery, at a rate specified; the hops to be delivered free in Quebec. In 1856, K. & Co. sent to B. a quantity of hops consisting of eighty-two bales, of the growth of 1856, in weight far exceeding five tons. B. inspected the hops, and after a tender by K. & Co. of the bulk, but without any specific tender of the specific quantity of five tons, B. refused to accept any of the hops, when K. & Co.

took them away, and deposited them in a storehouse at Quebec. K. & Co. then brought an action against B. for breach of contract in not accepting the hops:—Held, that as the five tons of hops had never been separated from the bulk, and there was no complete delivery, K. & Co. could not sue for the price, but only recover damages for the non-acceptance of the hops. *Id.*

Held, also, that the measure of such damages was the difference of the contract price and market price at the time when the contract was broken. *Id.*

iii. Action for Goods Sold and Delivered.

Commission.—The mere delivery of goods by A. to B. will not support an action at the suit of A. for goods sold and delivered, where it appears that A. was to pay C. a commission upon the sale of the goods to B. *Miller v. Newman*, 4 M. & G. 646.

Place.—An action for goods sold and delivered is not supported by proof of an order by the defendant to send the goods to a certain quay, to be left till called for, without a reception and an acceptance on the part of the vendee of the goods so sent. *Anderson v. Hodgson*, 5 Price, 630.

Fixing Engine.—Where it was proved that a contract was "to build an engine of 100-horse power for 2,500l., to be completed and fixed by the middle or end of December;" and that the different parts of the engine were constructed at the plaintiff's manufactory, and sent in parts at different intervals to the defendant's colliery, a distance of twenty miles, where they were fixed piecemeal, and so made into an engine:—Held, that the price agreed upon was not recoverable as for goods sold and delivered. *Clark v. Bulmer*, 11 M. & W. 243; 1 D. & L. 367; *S. P., Parsons v. Sexton*, 2 C. & K. 266.

Condition—Resale.—Where goods are sold on a condition that if they are not paid for at a time specified, the owner may resell them, and the vendee shall be answerable for any loss on resale, such sale is conditional and not absolute. *Lamond v. Darall or Devalle*, 9 Q. B. 1030; 16 L. J., Q. B. 136; 11 Jur. 266.

Appropriation.—A. sold to B., by sample, twenty-four sacks of flour, part of a lot of 217 sacks belonging to A. which were lying at the warehouse of M., and he also gave B. a delivery order on M., in pursuance of which M. transferred twenty-four sacks of flour to B.'s name in the books, and afterwards delivered twelve sacks of the flour to B., which B. paid for. No appropriation of any particular twenty-four sacks was ever made for B. The flour contained in the twelve sacks delivered was found on examination not to correspond with the sample, and B. consequently refused to accept or pay for the remaining twelve:—Held, that A. could not recover the price of these twelve sacks as for goods sold and delivered. *Elliott v. Heginbotham*, 2 C. & K. 545.

Title.—In an action for goods sold and delivered, the defendant cannot shew, under the general issue, that, at the time of the sale, the goods did not belong to the vendor, and that they were afterwards reclaimed by the real owner,

Walker v. Mellor or Mellon, 11 Q. B. 478; 2 C. & K. 346; 17 L. J., Q. B. 103; 12 Jur. 268.

Retaking from Buyer.—Where the seller of goods, which have not been paid for according to the contract, retakes them from the buyer without his consent, although under circumstances inducing a suspicion of fraud in the buyer, such retaking is no answer to an action by the seller for the price. *Gillard v. Brittan*, 8 M. & W. 575; 1 D., N. S. 424.

Sale and Return.—A contract with an advertising tailor for four suits a year, and a return of the old suits, is not provable under a count for goods sold; it is a special contract, and should be declared on as such. *Rees v. Manners*, 3 Smith, 119.

Death of Horse before Sale absolute.—A horse was sold by the plaintiff to the defendant, upon condition that it should be taken away by the defendant and tried by him for eight days and returned at the end of that time if it was not found suitable for his purposes. The horse died on the third day after it was placed in the defendant's stable, without fault of either party:—Held, that the plaintiff could not maintain an action for the price as for goods sold and delivered. *Elphick v. Barnes*, 5 C. P. D. 321; 49 L. J., C. P. 698; 29 W. R. 139; 44 J. P. 651.

Goods Damaged while Lent.—The plaintiff agreed to let (or lend) the defendant a musical snuff-box, on the understanding that if it was damaged, the defendant was to have it and pay for it, and 3l. 10s. was to be taken as its value. The defendant received the box accordingly, and it was damaged while in his possession:—Held, that the plaintiff was entitled to maintain an action for goods sold and delivered, to recover the 3l. 10s. *Bianchi v. Nash*, 1 M. & W. 545.

Sale or Return.—When goods have been sold upon a contract of sale or return within a reasonable time, and the goods are detained an unreasonable time, the plaintiff may bring an action for goods sold and delivered. *Beverley v. Lincoln Gas Light and Coke Company*, 2 N. & P. 283; 6 A. & E. 829; S. P., *Bailey v. Gouldsmith*, Peake, 56; *Harrison v. Allen*, 9 Moore, 28; 2 Bing. 4; 1 C. & P. 235.

Where goods are sold under a contract of sale or return, they pass to the purchaser, subject to an option in him to return them within a reasonable time; and if he fails to exercise that option within a reasonable time, the price of the goods may be recovered as upon an absolute sale. *Moss v. Sweet*, 16 Q. B. 493; 20 L. J., Q. B. 167; 15 Jur. 636. *Contra*, *Iley v. Frankenstein*, 8 Scott, N. R. 839. *Overruled*, 2 Bing. 484.

Goods sold in Casks.—On the sale of beer in casks, the seller gave notice to the purchaser, that, unless he returned the casks within a fortnight, he would be considered as the purchaser, and he did not return them within a fortnight:—Held, that the seller could not maintain an action for goods sold and delivered, the whole resting on a special agreement. *Lyons v. Barnes*, 2 Stark. 39.

In an agreement for the sale of oil was the following memorandum:—"The casks to be returned in three months, or to be paid for at the rate of 3l. per ton." The casks not having been

returned within the time specified:—Held, that the value might be recovered as goods sold and delivered. *Johnson v. Kirkaldy*, 1 Arn. & H. 7; 4 Jur. 988.

Brewers in Dublin supplied porter in casks to a customer on the terms that the empty casks were to be returned to Dublin at the customer's expense, within six months from the date of invoice, or paid for at the invoice price, at the option of the shippers:—Held, that, as soon as the casks were empty, the customer was in the situation with respect to them of a mere bailee during pleasure, and that the brewers had such an immediate right of possession of the empty casks as would entitle them to maintain an action against any person who converted them to his own use. *Manders v. Williams*, 4 Ex. 339; 18 L. J., Ex. 437.

The defendant sold to the plaintiff cement in casks and bags for a certain sum, the defendant to allow the plaintiff 3s. 6d. for each cask, and 2s. 6d. for each bag which should be returned, terms cash. In an action upon the contract for the price of the casks and bags, the plaintiff averred, and the defendant traversed, a readiness and offer to return the casks and bags:—Held, that the averment was severable, and that the plaintiff was not bound to prove a readiness to return all the casks and bags. *Nelson v. Pat-trick*, 3 C. B. 774; 16 L. J., C. P. 98.

By way of Barter or Exchange.—Where two parties agreed to barter goods for goods, and the balance being in favour of the plaintiff, the defendant omitted for three years to send goods to meet it:—Held, that the lapse of time did not entitle the plaintiff to bring an action for goods sold, but that his remedy was by an action against the defendant for not delivering goods. *Harrison v. Luke*, 14 M. & W. 139; 14 L. J., Ex. 248.

The plaintiff sued for goods sold and delivered. It appeared at the trial that the plaintiff had sold the defendant goods, for which he was to be paid partly in money and partly by a second-hand saddle and bridle. No evidence was given to shew whether the goods had or had not been delivered by the defendant to the plaintiff:—Held, that it was no objection that the plaintiff had not declared on the special contract. *Bull v. Parker*, 2 D., N. S. 345; 12 L. J., Q. B. 93; 7 Jur. 283.

Upon an agreement between two traders to supply each other on the footing of goods for goods; after a balance struck between them, such balance is to be paid in money, and may be sued for on the general counts. *Ingram v. Shirley*, 1 Stark. 185.

If trefoil is sold, to be paid for partly in goods and partly in money, the seller should declare specially on the contract, and not generally for goods sold and delivered. *Talcer v. West*, Holt, 178.

B. agreed to purchase of A. a gun, for forty-five guineas; but it was stipulated that A. should take a gun of B.'s, valued at thirty guineas, in part payment: B. having refused to deliver his gun and complete the contract:—Held, that A. was entitled to recover the forty-five guineas, as the stipulated price. *Forsyth v. Jervis*, 1 Stark. 437.

iv. Pleadings and Evidence.

Pleadings—Non-delivery.—It is not neces-

sary, in an action for non-delivery of goods sold, to set out more of the contract than relates to the breach. *Sequier v. Hunt*, 3 Price, 68.

A contract for the sale of tallow warranted to be ready for delivery from ship or warehouse before 1st November:—Held, that this was equivalent to a contract to be generally ready for delivery before that day, and need not be specially averred. *Thornton v. Jones*, 6 Taunt. 581; 2 Marsh. 287; Holt, 164.

Upon breach of a contract for the purchase of 100 bags of wheat, forty or fifty of which were to be delivered on one market-day, and the remainder on the next market-day, the plaintiff cannot declare as upon an absolute contract for the delivery of forty bags on the first day, &c., though forty bags were then in fact delivered, but the contract should be stated in the alternative, according to the original terms of it. *Penny v. Porter*, 2 East, 2.

Where, in consideration of the purchase of hay by the plaintiff of the defendant, the latter promised to deliver it to, and suffer the plaintiff to take it away as he wanted it, when requested, an allegation that the defendant, after suffering the plaintiff to take away a part, sold and disposed of the residue to other persons, supersedes the necessity of alleging a request to deliver the residue. *Bowdell v. Parsons*, 10 East, 359.

— **Tender of the Price of Goods.**—In an action for the non-delivery of malt, which the defendant had undertaken to deliver on request at a certain price, it is sufficient for the plaintiff in his declaration to aver such request, and that he was ready and willing to receive the malt, and to pay for it according to the terms of the sale, but that the defendant refused to deliver it, without averring an actual tender of the price. *Rawson v. Johnson*, 1 East, 203; *S. P.*, *Waterhouse v. Skinner*, 2 B. & P. 447.

In an action for the non-delivery of corn at S. pursuant to an agreement, whereby the defendant, in consideration that the plaintiff had bought of him a certain quantity at a fixed price, undertook to deliver it to the plaintiff at S. within one month from the time of the sale, the plaintiff must aver a tender of the price, or what is equivalent thereto: for the delivery of the corn and the payment of the price were concurrent acts to be done by the parties respectively at the same time, and each must aver performance, or offer to perform his part, before he can maintain an action against the other. *Morton v. Lamb*, 7 T. R. 125.

— **Non-acceptance.**—In an action for not accepting a quantity of guano, the declaration alleged that the plaintiffs were ready and willing to deliver the guano to the defendant according to the terms of the contract:—Held, that it was not necessary for the plaintiffs to aver a tender or an offer to deliver, or that the defendant dispensed with a tender. *Boyd v. Lett*, 1 C. B. 222; 2 D. & L. 847; 14 L. J., C. P. 111.

A declaration stated that the defendants bought of the plaintiff linseed, to be worked by them within a specified time, and to be paid for in ready money, and by the defendants' acceptance at two months; that the plaintiff tendered the linseed to the defendants, who, although requested, refused to pay in ready money or to give their acceptance, and discharged the plain-

tiff from tendering the bill for that purpose. The defendants pleaded, first, that they were not requested to pay for the linseed in ready money, or to give their acceptance; and, secondly, that they did not refuse to give their acceptance or discharge the plaintiff from drawing upon them:—Held, that the pleas were bad, the averments traversed being immaterial. *Spaeth v. Hare*, 1 D., N. S. 595; 9 M. & W. 326.

To a count for not accepting goods described in the contract as "to arrive ex Peerless from Bombay," a plea that the defendant meant another ship of the same name, which sailed from Bombay two months earlier, and that the plaintiff was not ready to deliver any goods which arrived by that ship, is a good answer. *Raffles v. Wichelhaus*, 2 H. & C. 906; 33 L. J., Ex. 160.

The plaintiffs declared upon a contract for the sale of refined petroleum. The declaration stated that the plaintiffs were ready and willing to perform their part of the agreement, but that the defendants, though they accepted part of the petroleum, refused to accept the remainder. The defendants pleaded that the contract was contained in certain bought and sold notes, and that the plaintiffs were never ready and willing to sell to the defendants such refined petroleum as they agreed to sell, and that the petroleum received by the defendants was received by them in ignorance, and without the means of knowing that it was not such refined petroleum as the plaintiffs agreed to sell:—Held, that the plea, if not amounting to a traverse of the plaintiffs' readiness and willingness to perform their contract, was bad in substance, as setting up an understanding inconsistent with that stated in the declaration, and admitted by the plea. *Borrowman v. Rossel*, 16 C. B., N. S. 58; 10 Jur., N. S. 679; 10 L. T. 236; 12 W. R. 580.

It is a good defence to an action, on an agreement to deliver goods sold, that the plaintiff is in such a situation as to be unable to pay for them, and had compounded with his creditors. *Reader v. Knatchbull*, 5 T. R. 218, n.

— **Bargain and Sale.**—Where goods are sold for ready money, and payment is made accordingly, no debt arises, and such payment is therefore provable under the general issue. *Bussey v. Barnett*, 9 M. & W. 312; 1 D., N. S. 646. Contra, *Littlechild v. Banks*, 7 Q. B. 739; 14 L. J., Q. B. 356; 9 Jur. 1096.

Under a plea of *nunquam indebitatus* for goods bargained and sold, it is open to the defendant to take the objection, that the contract is void by the 17th section of the Statute of Frauds. *Fricke v. Thomlinson*, 1 M. & G. 772; *S. P.*, *Leaf v. Taton*, 10 M. & W. 393.

— **Evidence—Readiness and Willingness.**—A demand of delivery of the goods sold is sufficient proof of an averment that the plaintiff was ready and willing to perform his part of the contract, although that demand was made by his servant when he was not himself present to have done so, if required, on the spot. *Sequier v. Hunt*, 3 Price, 68.

In an action for not delivering goods according to agreement, after demand made, it is not necessary to adduce evidence in support of the averment, that the plaintiff was ready and willing to accept and pay for the goods. *Wilks v. Athinson*, 1 Marsh. 412; 6 Taunt. 11.

— **Parties.**]—A. bought goods of B., which were delivered to C., a carrier, to be by him conveyed to A.'s shop. C., by mistake, delivered to A. goods of the like description, but of greater value, which had been entrusted to him to deliver to a third person. A. having, in ignorance of the mistake, appropriated the goods so delivered to him, afterwards agreed to pay C. (who had paid their value to the owner) for the goods, at the same rate that he was to have paid for those he had ordered:—Held, that this was some evidence in support of a count, for goods sold and delivered. *Coles v. Bulman*, 6 C. B. 184; 17 L. J., C. P. 302; 12 Jur. 586.

— **Time of Delivery.**]—If a written contract for the sale of goods specifies no time for delivering them, in an action for not delivering them it is not competent for the defendant to give parol evidence that it was a condition of the sale that the goods should be taken away immediately, or that by the usage of trade, where goods are sold to be delivered at a distant day, the time is always mentioned in the written contract. *Greaves v. Ashlin*, 3 Camp. 426.

— **Method of Delivery.**]—A declaration alleging that the defendant undertook to deliver a parcel of goods for the plaintiff, is disproved by evidence of a special agreement to deliver them to the bearer of a receipt given for the goods at the time of delivery. *Samuel v. Darch*, 2 Stark. 60.

— **Inference from Catalogue.**]—At the trial of an action for not accepting goods, described in a colonial broker's catalogue, the defendant's counsel put the catalogue into the hands of a witness, and, without laying foundation for the question by asking whether there was any usage, asked at once whether, from the catalogue, it would be inferred by custom that the goods were sound and in their original packages:—Held, that the question in that form was inadmissible. *Curtis v. Peek*, 13 W. R. 230—Ex. Ch.

Evidence of Sale.]—A receipt and also a delivery order given by the plaintiff to a witness a month after the sale, but dated on the day of the sale, and not otherwise shewn to be in existence before the sale, is admissible as affording some evidence of the sale having taken place on the day of the date of the documents. *Morgan v. Whitmore*, 6 Ex. 716; 20 L. J., Ex. 289.

In an action for goods sold and delivered, to which the defence was, that the plaintiff had sold them to the defendant on certain terms, the defendant was not allowed to call witnesses to prove that the plaintiff had sold the same quality of goods to other persons on the same terms. *Hollingham v. Head*, 4 C. B., N. S. 388; 27 L. J., C. P. 241; 4 Jur., N. S. 379.

In an action for goods sold, if a defendant says that he owes the debt, and that the plaintiff has applied to him to pay him, and that he will do so as soon as he can, but does not mention any sum; on evidence of this, the plaintiff is entitled to a verdict, with nominal damages. *Dixon v. Deveridge*, 2 C. & P. 109.

Where the plaintiff sent goods to the defendant, resident abroad, on the order of merchants in London, and the defendant received and used

the goods:—Held, that it was *prima facie* evidence of goods sold and delivered to the defendant. *Bennett v. Henderson*, 2 Stark. 550.

In an action for the price of goods sold which have been sent by a carrier, there must be evidence either that they were ordered or received. *Harman v. Bennett*, 1 F. & F. 400.

Where the price of goods is above 10*l.*, and nothing is paid as earnest to bind the bargain, nor is there any memorandum in writing, signed by the defendant or his agent, two things must be proved to entitle the plaintiff to recover: first, that the defendant in fact ordered the goods; and, secondly, that he accepted them with an intent to take to them as owner. *Smith v. Rolt*, 9 C. & P. 696.

Under the general issue evidence is admissible that the period of credit was not expired when the action was commenced. *Broomfield v. Smith*, 1 M. & W. 543.

Under the general issue the defendant may prove that the goods delivered were not such as were ordered, although there was a special contract to pay for the goods at a certain price; and the plaintiff can then recover only on the quantum meruit. *Cousins v. Paddon*, 2 C., M. & R. 547.

A count for a tailor's bill: the defendant put in an agreement between himself and the plaintiff, by which it was agreed that the defendant should recommend customers to the plaintiff, and receive a percentage on their accounts; such percentage to be received by the defendant in clothes, to be ordered from the plaintiff by the defendant, from time to time, as he might want the same, and that a settlement of accounts should take place between the parties every six months, or at the furthest in twelve months:—Held, on this agreement, under *nunquam indebitatus*, that the onus lay on the plaintiff to prove that a settlement of accounts had been come to, on which the balance was in his favour, and that no action lay till the expiration of twelve months. *Garey v. Pyke*, 2 P. & D. 427; 10 A. & E. 512.

— **Invoices.**]—If a party receiving an invoice does not object to it on the ground of its brevity and incompleteness, the party furnishing it will be bound by it. *Pauli v. Simes*, 6 C. & P. 506.

If brokers alter an invoice of the owner of goods from the name of one purchaser to another, and send it to the latter with a letter, saying that, to simplify the transaction, they had transferred the seller's invoice to him, such invoice will amount to a contract of sale. *Id.*

An invoice being in the hands of a purchaser stating the weight of the goods sold, and no objection being made by him, is some evidence of their weight. *Baylis v. Lundy*, 4 L. T. 176; 9 W. R. 556.

The fact of a tradesman delivering an invoice or an account in which goods are described as bought from him, does not operate as an estoppel, so as to prevent his shewing that he was not in truth the seller. *Holding v. Elliott*, 5 H. & N. 117; 29 L. J., Ex. 134; 8 W. R. 192.

b. Measure of Damages.

Fraudulent Sale—Price in Market at Time of Sale.]—L. ordered the defendant to buy for him

rupee paper: the defendant sold rupee paper of his own to L., whilst he fraudulently led L. to believe that it belonged to third persons. The value of rupee paper afterwards became considerably less, but L. held for many months what the defendant had sold to him, and ultimately resold it at a loss of 43,000*l.*:—Held, that the measure of damages was not the amount of the loss ultimately sustained by L., but the difference between the price which he paid for the rupee paper and the price which he would have received, if he had resold it in the market forthwith after purchasing it. *Waddell v. Blockley*, 4 Q. B. D. 678; 48 L. J., Q. B. 517; 41 L. T. 458; 27 W. R. 938—C. A.

Delivery by Instalments.—B. bought of M. 500 tons of iron, to be delivered in about equal proportions in September, October, and November, 1871. In August, 1871, M. gave notice to B. that he did not intend to deliver any iron. In December, B. commenced an action for non-delivery, and claimed as damages the difference on the 30th of November, between the contract and market prices of the iron:—Held, that the proper measure of damages was the sum of the differences between the contract and market prices of one-third of 500 tons on the 30th of September, the 31st of October, and the 30th of November, respectively. *Brown v. Muller*, 7 L. R., Ex. 319; 41 L. J., Ex. 214; 27 L. T. 272; 21 W. R. 18.

The defendants in October, 1870, contracted to sell to the plaintiffs 2,000 tons of iron, "delivery in monthly quantities (of 166½ tons) over 1871, or sooner if required;" payment by four months' acceptance from the 10th of the month following delivery. In January, 1871, 101 tons were delivered, but the plaintiffs did not then demand the delivery of the balance of the monthly quantity. In February, 1871, and at several periods between that date and December, 1871, the plaintiffs requested the defendants to forbear from delivery of more iron under the contract, and the defendants accordingly only made partial deliveries during the several months of 1871, up to and including November. In December the plaintiffs required delivery of the residue of the whole 2,000 tons, and upon the defendants' refusal, brought an action for non-delivery:—Held (by Kelly, C. B., and Pigott, B.; Martin, B., dissentiente), that the plaintiffs having themselves requested the defendants to forbear from delivery during the several months of 1871 up to November, could not require delivery of the residue of the whole 2,000 tons in December, and were therefore not entitled to recover. By Martin, B., first, that the original contract had not been put an end to by the plaintiff's application to the defendants not to deliver full monthly quantities between February and November, 1871, and that the defendants were bound to deliver the whole 2,000 tons under their contract; and, secondly, that the proper measure of damages was the difference between the contract and market prices in December, 1871, when the defendants refused to deliver the iron. *Tyers v. Rosedale and Ferryhill Iron Company*, 8 L. R., Ex. 305; 42 L. J., Ex. 185; 29 L. T. 751; 21 W. R. 793. Reversed on appeal, *ante*, col. 895; the point as to damages not arising in Ex. Ch. See also cases sub tit. PERFORMANCE OF CONTRACT OF SALE (*Time of Delivery*), *ante*, col. 893.

If a contract is made for the sale of a certain quantity of goods to be delivered by parcels on successive days, and prior to the time for fulfilment of the agreement, the vendor finally repudiates and declines to perform it, whereupon the buyer, electing to treat such repudiation as a breach of the entire contract, brings an action for the same, before the period for completion has arrived—the measure of damages will be the difference between the contract and market price of the goods on the several days when the vendor ought to have performed his contract by delivery; subject, however, to the reduction of the amount so ascertained, by proof of any facts which may have afforded the buyer the means of mitigating and diminishing the loss incurred. *Roper v. Johnson*, 8 L. R., C. P. 167; 42 L. J., C. P. 65; 28 L. T. 296; 21 W. R. 384.

The defendant in April agreed to sell and the plaintiffs to buy 3,000 tons of coal, at 8*s.* 6*d.* per ton, "to be taken during the months of May, June, July, and August." No coal having been taken by the plaintiffs in May, the defendant wrote on the 31st of that month desiring the plaintiffs to consider the contract cancelled. The plaintiffs did not assent to this; but on the 11th of June the defendant definitively refused to deliver any coal, and on the 3rd of July the plaintiffs brought an action for this breach. At the trial, which took place on the 13th of August, the plaintiffs proved that the price of coal had risen during the whole period since the beginning of May, and was still rising. No evidence was given to shew whether they could have gone into the market, and obtained a new contract for coals:—Held, that in the absence of evidence on the part of the defendant that the plaintiffs could have obtained a new contract on such terms as to mitigate their loss, the true measure of damages was the sum of the differences between the contract price and the market price at the several periods for delivery, notwithstanding that the last period had not elapsed when the action was brought, or when the cause was tried. *Id.*

The defendants entered into a contract with the plaintiff, whereby they undertook to deliver, from the 1st January until the 31st December, 1872, 6,260 waggons of coal, at 7*s.* 3*d.* per ton of 20 cwt., at the fair average rate of twenty waggons per day; payment by three months' acceptance, drawn on the 10th of each month, for the previous month's supply. The deliveries were irregular in point of time, and insufficient in point of quantity, and they failed to comply with the condition of the contract, that they should be at the fair average rate of twenty waggons per day. At the end of the year there was a large deficiency. The plaintiff, although constantly complaining of the deliveries, did not go into the market and buy against the defendants at any time during 1872, but on the 13th February, 1873, he bought coal in the market to supply the whole of the deficiency of the coal undelivered, at a very much higher price, namely 19*s.* per ton. Coal had been gradually rising in price in the market throughout the successive months of 1872, and it rose more rapidly in the months of January and February, 1873. The plaintiff claimed to be entitled to, as damages, the difference between the contract price of 7*s.* 3*d.*, and the market price of coal at the expiration of such a reasonable time after the 31st December, 1872, as would have enabled him to go into the market and obtain it, calculated upon the whole

of the deficiency left undelivered by the defendants under their contract throughout the year 1872. The defendants contended that the plaintiff was not entitled to wait until the expiration of the year before assessing his damages, as contended for by the plaintiff, for that a breach of the contract was committed as often as a month expired without the proper quantity applicable to such month having been delivered, and that the plaintiff was bound to assess his damages in respect of such breach from an estimate of that month's market price of coal, or that the breaches were committed at some shorter periods; but that the damages should be calculated at the end of each month.—Held, that as soon as the defendants failed to deliver a fair average of coal, according to the terms of the contract, a breach had taken place, for which, at that time, the plaintiff was entitled to damages as upon that breach, and so on from time to time as each subsequent breach took place, and that it was an erroneous way of estimating the damages by waiting until the full period of the contract had expired, and then claiming the difference at that time. *Barningham v. Smith*, 31 L. T. 540.

Non-delivery—Penalties.—The defendant, in January, 1872, agreed to furnish the plaintiffs with a quantity of sets of wheels and axles according to tracings, to be delivered on certain specified days, free on board at Hull. The plaintiffs were under a contract with a Russian railway company to deliver them 1,000 covered waggons, 500 on the 1st of May, 1872, and 500 on the 31st of May, 1873, under a penalty of two roubles per waggon for each day's delay in delivery. In the course of the negotiations the defendant was told by the plaintiffs that they wanted the wheels and axles to complete waggons which they were bound to deliver under penalties, but neither the precise day for the delivery nor the amount of the penalties was mentioned. The defendant did not deliver the sets of wheels in time, and the plaintiffs in consequence had to pay certain penalties, but the Russian company consented to take one rouble a day, amounting in the whole to 100*l.* :—Held, that though the plaintiffs were not entitled to recover in an action for breach of contract, as a matter of right, the amount of the penalties, yet the jury might reasonably assess the damages at that amount. *Elbinger Actien-Gesellschaft für Fabrication von Eisenbahn Materiel v. Armstrong*, 9 L. R., Q. B. 473; 43 L. J., Q. B. 211; 30 L. T. 871; 23 W. R. 127.

The plaintiff, having contracted to supply iron rails to a foreign company, applied to the defendants, who wrote him: "We have this day sold you about 5,413 tons of iron rails . . . delivered f. o. b. at Newport. Payment to be stated in the specification." By the specification "the delivery of the rails was to commence by the 15th of February, 1873," and to be completed by the 15th of April, 1873. The makers to have the option to begin delivery on the 15th of December, 1872. In the event of the makers exceeding the time of delivery above stipulated, they were to pay by way of fine 7*s.* 6*d.* per ton per week, this amount to be deducted out of the payment for the rails. The rails were to be stacked so that they might be tested, and payment to be made by bills. In the event of ships not being ready within fourteen days' notice

being given, then the payment by the same bills to be made against wharf warrants and engineer's certificate for each 500 tons stacked, and being to put f. o. b. when the vessel was ready. The workmen in the employ of defendants struck work, and defendants did not deliver any rails until the month of May. They continued the delivery from time to time, but the whole quantity was not delivered until the month of September:—Held, that the sum of 7*s.* 6*d.* per ton per week was a liquidated sum which the defendants were bound to pay to the plaintiff, but that it was only to be calculated from the 15th of May. *Bergheim v. Blaenavon Iron and Steel Company*, 10 L. R., Q. B. 319; 44 L. J., Q. B. 92; 23 W. R. 238. See also PENALTY.

Increased Freight.—A charterer who has, through the shipowner's default in not being ready to load at the time agreed upon, been compelled not only to pay increased freight, but also to pay a higher price for the article to be shipped, is, in the absence of evidence that he will be able to sell at a corresponding increased price at the port of delivery, or of other evidence that he will not be a loser, entitled to recover as damages the additional price paid as well as the difference in freight. *Featherston v. Wilkinson*, 8 L. R., Ex. 122; 42 L. J., Ex. 78; 21 W. R. 442.

Postponement of Delivery.—When a vendor of goods, by contract in writing, at the request of the purchaser, who is at the time fixed for delivery unable to take and pay for the goods, withholds delivery till a later date on a parol promise to the purchaser to that effect:—Held, that, if at the expiration of the later date so fixed the purchaser refuses to accept delivery, the vendor may sue for damages as for a breach at the time fixed for delivery by the original contract, and is entitled to damages according to the market price at the later date verbally fixed for the purchaser's convenience. *Hickman v. Haynes*, 10 L. R., C. P. 598; 44 L. J., C. P. 358; 32 L. T. 873; 23 W. R. 872.

By bought and sold notes signed by brokers acting both for the plaintiff and the defendant, the last of which was dated April 25th, the plaintiff bought of the defendant 500 tons of iron, the delivery to extend over three months. None of the iron was delivered by the 25th July. A correspondence ensued between the brokers and the defendant's agent until February following, from which a jury might properly come to the conclusion that the plaintiff waited for the delivery of the iron at the request of the defendant; he then went into the market and bought, the price of iron being higher than at the end of July:—Held, that, as the plaintiff had not bound himself to wait, there was no alteration of the contract within the Statute of Frauds, and therefore he might recover from the defendant the difference between the contract price of the iron and the market price in February. *Ogle v. Vane (Earl)*, 3 L. R., Q. B. 272; 37 L. J., Q. B. 77; 16 W. R. 463; 9 B. & S. 182—Ex. Ch.

Non-delivery of Goods Sold on Credit.—A. having bought some sheep on credit, left them in the custody of the vendor; without any default on the part of A. the vendor resold the

sheep :—Held, that the measure of damages was not the value of the sheep, but the loss sustained by A. by not having the sheep delivered to him at the price agreed on. *Chinery v. Viall*, 5 H. & N. 288 ; 29 L. J., Ex. 100 ; 8 W. R. 629.

Late Delivery—Loss of Profit.]—The plaintiffs, in July, 1877, undertook to make for J. a machine, to be delivered at the end of August. The defendants contracted with the plaintiffs to make "as soon as possible" part of the machine called a "gun." The defendants were aware that the machine was wanted by J. at the end of August, but they did not finish the "gun" until the latter part of September. J. then refused to accept the machine from the plaintiffs. The delay on the part of the defendants was owing to the circumstance that at the time of undertaking to manufacture the "gun" they had not a foreman competent to prepare certain patterns, without which it could not be made :—Held, that the defendants had committed a breach of their contract, and that the plaintiffs were entitled to recover damages for the loss of profit upon the contract with J., and for the expenditure uselessly incurred by them in making other parts of the machine. *Hydraulic Engineering Company v. McHaffie*, 4 Q. B. D. 670 ; 27 W. R. 221—C. A.

— Of Thrashing Machine—Injury to Corn.]

—The plaintiff, a farmer, contracted with the defendant, an agent for the sale of thrashing machines, for the purchase of a thrashing machine, to be delivered on the 14th August; the defendant was aware of the particular purpose for which it was ordered. The machine was not delivered on that day, and the plaintiff being led by the promises of the defendant to expect that it would be delivered from day to day, abstained from hiring one elsewhere :—Held, that the plaintiff was entitled to recover for loss sustained by injury to his wheat by a fall of rain, and for expenses incurred in carting the wheat and thatching it, and for the cost of kiln-drying it, but not for loss by a fall in the market price of wheat. *Smeed v. Ford*, 1 El. & El. 602 ; 28 L. J., Q. B. 178 ; 5 Jur., N. S. 291.

Loss of Profit on Contract to Resell.]—In an action for breach of contract to deliver goods it was shewn that the goods were not procurable in the market, that the plaintiff had entered into a contract of subsale, which in consequence of the non-delivery he could not perform, that such contract was not known to the defendant at the time of sale, but that he knew that the goods had been purchased by the plaintiff for resale :—Held, that the plaintiff was not entitled to recover damages for loss of profit on the resale. *Borries v. Hutchinson* (*infra*) distinguished. *Thol v. Henderson*, 8 Q. B. D. 457 ; 46 L. T. 483 ; 46 J. P. 422.

The defendant contracted to sell to the plaintiff 75 tons of caustic soda, a commodity not ordinarily procurable in the market, at a given price, to be delivered on the rails at Liverpool for Hull, 25 tons in June, 25 tons in July, and 25 tons in August; but he failed to deliver any until the 16th of September, between which day and the 26th of October he delivered 26 tons in all. At the time of entering into the contract, the defendant was aware that the plaintiffs were

buying the soda for a foreign correspondent, but did not know until the end of August that it was destined for St. Petersburg. The plaintiffs had in fact contracted to sell the soda to A., a merchant at St. Petersburg, at an advanced price, and A. had contracted to sell it to B., a soap manufacturer at that place, for a still further advance. In consequence of the late delivery of the 26 tons, the plaintiffs were compelled to pay a higher rate of freight and insurance; this amounted to 40l. 17s. For their failure to deliver the remainder to A., they were called upon to pay and actually paid 159l., which A. claimed as the compensation he had been obliged to pay to B. for the failure to perform his sub-contract with him. In an action by the plaintiffs to recover from the defendant damages for the breach of his contract with them, it was conceded that they were entitled to recover the difference between the price (on the 49 tons undelivered) at which he had sold the caustic soda to them, and the price at which they had contracted to sell it to A.; in other words, the loss of profit on the resale. *Borries v. Hutchinson*, 18 C. B., N. S. 445 ; 34 L. J., C. P. 160 ; 11 Jur., N. S. 267 ; 11 L. T. 771 ; 13 W. R. 386.

Held, that they were also entitled to recover the 40l. 17s., the excess of freight and insurance which was the necessary result of the defendant's breach of contract; but that the defendant was not chargeable with the 159l. which the plaintiffs had paid to A. to compensate B. for the loss of his bargain, this being too remote a damage. *Id.*

— Custom.]—On the 1st April the plaintiff and the defendants, who were cotton brokers at Liverpool, entered into a contract, by which the defendants agreed to sell to the plaintiff 500 piculs China cotton, at 16½d. per pound, to be delivered in August, guaranteed fair. On the 25th May the plaintiff made a contract to sell to M. and A. the same quantity and quality of cotton, at 19½d. per pound, to be delivered in August. It is the practice at Liverpool for purchasers of cotton to resell before the time for delivery. The defendants had not fulfilled their contract on the last day of August, on which the price of cotton was 18½d. In an action for breach of contract, whereby the plaintiff was incapacitated from performing his contract with M. and A. :—Held, that the measure of damages was the difference between the contract price and the market price on the last day for delivery, and that the plaintiff was not entitled to recover damages for the loss of profit from that contract. *Williams v. Reynolds*, 11 Jur., N. S. 973 ; 12 L. T. 728 ; 6 B. & S. 495.

Sub-Contract—Written Agreement not mentioning.]—The plaintiff having received an order from P. to supply from 150 lbs. to 200 lbs. of wound cotton daily, verbally agreed with the defendant that the defendant should undertake the winding of it, informing the defendant, as was the fact, that the plaintiff had taken upon himself the consequences of late delivery, if any, to P., and obtaining from the defendant the assurance that he, the plaintiff, might rely on him. Afterwards, and on the day of the interview, the plaintiff sent the defendant a written order for the cotton, on the express condition that the same should be delivered daily, but containing

no notice or stipulation as to the sub-contract of the plaintiff with P. The defendant failing to deliver regularly to the plaintiff, and the plaintiff to P., the result was that P. claimed, and the plaintiff paid to P. 300*l.* by way of reimbursing P. for his loss upon resale of the goods which P.'s customers had refused to accept, as having been delivered late:—Held, that the plaintiff might recover the 300*l.* from the defendant as damages for the breach of contract to deliver the cotton daily. *Sawdon v. Andrew*, 30 L. T. 23.

Notice of Sub-Contract.]—The defendant agreed at Belfast with the plaintiffs, who were commission agents there, for the sale to the plaintiffs of a quantity of iron. The sold note was as follows:—"19th February, 1880. Sold Messrs. Hamilton, Megaw and Thomson, 500 to 700 tons, as lot may turn out, heavy No. 1 wrought scrap iron, as per Philadelphia inspection, copy of which I have received from you, for shipment to Philadelphia, not later than 19th April, 1880, at 6*l.* 5*s.* per ton, cost, freight and insurance, to Philadelphia. Payment to be made by you, net cash in exchange for bills of lading, as shipments are made.—James Magill." After such contract had been entered into, the plaintiffs contracted with W. for the sale to W. of a lot of scrap iron of the same description, up to 700 tons, upon certain terms which had been offered by W. prior to the contract, viz.:—"No. 1 wrought scrap iron, according to W.'s classification of October 17th, 1879, at 130/- c. f. i. to Philadelphia; shipment on or before April 19th, 1880." Immediately after the defendant began to ship the iron, the plaintiffs complained that the iron shipped did not answer the description in the contract, which was afterwards admitted to be the case, but it was agreed between the plaintiffs and the defendant that the former should be at liberty to accept the bills of lading of the shipments, without prejudice to the question between the plaintiffs and the defendant as to whether the iron shipped was in accordance with the contract. The vessel, on board which the iron was shipped, arrived at Philadelphia early in June, 1880, when W. refused to receive the cargo, which was admittedly not in accordance either with the contract between the plaintiffs and defendant, or with that between the plaintiffs and W. The plaintiffs, thereupon, sold the cargo at Philadelphia for 975*l.* 7*s.* 2*d.* If the cargo had been equal to the contract between the plaintiffs and the defendant, the plaintiffs would have been entitled to receive for it from W. the sum of 2,990*l.* 14*s.* 2*d.* In an action by the plaintiffs against the defendant for the breach of the contract, the jury found that the cargo equal to the contract would, at the time of delivery, have been 2,055*l.* 9*s.* 8*d.*, and the value of the cargo actually delivered was 975*l.* 7*s.* 2*d.*, viz., the amount got for it by the plaintiffs, after its refusal by W. The jury also found, inter alia, that the defendant at the time of the contract, had notice that it was entered into by the plaintiffs to enable them to accept an offer already received by them for shipment to Philadelphia of iron answering the description of W.'s classification of October 17th, 1879, and that the profit on the resale was not an unusual one in such a transaction:—Held, that the plaintiffs were entitled to recover as damages the sum of 2,015*l.* 7*s.*, being the difference between the actual value and the amount

which would have been receivable from W., had the cargo been in accordance with the contract, and not merely the difference between the actual value and the value of a cargo equal to the contract at the time of delivery. *Hamilton v. Magill*, 12 L. R., Ir. 186. See *Horne v. Midland Railway Company*, 8 L. R., C. P. 131; 42 L. J., C. P. 59; 28 L. T. 312; 21 W. R. 481—Ex. Ch.; and *Hydraulic Co. v. McHaffie*, *supra*.

Market Price—Difference.]—The defendant on the 26th July, sold by sample to the plaintiff, 3,000 gallons of naphtha, at 2*s.* 2*d.* On the 27th the plaintiff resold the same to H. also by sample at 2*s.* 6*d.* The sample contained 73 per cent. of benzol, an article used in the manufacture of Magenta dye, newly discovered, and for that purpose was worth 5*s.* 9*d.* a gallon. The defendant failed to deliver the naphtha. It was proved that H. had claimed the difference between 5*s.* 9*d.* and 2*s.* 6*d.* from the plaintiff. In assessing the damages for the non-delivery of the naphtha, the jury gave this amount to the plaintiff as damages:—Held, that there must be a new inquiry, because it did not appear at what price the plaintiff could have procured naphtha according to the sample at the time of the breach. *Jouling v. Irvine*, 6 H. & N. 512; 30 L. J., Ex. 78; 4 L. T. 251.

On a second inquiry, naphtha known to contain 73 per cent. of benzol could not have been bought for less than 5*s.* 9*d.* at the time of the breach. The judge told the jury that the plaintiff would have no answer to an action by H. for the difference, and advised the jury to give such a sum as would enable him to pay H. The jury having given this amount:—Held, that the damages were rightly assessed, and that there was no misdirection. *Ib.*

In an action for a breach of contract in not delivering a quantity of bacon upon a given day, the damages must be estimated by the price of bacon of the same description at or about the time when the contract was broken, and not at the time when the damages are assessed. *Gainsford v. Carroll*, 4 D. & R. 161; 2 B. & C. 624.

The defendants, in the month of September, contracted to deliver tallow to the plaintiff "in all next December," at a certain price per cwt. In October they informed him that they had sold the tallow, and could not perform the contract:—Held (tallow having risen in price), that the plaintiff was entitled to recover damages according to the market price, on the last day on which the contract could have been performed, viz. 31st of December, as he had not acquiesced in its being rescinded when the defendants refused to perform it. *Leigh v. Paterson*, 2 Moore, 588.

The measure of damages in the case of a breach of a contract to deliver goods at a specified time, is, the difference between the contract price and the market price at the time of the breach of contract, or the price for which the vendee had sold; but the latter cannot recover, as special damage, the loss of anticipated profits to be made by his vendees. *Peterson v. Ayra*, 13 C. B. 353.

Loss of Market.]—Where, on account of defects in the ship, the voyage had been protracted, and in the meantime the market price of the goods shipped had fallen:—Held, that the consignee could not recover damages for the

loss of market. *The Parana*, 2 P. D. 118; 36 L. T. 388; 25 W. R. 596—C. A.

No Market.—When goods which cannot be procured in the market are sold to be delivered on a day certain, the purchaser is entitled to recover, in an action for breach of contract to deliver, the amount which he has reasonably expended to avert the loss which he would otherwise have sustained from non-delivery. *Hinde v. Liddell*, 10 L. R., Q. B. 265; 44 L. J., Q. B. 105; 32 L. T. 449; 23 W. R. 650.

The defendant contracted to supply to the plaintiff 2,000 pieces of grey shirtings, to be delivered on the 20th of October certain, at so much per piece, the defendant being informed that they were for shipment. Shortly before the 20th of October the defendant informed the plaintiff that he would be unable to complete his contract by the time specified, on which the plaintiff endeavoured to get the shirtings elsewhere, but, there being no market in England for it, that kind of shirtings could only be procured by a previous order to manufacture it. The plaintiff, therefore, in order to ship according to his contract with his sub-vendee, procured 2,000 pieces of other shirtings of a somewhat superior quality, at an increase of price, which the sub-vendee accepted, but paid no advance in price to the plaintiff. The plaintiff sought to recover against the defendant for the breach of his contract, the difference between what he paid for the substituted shirtings and the defendant's contract price. The shirtings which the plaintiff bought were the nearest in price and quality that could be got by the 20th of October, and the jury returned a verdict for the amount claimed:—Held, that there being no market for the article contracted for, the measure of damages was the value of it at the time of breach; and that the plaintiff having done the best thing he could, was entitled to recover the difference in the price. *Ib.* And compare the following case.

A purchaser bought champagne lying at a wharf at 14s. per dozen, and resold it at 24s. to the captain of a ship about to leave England. The wharfinger refused to deliver the wine, and the purchaser was unable to fulfil his contract, champagne of a similar quality not being procurable in the market. The wharfinger had no knowledge of the sale, or of the purpose for which the purchaser required delivery of the champagne. In an action for the conversion:—Held, that he was entitled, as damages, to the price at which he had sold the champagne. *France v. Gaudet*, 6 L. R., Q. B. 199; 40 L. J., Q. B. 121; 19 W. R. 622.

Payment by Bill—Dishonour—Parties.—On 30th October, 1857, A. agreed with B. to buy of him 100 parcels of iron of a named quality, and 300 parcels of iron of another named quality, to be delivered immediately, and paid for by a bill of exchange at four months' date, down. No specific iron was appropriated for the purposes of the contract. A. gave the bill, which, on the 31st October, 1857, B. indorsed to his bankers, who continued the holders till the bill fell due. B. duly delivered the 100 parcels of iron, and gave A. a delivery order for the 300 parcels; which A., on 19th November, 1857, indorsed to his bankers, H. & Co., and a few days afterwards gave B. notice of the indorsement. H. & Co. presented the

order at the works where the iron was lying, on 19th November, 1857, when delivery of it was refused. On 17th November, 1857, B. suspended payment; and, on 10th February, 1858, A. was adjudicated a bankrupt. On 4th March, 1858, the bill given by A. fell due, and was dishonoured. The banking company, though they claimed to be creditors of A. for the amount of the bill, did not prove against his estate, nor had A. paid any part of the amount. B., however, had paid them a composition of 8s. in the pound upon the amount of the bill:—Held, in an action for non-delivery of the 300 parcels of iron, that A. was entitled to recover only nominal damages, and that the fact that H. & Co. were the real parties, suing in A.'s name, could not be taken into consideration as affecting the damages, inasmuch as H. & Co. could have no greater right to recover than A. himself had. *Griffiths v. Perry*, 1 EL. & EL. 680; 28 L. J., Q. B. 204; 5 Jur., N. S. 1076.

Sub sale—Retention of Waggon inferior to Sample—Trove.—The plaintiffs being under contract to sell waggons, employed L. to make them according to sample at a certain price. L. then employed a waggon company to make them according to sample at a lower price. The company afterwards proposed to receive payment direct from the plaintiffs, who consented, and were authorized by L. to pay them. Some waggons were delivered by the waggon company to a railway company, to the order of the plaintiffs. The plaintiffs sent a complaint to the waggon company that the waggons were unequal to sample, but did not reject them; and they informed L., and also the waggon company, that they would dispose of the waggons at the best price obtainable, and hold L. responsible for the loss. L. rejected the waggons. The plaintiffs gave notice to the railway company not to deliver the waggons without their order, but the railway company nevertheless delivered them to the waggon company, who refused to deliver them up:—Held, that the arrangement for the advantage of the waggon company, that they should receive direct payment from the plaintiffs, had not created any relationship between them which would prevent the application of the ordinary rule as to the measure of damages in trover against mere strangers, and that the plaintiffs were therefore entitled to recover the full value of the goods at the time of the conversion without deduction of the price. *Johnson v. Lancashire and Yorkshire Railway Company*, 3 C. P. D. 499; 39 L. T. 448; 27 W. L. 459.

Non-acceptance—No Market—Duty of Party Injured.—The damages for the breach of a forward contract to accept goods for which there is no market, is the full amount of the damage actually sustained, the person who broke the contract not being put to additional cost by reason of the other party not doing what he ought to do, as a reasonable man, and he, on the other hand, not being bound to do otherwise than is the ordinary course of his business. The plaintiffs contracted to sell to the defendant 15,000 tons of cannel coal in weekly quantities, the deliveries not to commence before June, at 26s. per ton, payable by monthly instalments, the defendant not to sell in certain specified places. The defendant repudiated the contract in July, but the plaintiffs attempted to

come to terms with him, and did not treat it as broken until September, when, there being no regular market for cannel coal, they tried without advertising to find another purchaser according to the ordinary course of their own business. After several failures, the coal was sold at 19s. per ton:—Held, that the plaintiffs were entitled to the full amount of the difference between the contract price and that which they obtained. *Lever v. Dunkirk Colliery Company*, 43 L. T. 706—H. L. (E.).

— **Goods of Perishable Nature—Coal not raised.**—The plaintiff company, colliery owners, contracted to supply, and the defendant company, dealers in coal, in London, contracted to purchase, 3,250 tons of old Silktone coal, at 19s. a ton, to be delivered to and taken by the defendants at the pit's mouth in equal monthly quantities, extending over a period of nine months. During several of the months the defendants failed to send waggons forward to accept the full quantity they were bound to accept, and which the plaintiffs were ready and willing to supply in such months, and the defendants therein made default. The coal of the plaintiffs' colliery was a perishable coal, deteriorating rapidly in quality if stacked or stored above ground, and it was not the ordinary course of business, nor a reasonable course for the colliery owner, to raise such coal, except to supply contracts previously entered into, and it was raised as far as possible from day to day to supply the waggons arriving to receive it, into which it was delivered direct from the pit's mouth. Such coal already raised could be, and frequently was, sold in small quantities in the London coal exchange by colliery owners, when a truck of coal had been refused by a customer, or had been sent astray, or when from any other reason coals ready raised were left on their hands, but not otherwise. An action was brought by the plaintiffs to recover damages from the defendants for breach of contract in failing to take the full monthly quantity of coals:—Held, that the amount of damages the plaintiffs were entitled to recover was the difference between the cost of raising the coal, added to the value of the coal itself remaining unraised in the mine (whatever those two heads of calculation might amount to) and the contract price of 19s. a ton, and that such amount could be accurately calculated and ascertained by persons familiar with the subject, without actually raising and selling the coal, which, being of a perishable nature, was not readily or profitably to be so disposed of, and that the plaintiffs were not bound to have so raised and sold it. *Silktone and Dodsworth Coal and Iron Company v. Joint Stock Coal Company*, 35 L. T. 668.

— **Value of Goods when Tendered.**—Where A. contracted for the purchase of wheat, "to be delivered at Birmingham as soon as vessels could be obtained for the carriage thereof;" and, subsequently (the market having fallen), gave the seller notice that he would not accept it if delivered, the wheat being then on its transit to Birmingham:—Held, in an action against A. for not accepting the wheat, that the proper measure of damages was the difference between the contract price and the market price on the day when the wheat was tendered to

him for acceptance at Birmingham and refused, and not on the day when the notice was received by the seller. *Phillips v. Evans*, 5 M. & W. 475.

The measure of damages for non-acceptance of goods is the difference of the contract and market price at the time of breach. *Boswell v. Kilborn*, 8 Jur., N. S. 443; 6 L. T. 79; 10 W. R. 617; 15 Moore, P. C. C. 309.

— **Full Price.**—The plaintiff declared on a contract by the defendant to purchase iron of the plaintiff, and if the delivery of the iron should not be required by the defendant on or before the 30th April, the defendant agreed to pay for the iron on that day; and alleged that the plaintiff had always been ready and willing to deliver the iron, according to the terms of the contract, and that the 30th April had elapsed before the action, yet the defendant had not paid for the iron:—Held, that the plaintiff was entitled to recover, on this contract, the full price of the iron, and not merely the damages which he had sustained by the breach of the contract. *Dunlop v. Grote*, 2 C. & K. 158.

— **Dishonoured Bill.**—Where, in a contract of sale, there are specified days for the delivery of the goods, and payment is to be made by bill, if the bill is given, but dishonoured before the goods are delivered, the parties are placed in the same position as if no bill had been given, or as if the contract had been for ready money; and, therefore, if the vendor is sued by the vendee, after the dishonour of the bill, for non-delivery of the goods, the measure of damages is not the full contract price, but the difference between the contract and the market prices of the goods. *Valpy v. Oakeley*, 16 Q. B. 941; 20 L. J., Q. B. 380; 16 Jur. 38.

— **Loss on Resale.**—If a purchaser refuses to accept goods bargained and sold, the vendor may resell them and recover against the purchaser the amount of the loss on the resale. *Maclean v. Dunn*, 4 Bing. 722; 1 M. & P. 761.

— **Mitigation of Damages.**—Where A., for a valuable consideration, contracted to sell and plant 70,000 trees, on certain lands of the defendant, and also well and sufficiently to keep in order the trees aforesaid, for two years next after the planting thereof, and that such of them as should die during such period, except from injury by sheep, game, or cattle, should be replanted in the autumns of the two years by him:—Held, that evidence of non-performance by A. of any part of his contract, by which the trees had become of less value to the defendant, was admissible to reduce the damages in an action on the agreement for their price, and for planting them. *Allen v. Cameron*, 3 Tyr. 907; 1 C. & M. 832.

Where a contract between A. & B. was, the one to deliver, and the other to accept, a steam-engine of fourteen horse-power, and the foreman of B. went over to the premises of A. and there saw a steam-engine in pieces, which he approved of, and which steam-engine was afterwards delivered by A.:—Held, that the fact that the power of the engine was not a fourteen horse-power was no answer to an action for the price, though it might be given in evidence for the purpose of reducing the damages. *Parsons v. Leaton*, 4 C. B. 899; 16 L. J., C. P. 181; 11 Jur. 849.

Breach of Warranty—Death of Cattle fed on Barley sold.]—The plaintiff purchased from the defendants, who were a firm of distillers, a quantity of grains, warranted by the defendants as being good, sound and merchantable, and as reasonably answering the description "distillers' grains." These grains were ordinarily used in feeding cattle, as the defendant knew, though the sale to the plaintiff was not expressly made for that purpose. The substance delivered to the plaintiff, and which was used by him in feeding cattle, did not answer the description warranted, as it contained small particles of lead and deleterious matter, which had become accidentally intermixed with it during a fire which occurred at the defendants' premises, and the cattle fed with the grains were poisoned:—Held, that the defendants were liable in damages for the value of the cattle. *Wilson v. Dunville*, 6 L. R., Ir. 210.

For the purpose of rendering a defendant responsible for damages, which, in the ordinary course of things, flow from a particular breach, it is unnecessary that the actual breach which ensued should have been within the contemplation of the parties; for anything which amounts to a breach of contract, whether foreseen or unforeseen, the party breaking the contract is responsible. *Ib.*

See also cases under WARRANTIES, *supra*.

VII. RIGHTS OF UNPAID VENDOR.

1. LIEN.

Reviving, on Dishonour of Acceptances.]—The defendants agreed to manufacture for F. & Co. 4,000 tons of iron rails to be ready for delivery by a certain date, "payment to be made by buyers' acceptances of sellers' drafts at six months' date against inspector's certificate of approval and wharfinger's certificate of each 500 tons being stacked ready for shipment." The defendants manufactured the iron, and inspector's and wharfinger's certificates were duly given for it, and in accordance with the contract, F. & Co., as the certificates were delivered to them, accepted the drafts of the defendants, and they negotiated the acceptances. Before the contract was completed, F. and Co. filed a liquidation petition, under which a receiver was appointed. The plaintiff, to whom F. & Co. had pledged the wharfinger's certificates to secure an advance, filed a bill, alleging that by the custom of the iron trade those certificates were warrants for the delivery of the iron rails, and praying for a declaration that he was entitled to a lien on the iron rails in priority to the defendants, in whose possession the rails still remained, and for an injunction to restrain the defendants from parting with the rails:—Held, that the payment by the acceptances given by F. & Co. to the defendants did not amount to an absolute payment, but was conditional on the acceptances being honoured at maturity, and that the debt and the vendors' lien revived on F. & Co. becoming openly insolvent. *Gunn v. Bolckow, Vaughan, & Co.*, 10 L. R., Ch. 491; 44 L. J., Ch. 732; 32 L. T. 781; 23 W. R. 739.

A. sold to B. rum lying in the warehouse of C. at L., and delivered to B. an invoice with marks and numbers. B. accepted the draft of A. for

the price, and sold to D., and obtained payment from D. The usage at L. was for the vendor to deliver to the vendee delivery orders, addressed to the warehouseman, who accepted such orders. No delivery order was given by A. to B., except for a small portion of the goods, which B. received. By the permission of B., but without the knowledge of A., D. gauged and coopered the casks in the warehouse, and marked them with his initials. Upon B.'s acceptance being dishonoured:—Held, that A. had a lien upon the rum for the price. *Dixon v. Yates*, 2 N. & M. 177; 5 B. & Ad. 313.

— Payment of Bill—Condition.]—K. purchased corn at New Orleans, for the plaintiff, a London merchant, whose agent K. was. The purchase was made with K.'s money, and K. drew for the amount upon the plaintiff, the bill being in its body expressed to be on account of the corn. K. sold the bill to the defendant at New Orleans, and at the same time handed to the defendant a bill of lading of the corn, which had been drawn for delivery to K.'s order, and indorsed by K. K. at the same time empowered the defendant to sell the corn if the bill of exchange should not be paid. Afterwards K. advised the plaintiff of the transaction, forwarded to him the invoice, which stated the corn to be shipped at the risk and on account of the plaintiff, and requested the plaintiff to accept the bill of exchange:—Held, that the inference from these facts was that K. did not transfer the property in the corn to the plaintiff, subject to a lien, but only transferred the property to the plaintiff on the condition of his paying the bill of exchange, and that in the meantime the corn was the property of the defendant. *Jenkyns v. Brown*, 14 Q. B. 496; 19 L. J., Q. B. 286.

Goods were sold under an invoice, which expressed that they remained at rent. The vendee subsequently accepted a bill of exchange, drawn by the vendor for the price, which was negotiated by the vendor. Whilst the bill was running, the vendee sold a part, which, by his direction, was delivered by the vendor to the sub-vendee, whom the vendor charged with warehouse rent for the part, which he had paid. Subsequently the vendee became bankrupt, and the bill was dishonoured:—Held, that the assignees of the vendee could not, without paying the price, maintain trover against the vendor for the residue of the goods which had remained in his hands. *Miles v. Gorton*, 2 C. & M. 504.

A purchaser of goods accepted a bill for the price, which the vendor indorsed over; and the indorsee recovered judgment on the bill against the purchaser, but did not issue execution; afterwards the vendor took up the bill and received a mortgage from the purchaser, from which, however, there were no proceeds:—Held, that the vendor was not, in point of law, paid for the goods. *Turleton v. Allhusen*, 2 A. & E. 32.

— Lien lost.]—A vendor who takes in payment a promissory note, and negotiates it, loses his lien, which is not revived upon the dishonour of the note which is outstanding in the hands of an indorsee. *Bunney v. Poyntz*, 1 N. & M. 229; 4 B. & Ad. 568.

Destroyed by reason of Property having passed by Negotiable Instruments.]—Goods

were consigned to the plaintiffs' order to a railway station, and the usual advice note was sent them by the company. On the 12th April the plaintiffs sold these goods to J., payment half by cash, half by bill at three months, due the 13th July, and handed over the advice note to J., with an indorsement directing the company to deliver the goods to J.'s order. On the 24th April J. handed over this delivery order to D. as collateral security for the payment of money advanced to him by D., with a second indorsement ordering the company to deliver the goods to D.'s order. But neither this delivery order nor that made by the plaintiffs was stamped in accordance with the Stamp Act, 1870, s. 89. J. becoming insolvent, D. on the 14th May wrote to the company inclosing the delivery order, and directing them to hold the goods to his order. To this he received the following reply from the goods manager, dated the 15th May: "I have yours of yesterday, inclosing transfer of rails, and beg to say I hold them to your order; but you will please produce this order when applying for the rails, and which order must also bear a transfer stamp by both parties transferring the goods, in accordance with the act of parliament. You will be aware they remain here at owner's risk and subject to our usual rent-charges." On the 19th May, D. affixed an adhesive stamp to each transfer, but omitted to cancel the stamp, as required by ss. 24 and 89, and the same were never, up to trial, so cancelled. On the 23rd May, the company wrote to the plaintiffs, asking if they consented to the goods being delivered to D., to which they replied on the 23rd and 30th June, giving the company formal notice to hold them to their (plaintiffs') order; but upon indemnity being given by D. the goods were handed over to D. The bill given to the plaintiffs by J. in part payment of these goods not being met at maturity, the plaintiffs claimed the goods as partial unpaid vendors, and brought an action against the company for wrongfully parting with the possession of them:—Held, that the condition in the company's letter of the 15th May, as to the transfer stamp, was no qualification of their admission that they held the goods to D.'s order; that the letter was an absolute attornment by the company to D., by which the plaintiffs' right of possession as unpaid vendors was destroyed, and that the plaintiffs were, therefore, not entitled to recover. *Poolley v. Great Eastern Railway Company*, 34 L. T. 537.

—**Indorsing Delivery Order.**—On the 3rd of March goods belonging to C., lying at the St. Katharine Dock, in the custody of the Docks Company, were bought by D., as broker for buyers and sellers, for B. & Co., without disclosing the names of his principals, and D. indorsed to them the delivery order he had obtained from the sellers, on the representation of B. & Co. that the goods were wanted for immediate shipment. They, however, pledged their interest in the goods to the plaintiffs, and indorsed the order to them. On the prompt day, the 18th of March, the plaintiffs' clerk lodged the order at the London office of the Docks Company, with this memorandum, "Hold within to our order, and have warrants made out as soon as possible." He was told that the warrants would be ready with the goods on the 20th of March. Three hours later a messenger from

the office reached the warrant office at the Dock House, with a notice that the order had been lodged. Meanwhile B. & Co. had stopped payment, and D. being so informed, and having no notice of the plaintiffs' title, on the same day paid C. for the goods, and through a clerk, who reached the Dock House before the messenger had arrived, obtained at the warrant office a warrant for the goods in the name of C., who indorsed the same to D., and gave him a second delivery order. The first delivery order was returned to the plaintiffs by the Docks Company, who refused to act upon it. In an action by the plaintiffs, claiming as against the Docks Company, C., and D., to be entitled to the goods:—Held, that D. was the surety, and B. & Co. the principal debtors; that, in the circumstances of the case, the unpaid vendors' lien had passed to D.; that the title to the goods was in D. *Imperial Bank v. London and St. Katharine Docks Company*, 5 Ch. B. 195; 46 L. J., Ch. 335; 36 L. T. 233.

—**Custom of Iron Trade—Warrants.**—By the usage of the iron trade warrants for goods "deliverable (f. o. b.) to A. B., or their assigns, by indorsement hereon," are considered to pass to the holders for value free from any vendor's lien. *Merchant Banking Company of London v. Phœnix Bessemer Steel Company*, 5 Ch. D. 205; 46 L. J., Ch. 418; 36 L. T. 395; 25 W. R. 457.

A company, being manufacturers of steel rails, contracted with S. & Co., iron merchants, for the sale of a quantity of rails to be rolled at their works, and to be delivered at intervals, payment to be made as to three-fifths at three days' sight, and as to two-fifths by buyers' acceptances at four months. On the completion of each portion of goods a warrant for the same in the above form was sent to S. & Co. with an invoice and drafts for the purchase-money, and the goods referred to in the warrants were stacked at the works. In the meantime S. & Co. pledged the several warrants, and indorsed the same to the plaintiffs. Before the contract was completed, when only part of the goods was paid for, S. & Co. became bankrupt, and their acceptances were dishonoured. At that time part of the goods had been despatched in waggons sent by order of S. & Co., and was stored in a railway company's warehouse, addressed to the agents of S. & Co., and part remained stacked at the works:—Held, that, by the usage of the iron trade, as well as by the intention of the parties as shewn by their course of dealing, the plaintiffs, as holders for value of the warrants, were entitled to the goods free from any vendor's lien. *Id.*

—**Delivery, whether Actual or Constructive.**—The defendants sold to B. & Co. 100 tons of zinc (unappropriated) upon certain terms of payment, giving them at the time of the contract four several documents to the following effect:—"We hereby undertake to deliver to your order indorsed hereon twenty-five tons merchantable sheet zinc off your contract of this date." Upon the faith of these documents, the plaintiffs bought of B. & Co., and paid for, fifty tons of the zinc mentioned in the contract. B. & Co. having failed, and the contract price being unpaid, the defendants refused to deliver the zinc:—Held, that the giving of these delivery orders or undertakings did not estop the defendants from setting

up, as against the vendees of B. & Co., their right as unpaid vendors to withhold delivery. *Farmiloe v. Baiz*, 1 C. P. D. 445; 45 L. J., C. P. 264; 34 L. T. 324.

Unless actual possession of goods sold has been delivered to the purchaser, the vendor is not deprived of his right of lien as against the assignees of the purchaser, in the event of his insolvency. *Grice v. Richardson*, 3 App. Cas. 319; 47 L. J., P. C. 48; 37 L. T. 677; 26 W. R. 358.

An indorsement on warehouse certificates by the vendor's clerk, making the goods deliverable to the purchaser's order, and entered in the transfer book, is not such a constructive delivery as would defeat the vendor's right. *Id.*

When the vendors were also warehousemen of the goods sold, under an arrangement with the purchasers to pay warehouse rent:—Held, that, as the goods remained in the possession of the vendors and no actual delivery had been made to the purchasers, the vendors' lien revived upon the insolvency of the vendees. *Id.*

Wharfinger's certificates are not warrants for delivery, and no custom of trade to raise money upon such certificates can alter the nature of the certificates or affect the vendor's lien. *Gunn v. Bolckow, Vaughan & Co.*, 10 L. R., Ch., 491; 44 L. J., Ch. 732; 32 L. T. 781; 23 W. R. 739.

Timber, which was deposited in the name of A., the importer, in the West India Docks, was sold by him to B.: B. afterwards contracted to sell the timber to C., who accepted a bill for the amount, B. giving him an invoice of the timber, and a delivery order. The dock company refused to deliver the timber, except upon an order from A. C. became bankrupt without having obtained such an order, and the bill was dishonoured:—Held, that there had been no constructive delivery to C., so as to put an end to B.'s lien on the timber for the price. *Lackington v. Atherton*, 7 M. & G. 360; 8 Scott, N. R. 38; 8 Jur. 406; 13 L. J., C. P. 140.

Held, also, that B. was not estopped, by having given a delivery order, from disputing the operation of such an order as a constructive delivery of the timber. *Id.*

The giving of a delivery order does not, without some positive act done under it, operate as a constructive delivery of the goods to which it relates, nor deprive the owner of the goods, who gave it, of his right of lien for their price, even as against the claims of a third person who has bona fide purchased them from the original vendee. *McEwan v. Smith*, 2 H. L. Cas. 309; 13 Jur. 265.

Bill of Lading to Shipper's Order.]—Upon a sale of goods, where the shipper takes and keeps in his own hands a bill of lading, making the goods deliverable to the shipper's order with the intention to protect himself, the effect of his so doing is to preserve to him a hold over the goods until the vendee has fulfilled, or has been ready and willing to fulfil, the conditions of the sale; and the hold so preserved is not merely a right to retain possession till those conditions are fulfilled, but involves in it a power to dispose of the goods on the vendee's default, so long at least as the vendee continues in default. *Ogg v. Shuter*, 1 C. P. D. 47; 45 L. J., C. P. 46; 33 L. T. 492; 24 W. R. 100—C. A.

L., in France, contracted to sell to the plaintiffs in England a certain quantity of potatoes,

to be shipped free on board at Dunkirk, cash against bill of lading, and took a bill of lading to his own order. On the arrival of the ship and tender of the bill of lading, the plaintiffs, erroneously believing that the full number of sacks had not been sent, made default in payment. The defendant, by order of L., re-sold the potatoes. After the re-sale, the plaintiffs were ready and willing to pay the price, and demanded the potatoes:—Held, that the defendant was not liable in trover to the plaintiffs. *Id.*

After Part Delivery.]—It is not an entire waiver of a condition to be paid for goods on delivery, that the vendor allowed the purchaser to carry away part of the goods without being paid for them. *Payne v. Shadbolt*, 1 Camp. 427.

The plaintiff, having purchased timber growing on the land of B., felled it, and afterwards sold it to J. at a certain price per cubic foot, J. to be at liberty to convert the timber on the land. The trees were marked and measured by J., the number of cubic feet in each tree being ascertained, but the total contents were not summed up. Some of the trees were taken away by the purchaser:—Held, that the transfer of the whole was complete, and consequently, that the vendor had no right of lien for the unpaid price of the timber. *Tansley v. Turner*, 2 Scott, 238; 2 Bing. N. C. 151; 1 Hodges, 267.

A vendor has a general lien for the price of the goods sold while in his possession, even after a part delivery, if the right to stop in transitu is not gone. *Hanson v. Meyer*, 6 East, 614; 2 Smith, 670.

Delivery of Keys.]—Goods were sold to be paid for by instalments, the balance to be paid before removal. The vendor allowed the vendee to place the goods under lock and key upon the vendor's premises, and delivered the key to the vendee, but retained the key of the external inclosure. The balance remaining unpaid:—Held, that the vendee had not such a possession as entitled him to maintain trover against the vendor upon a wrongful removal and sale of the goods. *Milgate v. Kibble*, 3 M. & G. 100; 3 Scott, N. R. 358.

After Verdict.]—A. sells to B. a carriage, to be paid for partly by a bill upon delivery, and partly by a bill at a future day, and B. neglecting to take the carriage, A. obtains a verdict against him for goods bargained and sold. Until the amount is paid to him he has a lien upon the carriage. *Houlditch v. Desanges*, 2 Stark. 337.

Part Payment.]—The right of an unpaid vendor to a lien on goods in the hands of his agent is not taken away by the fact that the vendor has recovered a verdict for their price against the purchaser, and, under a county court order for payment of the debt by instalments, has been paid one instalment of it. *Sorvener v. Great Northern Railway Company*, 19 W. R. 388.

A quantity of tea was sold at a price, which was to be paid at a future day. After the day had elapsed, the purchaser paid a sum on account, and wrote to the vendors, who had retained the warrants in their possession, requesting them to wait the arrival of the overland mail, and on its receipt to dispose of the tea. He afterwards became bankrupt:—Held, that the vendors had

a lien on the tea for the unpaid purchase-money. *Twining, Ex parte*, 1 Mont. D. & D. 691; 5 Jur. 536.

Trover by Purchaser.]—A purchaser of goods, of which the vendor retains possession with a lien for unpaid purchase-money, cannot maintain trover against a mere wrongdoer. *Lord v. Price*, 9 L. R., Ex. 54; 43 L. J., Ex. 49; 30 L. T. 271; 22 W. R. 318.

2. STOPPAGE IN TRANSITU.

a. Nature of Right.

Stoppage in transitu is an ordinary legal right, as to which a court of equity, unless by reason of some unusual circumstances, will not interfere. *Straker v. Ewing*, 34 Beav. 147; 11 Jur., N. S. 127; 11 L. T. 588; 13 W. R. 286.

Where Pledge.]—An equitable right of (quasi) stoppage in transitu remains in the vendor, notwithstanding an indorsement of the bill of lading by the vendee to a person who advances money on the security of such indorsement. But such right of the vendor is subject to the right of the indorsee to be repaid his advances. *Westzynthius, In re*, 2 N. & M. 644; 5 B. & Ad. 817.

The vendor has an equity to require the indorsee of the bill of lading to repay himself out of other property of the vendee in his hands, as far as such other property will extend. *Ib.*

And if the indorsee applies the proceeds of the property so equitably stopped in transitu in payment of his debt, the vendor will have a lien upon the interest of the vendee in such other property. *Ib.*

Subsale.]—The purchaser of goods (shipped by the vendor) consigned them abroad, and indorsed the bill of lading to a bank as security for an advance. Afterwards and before the arrival of the ship the consignees sold the goods "to arrive" to sub-purchasers, to whom they were delivered. The purchaser having become bankrupt, the unpaid vendor gave notice to the master, after the subsales but before delivery and before payment of the freight, to stop the goods in transitu. The consignees remitted the proceeds of the subsales to the bank, who after repaying themselves their advance, handed to the trustee of the bankrupt the balance, which was less than the original purchase-money:—Held, that the principles established by *Westzynthius, In re* (5 B. & Ad. 817), and *Spalding v. Ruding* (6 Beav. 376; 12 L. J., Ch. 503) were applicable; that the right of stoppage in transitu was not at an end when the notice was given; and that the vendor was entitled to the balance after satisfaction of the bank's claim. *Kemp v. Falk*, 7 App. Cas. 573; 52 L. J., Ch. 167; 47 L. T. 454; 31 W. R. 125; 5 Asp. M. C. 1—H. L. (E.).

A resale of goods by a vendee, and payment to him, does not destroy the vendor's right of stoppage in transitu. *Craven v. Ryder*, 6 Taunt. 433; 2 Marsh. 127; Holt, 100. *And see cases post*, col. 964.

Right Analogous to.]—H. agreed to deliver 330 tons of bleaching powder to E., at the rate of 30 tons per month, E. paying for each delivery of 30 tons within one fortnight from that

delivery. When only 30 tons remained to be delivered, E. made a declaration of his insolvency; H. retained the 30 tons; C., the creditors' trustee of E., demanded delivery of the 30 tons, which H. refused to make; and H. also returned E.'s debit note of 150*l.*, the price of the 30 tons:—Held, that H. had a clear right to refuse delivery, whether on the ground of a rescission of the contract, or in exercise of a right analogous to that of stoppage in transitu. *Edwards, In re, Chalmers, Ex parte*, 42 L. J., Bk. 2; 21 W. R. 138. Affirmed, 8 L. R., Ch. 289; 42 L. J., Bk. 37; 28 L. T. 325; 21 W. R. 349. See *Phoenix Bessemer Company, In re, ante*, col. 918.

Price Compounded for.]—A. sold to B. a butt of wine, which was not delivered; B. compounded with his creditors, and the amount was, by A.'s consent, included in the composition. The composition-money was secured by bills, and A. had a claim against B. beyond the price of the wine. Before the whole of the composition was paid, B. demanded the wine from A., who refused to deliver it:—Held, that he was bound to deliver it, as he had undertaken to do so; and that the doctrine of stoppage in transitu did not apply. *Nicholls v. Hart*, 5 C. & P. 179.

Whether Contract Rescinded by.]—A vendor of cotton in America, by direction of the purchasers in England, shipped the cotton on board a vessel belonging to the latter, who became bankrupt before its arrival. A mortgagee of the ship, who happened to be an agent of the vendor, took possession of the ship under his mortgage, and sold the cotton under a supposed right on the part of his principal to stop it in transitu, and the principal sanctioned the transaction as between himself and his agent by accepting a credit in account for the proceeds of the cotton. The assignees of the purchasers then brought an action against the mortgagee for the seizure, and he paid them, under a compromise, the amount for which the cotton sold:—Held, that the contract was not rescinded by the seizure of the cotton, but that the vendor was entitled to prove for the purchase-money. *Humberston, In re*, De Gex, 262; 8 Jur. 675.

In respect of what Goods or Matters.]—The right of stoppage in transitu extends only over the goods themselves and the net proceeds of the sale, and not over the policy-moneys paid in respect of insurances effected by the vendee. *Berndtson v. Strang*, 3 L. R., Ch. 588; 37 L. J., Ch. 665; 19 L. T. 40; 16 W. R. 1025.

Where a party remits money on a particular account for a particular purpose, and the consignee becomes insolvent, it may be stopped in transitu; aliter, where it is a general remittance from a debtor to his creditor on account of his debt. *Smith v. Boules*, 2 Esp. 578.

b. Who Entitled to Stop.

Where Mutual Dealings.]—A merchant in England sent goods of a given value to a merchant at Quebec for sale on his account. Before the goods were sold or the proceeds ascertained, the latter shipped three cargoes of timber to the former to credit in account; two of them arrived; against the third the consignor drew a bill for the amount whilst it was in transitu; in the interval

the consignee dishonoured the bill and became insolvent:—Held, that the consignor had a perfect right of stoppage in transitu, and was not bound to wait until their mutual accounts were finally adjusted. *Wood v. Jones*, 7 D. & R. 126.

Correspondent Abroad—Payment by Bills.]—

A trader here gave an order to his correspondent abroad to ship him goods, which the latter procured upon his own credit, without naming the trader here, and shipped to him at the original price, charging only his commission:—Held, that the correspondent abroad was so far a vendor as between him and the trader here, that, on the bankruptcy of the latter, he might stop the goods in transitu, by procuring the bill of lading from the bankrupt's brother; and this, though the trader here had before his bankruptcy accepted bills drawn on him by his correspondent for the amount of the goods; such acceptances, provable under his commission, amounting at most to part payment for the goods, which did not take away the vendor's right to stop in transitu. *Feise v. Wray*, 3 East, 93.

Agent of Bankrupt.]—Where goods are furnished to the agent of a bankrupt, on the agent's credit, he may, to protect himself, stop them in transitu, and give them a new direction adversely to his principal; but if he gives them a fresh destination, in furtherance of the usual course of business of the principal, they pass to the assignees as in the order and disposition of the bankrupt. *Hawkes v. Dunn*, 1 Tyr. 413; 1 C. & J. 519.

Agents on behalf of Principals—Ratification.]—

—C. and T., merchants at Liverpool, sent orders to I., a merchant at New York, to purchase for them goods, which were accordingly shipped by him in five vessels bound to Liverpool, and consigned to C. and T., who after the receipt of the goods by one of the vessels, stopped payment on the 7th April, 1846. I. had drawn bills for the goods partly on C. and T. and partly on B. & Co., with whom C. and T. had dealings. B. & Co., who were merchants at Liverpool, and also had a house of business at New York, purchased there several of the bills, which were drawn at sixty days' sight, and were dated, some on the 28th March, and the rest on the 30th. On the 8th of May, a fiat in bankruptcy issued against C. and T. The four other vessels arrived at Liverpool on the 3rd, 5th, 6th, and 9th of May respectively, and immediately on the arrival of each, and whilst the transitu of the goods on board continued, B. & Co., on behalf of I., gave notice to the master and consignees of each ship, claiming to stop the goods in transitu. B. & Co. were not the general agents of I., nor had they received from him any authority to make this stoppage. On the 11th May the assignees of C. and T. made a formal demand of the goods from the master and consignees of each of the four ships, at the same time tendering the freight, but they refused to deliver them, and on the same day delivered the whole to B. & Co. On the next day the assignees made a formal demand of the goods from B. & Co., but they refused to deliver them up, claiming title under the stoppage in transitu. On the 28th April, I. heard at New York that C. and T. had stopped payment, and on the next day he executed a power of attorney to H., at Liverpool, authorizing him to stop the goods in

transitu. This was received by H. on the 13th May, and he on that day adopted and confirmed the previous stoppage by B. & Co. I. afterwards adopted and ratified all that had been done both by H. and B. & Co.:—Held, first, that there could be no valid stoppage in transitu after the formal demand of the goods by the assignees on the 11th May, and the subsequent delivery of them to the defendant. *Bird v. Brown*, 4 Ex. 786; 19 L. J., Ex. 154; 14 Jur. 132.

Held, secondly, that the ratification of the stoppages by I., after the conversion by B. & Co., had not the effect of altering retrospectively the ownership of the goods, which had already vested in the assignees of C. and T. *Id.*

— **Authority.]—**M. & Co., merchants of Jamaica, ordered of P. and G., merchants of Baltimore, goods, to be shipped from Baltimore to Jamaica, at the risk and expense of M. & Co. The goods were shipped on board the ship C., and were, by the terms of the bills of lading, deliverable to M. & Co. or their assigns, on payment of freight. The goods were not paid for. While the vessel was on her voyage, M. & Co. became bankrupt. On her arrival at Jamaica, the agents of P. and G. went on board, and demanded a package of the cargo, in the name of the whole, on behalf of P. and G. Before the arrival of the goods at Jamaica, P. and G. wrote to their agents, saying, "in disposing of the cargo, use your own judgment," and forwarded a power of attorney for that purpose; but the letter did not arrive at Jamaica till after the agents had seized the cargo:—Held, first, that the agents, at the time of the seizure of the goods, had authority to stop the goods in transitu on behalf of P. and G. *Hutchings v. Nunes*, 1 Moore, P. C. C., N. S. 243; 10 Jur., N. S. 109; 9 L. T. 125.

Held, secondly, that there was an effectual stoppage in transitu of the goods by the agents. *Id.*

— **End of Transit.]—**W. at Bahia sold goods to A. at Glasgow. By the contract W. shipped them on board a vessel chartered by himself, to proceed either direct or via Falmouth, Cowes or Queenstown, for orders to any port in the United Kingdom, or a specified part of the continent. The bill of lading was made out in the name of W. to order, or his assigns, signed by the master, and indorsed in blank by W., who forwarded it with the charter-party and invoice, which expressed the goods to be shipped on the account and at the risk of A., through his agents, to A. The bill of lading, charter-party, and invoice were received by A. When the vessel arrived at Falmouth W.'s agents applied to A. for instructions as to the port of destination; but, before such instructions were given, heard of A.'s insolvency:—Held, that W.'s agents had a right to stop in transitu, as the goods had never arrived at their destination. *Fraser v. Witt*, 7 L. R., Eq. 64; 19 L. T. 440; 17 W. R. 92.

— **Agent treated as Purchaser.]—**A. & Co., merchants of Londonderry, instructed their correspondent, A., a merchant in London, to purchase corn on their account. A. purchased a cargo of Indian corn, and sent a contract note to the vendors, R. & Co., which stated that the cargo was "sold by order and for account of R. & Co., to our principals, shipped per *Cleopatra*," at the price of 24s. 6d. per quarter. The entry

of the sale in the books of R. & Co. made A. "debtor to the cargo of Indian corn;" and they sent to A. the charterparty, the bill of lading duly indorsed, an invoice, and an order directing the captain to act upon the instructions of A. In the invoice A. was made the purchaser of the cargo. On the day of the purchase A. wrote to A. & Co., advising them of "having purchased for your account the cargo at 24s. 9d." and inclosing the bill of lading and other documents received from R. & Co., as also A.'s draft for 1,525l. 16s. 3d. at three months, and an invoice signed by A., and stating that the cargo was bought by order, and for account and risk of A. & Co. at 24s. 9d. per quarter. A. afterwards wrote requesting the draft to be made payable at a banker's, "as it facilitates our discounting the bill." The draft was returned to A. accepted, and before the bill was due he became bankrupt, and R. & Co. thereupon stopped the cargo in transitu, not having received payment for it "on account (as they stated) of the bankruptcy of the cargo buyer." A. & Co. then wrote to R. & Co., stating that A., "from whom we bought the cargo," had informed them of its being stopped, and stating that they would then take up their acceptance upon the cargo being allowed to proceed. A. & Co. afterwards paid to R. & Co. the amount of the cargo, as invoiced by R. & Co. to A., upon being indemnified by R. & Co., and the cargo was allowed to proceed as ordered by A. & Co.:—Held, in an action by the assignees of A. to recover the amount of A. & Co.'s acceptance, that the documents shewed that A. was the purchaser of the corn from R. & Co. and the seller of it to A. & Co., and not merely an agent; that, therefore, R. & Co. had not at the time the right of stoppage in transitu; and that the assignees were entitled to recover. *Pennell v. Alexander*, 3 El. & Bl. 283; 23 L. J., Q. B. 171; 18 Jur. 627.

Alien Enemy—Licence.—A trading licence from the crown to British merchants to send a ship in ballast to an enemy's port, there to receive and load a cargo, and import it into this country, by legalizing the purchase by the subject, legalizes the sale by the enemy, and impliedly legalizes the vendor-enemy's right to stop the goods in transitu after their arrival in port here, upon the intermediate insolvency of the vendees, after a part payment only (which was offered to be refunded), and also to employ an agent here for that purpose; and such agent having possessed himself of the goods, the assignees of the bankrupt vendees cannot recover from him the value of them in trover. *Fenton v. Pearson*, 15 East, 419.

c. Effect of Part Payment or Acceptances.

Part Payment.—A consignor's right of stopping goods in transitu is not taken away by the consignee's having partly paid for the goods. *Hodgson v. Loy*, 7 T. R. 440.

Acceptances.—But the vendor, having taken the vendee's acceptances in payment, cannot stop the goods in transitu, unless the bills have been dishonoured. *Davis v. Reynolds*, 1 Stark. 115.

Condition precedent.—A., a merchant in Liverpool, bought certain winches of yarn of B., in London, through C., who acted as broker

for both parties, "To be taken immediately from the wharf in London and paid for by the buyer's acceptance at four months." B. sent an invoice of the goods to A., inclosing a bill of exchange for his acceptance, and on the same day C., acting as agent for A., directed the goods to be forwarded by rail to Liverpool. Upon their arrival there the railway company sent A. the usual advice note that the goods "remained there to his order, and were then held by the company, not as carriers, but as warehousemen." A. did not accept the bill of exchange, but filed a petition for liquidation. B. having claimed the right of stoppage in transitu as against the trustee under A.'s liquidation:—Held, that the acceptance of the bill of exchange was not a condition precedent to the passing of the property in the goods; and also that the goods on arriving at Liverpool had reached their final destination, and consequently that the transitu had ended. *Catling, Ex parte, Chadwick, In re*, 29 L. T. 431.

Of Factor.—If, in consideration of goods being consigned to him, a factor accepts bills drawn by the consignor, and pays part of the freight, and becomes insolvent before the bills are due, and before the goods get into his actual possession, the consignor may stop them in transitu. *Kinloch v. Craig*, 4 Bro. P. C. 47; 3 T. R. 119, 783.

Tender of Bill.—A consignor of goods, who has received the acceptance of the consignee for part of the goods, may stop them in transitu on the consignee's insolvency, and retain possession of them without tendering back the bill. *Edwards v. Brewer*, 2 M. & W. 375.

Balance of Account.—A., being indebted to B. on the balance of accounts, including bills still running accepted by B. for A., consigned goods to B. on account of this balance:—Held, that A. had a right to stop the goods in transitu, upon B. becoming insolvent before the bills were paid. *Vertue v. Jewell*, 4 Camp. 31.

d. Notice or Claim to Stop.

Sufficiency.—A claim made without obtaining actual possession is sufficient in the case of stoppage in transitu. *Northey v. Field*, 2 Esp. 613; *S. P., Holst v. Pownall*, 1 Esp. 240.

To whom.—A notice of stoppage in transitu, to be effectual, must be given either to the person who has the immediate custody of the goods, or to the principal whose servant has the custody, at such a time and under such circumstances as that he may, by the exercise of reasonable diligence, communicate it to his servant in time to prevent the delivery to the consignee. *Whitehead v. Anderson*, 9 M. & W. 518; 11 L. J., Ex. 157.

To Captain of Consignee's Vessel.—A timber merchant in Sweden agreed to sell timber to L. and R. By the original contract, the goods were to be delivered "free on board, payable by buyers' acceptance of seller's drafts, at six months from date of bills of lading; shipment to London," &c.; the seller was to provide ships at rates not exceeding a certain limit. It was subsequently agreed that the buyers should themselves charter a ship to convey the timber

to London. The buyers accordingly chartered a ship, and the goods were loaded on board of her. The ship was obliged to put into Copenhagen, and there, the buyers having stopped payment before the acceptance became payable, the vendor caused a notice of stoppage in transitu to be served on the captain:—Held, that the notice was effectual. *Berndtson v. Strang*, 3 L. R., Eq. 481; 36 L. J., Ch. 879; 16 L. T. 583; 15 W. R. 1168.

Mistake of Carrier.—If a carrier, after notice from the vendor of goods to stop them in transitu, by mistake delivers them to the vendee, the sale is nevertheless rescinded, and the vendor may bring trover for them against the vendee. *Litt v. Cowley*, 7 Taunt. 169; 2 Marsh. 457; Holt, 338.

Demand of Bills of Lading—Agreement for Lien on.—An agreement was entered into between L., a merchant in London, and W., a manufacturer in Yorkshire, that W. should from time to time supply L. with goods, W. drawing upon L., and L. accepting bills of exchange for the invoice price of the goods. L. was to ship the goods to R. at Shanghai, for sale on L.'s account. On receipt of the bills of lading L. was to send them to R., to whose order they were to be made out. W. was to have a lien upon the bills of lading, and each shipment of goods in transit outwards, or in the hands of the consignee or any other persons, which lien, however, was to extend only to the particular shipment, and was to cease when the bills of exchange given for that shipment had been paid. No notice of this agreement was given to R. In pursuance of the agreement L. ordered a parcel of goods of W. The goods were packed by W.'s packer, who forwarded them by railway to London in bales marked for Shanghai, and addressed to a ship called the Gordon Castle designated by L., which was loading in the West India Docks for Shanghai. The freight to London was paid by W. The packer, in advising L. of the dispatch of the goods, told him that they were at his disposal. L. accepted a six months' bill of exchange drawn upon him by W. for the invoice price. The railway company, in advising L. of the arrival of the goods at their Poplar Docks Station, told him that they remained at his order and were held by the company as warehousemen at his risk, but added, "will be sent to the Gordon Castle." The goods were shipped on board that vessel. The bills of lading were by L.'s directions made out to the order of himself or assigns, but they were never delivered to him by the shipowners, inasmuch as he did not pay the freight. The ship sailed for Shanghai with the goods on board. A few days previously L. had stopped payment, and shortly after she had sailed he committed an act of bankruptcy, upon which he was adjudicated a bankrupt. The bills of lading were still in the possession of the shipowners in London, of whom they were claimed by W. and by the trustee in the bankruptcy. It was arranged that the goods should be sold by the agent of the shipowners at Shanghai, and the proceeds of sale paid to the person who should be entitled to them:—Held, that the agreement did not deprive W. of the right to stop the goods in transitu; that the transit was not ended till the goods arrived at Shanghai, and that the demand by W. of the bills of lading

from the shipowners was an effectual stoppage in transitu. Consequently, that W. was entitled to have the bill of exchange satisfied out of the proceeds of sale. *Watson, Ex parte, Lore, In re*, 5 Ch. D. 35; 46 L. J., Bk. 97; 36 L. T. 75; 25 W. R. 489—C. A.

Held, also, that W. could have obtained an injunction to restrain L. from sending the goods to any other destination than Shanghai. *Ib.*

Notice to Shipowner.—Semble, that notice of stoppage in transitu given to a shipowner imposes no duty on him to communicate the notice to the master of the ship, and that it is not effectual until it is communicated to the master. *Falk, Ex parte, Kiell, In re*, 14 Ch. D. 446; 42 L. T. 780; 28 W. R. 785; 4 Asp., M. C. 280—C. A. And see the case in H. L., sub nom. *Kemp v. Falk*, *infra*.

e. Determination of Transitus.

i. Generally.

Destination.—Upon a sale of goods the transitu continues until the goods have reached their ultimate destination under the contract of sale, or the vendor has given a new direction to the property. *Morley v. Hay*, 3 M. & R. 696.

The transitu continues until the goods arrive at the place mentioned by the vendee to the vendor. *Coates v. Railton*, 6 B. & C. 422; 9 D. & R. 593.

Till the goods are in the actual possession of the purchaser the transit is not at an end, and it makes no difference that the ultimate destination has not been communicated to the vendor. *Rosecar China Clay Company, Ex parte, Cock, In re*, 11 Ch. D. 560; 48 L. J., Bk. 100; 40 L. T. 730; 27 W. R. 591—C. A.

End of Voyage.—Where a cargo is consigned, and before the ship's arrival the consignee becomes a bankrupt, the arrival of the ship in the port, where she is taken possession of by the assignees, but from whence she is ordered out to perform quarantine, is not such a completion of the voyage as will vest the property in the assignees; but the consignor may still consider the goods as in transitu, and stop them. *Holt v. Pownall*, 1 Esp. 240.

The test of the consignor's right of stoppage in transitu is not whether the voyage is at an end, but whether there has been a delivery of goods to the consignee. *Coventry v. Gladstone*, 6 L. R., Eq. 44; 37 L. J., Ch. 492; 16 W. R. 837.

Sub-Sale—Right of Vendor to Purchase-Money of Sub-Purchaser.—The purchaser of goods (shipped by the vendor) consigned them abroad, and indorsed the bill of lading to a bank as a security for an advance. Afterwards, and before the arrival of the ship, the consignees sold the goods "to arrive" to sub-purchasers, to whom they were delivered. The purchaser having become bankrupt, the unpaid vendor gave notice to the master, after the sub-sales but before the delivery and before payment of the freight, to stop the goods in transitu. The consignees remitted the proceeds of the sub-sales to the bank, who, after repaying themselves their advance, handed to the trustee of the bankrupt the balance, which was less than the original purchase-money:—Held, that the right of stoppage in

transitu was not at an end when notice was given, and that the vendor was entitled to the balance after satisfaction of the bank's claim. *Kemp v. Falk*, 7 App. Cas. 573; 52 L. J., Ch. 167; 47 L. T. 454; 31 W. R. 125; 5 Asp. M. C. 1—H. L. (E.).

The mere fact that the purchaser of goods has resold them, and that the bill of lading has been made out in the name of the sub-purchaser, does not put an end to the transitus, or destroy the right of the original vendors to stop the goods in transitu. *Golding, Ex parte, Knight, In re*, 13 Ch. D. 628; 42 L. T. 270; 48 W. R. 481—C. A.

The rule being that effect will be given to a vendor's right of stoppage in transitu, so far as the exercise of that right will not interfere with the rights of third parties acquired for value, it follows that an unpaid vendor, who has given a valid notice to stop in transitu before his vendee has received the purchase-money of the goods from his sub-purchaser, is entitled, on the principle of *Spalding v. Ruding* (6 Beav. 376), to have the original purchase-money satisfied out of the unpaid purchase-money of the sub-purchaser. *Ib.*

Transfer of Bill of Lading.—The transfer of a bill of lading for valuable consideration to a bona fide transferee defeats the right of stoppage in transitu of the unpaid vendor of the goods, although the consideration was past and not given at the time the bill of lading was handed to the transferee by the lawful holder. *Leask v. Scott*, 2 Q. B. D. 376; 46 L. J., Q. B. 576; 36 L. T. 784; 25 W. R. 654—C. A. Reversing 2 Q. B. D. 376; 46 L. J., Q. B. 329; 35 L. T. 903.

In December, 1875, G. & Co. purchased from the defendant a shipment of nuts, to be paid for by acceptance at three months on receipt of shipping documents. On the 1st of January, 1876, G. & Co., being already indebted to the plaintiff, applied to him for a further advance, which, he said, he would give, but they must first cover their account. G. & Co. promised to give him cover (not naming any particular securities), and the plaintiff at once advanced them a further sum of 2,000*l.* On the 4th of January the bill of lading of the nuts, indorsed in blank, came into the possession of G. & Co. from the defendant, and they accepted the defendant's draft; and on the following day they handed the bill of lading to the plaintiff with other securities, in fulfilment of their promise to give him cover. This transaction between the plaintiff and G. & Co. was bona fide. On the arrival of the ship on the 3rd of February, G. & Co. having in the meantime stopped payment, the defendant sought to stop the nuts in transitu, and the plaintiff claimed them under the bill of lading:—Held, that the plaintiff had a good title as against the defendant. *Ib.*

The vendee of goods may by assignment of the bills of lading to a bona fide transferee, defeat the vendor's right to stop them in transitu, in case of the vendee's insolvency. The consignor may stop goods in transitu before they get into the hands of the consignee in case of the insolvency of the consignee; but if the consignee assigns the bill of lading to a third person for a valuable consideration, the right of the consignor as against such assignee is divested. There is no distinction between a bill of lading indorsed in blank and an indorsement to a particular person. *Lickbarrow v. Mason*, 2 T. R. 63; 1 H. Bl. 357;

6 East, 21. And see SHIPPING (*Bills of Lading*).

— **Consideration—Pre-existing Debt.**—The forbearance or release of an antecedent claim is not a good consideration for an indorsement of a bill of lading, so as to defeat an unpaid vendor's right of stoppage in transitu. *Rodger v. Comptoir d'Escompte de Paris*, 2 L. R., P. C. 393; 38 L. J., P. C. 30; 21 L. T. 33; 17 W. R. 468; 6 Moore, P. C. C., N. S. 538.

L. & S., carrying on business in London and at Hong Kong, as L. S. & Co., bought goods of L. and others, merchants at Manchester, to be shipped to their firm at Hong Kong. The goods were on a ten months' credit, and it was agreed that remittances of proceeds of the sales should be made from Hong Kong to meet the acceptances of L. & S. given for the price of the goods, on receipt of the bills of lading. L. & S. contracted for the carriage, and shipped the goods in a vessel which they engaged, and the bills of lading deliverable to their firm in Hong Kong, or their assigns, were signed by the master and handed over to L. & S., who accepted the draft of the vendors for the amount of the purchase. Before the goods or bills of lading reached Hong Kong, L., S. & Co., being insolvent, and pressed by two banking firms at Hong Kong, to whom they were largely indebted, in consideration of their debt to the bank assigned to them the "whole of their property, premises and chattels, specified in the schedule thereto, with all the estate, right, title, interest, claim or demand of L., S. & Co. arising thereout or therefrom." The schedule enumerated "all goods and bills of lading, or other documents, for all goods now on the way hither." In pursuance of this agreement the bills of lading were indorsed and handed over to the banking firms, to whom the insolvent circumstances of L., S. & Co. at that time were well known:—Held, that a pre-existing debt was not a valuable consideration for the assignment, so as to defeat the right of the unpaid vendors to stop the goods in transitu. *Ib.*

Place of Delivery—Generally.—It is not necessary, in order to divest the consignor's right to stop in transitu, that the goods should have been taken by the very hands of the consignee himself. *Ellis v. Hunt*, 3 T. R. 464.

— **Consignee taking Samples at Warehouse.**—Where goods are to be delivered to the vendee at a particular place, the transitu in general continues until they are delivered to him at that place; but if he by his own act prevents the delivery which otherwise in the ordinary course would take place, and does any act equivalent to taking possession, the transitu is thereby terminated: and, therefore, where the vendee of several hogsheads of sugar, upon receiving from the carrier notice of their arrival, took samples from them, and for his own convenience desired the carrier to let them remain in his warehouse until he should receive further directions, and before they were removed became bankrupt:—Held, that the transitu was at an end, and that the vendor was not entitled to stop them. *Foster v. Frampton*, 6 B. & C. 107; 9 D. & R. 108; 2 C. & P. 469.

Agents Receiving and Forwarding.—Where A. & B., traders, living in London, were in the

habit of ordering goods from cotton manufacturers at Manchester, to be sent to M. & Co. at Hull, for the purpose of being afterwards sent to the correspondents of A. & B. at Hamburg; and A. & B. sent orders to the manufacturers for goods to be sent to M. & Co. at Hull, to be shipped for Hamburg as usual:—Held, that, as between buyer and seller, their right to stop as in transitu was at an end when the goods came to the possession of M. & Co. at Hull; for they were for this purpose the appointed agents of the vendees, and received orders from them as to the ulterior destination of the goods; and the goods after their arrival at Hull were to receive a new direction from the vendees. *Dizon v. Balduen*, 5 East, 175.

A., residing in Guernsey, employed his agent at Southampton to ship all goods which arrived there directed to him. The agent paid the carriage and the wharfage dues, and selected the ship by which he forwarded the goods:—Held, that the transit of the goods was not ended at Southampton, and that the vendor might stop them after they had been put on board a vessel for Guernsey. *Nicholls v. Le Feuvre or Slater*, 2 Bing. N. C. 81; 1 Hodges, 255; 2 Scott, 146; 7 C. & P. 91.

— Ulterior and Subsequent Transit.]—

When goods have been sent by an unpaid vendor through a carrier to a forwarding agent, who has been appointed by the vendee, and who receives the necessary orders from the vendee and not from the vendor, the transit of the goods upon reaching the hands of the forwarding agent is at an end, and the right to stop in transitu is lost, even although the goods may have been intended to be sent to an ulterior and subsequent destination. L. bought certain goods of W. at Bolton, saying nothing as to the place of delivery. L. afterwards arranged with M. that the goods should be sent by steamer from Garston to Rouen. L. then instructed W. to send the goods to M. at Garston. W. accordingly dispatched the goods by railway. The railway company gave notice to M. of the arrival of the goods, and further gave notice that they would hold the goods as warehousemen. L. then filed a petition for the liquidation of his affairs by arrangement; he had not paid W. for the goods. W. thereupon stopped the delivery of the goods, and M. returned them to him. The trustee in liquidation of L. having brought an action against M. and W. to recover the value of the goods:—Held, that the transit of the goods had ceased when the goods reached Garston and came into the possession of M., as forwarding agent for L., that the right to stop in transitu was then at an end, and that the trustee was entitled to recover the value of the goods. *Kendal v. Marshall*, 11 Q. B. D. 356; 52 L. J., Q. B. 313; 48 L. T. 951; 31 W. R. 597—C. A. Reversing 46 L. T. 693; 46 J. P. 631.

ii. Delivery to Carrier.

Delivery to Railway Company as Purchaser's Agent.]—Cotton was shipped at Charleston, in America, for carriage to Liverpool. The purchaser resided at Luddenhams Foot, in Yorkshire. The cotton was consigned to the vendor's agent at Liverpool, to whom the bills of lading were also sent by the vendor, together with a bill of exchange for the price of the cotton, drawn by

the vendor on the purchaser. On the arrival of the cotton at Liverpool, the bill of exchange was sent by the vendor's agent to the purchaser, and upon its return accepted by him the bill of lading was sent to him. He then indorsed the bill of lading and sent it to the manager of a railway company in Liverpool, who paid the sea freight and obtained possession of the cotton, which was then forwarded by the railway to Luddenhams Foot station. The invoice of the cotton which was sent to the purchaser described it as shipped by the vendor to Liverpool, consigned to order, for account and risk of the purchaser, Luddenhams Foot. The bill of lading provided for the shipment of the cotton into the port of Liverpool, there to be delivered to order or assigns, he or they paying freight immediately on landing the goods:—Held, that the transitus prescribed by the vendor ended at Liverpool, and that after the cotton had been delivered there to the railway company as agents for the purchaser, the vendor had no right to stop it in transitu. *Gibbes, Ex parte, Whitworth, In re*, 1 Ch. D. 101; 45 L. J., Ch. 10; 33 L. T. 479; 24 W. R. 298.

Manufacturers at Sheffield contracted to deliver goods free on board at Liverpool, and would have sent the goods thither in their own name but for a subsequent arrangement with the purchasers, under which the goods were loaded in trucks sent by the purchasers, and on their arrival at Liverpool were warehoused in the name of the purchaser's agent there:—Held, under the circumstances, that the transit was at an end in law when the goods were loaded in the trucks. *Merchant Banking Company of London v. Phoenix Bessemer Steel Company*, 5 Ch. D. 203; 46 L. J., Ch. 418; 36 L. T. 395; 25 W. R. 457.

— On Refusal by Consignee to Accept.]—

A. sold to B. goods which were lying at X., one of the stations of a railway company. A portion was by B.'s orders sent to Y., another station of the railway company, was there taken by him, and was paid for. B. refused to take any more, but A. sent the remainder to Y. to be delivered to him. B. refused to take them, and they were sent back to X.; A. also refused to take them, and they were again sent to Y., where they remained till B. became bankrupt. A. then directed the railway company to keep them for him, and they did so:—Held, that he had a right of stoppage in transitu, and that the company was therefore justified in detaining the goods for him. *Bolton v. Lancashire and Yorkshire Railway Company*, 1 L. R., C. P. 431; 35 L. J., C. P. 137; 12 Jur., N. S. 317; 13 L. T. 764; 14 W. R. 430.

Where Carrier named by Vendee.]—Delivery of goods by the vendor to a carrier, even though the carrier be nominated and hired by the purchaser, is only constructive, not actual delivery to the purchaser, inasmuch as the contract with a carrier to carry goods does not make the carrier the agent or servant of the person with whom he contracts. *Rosecar China Clay Company, Ex parte, Cock, In re*, 11 Ch. D. 560; 48 L. J., Bk. 100; 40 L. T. 730; 27 W. R. 591—C. A.

A contract was entered into for the sale of some china clay to be delivered free on board at a specified port, and to be paid for by an acceptance of the purchaser. Afterwards the purchaser chartered a ship and gave notice to the

vendors, who then delivered the clay on board the specified ship at the port agreed upon. The destination of the clay had not been communicated to the vendors. Before the ship left the harbour the vendors heard of the insolvency of the purchaser, and gave notice to the master of the ship to stop the clay in transitu. No bill of lading had been signed, nor had the purchaser given any acceptance for the price of the clay:—Held, that, the clay being in the possession of the master of the ship only as carrier, the transit was not at an end, and the notice to stop was given in time. *Id.*

L. & S., carrying on business in London and at Hong Kong, as L. & S. & Co., bought goods of L. and others, merchants at Manchester, to be shipped to their firm at Hong Kong. L. & S. contracted for the carriage and shipped the goods in a vessel which they engaged, and the bills of lading deliverable to their firm in Hong Kong were signed by the master and handed over to L. & S. L. & S. became insolvent, and the goods were stopped in transitu:—Held, that the transitus had not ended before the arrival of the goods at Hong Kong, as the transitus continued while the goods were in charge of a third party, contracted with as carrier for the purpose of forwarding them. *Rodger v. Comptoir d'Escompte de Paris*, 2 L. R., P. C. 393; 38 L. J., P. C. 30; 21 L. T. 33; 17 W. R. 468; 5 Moore, P. C. C., N. S. 538.

The transitus of goods is not ended by delivery on board a ship chartered by the vendee. *Berndtson v. Strang*, 3 L. R., Ch. 588; 37 L. J., Ch. 665; 19 L. T. 40; 16 W. R. 1025.

Coals sold at Hull were shipped on board a vessel chartered by the buyer, to be paid for in cash, against bill of lading in the hands of the seller's agent, in London:—Held, that no property passed to the buyer until the condition was fulfilled, and that the price, being unpaid, the seller was entitled to intercept the delivery. *Moakes v. Nicolson*, 19 C. B., N. S. 290; 34 L. J., C. P. 273; 12 L. T. 573.

Goods were shipped by a vendor on board a ship belonging to the purchaser, but employed as a general trader. Four bills of lading were made under which the goods were deliverable to the purchaser or assigns; three of the bills were kept by the vendor, and one by the master of the ship:—Held, that the delivery on board the purchaser's ship was a delivery to the purchaser so as to preclude a stoppage in transitu before the delivery of the goods at the port of consignment. *Schotsmans v. Lancashire and Yorkshire Railway Company*, 2 L. R., Ch. 332; 36 L. J., Ch. 361; 16 L. T. 189; 15 W. R. 537.

A delivery by the consignor of goods on board a ship chartered by the consignee is a delivery to him, and the consignor cannot afterwards stop them in transitu; but where the delivery was made on board such a ship in Russia, and, by a law of that country, the owner of goods, in case of the bankruptcy of the vendee, may sue out process to retake his goods on board a ship, and retain them till payment; and the owners hearing of the insolvency of the vendee, applied to the captain on board whose ship the goods had been delivered to sign the bills of lading to their order, which he complied with, without the necessity of suing out process:—Held, that this was a substantial compliance with such law, and that the captain, on his arrival here, was bound to deliver the goods to the order of the vendors,

and not to the assignees of the vendee, who had become bankrupt. *Inglis v. Usherwood*, 1 East, 515. And see *Fowler v. McTaggart*, 1 East, 522, n.; 7 T. R. 442, n.

A trader in England chartered a ship on certain conditions for a voyage to Russia, and to bring goods home from his correspondent there, who accordingly shipped the goods on account and at the risk of the freighter, and sent to him the invoices and bills of lading of the cargo:—Held, that the delivery of the goods on board such chartered ship did not preclude the right of the consignor to stop the goods while in transitu on board the same to the vendee, in case of his insolvency in the meantime, before actual delivery, any more than if they had been delivered on board a general ship for the same purpose; and a demand of the goods having been made by the agent of the consignor upon the captain before they were unloaded, after which he delivered them to the assignees of the vendee:—Held, that the consignor might maintain trover against them. *Bohling v. Inglis*, 3 East, 381; *S. C.*, nom. *Boehling v. Schneider*, 3 Esp. 58.

The fact that the ship is named by the consignee, makes no difference as to stoppage in transitu. *Thompson v. Trail*, 2 C. & P. 334.

Goods in Carriers' Warehouse.—Merchants in London sold goods to Worsdell, a trader at Falmouth, and forwarded the goods by steamer to Worsdell, Killigrew-street, Falmouth; and they also sent by post to the purchaser an invoice which stated that the goods were sent by steamer. On the 31st of October the goods were discharged at Falmouth and placed by the company's agents in a warehouse belonging to the company. The course of business of the Falmouth agents was to hold the goods subject to the order of the consignee on his paying freight and warehouse rent. On the 30th of October Worsdell committed an act of bankruptcy by absconding from Falmouth, and no notice of the arrival of the goods could be given to him. He was adjudicated bankrupt on the 4th of November, and a receiver appointed, and on the same day, the goods not having been paid for and not having been claimed on behalf of the consignee, the merchants telegraphed to the company's agents to stop delivery:—Held, that the transit was not at an end when the goods were stopped, nothing having taken place to constitute the company's agents at Falmouth bailees for the consignee. *Barrow, Ex parte, Worsdell, In re*, 6 Ch. D. 783; 46 L. J., Bk. 71; 36 L. T. 325; 25 W. R. 466.

Semble, that a wharfinger holding goods in transitu cannot turn himself into an agent for the consignee so as to put an end to the transitus without the express authority of the consignee. *Id.*

Where goods were conveyed by a carrier by water, and deposited in his warehouse, for the convenience of the vendee, to be delivered out as he should want them:—Held, that the transitus was at an end, and the vendor's right to stop in transitu gone, although it appeared that the carrier claimed to have a lien on the goods. *Allan v. Gripper*, 2 C. & J. 218; 2 Tyr. 217.

A trader in London was in the habit of purchasing goods at Manchester, and exporting them to the Continent shortly after their arrival in London. The goods consigned to him remained in the waggon office of the carriers, until they

were removed by his agent for the purpose of being shipped.—Held, that the transitus of the goods was at an end on their arrival at the waggon office. *Rouge v. Pickford*, 1 Moore, 526.

Where goods were given into the custody of carriers as agents of the vendor, and, by direction of the purchaser, they set out on a journey which was to begin at Bradford and end at Shanghai, where they were to be delivered to a firm, who would have been under an obligation to the vendor if he had thought fit to give him notice of his rights. The bills of lading were retained in England, and the goods remained in the possession of the carriers. Before delivery of the goods an arrangement was come to by all parties that the goods should be sold.—Held, that the transitus was not ended. *Watson, Ex parte, Love, In re*, 5 Ch. D. 35; 46 L. J., Bk. 97; 36 L. T. 75; 25 W. R. 489—C. A.

Notice by Carrier of Arrival.—G. sold sixteen casks of oil by letter to the bankrupts, upon terms of payment by acceptance at thirty days' date. The oil arrived, and its arrival was notified to the bankrupts by the carrier. Subsequently G. telegraphed to stop the delivery. The carrier gave notice to the parties to interplead.—Held, that the transitus ended with the notice of arrival of the goods, and that the trustee in bankruptcy was entitled. *Gouda, Ex parte, Mille, In re*, 20 W. R. 981.

Retention of Bill of Lading.—When an unpaid vendor shipping goods under a contract of sale takes a bill of lading making the goods deliverable to his own order, and retains such bill of lading in his own or his agent's hands for his own protection, he does not reserve the vendor's lien only, in case of the purchaser's making default in payment of the price, but reserves a right of disposing of the goods so long at least as the purchaser continues in default. *Ogg v. Shuter*, 1 C. P. D. 47; 45 L. J., C. P. 44; 33 L. T. 492; 24 W. R. 100—C. A.

Deliverable under Mate's Receipts.—Where goods were sold free on board, and on their shipment the agent of the vendor tendered a receipt to the mate in the absence of the captain, by which the goods were acknowledged to be shipped on account of the vendor, which the mate kept, but refused to sign, and on the following day signed bills of lading to the order of the vendees.—Held, that the transitus was not at an end, but that, on the insolvency of the vendees, the vendor was entitled to stop the goods. *Ruck v. Hatfield*, 5 B. & A. 632.

Goods contracted to be sold and delivered "free on board," to be paid for by cash or bills, at the option of the purchasers, were delivered on board, and receipts taken from the mate by the lighter-man employed by the sellers, who handed the same over to them. The sellers apprised the purchasers of the delivery, who elected to pay for the goods by a bill, which, the sellers having drawn, was accepted by the purchasers; the sellers retained the mate's receipts for the goods, but the master signed the bill of lading in the purchasers' names, who, while the accepted bill was running, became insolvent.—Held, that trover would not lie for the goods; for that, on their delivery on board the vessel, they were no

longer in transitu so as to be stopped by the sellers, and that the retention of the receipts by the sellers was immaterial, as, after their election to be paid by a bill, the receipts of the mate were not essential to the transaction between the seller and purchaser. *Cowanjee v. Thompson*, 5 Moore, P. C. C. 165; 3 Moore, Ind. App. 422.

iii. Delivery to Wharfingers.

Authority to End.—Semble, that a wharfinger holding goods in transitu cannot turn himself into an agent for the consignee so as to put an end to the transitus without the express authority of the consignee. *Barrow, Ex parte, Worsdell, In re*, 6 Ch. D. 783; 46 L. J., Bk. 71; 36 L. T. 325; 25 W. R. 466.

Habitual Use of Warehouse.—If a consignee generally makes use of a wharfinger's warehouse as a place to keep his goods, the transitus is at an end when the goods are deposited there. *Tucker v. Humphrey*, 4 Bing. 516; 1 M. & P. 378, n.; *S. P., Richardson v. Goss*, 3 B. & P. 119.

But where the consignee, though accustomed to make such use of the wharfinger's warehouse, had not produced his bill of lading to the wharfinger, nor exercised any act of ownership, and the wharfinger delivered the goods to a person who had an order from the shippers.—Held, that the transitus was not at an end on the arrival of the goods at the wharfinger's. *Id.*

Bales of flax sold by A., in London, to B., residing at Mickley Mill, near Ripon, were addressed to B., Mickley, and were shipped for Hull, under a bill of lading, making them deliverable "at the port of Boroughbridge, for B., Mickley Mill." The bales were forwarded from Hull to Boroughbridge by water-carriage, and deposited there in the warehouse of C., a party unconnected with the carrier, who was in the habit of receiving goods for B., and holding them at his risk, and without charging warehouse rent, until fetched away by B., or delivered to other persons by his order.—Held, that the transitus was at an end, and the bales could not be stopped by A. upon the insolvency of B., although B. had exercised no act of ownership over them. *Dodson v. Wentworth*, 4 M. & G. 1080; 5 Scott, N. R. 821; 12 L. J., C. P. 59; 6 Jur. 1066.

Partial Stoppage.—H. & Co., of Hull, having sold to W., of Mickley Mills, near Leeds, twenty mats of flax, they were on the 10th of August sent by railway to Leeds, and arrived at the defendants' warehouse at Leeds, where it was the custom for the defendants to receive goods sent for W., and to give him notice of their arrival, and for him to send his carts for them. On the 16th of August, W. sent his cart and took away ten of the mats. On the 18th of August, H. & Co. sold to W. twenty other mats of flax and a quantity of other goods; the flax was sent by railway to Leeds, and arrived at the defendants' warehouse; the other goods were sent by sloop to Boroughbridge. On the arrival of this flax at the defendants' warehouse, notice was given to W. by letter, which stated that, unless the goods were sent for, they would remain there at warehouse rents. On the 23rd of

August, W. sent his cart and took away ten of the latter mats, and left there ten of the mats last sent, and ten of the former. On the 8th of September, W. having become insolvent, the goods which had been shipped for Boroughbridge were stopped in transitu at Hull; and on the same day the ten mats of flax of the second parcel were also stopped at Leeds by H. & Co. On the 11th of September, the sheriff entered and seized all the flax in the defendants' warehouse sent by H. & Co., under an execution against W. On the 15th of September, there was also a stoppage by H. & Co. of the remaining ten mats of the first parcel. It was found by the jury at the trial, that the parties contemplated that the goods were to be used for the purpose of manufacture at Mickley Mills:—Held, that the transitus was at an end on the arrival of the goods at the defendants' warehouse. *Wentworth v. Outhwaite*, 10 M. & W. 436; 12 L. J., Ex. 172.

Held, also, that the stoppage of the goods which had been shipped to go to Boroughbridge had not the effect of revesting the property in the parcel of flax which had been sent to the defendants' warehouse at Leeds, although comprised in one joint contract with the other goods. *Id.*

Held, also, that the vendor had no right to retake that part which had arrived at its journey's end. *Id.*

Goods to be Forwarded.]—Goods sent by the directions of the purchaser to a wharfinger to be forwarded to him, may be stopped in transitu by the vendor in the wharfinger's hands. *Smith v. Goss*, 1 Camp. 282.

But where goods are delivered to a vendee at a wharf, who afterwards ships them there, no subsequent stoppage of the goods in transitu can take place. *Noble v. Adams*, 7 Taunt. 59; 2 Marsh. 366; Holt, 248.

Not Landed in Consignee's Name.]—Goods were consigned to A., deliverable in the port of London. The vessel in which they were shipped arrived off the wharf at which the captain was in the habit of trading. The captain called at A.'s place of business, and saw B. his clerk—A. being from home—and pressed him to send a craft for the goods, or he should be under the necessity of landing them. After some days, B. wrote to the captain, stating that A. was from home, but he, B., thought he had better land the goods on A.'s account. They were accordingly landed at the wharf, and entered in the wharfinger's book, with freight and charges set opposite to them, and not in the name of any party as consignee. While they were lying there, A. became insolvent, and they were stopped by the consignor:—Held, that the transitus was not determined. *Edwards v. Breuer*, 2 M. & W. 375.

Wharfingers Forwarding.]—M. purchased lead of the plaintiff at Newcastle, without specifying any place of delivery; after a time, M. desired that it should be forwarded to him in London, and the plaintiff gave M.'s agent an order on the plaintiff's servant for its delivery; the agent indorsed the order to a keelman, who received the lead and put it on board a vessel for London; the vessel arrived in London on 21st June, and the wharfingers undertook the delivery of the lead; M. failed on that day; on the 22nd and

24th M. demanded the lead of the captain of the vessel, who refused to deliver it, though the freight was tendered, alleging that the wharfingers had stopped it on account of the failure of M. On the 28th a letter arrived from the vendor, ordering the lead to be stopped in transitu; it was then on board a lighter belonging to the wharfingers:—Held, that the transitus was not at an end, and that the vendor was in time to stop the lead. *Jackson v. Nichol*, 5 Bing. N. C. 508; 7 Scott, 577.

iv. Delivery to Purchaser's Packer.

At Warehouse.]—Where a trader has been in the habit of having goods consigned to him deposited in the warehouse of his packer, the delivery is complete, and the transitus of such goods terminates upon their arrival at the packer's. *Scott v. Pettit*, 3 P. & P. 469.

A., the general agent in London of B. & Co., a house at Paris, with power to export for them to such markets as he should think fit, purchased goods in the name of B. & Co. of C. at Manchester, and directed them to be sent to D., a packer in London. After their arrival, A. had some of the goods unpacked and sent away, and the remainder repacked. News then arrived of the failure of B. & Co.:—Held, that the goods in D.'s hands were no longer in transitu, and that C. therefore had no right to stop them. *Leeds v. Wright*, 3 B. & P. 320; 4 Esp. 243.

— **Conditional.]**—Although goods are delivered to the packer of the purchaser, he having no warehouse of his own, if they were to be paid for in ready money, and this was intimated to the packer when he received them, they still may be stopped in transitu. *Lorchman v. Williams*, 4 Camp. 181.

v. Part Delivery.

Delivery of Part not constructive Delivery of Whole.]—A cargo of 114 tons of miscellaneous iron castings was consigned from Scotland to London on board a ship chartered by the vendor, the bill of lading being made out in favour of the purchaser or his assigns, he or they paying freight. After thirty tons of the cargo had been delivered to the purchaser the vendor gave notice to stop the unloading of the ship. At this time only part of the freight had been paid to the master of the ship. Soon afterwards the purchaser filed a liquidation petition and a receiver was appointed. The balance of the freight was paid by the receiver, and the remainder of the iron was placed in medio:—Held, that, inasmuch as it could not be supposed that the master intended to abandon his lien for the unpaid freight, the delivery of the thirty tons did not operate as a constructive delivery of the whole cargo, and that, consequently, the transitus was not at an end as to the remainder of the cargo, and the vendor's notice to stop in transitu was given in time. *Cooper, Ex parte McLaren, In re*, 11 Ch. D. 68; 48 L. J., Bk. 49; 40 L. T. 105; 27 W. R. 518—C. A.

In an earlier case part delivery by a carrier to the consignee was held to be *prima facie* such a virtual delivery of the whole as to put an end to the consignor's right of stoppage in transitu. *Betts v. Gibbins*, 4 N. & M. 64; 2 A. & E. 57.

A., at a foreign port, shipped goods by the

order and on the account of B., to be paid for at a future day; and bills of lading were accordingly signed by the master of the ship. One of the bills was immediately transmitted to B., who, before the arrival of the ship at the place of destination, sold the goods, and indorsed the bill of lading to C. After the arrival of the ship, and a delivery of part of the goods to the agent of C., B. became bankrupt, without having paid A. the price of the goods:—Held, that by this delivery the transitu was at an end as to the whole of the goods. *Slubey v. Heyward*, 2 H. Bl. 504.

This case observed on in *Kemp v. Falk*, in C. A., 14 Ch. D. 466; 42 L. T. 780; 28 W. R. 785—C. A. In H. L., ante, col. 965.

—**To Sub-Vendees.**—Goods were forwarded in bales by ship to London, deliverable to B. & Co., or their assigns, who were factors, for sale, and were landed at the defendants' wharf. B. & Co. gave the defendants orders to weigh and deliver the goods to M., who had contracted with B. & Co. for the purchase of them. They were accordingly weighed, and an account of the weights sent to B. & Co., who made out invoices to M. accordingly. M. resold several bales of the goods, which were delivered by the defendants, upon his order, to his vendees; the rest remained at the defendants' wharf until they were stopped by B. & Co., as unpaid vendors. They were never transferred in the defendants' books from the names of B. & Co. to that of M., nor was any warehouse rent paid by him:—Held, that B. & Co.'s right of stoppage in transitu was not determined by the part delivery to M.'s vendees. *Tanner v. Scovell*, 14 M. & W. 28; 14 L. J., Ex. 321. See also *Wentworth v. Outhwaite*, ante, col. 973.

vi. Effect of Delivery Orders.

Delivery passing Right to Goods.—Wharfinger's certificates are not documents of title, and their delivery passes no right to the goods; and no custom of trade can give them the effect of warrants or documents of title as against the vendors. *Gunn v. Bolekovo, Vaughan & Company*, 10 L. R., Ch. 491; 44 L. J., Ch. 732; 32 L. T. 781; 23 W. R. 739.

—**Custom.**—By the usage of the iron trade warrants for goods "deliverable (f. o. b.) to A. B., or their assigns, by indorsement hereon," are considered to pass to the holders for value free from any vendor's lien. *Merchant Banking Company of London v. Phaziz Bessemer Steel Company*, 5 Ch. D. 205; 46 L. J., Ch. 418; 36 L. T. 395; 25 W. R. 457.

Whether fresh Agreement as to Goods.—G. shipped linseed from Smyrna to W. in London by a general ship. W. having obtained the bill of lading, mortgaged the cargo, and subsequently, before the ship's arrival, became bankrupt. W.'s mortgagees, after the ship had arrived, obtained a delivery order for the linseed, and handed it to an officer on board the ship, who promised to deliver the linseed to them when he got it clear:—Held, that this did not amount to a constructive delivery of the goods, and that the consignor's right of stoppage in transitu remained. *Coventry v. Gladstone*, 6 L. R., Eq. 44; 37 L. J., Ch. 492; 16 W. R. 837.

The test of the consignor's right of stoppage is not whether the voyage is at an end, but whether there has been a delivery of the goods to the consignee. *Ib.*

In order to create a constructive delivery, there must be a fresh agreement between the parties as to holding or delivering the goods. *Ib.*

Whether Attornment by Carriers.—Goods were consigned to the plaintiffs' order to a railway station, and the usual advice note was sent by them to the company. On the 12th April the plaintiffs sold these goods to J., payment half by cash, half by bill at three months, due the 13th July, and handed over the advice note to J., with an indorsement directing the company to deliver the goods to J.'s order. On the 24th April, J. handed over this delivery order to D. as collateral security for the payment of money advanced to him by D., with a second indorsement ordering the company to deliver the goods to D.'s order. But neither this delivery order nor that made by the plaintiffs was stamped in accordance with the Stamp Act, 1870, s. 89. J. becoming insolvent, D. on the 14th May wrote to the company inclosing the delivery order, and directing them to hold the goods to his order. To this he received the following reply from the goods manager, dated the 15th May: "I have yours of yesterday, inclosing transfer of rails, and beg to say I hold them to your order; but you will please produce this order when applying for the rails, and which order must also bear a transfer stamp by both parties transferring the goods, in accordance with the act of parliament. You will be aware they remain here at owner's risk and subject to our usual rent-charges." On the 19th May, D. affixed an adhesive stamp to each transfer, but omitted to cancel the stamps, as required by ss. 24 and 89, and the same were never, up to trial, so cancelled. On the 23rd May, the company wrote to the plaintiffs, asking if they consented to the goods being delivered to D., to which they replied on the 23rd and 30th June, giving the company formal notice to hold them to their (plaintiffs') order; but upon indemnity being given by D. the goods were handed over to D. The bill given to the plaintiffs by J. in part payment of these goods not being met at maturity, the plaintiffs claimed the goods as partial unpaid vendors, and brought an action against the company for wrongfully parting with the possession of them:—Held, that the condition in the company's letter of the 15th May, as to the transfer stamp, was no qualification of their admission that they held the goods to D.'s order; that the letter was an absolute attornment by the company to D., by which the plaintiffs' right of possession as unpaid vendors was destroyed, and that the plaintiffs were, therefore, not entitled to recover. *Pooley v. Great Eastern Railway Company*, 34 L. T. 537.

Carriers declining to Act upon.—Where goods were entered in the books of the West India Dock Company in the name of the original consignee as owner, such consignee having sold them to A., who had afterwards made a sub-sale to B., and had given to B. a delivery order for the goods upon the company:—Held, that the right of A. to stop the goods in transitu was not thereby defeated, such order being one upon which the company, according to their invariable

custom, had declined to act, and had refused to deliver the goods to B. without an order from the original consignee. *Lackington v. Atherton*, 8 Scott, N. R. 38 ; 7 M. & G. 360 ; 13 L. J., C. P. 140 ; 8 Jur. 406.

— **Priorities under.**—On the 3rd of March goods belonging to C., lying at the St. Katharine Dock, in the custody of the Docks Company, were bought by D., as broker for buyers and sellers, for B. & Co., without disclosing the names of his principals, and D. indorsed to them the delivery order he had obtained from the sellers, on the representation of B. & Co. that the goods were wanted for immediate shipment. They, however, pledged their interest in the goods to the plaintiffs, and indorsed the order to them. On the prompt-day, the 18th of March, the plaintiffs' clerk lodged the order at the London office of the Docks Company, with this memorandum, "Hold within to our order, and have warrants made out as soon as possible." He was told that the warrants would be ready with the goods on the 20th of March. Three hours later a messenger from the office reached the warrant office at the Dock House with a notice that the order had been lodged. Meanwhile B. & Co. had stopped payment, and D. being so informed, and having no notice of the plaintiffs' title, on the same day paid C. for the goods, and through a clerk, who reached the Dock House before the messenger had arrived, obtained at the warrant office a warrant for the goods in the name of C., who indorsed the same to D., and gave him a second delivery order. The first delivery order was returned to the plaintiffs by the Docks Company, who refused to act upon it. In an action by the plaintiffs, claiming as against the Docks Company, C., and D., to be entitled to the goods:—Held, that D. was the surety and B. & Co. the principal debtors ; that, in the circumstances of the case, the unpaid vendors' lien had passed to D. ; that the title to the goods was in D. *Imperial Bank v. London and St. Katharine Docks Company*, 5 Ch. D. 195 ; 46 L. J., Ch. 335 ; 36 L. T. 233.

vii. Taking Possession as Owner.

Parol Evidence of Intention.—Goods were consigned to A., deliverable in the River Thames ; on the arrival of the vessel in the river, the captain pressed A. to have them landed immediately ; A. in consequence sent B., his son, with directions to land them at a wharf where he was accustomed to have goods landed for him, and kept until he carts them away to his customers in his own carts ; but A. (being then insolvent) at the same time told B. he would not meddle with the goods, that he did not intend to take them, and that the vendor ought to have them. The goods were by B.'s direction landed at the wharf, and there stopped in transitu by the vendor. In trover for the goods by the assignees, on the bankruptcy of A., against the wharfinger:—Held, that the declarations so made by A. to B. were admissible, although they were not communicated to the vendor or to the wharfinger ; and that they shewed that A. had not taken possession of the goods as owner, and therefore that the transitus was not determined. *James v. Griffin*, 2 M. & W. 622.

Transfer in Wharfinger's Books.—A vendor,

by a delivery order, directed wharfingers to deliver to the vendee 1,028 bushels of oats, bin 40, to be weighed, and the expense of weighing to be charged to the vendor. The vendee afterwards gave an order to the same effect, on a sale to the plaintiffs. There were no other oats in the bin, and they were transferred to the plaintiffs in the books of the wharfingers, but never weighed over. The vendor, on the failure of the first vendee, claimed a right of stoppage in transitu:—Held, without reference to any estoppel against the wharfingers, that the property had passed as between buyer and seller, so as to defeat the vendor's right of stoppage. *Swanwick v. Sothorn*, 1 P. & D. 648 ; 9 A. & E. 895.

Sampling and Selling Part.—A cargo of eighty quarters of wheat was shipped in London, on the 6th December, 1839, on board a vessel bound to Barmouth and Tremadoc, and, by the bill of lading, was to be delivered at the port of Barmouth and Tremadoc to T., or to his assigns, on his paying freight, &c. The cargo was paid for by T. partly in cash, and partly by his acceptance at two months. On the 28th January, 1840, T. assigned all his estate and effects to the plaintiff and A., in trust for the benefit of themselves and his other creditors. T. was at that time insolvent, to the plaintiff's knowledge. The bill of lading was indorsed by T. to the plaintiff as follows (the indorsement being without date):—"I do hereby order that Captain J. do deliver the possession of the within-mentioned quantity of wheat to Mr. R. J., being one of my assignees, to be disposed of as he may think proper." On the 4th February, the vessel arrived at Barmouth with the wheat on board, and J. there went on board and took samples, and sold seventy of the eighty quarters, for which he paid the freight, and they were delivered to the purchasers ; and he directed the master to take forward the remaining ten quarters to Tremadoc. On the 9th February T.'s acceptance became due and was dishonoured ; and on the 10th, the shippers gave notice to the captain at Barmouth not to deliver the wheat, but to hold it to their use. On the 23rd, the vessel arrived at Tremadoc, where J. demanded the remaining ten quarters, tendering the freight, but the master refused to deliver it:—Held, that, under these circumstances (even supposing the plaintiff to be in the same situation as T.), the right of stoppage in transitu was determined, as to the whole of the cargo, by the acts done by the plaintiff at Barmouth. *Jones v. Jones*, 8 M. & W. 431.

Marking Timber—Consent of Vendor.—The defendants having sold timber, then lying at their own wharf, to D., for bills, payable at a future day ; which timber was then marked by D., and a small part of it was forwarded by the defendants to one place, and part to another ; and then D., before the time of payment arrived, sold the whole to the plaintiff, who notified such sale to the defendants, and was answered that it was very well ; and then, in their presence, the plaintiff marked all the timber lying at their wharf, and afterwards marked that which had been forwarded to the two other stages:—Held, that the defendants, after such assent to the transfer, and such marking by the plaintiff, could not retain or stop any of the timber as in transitu upon the subsequent insolvency, before the day of payment, of D., the original vendee,

to whom payment had been made by the plaintiff, whatever question there might have been as between the original vendors and vendee. *Stovell v. Hughes*, 14 East, 308.

Timber merchants at Ledbury, in Herefordshire, sold to G., a timber merchant at Birmingham, timber, at a certain price per foot, "to be delivered free to boats when required. Payment, 100*l.* by bill at one month, and balance by bill at four months from measurement." The vendors brought the timber to a wharf belonging to a canal company, and whilst it was there G. measured and numbered each tree, and marked it with his initials, and expended money in squaring it. G. afterwards gave the bills, and inquired of the vendors whether they wished to freight the timber at Birmingham, and their terms. One of the bills was paid; but before the others were due, and whilst the timber remained on the wharf, the buyer became insolvent:—Held, that both the property and possession of the timber vested in G., and therefore the vendors had no right of stoppage in transitu or of lien. *Cooper v. Bell*, 3 H. & C. 722; 34 L. J., Ex. 161; 12 L. T. 466.

Redelivering for Special Purpose.—A., a merchant at Birmingham, bought goods of B. & Co., commission agents at Manchester and Leeds. On the 20th March, 1844, the goods were, by A.'s direction, sent to L. & Co., shipping agents at Liverpool, employed by A. to receive and forward them to Valparaiso; and on the same day B. & Co. wrote to L. & Co., advising them of the transmission of patterns, which they requested them to ship with the goods, "as A. might direct them to be shipped." The goods were, on the 4th April, shipped by L. & Co. on board a vessel bound for Valparaiso, and afterwards relanded by order of a member of the house at Valparaiso, to which they were consigned by A., and sent to B. & Co.'s house at Manchester, for the purpose of being repacked in smaller cases. The price of the goods became payable on the 26th April, but was not paid, A. having, in the meantime, become insolvent:—Held, that the property and possession of the goods had vested absolutely in A., the vendee, before they were redelivered to B. & Co. at Manchester, and that by such redelivery the latter acquired no new rights as unpaid vendors. *Valpy v. Gibson*, 4 C. B. 837; 16 L. J., C. P. 241; 11 Jur. 826.

Receipt—Offer to Rescind.—Goods were consigned from London to A. at Sunderland, according to order, and a draft for the price: the invoice and the bill of lading were forwarded on the arrival of the goods at Sunderland. A. was in difficulties, and desired that they should not be received from the wharf where they then lay; but in his absence, and without his consent, the goods were deposited on his premises. He afterwards knew of these facts, and took and kept the key of the warehouse in which the goods were deposited. On the 4th of February, he wrote to the vendor, returning the draft unaccepted, and stating the circumstances as to the goods, and that a stoppage of his business was decided upon, and continued: "I immediately sent for my solicitor, to get his advice as to whether I could not, under the circumstances, return the hemp to the wharf. He declared not, which placed me under the necessity of depriving

you of what I consider your right. I retain your draft, and, although it can be little satisfaction to you, must express my extreme regret that you are so unfortunately placed." On the 6th February the vendor applied to A. for the goods, and was referred by him to his solicitor. On 25th February, A. made an assignment to trustees for the benefit of his creditors, and delivered the key of the warehouse to them; the goods were demanded of them, and were refused, and they sold them:—Held, that the property in the hemp passed to A. by the delivery on board ship, and the forwarding of the bill of lading; that there was no valid rescission of the contract, for that such can only be by mutual consent; that therefore, any expression of wish to rescind uttered by one party, and not communicated to the other, is immaterial; that the letter of 4th February, which was communicated to the vendor, did not amount to an offer against A. to rescind, but to an assertion that he could not do so; and that there was no valid stoppage in transitu; for the natural transit was ended, and the facts shewed that A. had taken to the goods as owner, whilst they were in his possession. *Heinekey v. Earle*, 8 El. & Bl. 410; 28 L. J., Q. B. 79; 4 Jur., N. S. 848; 6 W. R. 687—Ex. Ch.

Acts of Ownership by Assignees of Vendee.—Where goods were consigned to A., and on his becoming a bankrupt his assignee went to the inn where they had arrived, and put his mark on them, but did not take them away, because they had been attached there by a creditor of the bankrupt:—Held, that the consignor could not afterwards stop them, because they were not then in transitu. *Ellis v. Hunt*, 3 T. R. 464.

f. Rights of Third Parties.

Lien of Carriers.—A usage for carriers to retain goods as a lien for a general balance of account between them and the consignees, cannot affect the right of the consignor to stop the goods in transitu. *Oppenheim v. Russell*, 3 B. & P. 42.

A. consigned iron to B. in barter, and sent it to a carrier to be conveyed, who delivered part of the cargo on the wharf of B., but before the remainder was delivered the carrier discovered that B. was insolvent, and reshipped the part delivered, and retained the whole to satisfy his lien for the freight of the cargo, and for a general account between him and the consignee:—Held, that the consignor's right of stoppage in transitu was not gone; and that he might maintain trover against the carrier for the goods. *Crawshay v. Eades*, 2 D. & R. 288; 1 B. & C. 181.

A claim of lien by carriers who hold goods for a consignee does not enlarge the consignor's right to stop in transitu. *Allan v. Gripper*, 2 C. & J. 218; 2 Tyr. 217.

Wharfinger.—A., of Newcastle, shipped goods for London to order of B.; before their arrival B. wrote to say that he was in failing circumstances, and would not apply for the goods on their arrival. To this A. returned a general answer without making any mention of the goods, but immediately left Newcastle for London, and on his arrival applied at the wharf of C., where the goods had in the meantime arrived (and where goods shipped for B. usually

were landed and kept till sent for by him), tendering the freight and charges paid for the goods, and requiring a delivery of them, which was refused, unless upon payment of a general balance due from B. to C. for wharfage:—Held, that the contract as between A. and B. having been rescinded previously to the arrival of the goods, C. had no right to retain against A. for a general balance due to him from B. *Richardson v. Goss*, 3 B. & P. 119.

Under Foreign Attachment.]—A right of stoppage in transitu is not divested by a foreign attachment at a suit of a creditor of the vendee. *Oppenheim v. Russell*, 3 B. & P. 42; *S. P.*, *Smith v. Goss*, 1 Camp. 282.

B. SALES BY AUCTION.

1. STATUTE OF FRAUDS.

What within.]—Sales of goods by auction are within the Statute of Frauds. *Kenworthy v. Schofield*, 4 D. & R. 556; 2 B. & C. 945.

So are sales of lands. *Walker v. Constable*, 1 B. & P. 306; 2 Esp. 659; *S. P.*, *Stanfield v. Johnson*, 1 Esp. 101.

Entries of Auctioneer.]—At a sale by auction subject to conditions, the auctioneer entered in his sale-book the names of the vendor and purchaser, the subject-matter of the sale, and the amount of the purchase-money, but omitted, in the entry, to embody or make any reference to the conditions of sale. There was no other memorandum or contract in writing:—Held, that there was no sufficient contract in writing within s. 4 of the Statute of Frauds, and specific performance refused as against the purchaser. *Rishton v. Whatmore*, 8 Ch. D. 467; 47 L. J., Ch. 629; 26 W. R. 827.

The plaintiff sent a mare to be sold by auction at the defendant's repository. The defendant advertised the mare for sale by auction on the 28th of March, 1872, and circulated a printed catalogue of the horses to be sold at his sale, with conditions of sale annexed, in which the plaintiff's mare was described as Lot 49. The defendant had a sales ledger, which was headed "Sales by auction, 28 March, 1872," in which the plaintiff's mare was also numbered 49; but neither was the catalogue nor were the conditions of sale annexed to the sales ledger, nor were they referred to therein. On the 28th March, 1872, the lots described in the catalogue were put up by the defendant for sale under the conditions. The plaintiff's mare was put up for sale and knocked down to M. for 33*l.*, and thereupon the defendant's clerk wrote in the columns of the sales ledger left blank for this purpose the name of M. as purchaser, and the price. M. afterwards refused to take the mare:—Held, that the catalogue and the conditions of sale were not sufficiently connected with the entries in the sales ledger to make a note or memorandum in writing of a contract by M., to satisfy the 17th section of the Statute of Frauds. *Peirce v. Corf*, 9 L. R., Q. B. 210; 43 L. J., Q. B. 52; 29 L. T. 919; 22 W. R. 299.

Semble, that the entry by the clerk was not by an authorized agent, so as to bind the purchaser. *Ib.*

Where goods were sold by auction to an agent, and the auctioneer wrote the initials of the agent's name, together with the prices, opposite the lots purchased by him, on the printed catalogue, and the principal afterwards in a letter to the agent recognized the purchase:—Held, that the entry in the catalogue and the letter coupled together were a sufficient memorandum of the contract. *Phillimore v. Barry*, 1 Camp. 513.

Where at a public sale by auction the conditions of sale were read by the auctioneer before the biddings commenced, but the printed catalogue did not refer to the conditions, nor were they attached to it, and the agent of the defendant was declared the highest bidder for a lot, and the auctioneer put down his name and the price opposite the lot in the sale catalogue:—Held, not a sufficient memorandum in writing to satisfy the statute. *Kenworthy v. Schofield*, 4 D. & R. 556; 2 B. & C. 945.

It seems that taking sales of goods by auction to be within the 17th section, the auctioneer or broker, who is a middleman, must be taken to be the agent of both parties so as to bind the purchaser by his signature. *Hinde v. Whitehouse*, 7 East, 558; 3 Smith, 528.

An auctioneer is an agent lawfully authorized by the buyer to sign a contract for him, whether it is for the purchase of land or goods, and his authority is given by the purchaser bidding aloud; and the name of the purchaser of divers lots at an auction being written down on the sale bill opposite such lots, for which the purchaser was declared to be the highest bidder, is a note or memorandum in writing sufficient to satisfy the intent of the statute. *Emmerson v. Heelis*, 2 Taunt. 38.

The highest bidder is bound by the entry in the sale-book of the auctioneer's clerk, made in his presence, upon his name being called out as the purchaser, even in an action brought by the auctioneer. *Bird v. Boulter*, 1 N. & M. 313; 4 B. & Ad. 443.

— After Auction.]—The plaintiff put up for sale by public auction a quantity of timber, several lots of which were unsold. A few days afterwards the defendant called on the auctioneer, and selected from the catalogue two of the unsold lots which he agreed to purchase. The auctioneer then wrote, in the defendant's presence, his name in the catalogue opposite these lots:—Held, that the auctioneer was not the agent of the defendant, so as to bind him by signing his name, and consequently there was no sufficient note or memorandum of the bargain. *Mews v. Curr*, 1 H. & N. 484; 26 L. J., Ex. 29.

— Printed Name.]—A receipt given by an auctioneer's clerk three days after the sale, and signed by the clerk, acknowledging payment of part of the purchase-money for "Lot 4, Mr. J. S.'s property," is not such a memorandum in writing as would bind the vendor. Semble, that the name of the auctioneer printed on the back of the particulars and conditions of sale is sufficient to bind the vendor. *Dyas v. Stafford*, 7 L. R., Ir. 590.

2. WHAT IS AN AUCTION.

At the sale of premises, the vendor invited each bidder to put down two sums on a slip of paper, and upon collating such biddings, he

whose paper contained the highest bidding was to be declared the purchaser at the lowest of the two sums, if that exceeded the highest of any other bidder:—Held, that this was a sale by auction within 13 Geo. 3, c. 56, and that the vendor incurred the penalty as an auctioneer without being licensed, although the purchase was never completed. *Res v. Taylor, M'Clel.* 362; 13 Price, 636.

3. RIGHTS AND LIABILITIES OF BIDDERS.

Retracting Biddings.—A bidder at an auction under the usual conditions, that the highest bidder should be the purchaser, may retract his bidding at any time before the hammer is down. *Payne v. Cure, 3 T. R.* 148.

Stamp on Contract.—A written paper signed by the auctioneer, and delivered to the bidder, containing the terms of the contract, must be stamped. *Ramsbottom v. Morley, 2 M. & S.* 445. And see *Ramsbottom v. Tunbridge, 2 M. & S.* 434.

The same paper containing two different contracts for the purchase of different lots by different persons, having one stamp affixed on that part of the paper which contains the contract with the defendant, is sufficient to legalize the evidence of such contract. *Powell v. Edmunds, 12 East, 6.*

Seem, that if parties choose to divide their contracts, so as to lessen the amount of stamps, they may legally do so. *Hawkins v. Clutterbuck, 2 C. & K.* 810.

If on a sale by auction the same person is declared the highest bidder for several lots, a distinct contract arises for each lot. *Emmerson v. Heelis, 2 Taunt.* 38; *S. P., Roots v. Dormer (Lord), 1 B. & Ad.* 77; *1 N. & M.* 667.

See also REVENUE.

Mock Biddings.—Where A., on the sale of a barge by auction under an execution, addressed the company, stating that he had built it for a person against whom the execution was issued, who had not paid him for it; on which no person bid against him, but the auctioneer refused to knock it down to him at his first bidding, when a friend of his made another bidding, and A. advanced one shilling more, and paid a deposit as part of the purchase-money:—Held, that he did not acquire any property in the barge under such sale. *Fuller v. Abrahams, 6 Moore, 316; 3 B. & B.* 116.

Agreement not to Bid.—A piece of land was advertised for sale. Two adjoining landowners were desirous of purchasing it; they agreed that one alone should attend the sale, and purchase, if it should be sold, for a sum not exceeding a sum named. If the land was purchased, terms were arranged, and it was to be divided between them:—Held, that the agreement between the purchasers was not contrary to equity and that it did not vitiate the contract. *Curew, In re, 26 Beav.* 187; *28 L. J., Ch.* 218; *S. P., Walton v. Emuss, 13 L. J., Ch.* 388; *8 Jur.* 507.

—**Brokers.**—But brokers agreeing together before a sale that only one of them shall bid for each article sold, and that all articles then bought by any of them shall be sold again among them at a fair price, and the difference between the

auction price and the fair price divided among them, are liable to be indicted for conspiracy. *Levi v. Levi, 6 C. & P.* 239.

4. RIGHTS AND LIABILITIES OF OWNERS OF PROPERTY.

a. Puffers.

Effect of Employment of.]—Upon a sale of real estate by auction, under conditions stating that the sale is subject to a reserved bidding, it is illegal to employ a person to bid up to the reserved price unless the right to do so is expressly stipulated for. *Gilliat v. Gilliat, 9 L. R., Eq.* 60; *39 L. J., Ch.* 142; *21 L. T.* 522; *18 W. R.* 203.

Landed property was sold by public auction under conditions which stated that the highest bidder should be the purchaser, and which reserved to the vendor the right to bid once by himself or his agent. The auctioneer bid three times with the sanction of the vendor, and then the vendor stated what the reserve price was, when a person bid beyond that sum, and was thereupon declared the purchaser:—Held, that by reason of the biddings of the auctioneer the vendor had exceeded the limited right reserved to him by the condition of bidding once by himself or agent, and that therefore the sale was void at the option of the purchaser, both at law and under 30 & 31 Vict. c. 48. *Parfitt v. Jepson, 46 L. J., C. P.* 529; *36 L. T.* 251.

When property is advertised to be sold "without reserve," such advertisement is understood to exclude any interference by the vendor, either direct or indirect, which can under any possible circumstances affect the right of the highest bidder, whatever may be the amount of his bidding, to be declared the purchaser; and any evasion of that engagement on the part of the vendor, being a violation of his contract with the public, will disentitle him to the aid of a court of equity to enforce the sale. *Robinson v. Wall, 2 Ph.* 372; *16 L. J., Ch.* 401; *11 Jur.* 577.

Where a sale by auction is advertised or stated by the auctioneer to be "without reserve," the employment by the vendor of a puffer to bid for him, without notice, renders the sale void, and entitles the purchaser to recover back his deposit from the auctioneer at law. *Thornett v. Haines, 15 M. & W.* 367; *15 L. J., Ex.* 230.

If the owner employs a person to bid for him, the sale is void, although only one such person is employed, and although he is to bid up to a certain sum only, unless it is announced at the time that there is a person bidding for the owner. *Wheeler v. Collier, M. & M.* 123.

If the owner of goods or of an estate put up to sale at an auction, employs puffers to bid for him without declaring it, it is a fraud on the real bidders, and the highest bidder cannot be compelled to complete the contract. *Howard v. Castle, 6 T. R.* 642.

The owner of a horse sold by auction has no right under the usual condition of a sale, that the highest bidder shall be the purchaser, to employ any person to bid for him for the purpose of enhancing the price; if he does he cannot recover the purchase-money from the buyer. *Crowder v. Austin, 3 Bing.* 368; *11 Moore, 283; 2 C. & P.* 208; *S. P., Fuller v. Abrahams, 6 Moore, 316; 3 B. & B.* 116.

The employment of a puffer at a sale by

auction of property seized under an extent, by an agent of the crown, to whom a bidding is reserved by the conditions of sale, vitiates the sale. *Rex v. Marsh*, 3 Y. & J. 331.

Upon a sale of goods by auction, where the highest bidder is to be the purchaser, the secret employment of a puffer on behalf of the vendor is a fraudulent act, and vitiates the transaction. *Green v. Baverstock*, 14 C. B., N. S. 204; 32 L. J., C. P. 181; 10 Jur., N. S. 47; 8 L. T. 360.

Though a puffer ought not to be employed to screw up the price, or take advantage of the ignorance of other bidders, yet a progressive bidding to a fixed or reserved bidding by a person employed by the vendor, without the knowledge of the other bidders, will not necessarily be deemed to be taking an advantage of their ignorance. *Flint v. Woodin*, 9 Hare, 618; 16 Jur. 719.

Property was put up for sale by auction subject to the condition that the highest bidder should be the purchaser and without any express stipulation as to the reserved price. The vendors employed a puffer to bid at the auction, and the auctioneer also announced, on behalf of the vendors, other biddings which were fictitious. In a suit for specific performance against a bonâ fide bidder, to whom the property was knocked down:—Held, that the sale was invalid. *Mortimer v. Bell*, 1 L. R., Ch. 10; 35 L. J., Ch. 25; 11 Jur., N. S. 897; 13 L. T. 348; 14 W. R. 68.

Pleading.—In an action by vendor against purchaser for breach of contract in not completing the purchase of land sold by auction, and for non-payment of the purchase-money, a paragraph of the statement of defence alleged that the bidding at the auction was not bonâ fide, three of the biddings being made by a puffer:—Held, that although 30 & 31 Vict. c. 48, s. 3, defines the word "puffer" for the purposes of that statute, the term as used in the statement of defence was objectionable as conveying no definite legal signification, there being nothing in the statement of defence to shew that it was used in the meaning given to it by the statute. *Jones v. Quinn*, 2 Ir. L. R. 516.

In an action for not completing the purchase of a house, the purchaser cannot set up a defence that the sale was a sale by auction, and void on the ground of puffing, without pleading the fact. *Jecby v. Grew*, 6 C. & P. 671.

b. Conditions of Sale.

Notice of.—The conditions of a sale by auction, printed and pasted up under the auctioneer's box, where he declares that the conditions are as usual, is sufficient notice to purchasers of the conditions. *Mesnard v. Aldridge*, 3 Esp. 271.

Notice of Matter contained in Particulars.—When property is sold in lots, described in particulars of sale, a vendee is only affected with notice of what concerns the lots which he purchases, and is not to be taken as having read all the particulars of all the lots. *Curtis v. Thomas*, 33 L. T. 664.

Particulars—Description of Property.—A person purchased at a sale by auction for 2,500*l.* property which was described in the particulars of sale as an "immediate reversion in fee-simple." Shortly after signing the contract he

discovered that by the conditions of sale, which were produced for the first time and read aloud by the vendor's agent at the commencement of the sale, the purchaser was to take the property subject to the obligation of paying off mortgages for 2,500*l.*, the gross value of the reversion being under 5,000*l.*:—Held, that the description in the particulars of sale was an improper description, and the reading of the conditions of sale in the auction-room was not sufficient to convey to the purchaser a knowledge of the real facts; and that he was therefore entitled to have the contract rescinded. *Torrance v. Bolton*, 8 L. R., Ch. 118; 42 L. J., Ch. 177; 27 L. T. 738; 21 W. R. 134.

A public-house and premises put up for sale by auction were described in the particulars as in the occupation of certain persons at certain rents. The conditions stated that the property was sold "subject to existing tenancies." Certain brewers by their agent became the purchasers of the property of the auction. Shortly afterwards they discovered that the property was in lease to another brewer for a term of years, of which about nine remained unexpired. Thereupon they refused to complete their contract. In a suit against them by the vendor for specific performance:—Held, that there was a misdescription of the property, which precluded the vendor from enforcing the agreement, and that the purchasers had not constructive notice of the lease. *Caballero v. Henty*, 9 L. R., Ch. 447; 43 L. J., Ch. 635; 30 L. T. 314; 22 W. R. 446.

See also VENDOR AND PURCHASER.

Statements of Auctioneer, when Evidence.—The verbal declarations of an auctioneer at the time of the sale are not admissible to contradict the printed conditions. *Gunnis v. Erhart*, 1 H. Bl. 289. And see *Powell v. Edmunds*, 12 East, 6; *Slack v. Highgate Archway Company*, 5 Taunt. 792.

The printed particulars under which a sale by auction proceeds cannot be varied by parol evidence of the verbal statement of the auctioneer at the time of the sale, either as to the parcels or qualities of the subject-matter of sale. *Shelton v. Livius*, 2 C. & J. 411; 2 Tyr. 420.

It makes no difference that the question arises on a sub-sale of the same subject-matter by the purchaser. *Ib.*

In an action by an auctioneer to recover the price of an article under the value of 10*l.*, which was described in the written catalogue of sale as being of silver:—Held, that evidence was receivable to shew, that before the article was put up for sale, the auctioneer, without making any alteration in the catalogue, stated publicly from his box, in the hearing of the defendant, that the catalogue was incorrect, and that the article would only be sold as plated; subsequently to which, the defendant bid for it. *Eden v. Blake*, 13 M. & W. 614; 14 L. J., Ex. 194; 9 Jur. 213.

Where property was stated to be held under the C. estate upon three lives, and it appeared in an action to recover back the deposit, that one of the lives had dropped before the sale, and that the property was not held directly under the C. estate:—Held, that the defendant could not call the auctioneer to prove that he had stated before the sale that the life had dropped; but that he might give evidence to shew that before the sale the plaintiff had read the original

lease under which the property was held. *Bradshaw v. Bennett*, 5 C. & P. 48.

In August, 1878, the defendant Berridge offered for sale by public auction a lease of a public-house at Hampstead. By the conditions of sale it was provided that "the lease to be granted shall contain the covenants, clauses, and provisions, and be in the form or to the effect set forth in the draft lease which will be produced on the sale, and may be seen at the office of the auctioneers for seven days previous to the day of sale," and that "the property is presumed to be correctly described; but, as the premises may be viewed and the draft lease inspected at the office of the auctioneers, the purchaser shall be deemed to have bought with full knowledge of the contents thereof; and no error, misdescription, or omission in the particulars shall annul the sale, and no compensation shall be required for any such error, misdescription, or omission." There was no reference either in the conditions of sale or in the draft lease to the existence of any right of way from the garden of the public-house to Hampstead-heath; but, at the time of the sale, the auctioneer *bonâ fide*, but without any authority from Berridge, and acting entirely upon an inference drawn by himself from the appearance of the premises, and believing that there was a right of way through the same and over the private road and so to Hampstead-heath, stated publicly that there was such a way, and spoke of it as enhancing the value of the premises:—Held, that the evidence of what passed at the time of the sale was admissible as against the vendor; but that no action could after the completion or the purchase be maintained against him to recover compensation for this innocent misrepresentation by the auctioneer. *Brett v. Clouser*, 5 C. P. D. 376.

Construction.]—A. put goods up to auction, one of the conditions of the sale being, that the goods should be taken away at the buyer's expense, within fourteen days; in default of which the deposit to be forfeited, the goods to be resold, and the loss to be made good by the purchaser at the auction. B. bought the goods, and a bought-note was then entered into, with this clause, "Fourteen days for receiving and delivery:—" Held, that the meaning of the two contracts (the conditions of sale and the bought-note) was, that the fourteen days should be allowed to the purchaser only; and that the vendor should have been always ready to deliver them on request. *Hagedorn v. Laing*, 1 Marsh. 514; 6 Taunt. 162.

As to Clearing Lot.]—A condition that lots shall be cleared within three days is not a condition precedent to the right to claim delivery. *Wolfe v. Horne*, *post*, col. 990.

No Implied Condition as to Inspection.]—Upon a sale by auction of woollen and mercery goods, the catalogue contained 485 lots, each of which was described as containing a certain number of yards. The lots were open to public view two days before the sale. By the printed conditions of sale, the biddings were by the yard; the purchasers were to pay down immediately a deposit of 25l. per cent. in payment for each lot; the lots were to be taken away, with all faults, imperfections or errors of description, on the Saturday after the sale, and the remainder of the purchase-money was to be paid before the

delivery. All the small remnants were to be cleared at the measure stated in the catalogue:—Held, that the law would imply no condition on such a sale, that the purchasers should have a right, before paying the balance of the purchase-money, to inspect or measure the goods for the purpose of ascertaining whether they corresponded with the description in the catalogue. *Pettit v. Mitchell*, Car. & M. 424; 5 Scott, N. R. 721; 4 M. & G. 819; 12 L. J., C. P. 9; 6 Jur. 1016.

Held, also, that these conditions expressly negatived such right. *Id.*

A condition that lots are to be taken away with all faults, refers to quantity as well as quality. *Id.*

Sale by Sample—Irresponsibility of Vendors.]

—In pursuance of an advertisement which announced that "purchasers are required to examine bulk for themselves, as sellers accept no responsibility," a corn-broker on the plaintiff's instructions put up for sale a quantity of maize which was stored at a distance from the auction-room. One of the conditions of sale which were read at the commencement of the auction, but which the defendant was not clearly proved to have heard, and which were not referred to in the auctioneer's ledger, declared that the maize would be "sold as it now lies in store (sellers being irresponsible)." Small bags labelled "ex Emma Peasant" (that being the name of the vessel whose cargo the plaintiff had directed the broker to sell), and containing samples of sound maize, were exhibited at the auction; and the defendant, who had not inspected the bulk, became the purchaser, the biddings being signed by the auctioneer, under the heading in his ledger—which was not shewn to the defendant—"Sale of mixed maize, ex Emma Peasant, by order of the plaintiff's firm." There was no other evidence of a written contract:—Held, that the meaning of the condition as to the irresponsibility of the sellers was that they guaranteed the sample was taken, though not necessarily fairly taken, from the bulk to be sold, and that the heading in the auctioneer's ledger, not having been shewn to the defendant before the sale, could not bind him. *Megaw v. Molloy*, 2 Ir. L. R. 530—C. A.

Purchase after Auction.]—A. and his agent attended an auction for the sale of a house, at which certain conditions of sale were exhibited, and with which they became acquainted. A. afterwards, through his agent and the agent of the vendor, purchased the same house:—Held, that the conditions were not incorporated with the purchase, and therefore not binding on the purchaser. *Cowley v. Watts*, 22 L. J., Ch. 591; 17 Jur. 172.

Where Loss on Resale.]—Where goods are sold by auction subject to a condition, that, if the purchase-money is not paid on the following day, they may be resold, and the loss recovered from the bidder making default, and the right of resale is accordingly exercised, the deficiency cannot be recovered in an action for goods bargained and sold, as the effect of the reservation of the power of resale is to make the original sale conditional and not absolute. *Lamond v. Darall* or *Derralle*, 9 Q. B. 1030; 16 L. J., Q. B. 136; 11 Jur. 266.

Separate Lots.]—In an action for refusing to adhere to the conditions of sale, the plaintiff cannot consolidate contracts for the sale of separate lots. *James v. Shore*, 1 Stark, 426.

5. RIGHTS AND LIABILITIES OF AUCTIONEERS.

a. Duty and Liability.

As Bailee.]—An auctioneer is bound only to take due care of property sent to him for sale, the same as he would of his own goods; and is not liable for unavoidable accidents. *Maltby v. Christie*, 1 Esp. 340.

Extent of Authority.]—The owner may at any time before the contract is complete revoke the auctioneer's authority, but he does so at his peril; and if the auctioneer has contracted any liability in consequence of the employment and revocation, the auctioneer is entitled to be indemnified by the owner; but if an auctioneer, not having authority from the owner to sell property without reserve, undertakes to sell it without reserve, he is liable on his undertaking. *Warton v. Harrison*, 1 EL. & EL. 295; 29 L. J., Q. B. 14; 6 Jur., N. S. 66—Ex. Ch.

To Sell for True Owner.]—If a person, employed as an auctioneer in the sale of any property, has notice that what he is about to sell does not belong to his principal, and yet he continues to sell, he is personally liable for the produce of the sale. *Hardacre v. Stewart*, 5 Esp. 103.

— Sale after Notice from True Owner.]—Goods, the separate property of a married woman, were placed by her husband in a hired warehouse, and intrusted to auctioneers for the purpose of sale:—Held, that the auctioneers became possessed of the goods; so that on receipt of notice of the wife's claim before sale they were liable to the wife for the value of both the goods sold and goods not sold but afterwards removed by the husband. *Davis v. Artingtall*, 49 L. J., Ch. 609; 42 L. T. 507; 29 W. R. 137.

— Damages, Measure of.]—The plaintiff is entitled to the real value of the goods sold, and not merely to what they fetched at the auction, which sum could not be assumed to be the real value of the goods. *Id.*

Notice of Injunction—Proper Mode of Giving.]

—A London solicitor, who obtains an order from the Court of Bankruptcy in London restraining a sale under an execution in the country, ought, instead of telegraphing the order to the sheriff's officer, to telegraph it to a solicitor at the place, as his agent, asking him to give notice of it to the persons affected. *Langley, Ex parte, Smith, Ex parte, Bishop, In re*, 13 Ch. D. 110; 49 L. J., Bk. 1; 43 L. T. 181; 28 W. R. 174—C. A.

— Notice by Telegram.]—Sufficient notice of the granting of an injunction may be given by telegram; but, if it is sought to commit for contempt a person who, after receiving such a notice, disregards it, the court must decide upon the particular facts, whether he had in fact notice of the injunction, and it is the duty of those

who ask for the committal to prove this beyond reasonable doubt. *Id.*

— Committal of Person believing Telegram a Hoax.]—A person who has violated an injunction will not be committed for contempt when he swears that, though he had received notice of it by telegram, he bona fide believed that no injunction had been granted, and the circumstances shew that such belief was not unreasonable. *Id.*

— Duty of Sheriff's Officers receiving Telegram.]—It is the duty of the sheriff's officer who receives notice by telegram, purporting to be sent by solicitors in London, of an injunction being granted by the Court of Bankruptcy to restrain a sale in the country under an execution, to telegraph to the Court of Bankruptcy, or to the London agents of the sheriff, to ascertain whether an injunction has really been granted. *Id.*

This, however, is not the duty of the auctioneer who is conducting the sale; he is only bound to communicate with the sheriff's officer who has instructed him to sell. *Id.*

Duty of Auctioneer to pay Money into Court.]

—It is the duty of an auctioneer who is nominated to conduct a sale by the court, to pay any money received by him into court, at all events as between himself and the court. After certificate, the ordinary course of business is for the solicitors to receive the money from the auctioneer, and themselves pay it into court. *Biggs v. Bree*, 51 L. J., Ch. 263; 46 L. T. 8; 30 W. R. 278—C. A. Affirming 51 L. J., Ch. 64; 45 L. T. 648; 30 W. R. 132.

Liability for Non-Delivery.]—Auctioneers are not in the position of ordinary agents, but may be personally liable for non-delivery of goods, even though they sell for disclosed principals, and although a condition of sale, by which goods sold are to be cleared out by the purchaser within a given time, has not been complied with, at all events where such condition is not a condition precedent. *Wolfe v. Horne*, 2 Q. B. D. 355; 46 L. J., Q. B. 534; 36 L. T. 703; 25 W. R. 728.

In an action for the non-delivery of goods, it appeared that the defendants, who were auctioneers, issued printed catalogues, headed "Great Western Railway Company. Catalogue of unclaimed property, &c., which will be sold by auction by Messrs. H. & E., on Tuesday, November 7th, and following day. By order of the directors of the above company," &c. The catalogue contained the following conditions: "The lots to be cleared away within three days after the sale at the purchaser's expense, &c. If any deficiency shall arise, or from any cause the auctioneer shall be unable to deliver any lot or portion of a lot, then in such case the purchaser shall accept compensation. Upon failure of complying with the above conditions, the money deposited in part payment shall be forfeited. All lots unclaimed within the time aforesaid shall be resold by public or private sale without further notice, and the deficiency made good by the defaulter." The plaintiff attended the sale, received a catalogue, bought one of the lots, and paid a deposit. He did not fetch the goods away on Saturday (the last of the

three days for clearing), but went for them on the Monday following, when he was told by one of the defendants that the lot had been delivered to another person. There was evidence that the lot was seen on Saturday morning in the defendants' possession as if ready for delivery, and that it was usual to delay the delivery of large lots like it till the smaller lots had been delivered:—Held, first, that on the face of the catalogue and conditions, there was evidence that the defendants contracted personally with the plaintiff for the delivery of the goods purchased by him. *Ib.*

Held, secondly, that the condition as to clearing the lot within three days was not a condition precedent to the plaintiff's right to claim delivery. *Ib.*

Neglect to obtain Deposit.]—Auctioneers having put a ship up for sale, under conditions, that the highest bidder should immediately sign the contract and pay a deposit, or that the ship should be put up again, allowed the highest bidder, who was unknown to them, to go away without signing or paying a deposit. He could not be found, and the ship was sold by the owner for less than the pretended purchaser had bid, but also for less than the auctioneers could have obtained by private contract:—Held, that if the jury thought there had been a neglect of duty, but no real injury, they should find a verdict for the plaintiff with nominal damages. *Hibbert v. Bayley*, 2 F. & F. 48.

Does not Bind himself that Purchase shall be Completed.]—From the employment of an auctioneer for reward a contract is implied on his part to use due care and skill in the conduct of the sale; but from his acceptance of an agreement to conduct an auction no absolute contract is implied that he will bind the person, to whom a lot may be knocked down, to complete the purchase. *Kavanagh v. Cuthbert*, 9 Ir. R., C. L. 136.

Payment to avoid Distress after Sale.]—Two partners authorized an auctioneer to sell the effects of the partnership, and to hold the proceeds as stakeholder until they should join in directing him as to the disposition thereof. The sale took place under conditions, one of which was, "Each and all lots shall be taken to be delivered at the fall of the hammer, after which time they shall remain, and be at the exclusive risk of the purchaser, and the auctioneer shall not be called upon for compensation for any injury or loss sustained after that time." When the sale was over, but before the lots had been all removed, the landlord demanded rent from the auctioneer, who promised to pay it out of the proceeds of the sale, in order to avert the distress which the landlord threatened:—Held, in an action by the partner, who was entitled, according to the joint direction of both of them, to the whole proceeds, against the stakeholder, that the property in the goods sold had passed to the purchasers at the time of the promise to pay the rent, and therefore that the stakeholder was liable to the plaintiff for the amount he had so promised. *Sweeting v. Turner*, 7 L. R., Q. B. 310; 41 L. J., Q. B. 58; 25 L. T. 796; 20 W. R. 185.

Effect of Advertisement.]—An auctioneer ad-

vertised in the London papers that certain brewing materials, plant, and office furniture would be sold by him at Bury St. Edmunds on a certain day and two following days. A commission broker in London having a commission to buy the office furniture, went down to the sale: on the third day, on which the furniture was advertised for sale, all the lots of furniture were withdrawn. Upon which he brought an action against the auctioneer to recover for his loss of time and expenses:—Held, that he could not maintain the action; for that the advertising the sale was a mere declaration and did not amount to a contract with any one who might act upon it, nor to a warranty that all the articles advertised would be put up for sale. *Harris v. Nickerson*, 8 L. R., Q. B. 286; 42 L. J., Q. B. 171; 28 L. T. 410; 21 W. R. 635.

An auctioneer caused to be circulated handbills, announcing that on a certain day he would offer for peremptory sale by auction, by direction of the mortgagee, a house and shop. At the foot of the handbill was printed: "For further particulars, apply to Mr. H., solicitor, or the auctioneer." H. was the solicitor of the mortgagee, and the representations in the handbills were made by his authority, but the name of the mortgagee was not disclosed. At the sale the plaintiff made the highest bidding, except a bidding which, to the plaintiff's knowledge, was made by an agent, who bought in the property for the mortgagee:—Held, that there was no personal contract or undertaking by the auctioneer to the plaintiff that the property should be peremptorily sold. *Mainprice v. Westley*, 6 B. & S. 420; 34 L. J., Q. B. 229; 11 Jur., N. S. 975; 13 L. T. 560; 14 W. R. 9.

Price.]—An action does not lie against an auctioneer for selling a horse at the highest price bid for him, contrary to the owner's express directions not to let him go under a larger sum named. *Bexwell v. Christie*, Cowp. 395.

Otherwise, if the owner had directed the auctioneer to set the horse up at such a particular price, and not lower. *Ib.*

Where an auctioneer delivered goods without receiving the price from the purchasers:—Held, that he was liable to his employer for not giving an accurate account of the full produce of the goods. *Brown v. Staton*, 2 Chit. 353.

Rescinding Contract.]—An action against an auctioneer, for having rescinded a contract of sale contrary to his duty, may be supported by implication of law arising upon the facts of the employment of the auctioneer by the plaintiff, and his sale of the goods, without proof of an express contract on his part not to rescind the contract. *Nelson v. Aldridge*, 2 Stark. 435.

The plaintiff instructed the defendant to sell a horse for him, representing to the defendant that the horse was a useful horse, but that he was not to warrant it; the defendant sold the horse, and represented it as a useful horse; the purchaser afterwards rescinded the contract on the ground of fraud, and gave the defendant notice not to pay over the purchase-money to the plaintiff:—Held, that, on an action being brought by the plaintiff for the purchase-money, these facts afforded a good defence. *Sterens v. Leigh*, 2 C. L. R. 251.

Selling to Vendor.]—The last bona fide bidder

at an auction, which is advertised as a peremptory sale, has no remedy against the auctioneer for knocking the property down to a subsequent bid by the vendor's agent. *Mainprice v. Westley*, 6 B. & S. 420; 34 L. J., Q. B. 229; 11 Jur., N. S. 975; 13 L. T. 560; 14 W. R. 9.

Sheriff's Auctioneer—Title.]—To an action founded on the implied promise by a vendor of goods that his title to them was good, it is no defence that the vendor was a sheriff's auctioneer, and desired the plaintiff to give him a written notice not to pay over the proceeds, and that the plaintiff having omitted to give such notice, the defendant paid over. *Peto v. Blades*, 5 Taunt. 637.

Where Principal Undisclosed.]—An auctioneer selling without disclosing the name of his principal, is personally liable for performance of the contract of sale, though he afterwards offers to give the name of his employer. *Franklin v. Lamond*, 4 C. B. 637; 16 L. J., C. P. 221; 11 Jur. 780. See also *Hanson v. Roberdeau*, Peake, 163.

Warranties.]—When an auctioneer sells without disclosing the name of his principal, the character and extent of the contract he enters into with the purchaser depends upon the conditions of sale, upon what is said by the auctioneer at the time, upon the surrounding circumstances, and upon the nature of the subject-matter of the sale. Where an auctioneer sells by auction standing corn with the straw, for an unnamed principal, the price to be paid at once, and the crop to be removed immediately after it has arrived at maturity at the purchaser's expense, there is a contract by the auctioneer to give the purchaser all proper authority to enter upon the land, and to cut and carry away the corn and straw, but there is no actual warranty of the validity of the title of his principal to sell. *Wood v. Baxter*, 49 L. T. 45.

b. Parties to Action for Rescission.

Auctioneer a Defendant.]—The plaintiff, who had bought property at an auction and paid a deposit to the auctioneers, brought an action against the vendors and the auctioneers to have the contract rescinded, the deposit repaid with interest, the costs of the action paid, and for damages. The statement of claim alleged that all, or nearly all, of the biddings previous to that of the plaintiff were fictitious, and were either biddings by the vendors or their agents, or were announced by the auctioneer without any bidding having in fact been made. The auctioneers applied for liberty to pay the deposit into court, and to have the action dismissed against them on such payment being made. The Master of the Rolls made an order that, the vendors undertaking to pay the auctioneers their costs of the action without prejudice to how they should ultimately be borne, and to pay any interest and damages to which the plaintiff might be held entitled, and the auctioneers undertaking, in the event of the vendors not carrying out their undertaking, to pay to the plaintiff interest on the deposit up to the time of payment into court, and the costs of the action up to and including that application in the event of the court holding the plaintiff entitled to such interests and costs, the auctioneers should be at liberty to pay the

deposit into court, and that all further proceedings against them should be stayed. But held, on appeal, that the order must be discharged, the auctioneers not having submitted to give the plaintiff all the relief which he could in any event be entitled to against them; for that if the allegations in the statement of claim were established, the plaintiff would be entitled to have judgment against them for the deposit with interest, and to have an order for costs of the action against all the defendants. *Heatley v. Newton*, 19 Ch. D. 326; 51 L. J., Ch. 225; 45 L. T. 455; 30 W. R. 72—C. A.

If the auctioneer is asked by the purchaser, before action brought, whether he had instructions from the vendor to sell the entire of the premises sold by auction, or part only (and fails to answer), he must bear his own costs on being made a party to the action. *Dyas v. Stafford*, 7 L. R., Ir. 590.

Defendant in Specific Performance.]—Although it is the law that an auctioneer holding the deposit on a purchase may be made a defendant in an action for specific performance, yet, as a general rule, the proper practice is not to make him a defendant when the deposit is of small amount, unless he refuses to pay it into court when required; but where the deposit is of large amount, he may be properly made a defendant, unless he has paid it into court before action brought. *Egmont (Earl) v. Smith*, *Smith v. Egmont (Earl)*, 6 Ch. D. 469; 46 L. J., Ch. 356.

c. Liability for Deposit and Expenses.

As Stakeholder.]—Where an auctioneer sells an estate by public auction, and receives a deposit, it is his duty, as the agent of both vendor and purchaser, to retain the deposit until the sale is complete, and it is ascertained to whom the money belongs. *Gray v. Gutteridge*, 1 M. & Rob. 614; 3 C. & P. 40. And see *Spittle v. Lavender*, 5 Moore, 270; 2 B. & B. 452.

Action by Vendee.]—An auctioneer is liable to an action by the bidder for a return of the deposit. *Burrough v. Skinner*, 5 Burr. 2639.

Non-disclosure of Principal.]—And where he does not disclose the name of his principal at the time of the sale, he is personally liable to an action for any damages which the vendee may have sustained by the non-completion of the contract. *Hanson v. Roberdeau*, Peake, 163; and *Franklin v. Lamond*, 4 C. B. 637; 16 L. J., C. P. 221.

Interest.]—An auctioneer, who, as agent for the vendor, agrees to sell an estate upon the terms contained in the conditions of sale, by which the purchaser is to pay down immediately a deposit, and the auction duty and the residue of the purchase-money upon a day certain, on having a good title, and the vendor is to prepare and deliver to the purchaser an abstract of title, is not, upon a failure of the contract in consequence of a defective title, personally responsible for interest upon the deposit and auction duty, unless the money is demanded or notice is given to him that the contract has been rescinded. *Gaby v. Driver*, 2 Y. & J. 549. But see *Curling v. Shuttleworth*, 6 Bing. 121.

Where the purchaser of an estate by public

auction deposited a sum with the auctioneer as part of the purchase-money, until the vendor made out a good title according to the conditions of sale:—Held, that the auctioneer was not liable for interest, although nearly four years had elapsed from the time of the sale; on the ground that no demand had been made on him for the repayment of the deposit. *Lee v. Munn*, 1 Moore, 481; 8 Taunt. 45.

— **Recovery of Costs of Defence.**—Where an auctioneer has sold an estate, the title of which is objected to, and, upon refusing to return the deposit, an action is brought, in which he afterwards pays the costs, the auctioneer cannot recover these costs against the principal in an action for money paid to his use; he must declare specially. *Spurrier v. Elderton*, 5 Esp. 1.

— **Award—Refusal to make Title.**—Where premises were put up for sale, under an award made in an arbitration between A., B. and others, and A. became a purchaser, and no good title could be made in consequence of B. refusing to do certain acts:—Held, that as A. was a purchaser in his own right, and upon a new contract, A. could maintain an action for the deposit-money against the auctioneer, without giving him any notice. *Duncombe v. Cafe*, 2 M. & W. 244.

— **Objections to Title.**—In an action against an auctioneer to recover the amount of a deposit on the sale of an estate, the defendant (after an abstract had been delivered) is entitled, as a matter of course, to a statement in writing from the plaintiff of the objections of fact to the title on which he relies; but he is not entitled to a statement of objections of law. *Roberts v. Rowlands*, 3 M. & W. 543; 6 D. P. C. 553.

— **Making Vendor Party.**—An auctioneer was employed to sell land by auction; the purchaser of a lot paid a deposit, but not being satisfied with the title, refused to complete the purchase, and sued the auctioneer for the deposit; the vendor gave the defendant notice to hold the money for her, as forfeited. The defendant applied to have the vendor made defendant. The court, the solvency of the vendor appearing doubtful, made the rule absolute on the money being brought into court, and security for costs being given to the plaintiff, but refused to order that the costs of the original defendant should be paid out of the money. *Deller v. Prickett*, 15 Q. B. 1081; 20 L. J., Q. B. 151; 15 Jur. 168.

— **What Expenses Allowed.**—In an action of trover by assignees of a bankrupt against an auctioneer who sold the bankrupt's property, the auctioneer should be allowed any sum that he has paid for rent, and also a reasonable sum for the expenses of the sale, but not any part of the expenses of removing the goods from the premises. *Grimshaw v. Atterwell*, 8 C. & P. 6.

— **Auctioneer Recovering Moneys from Principal without Title.**—Where the plaintiff, an auctioneer, sold goods under order of the defendant, who had no right to dispose of them, and the true owner afterwards recovered against the plaintiff; a declaration, which alleged that

the defendant, being possessed of the goods, represented to the plaintiff that he was entitled to dispose of them; that the plaintiff in consequence, at the defendant's request, sold them by auction, and, after deducting the charges for his trouble, paid the residue of the proceeds to the defendant; that the defendant deceived the plaintiff in this, that he was not at the time of the sale entitled to dispose of the goods; that the true owner afterwards recovered the value of the plaintiff, and that the defendant refused to reimburse him:—Held, sufficient after verdict. *Adamson v. Jarvis*, 4 Bing. 66; 12 Moore, 241.

— **Solicitor—Knowledge of Defective Title.**—An auctioneer receiving money as a deposit on the sale of an estate by auction, knowing that there is a defect in the vendor's title, is answerable to the purchaser for the deposit, though he may have paid it over to the vendor. *Edwards v. Hodding*, 1 Marsh. 377; 5 Taunt. 815.

An attorney, who was also an auctioneer, received a deposit on property which he had sold by auction, and after queries raised on the titles, and before they were cleared, paid over the deposit to his principal; on a demand of the deposit by the buyer, he answered that his principal would not consent to return it, and would enforce the contract:—Held, that the buyer might recover the deposit from the auctioneer; first, because he, as an attorney, had notice that the title had not been completed before he had paid over the money; and secondly, because he misled the plaintiff to sue, by not saying he had paid it over. *Ib.*

— **Agency.**—A solicitor was employed for the vendor of real estate. By the conditions of sale the deposit was to be paid into his hands "as agent for the vendor," and he signed the contract of sale and receipt for the deposit as such agent:—Held, that he was not a stakeholder, and was liable to pay over the deposit to the vendor on demand, and in default to pay interest from the time of such demand. *Edgell v. Day*, 1 L. R., C. P. 80; 35 L. J., C. P. 7; 12 Jur., N. S. 27; 13 L. T. 328; 14 W. R. 87; 1 H. & R. 8.

d. Authority.

— **Not to Warrant.**—An auctioneer intrusted with goods for sale by public auction has no implied authority from the vendor to warrant them. *Payne v. Leconfield (Lord)*, 51 L. J., Q. B. 642; 30 W. R. 814.

— **To Sell his own Property.**—Though the auctioneer at a sale by auction is the agent of the purchaser, yet he is not his agent for all purposes, and there is no reason why he may not sell property of which he is himself the owner. *Flint v. Woodin*, 9 Hare, 618; 16 Jur. 719.

— **Revoking.**—An authority given to an auctioneer to sell may be revoked by the vendor at any time before the sale, and such revocation is valid against parties dealing without knowledge of it. *Manser v. Back*, 6 Hare, 443; *S. P.*, *Warton v. Harrison*, ante, col. 989.

— **What Contract.**—An auctioneer has no authority to sign a vendor's name to any but the

real contract. *Megaw v. Molloy*, 2 Ir. L. R. 530—C. A.

Custom.—On an employment of an auctioneer to sell by auction there is no employment to sell by private contract if the public sale proves abortive, and evidence of a custom to that effect among auctioneers is inadmissible. *Marsh v. Jelf*, 3 F. & F. 234.

Interest.—An auctioneer, employed to sell goods by auction, has not such an interest as will make the licence to enter the premises for that purpose irrevocable. *Taplin v. Florence*, 10 C. B. 744.

An auctioneer put into possession of fixtures attached to the freehold for the purpose of selling them, the purchaser being bound to detach and remove them, has not such a possession as will support trespass de bonis asportatis for their wrongful removal. *Davis v. Danks*, 3 Ex. 435; 18 L. J., Ex. 213.

Distress.—Goods are privileged from distress during the time they are on the premises of an auctioneer for the purpose of sale by auction. *Williams v. Holmes*, 8 Ex. 861; 22 L. J., Ex. 283.

Although the place of sale is merely hired for the occasion, or the occupation has been acquired by the auctioneer by an act of trespass. *Brown v. Arundell*, 10 C. B. 64; 20 L. J., C. P. 137; 15 Jur. 402.

Not to Sell on Credit.—The plaintiff having employed an auctioneer to sell timber growing on his estate, the following conditions were read at the sale in the presence of the defendant:—"That each purchaser should pay down a deposit of 10l. per cent. in part of the purchase-money, and pay the remainder on or before the 17th August; but in case any purchaser should prefer to pay the whole amount of his purchase-money at an earlier period, discount after the rate of 5l. per cent. will be allowed." Also, "That each purchaser shall enter into a proper agreement and bond, if required, with such one, two, or more sureties, as shall be approved by the vendor or his agent for the performance of his agreement, pursuant to the above conditions." The defendant became the purchaser of one lot, and paid the deposit. Some days after the sale, which was on the 14th February, the defendant, at the auctioneer's request, drew a bill of exchange for the residue of the purchase-money, dated on the day of the sale, on M., payable six months after date to his own order, and indorsed it to the auctioneer, who, being in difficulties, indorsed it to a third person, to whom he was indebted on his own account. The bill became due on the 17th August, when the amount of it was duly paid to the holder. It was never transferred to the plaintiff:—Held, that, under these circumstances, the delivery and payment of the bill of exchange was not a valid payment of the residue of the purchase-money for the timber purchased by the defendant, the auctioneer having no authority to receive payment of such residue, or to take any security for the payment of it; but that, even if he was authorized by the conditions to receive payment, the payment required was a payment in cash, and he had no authority to take a bill of exchange. *Sykes v. Giles*, 5 M. & W. 645.

An auctioneer was employed to sell some furniture, and was desired to sell it for ready money only. He, however, sold the furniture to M. on his giving a bill of exchange for the amount, drawn by himself, upon, and accepted by D. The owner of the furniture afterwards applied for payment of the amount of the sale, and the bill, though at first refused to be taken by him, was ultimately taken by his agent, in order to get it discounted. The bill never was presented, nor was any notice of dishonour given either to M. or to the auctioneer, until ten days after the bill had become due. In an action against the auctioneer for negligence, in selling the furniture otherwise than for ready money, the jury having found that the plaintiff had not accepted the bill in satisfaction for the furniture:—Held, that his negligence in not presenting the bill, and not giving notice of dishonour, by which M. was discharged from any liability on the bill, was no answer to the action. *Ferrars (Earl) v. Robins*, 2 C., M. & R. 152; 1 Gale, 70; 5 Tyr. 705.

An auctioneer, having authority to sell goods and receive payment for them, took, as cash, in part payment of goods sold, a bill of exchange, which was duly honoured; before the bill matured, the authority of the auctioneer to receive payment was revoked. In an action by the vendor against the purchaser:—Held, that he was entitled to recover the price of the goods for which the bill was given, as the auctioneer had no general or special authority to give credit to a purchaser at the sale. *Williams v. Evans*, 1 L. R., Q. B. 352; 35 L. J., Q. B. 111; 13 L. T. 753; 14 W. R. 330.

e. Commission.

Sale Conducted by Mortgagee.—An auctioneer took an absolute assignment of chattels, &c., under a bill of sale by way of mortgage, and afterwards conducted the sale of them by auction under an agreement with another incumbrancer:—Held, that he was entitled to charge the usual commission on such sale, although no provision for a commission had been made either in the bill of sale or in the agreement. *Miller v. Beale*, 27 W. R. 403.

When Negligent.—If an auctioneer employed to sell an estate is guilty of negligence, whereby the sale becomes nugatory, he is not entitled to recover any compensation for his services from the vendor. *Dewen v. Daverell*, 3 Camp. 451.

How Calculated.—Where it was agreed that an auctioneer should receive a certain amount of commission, in case a sale of an estate should be effected "within two months" of a given day:—Held, that the term "months" prima facie meant lunar months, and that the subsequent conduct of the parties could not be regarded to shew that the term meant calendar months. *Simpson v. Margitson*, 11 Q. B. 23; 17 L. J., Q. B. 81.

An auctioneer is not entitled to an allowance of a percentage of seven and a half on the price, except on the ground of a private agreement. *Malby v. Christie*, 1 Esp. 340.

In Hands of Stakeholder.—Where the plaintiff employed an auctioneer to sell an estate, and disputed the sum charged by him for his expenses, when it was agreed that the amount

should be deposited with the defendant, until it should be ascertained whether the auctioneer was entitled to the whole of his demand or not, and the defendant paid it over to the auctioneer on receiving his indemnity, without the knowledge or concurrence of the plaintiff:—Held, that the latter was entitled to recover it back. *Cooling v. Beechum*, 7 Moore, 465.

Causa causans of Sale.—The rule is well established, that where an auctioneer intrusted with the sale of an estate is the *causa causans* of the sale (as by advertising and putting up the estate for sale by auction, which the purchaser afterwards attended), he is entitled to his commission, even though before the actual sale the vendor withdrew the property from sale by him. *Green v. Bartlett*, 14 C. B., N. S. 681; 32 L. J., C. P. 261; 8 L. T. 503; 11 W. R. 834.

In the absence of an express contract, auctioneers are entitled to reasonable remuneration for sales by private contract, effected through their instrumentality, even although by the act or default of the vendor the contract is rescinded; and it is for the jury whether the same commission as on sales by auction is reasonable; and semble, that, apart from express contract, they would be entitled to the expenses of abortive attempts at sale; but it would not be reasonable that the auctioneer should charge not only expenses and a fixed fee, but also commission. *Clark v. Smythies*, 2 F. & F. 83.

When Interested.—An agent, employed to sell land, sold it to a company in which he was interested as a shareholder and a director:—Held, that he was entitled to no commission from his employer in respect of the sale. *Salomans v. Pender*, 3 H. & C. 639; 34 L. J., Ex. 95; 11 Jur., N. S. 432; 12 L. T. 267; 13 W. R. 637.

On Sale of Land.—Leasehold premises were sold by public auction, upon a condition of sale, "that the purchaser shall pay 2½ per cent. auctioneer's fees." The declaration of sale was signed by the auctioneer, who was employed by the vendor, and the agreement of sale by the respective agents of the vendor and the purchaser, the conditions of sale being incorporated with both documents:—Held, that the auctioneer could not recover his fees from the purchaser on a count for work and labour, nor on the special contract, inasmuch as he was not a party to it and no consideration moved from him, and inasmuch as the only contract to pay the fees was between the vendor and the purchaser. *Cherry v. Anderson*, 10 Ir. R., C. L. 204.

2. Right to Sue for Price.

Absolute.—An auctioneer employed to sell the goods of a third person by auction may maintain an action for goods sold and delivered against a buyer, though the sale was at the house of such third person, and the goods were known to be his property. *Williams v. Millington*, 1 H. Bl. 81.

Broker otherwise.—A broker has no interest in the subject of a contract which gives him a right to sue or renders him liable to be sued; he thus differs from a factor or an auctioneer. *Fairlie v. Fenton*, 5 L. R., Ex. 169; 39 L. J., Ex. 107; 22 L. T. 373; 18 W. R. 700.

On Sale of Land.—Upon a sale of real estate, the auctioneer has no such right to sue in his own name, as he has on a sale of goods, arising from his qualified property in them; while on a sale of real estate, the right to sue depends on the written contract alone. *Cherry v. Anderson, supra*.

Where Settlement between Principals.—In an action for the price of goods sold and delivered by an auctioneer, whose charges in respect of the goods have been before action satisfied by his principal, an agreement before sale between the buyer and the principal that the buyer should bid at the auction and should receive the goods for which he should be the highest bidder, in payment of a debt due to him from the principal, is a good defence to the action, although the auctioneer had no notice of this agreement at the time of the sale, and gave up the goods to the buyer on the faith of his paying for them, if he on his part *bonâ fide* supposed that he was receiving the goods under the agreement. And the additional fact that the auctioneer has before action, but after notice of the agreement, paid to his principal on demand the price of the goods, gives him no right to sue the buyer, as he cannot by such payment prejudice the buyer's rights. *Grice v. Kenrick*, 5 L. R., Q. B. 340; 39 L. J., Q. B. 175; 22 L. T. 743; 18 W. R. 1155.

Goods belonging partly to A. and partly to B. were put up to auction at A.'s house, having been entered at the Excise in A.'s name, and the catalogue stating them to be all the property of A.; C., being the holder of an acceptance of A., purchased several of the articles, without being informed that part of them was the property of B., and settled with A. for the amount:—Held, that the payment to A. was good, and that the auctioneer having suffered C. to take away the goods without giving him notice not to pay to A., was precluded from recovering from C. the value either of the goods which had been the property of A., or of those which had been the property of B. *Coppin v. Walker*, 2 Marsh. 497; 7 Taunt. 237.

So, though there had been no actual settlement, the purchaser was entitled to set off a debt due to him from A. *Coppin v. Craig*, 2 Marsh. 501; 7 Taunt. 243.

An auctioneer may bring an action in his own name for the price of goods sold by him as auctioneer, and delivered to the purchaser; and a plea alleging that the goods were sold by the plaintiff as an auctioneer, agent and trustee for A. to the defendant, and that after the sale and before action the defendant paid A. the price of the goods, is no answer. *Robinson v. Rutter*, 4 El. & Bl. 954; 24 L. J., Q. B. 250; 1 Jur., N. S. 823.

An auctioneer, employed by a supposed executrix, sold goods of the testator, but before payment the real executrix claimed the money from the buyer:—Held, that the auctioneer could not afterwards maintain an action against the buyer, though the latter had expressly promised to pay on being allowed to take away the goods, which he did. *Dickenson v. Naul*, 4 B. & Ad. 638.

Whether an auctioneer is the agent of both purchaser and seller, depends upon the facts of the particular case. Therefore, where a party to whom money was due from the owner of goods sold by auction, agreed with the owner, before the auction, that the goods which he might purchase should be set against the debt, and became the purchaser of goods, and was entered as such

by the auctioneer:—Held, that he was not bound by the printed condition of sale, which specified that purchasers should pay a part of the price at the time of the sale, and the rest on delivery. *Bartlett v. Purnell*, 4 A. & E. 792; 6 N. & M. 299; 2 H. & W. 19.

Garnishee.]—A garnishee was an auctioneer; P. sent him goods for sale, for ready money, not to be removed until payment. The auctioneer sold them on those terms, stated in the conditions of sale, and received part of the price from some of the purchasers; but H., who had purchased part, took them away without payment, and without the consent of the auctioneer or of P. H. refused to pay, offering to set off a debt due to him from P; this was declined. H. having recovered judgment against P., obtained an order to attach the price of the goods remaining in the auctioneer's hands, which was served on the garnishee. On the same day, but after the service, P. became bankrupt. His assignees claimed the money from the garnishee, and also demanded payment from H. of the price of the goods taken away by him:—Held, that the effect of s. 2 of the 17 & 18 Vict. c. 125, was, that the service bound the debt, so as to render the judgment creditor a creditor having security for his debt, within s. 184 of the Bankrupt Act (12 & 13 Vict. c. 106), but did not give a lien, so as to bring him within the exception in that section; and, consequently, that the judgment creditor could not prevail against the assignees. *Holmes v. Tutton*, 5 El. & Bl. 65; 24 L. J., Q. B. 346; 1 Jur., N. S. 975.

Held, also, that if the auctioneer should sue H. in his own name, *ex contractu*, for the goods sold, H. would have a defence by a plea in the nature of set-off; or at least by way of equitable defence. Or, if the assignees sued on the contract, he would have a defence by way of mutual credit; but that the assignees might recover in trover, to which H. would have no defence. *Id.*

With whom Contract.]—A corporation to whom certain open land belonged, was in the practice of allowing annual races to be held upon part of it, under the management of a committee. Before the races, an auctioneer issued an advertisement—"Oxford Races. The ground for booths will be let by auction by Mr. J. F. on Monday next. Conditions for letting standings for booths.—The highest bidder to be the taker, and he shall, immediately the lot is knocked down, give the number of feet required, and pay for the same immediately after the letting." The defendant was the highest bidder for a lot of the land, and took possession of and occupied it during the races, without having previously paid for it. The auctioneer having brought an action in his own name for the hire of the land:—Held, that there was evidence on which a jury might find the contract was with the auctioneer himself. *Fisher v. Marsh*, 6 B. & S. 411; 34 L. J., Q. B. 177; 11 Jur., N. S. 795; 12 L. T. 604; 13 W. R. 834.

SALMON.

See FISH AND FISHERY.

SALVAGE.

See SHIPPING.

SANITARY LAW.

See HEALTH.

SATISFACTION.

I. BY WAY OF ACCORD.—See ACCORD AND SATISFACTION.

II. OF JUDGMENTS.—See JUDGMENT.

III. IN OTHER CASES.—See PAYMENT.

SAVINGS BANKS.

See BANKERS AND BANKING COMPANIES.

SCHOOL AND SCHOOL BOARD.

I. SCHOOLS.

1. *Generally.*
2. *Masters of*, 1005.
3. *Reformatory.*—See PRISON.

II. SCHOOL BOARD, 1011.

I. SCHOOLS.

1. GENERALLY.

Public—Power to Dismiss Head Master.]—The governing body of a school constituted under the Public Schools Act, 1868, has, under s. 13, absolute power to dismiss the head master of the school at its pleasure, that is, without assigning any reason; and so long as this power is fairly and honestly exercised the Court of Chancery cannot interfere. *Hayman v. Rugby School (Governors)*, 18 L. R., Eq. 28; 43 L. J., Ch. 834; 30 L. T. 217; 22 W. R. 587.

They may do so, moreover, although the head master received his appointment from a prior governing body in existence before the passing of the act, whose powers of dismissal were subject to restrictions as to time and place of exercise. *Id.*

Endowed—Trust.]—Building a school-house and educating poor children is within the meaning of a trust for the "relief of the poor." *Wilkinson v. Malin*, 2 C. & J. 636; 2 Tyr. 544.

Where by an ancient deed, tempore Hen. 6, land was conveyed to the persons therein named, and their heirs, in trust to apply the yearly profits to several public objects in a particular parish, and to the relief of the poor therein:—Held, that the whole or part of them might be applied to building a school-house, and educating the poor children of that parish. *Ib.*

— **Powers of Commissioners.**—The Endowed Schools Commissioners have power to inquire into the endowment of exhibitions at a college in a university, whenever they are restricted to a school or a district. *Meyricke Fund, In re*, 13 L. R., Eq. 269; 41 L. J., Ch. 187; 25 L. T. 787; 20 W. R. 258. Affirmed, 7 L. R., Ch. 500; 41 L. J., Ch. 553; 26 L. T. 596; 20 W. R. 715.

Wales is a district within the meaning of the Endowed Schools Act. *Ib.*

A direction in a deed of foundation that certain persons may be or continue at the school thereby founded after the age of manhood, does not make the endowment or any part of it less an educational endowment within the Endowed Schools Act, 1869 (32 & 33 Vict. c. 56), ss. 5, 24, than it would have been if no such privilege had been granted to those persons; the whole endowment being applicable "for the purpose of the education at school of boys or girls," and no part of it being applicable or applied to any "other charitable use." *Hodgson's School, In re*, 3 App. Cas. 857; 47 L. J., P. C. 101; 38 L. T. 790.

Sect. 19 prevents the commissioners from making particular religious opinions more or less necessary than they were before to qualify generally for the office of governor under the scheme. It does not prohibit them from making the office of the rector of a parish a qualification for a place on the governing body of a Church of England school. *Ib.*

It is not ultra vires the Charity Commissioners under s. 23 to provide in a scheme a species of visitatorial jurisdiction sufficient to indemnify the governors and to bind the objects of the charity in reference to proceedings under the scheme. *Ib.*

Scheme remitted to the Charity Commissioners, inasmuch as sufficient provision had not been made therein to satisfy existing educational interests according to the requirements of s. 11. *Ib.*

— **Vested Interest.**—The inhabitants and ratepayers of a parish having a right under a founder's deed to have their children taught free of expense in a school, but having no child whose status is injured by a scheme, have not a vested interest within s. 39 of the Endowed Schools Act, 1869. *Shafter's Charity*, 3 App. Cas. 872; 47 L. J., P. C. 98; 38 L. T. 793.

The Endowed Schools Act, 1869, by s. 13, provides that it shall be the duty of the commissioners to provide, in any scheme, for saving or making due compensation for such interest as any teacher or officer in any endowed school, appointed to his office before the passing of the Endowed Schools Act, 1868, may have. C. was appointed master of an endowed school before 1868. He held his office at the will of a majority of the governors of his school. After the passing of the Act of 1869 a scheme was adopted under the act, by which his office was injuriously

affected:—Held, that he had a vested interest in his office within the meaning of this act, and was therefore entitled to compensation. *Carver v. Allyn's College, Dulwich*, 1 App. Cas. 68; 45 L. J., P. C. 28.

— **Jurisdiction of Chancery.**—If the Endowed Schools Commissioners have not made a declaration under the Endowed Schools Act, 1869 (32 & 33 Vict. c. 56), s. 30, that it is desirable to apply, for the advancement of education, the income of a charitable endowment not previously applicable to education, the mere pendency of a scheme before the commissioners is no reason why the Court of Chancery should not exercise its jurisdiction to settle a scheme for the management of the charity; but the governing body of the charity ought to have an opportunity of proposing their own scheme in chambers, in opposition to the scheme of the attorney-general. *Prison Charities, In re, Christ's Hospital (Governors), Ex parte*, 8 L. R., Ch. 199; 42 L. J., Ch. 391; 28 L. T. 84; 21 W. R. 213.

Industrial—Liability to Poor Rates.—An industrial school, certified by the Secretary of State under the Industrial Schools Act, 1866 (29 & 30 Vict. c. 118), s. 7, and to which the Treasury contributes under s. 35, is liable to be rated for the relief of the poor. *Reg. v. West Derby (Overseers)*, 10 L. R., Q. B. 283; 44 L. J., M. C. 98; 32 L. T. 400.

— **Child Living in House resided in by Prostitutes.**—A child under fourteen who lives with and under the guardianship of her mother in "a house resided in by prostitutes," may be ordered to be sent to an industrial school under 29 & 30 Vict. c. 118, s. 14, although there is no evidence of any act of prostitution on the part of the mother. *Hiscocks v. Jermonson or Jermonson, In re*, 10 Q. B. D. 360; 52 L. J., M. C. 42; 48 L. T. 225; 31 W. R. 656; 47 J. P. 183.

Sunday Schools.—Under 32 & 33 Vict. c. 40, s. 1, which enacts that every authority having power to impose rates, "may exempt" a building used as a Sunday or ragged school from any rate, the rating authority has a discretion whether it will or will not exempt such a building. *Bell v. Crane*, 8 L. R., Q. B. 481; 42 L. J., M. C. 122; 29 L. T. 207; 21 W. R. 911.

Scheme of Charity Commissioners—Bequest for Educational Purposes.—A sum of money was given by a testatrix in 1643 to be laid out in the purchase of lands of the annual value of 10*l.*, one-half to be applied towards the better relief of the most poor and needy people of good life and conversation in the parish of K., to be paid to them half-yearly in the church or the porch thereof; and the other half to apprentice one poor boy or more of the parish. At that time K. was a small village, but it had now increased to a large and wealthy town, and the income of the charity estate had increased to more than 2,000*l.* The Charity Commissioners settled a scheme by which they appropriated the income to the following objects: (a) The relief of poor deserving objects of the parish in case of sudden accident, sickness or distress. (b) Subscriptions to dispensaries and hospitals in the parish. (c) Annuities for deserving and necessitous persons who

had resided seven years in the parish. (d) The advancement of the education of children attending elementary schools. (e) Premiums for apprenticeship and outfits for poor boys of the parish. (f) Payments to encourage the continuance of scholars at public elementary schools above the age of eleven years. (g) Exhibitions at higher places of education. (h) Providing lectures and evening classes. Some of the parishioners objected to the application of the income to educational purposes:—Held, that, considering the enormous increase of the income of the charity and of the population of the parish, and the change of the circumstances and habits of the people, the application of the income of the charity *cy-près* to educational and other charitable purposes was justifiable, and that the scheme of the Charity Commissioners ought to be confirmed. A long-continued unauthorized *cy-près* application of charity funds by the trustees is no ground of objection to a scheme of the Charity Commissioners directing a different *cy-près* application. *Campden Charities, In re*, 18 Ch. D. 310; 50 L. J., Ch. 646; 45 L. T. 152—C. A. See also *Hodgson's School, In re, ante*, col. 1003, and cases under CHARITY.

2. MASTERS OF.

Appointment.]—Masters of grammar schools must be licensed by the ordinary, who may examine the party applying for a licence as to his learning, morality, and religion; it is a good return to a mandamus (to the ordinary to grant such a licence) to state that he had suspended granting his licence until the party would submit himself to be examined, touching his sufficiency in learning. *Rex v. York (Archbishop)*, 6 T. R. 490.

A power to appoint a schoolmaster to an ancient foundation given to the vicar and churchwardens (of whom there were eleven), and, in case of their neglect in appointing, then to devolve to two corporate bodies in succession, and to result in the dernier ressort, to the same vicar and churchwardens, to whom also the general power of managing the trust was committed, is well executed by the vicar and a majority of the churchwardens, especially if such an election is supported by usage. *Withnell v. Gartham*, 6 T. R. 388.

— Alienation of Right of.]—A grammar school was founded and endowed by virtue of letters-patent, which ordained that the school should be altogether in the patronage and disposition of the founder and his heirs, by whom the schoolmasters and guardians should be nominated for ever:—Held, that such right of nomination might lawfully be aliened. *Att.-Gen. v. Brentwood School*, 3 B. & Ad. 59.

— Need not be in Writing.]—An appointment to the situation of a schoolmaster, under a conveyance to charitable uses, may be made without writing. *Wilkinson v. Malin*, 2 Tyr. 544; 2 C. & J. 636.

Power and Duty of.]—An action will lie against a schoolmaster who permits an infant pupil under his care to make use of fireworks, and he is responsible for the mischief which ensues. *King v. Ford*, 1 Stark. 421.

— To expel Boy.]—Although the master

of a school has the same authority over the scholars as the parents would have, and therefore may impose reasonable restraints upon their persons, either by way of prevention or punishment of disorderly conduct, yet he has not a discretionary power of expulsion, but only for reasonable cause. In judging of the cause, however, great regard must be had to his necessary discretion, as to the enforcement of discipline, and the wilful breach of its reasonable rules may be sufficient cause, and the repetition of acts of disobedience, each in itself separately insufficient, may be sufficient, as shewing a persistent disregard of discipline, and a habit of disobedience. But if the expulsion is justified on the ground of some particular act or conduct, not only as likely to be seriously injurious to the peace and good order of the establishment, but as committed with that object, it must appear that it was of that character, or the justification would fail. *Fitzgerald v. Northcote*, 4 F. & F. 656.

Dismissal of.]—The governing body of a school constituted under the Public Schools Act, 1868, has, under s. 13, absolute power to dismiss the head master of the school at its pleasure, that is, without assigning any reason; and so long as this power is fairly and honestly exercised the Court of Chancery cannot interfere. *Hayman v. Rugby School (Governors)*, 18 L. R., Eq. 28; 43 L. J., Ch. 834; 30 L. T. 217; 22 W. R. 587.

They may do so, moreover, although the head master received his appointment from a prior governing body in existence before the passing of the act, whose powers of dismissal were subject to restrictions as to time and place of exercise. *Ib.*

Queen Elizabeth founded and endowed a grammar-school, and incorporated certain persons and their successors as governors, and granted to them, for ever, full power and authority, from time to time, of electing, nominating and appointing a master and usher of the school, so often as to them and their successors, or the major part of them, occasion their moving thereto, should appear, and of removing the master or usher from the school according to their sound discretion, and of placing or appointing other or others, more fit, in their stead or steads:—Held, that by the terms of the charter the governors might, in their discretion, remove a master without summons or hearing, and although no charge against him had been exhibited to them. *Reg. v. Darlington School (Governors)*, 6 Q. B. 682; 14 L. J., Q. B. 67; 9 Jur. 21—Ex. Ch.

The governors were empowered to make bye-laws, and they made a bye-law requiring certain qualifications in the master, and ordaining (for the encouragement of well-qualified persons to accept the office) that no master should thereafter be displaced, removed or removable from the office, unless some sufficient cause of complaint should be exhibited in writing against such master, and signed by the governors or their successors, and the same cause of complaint be first allowed of and declared by them to be a sufficient cause:—Held, that the governors had no right thus to limit the discretion given by the charter, and that the bye-law was void. *Ib.*

By a scheme for the management of Edward the Sixth's Grammar-school at Ludlow, confirmed by the lord chancellor. it was declared

that the trustees should have authority, upon such grounds as they should at their discretion, in the due exercise and execution of the powers and trusts reposed in them, deem just, from time to time to remove the master, usher, &c., from his office, subject, however, to certain formalities being observed:—Held, that these words conferred an absolute discretionary power upon the trustees, provided the formalities specified were followed, and that they were not bound to summon the master before them, or to give him any hearing or opportunity of defending himself against the charges which formed the ground of his removal. *Doe d. Childre v. Wills*, 5 Ex. 891; 20 L. J., Ex. 85.

The neglecting of scholars would be a good ground of removal. *Doe d. Coyle v. Cole*, 6 C. & P. 359.

A schoolmaster, elected by a majority of the trustees of a public charity at a meeting of the body, cannot be dismissed except at a similar meeting. *Wilkinson v. Malin*, 2 Tyr. 544; 2 C. & J. 636.

P., in 1674, devised estates for support of a school for parish children, and directed that the trustees, with consent of the parishioners, should provide and keep an honest schoolmaster; and if at any time the schoolmaster should be idle, negligent, or abusive of his scholars, the trustees and parishioners should have power to dismiss him. On a vacancy occurring the trustees resolved that they would give 60*l.* a year to a master, or 55*l.*, he finding certain things; that the appointment was to be for one year, commencing on the 25th March next, and liable to be terminated by either party giving three months' notice, and that they would recommend the plaintiff for the post. At a vestry meeting of the parishioners the latter adopted the recommendation, and appointed the plaintiff schoolmaster, subject to the regulations of the trustees. On the 17th of April the trustees wrote to the plaintiff, that they would pay him at the rate of 55*l.* per annum so long as, by mutual consent, he should retain the office of master; the appointment to be subject to termination by three months' notice from either party. The plaintiff wrote back, assenting to hold on the terms mentioned. The plaintiff had entered into the office in March previously, and performed the duties. On the 1st of March, 1854, at a meeting of the trustees, a resolution was adopted, by a majority, that a notice should be given to the plaintiff to quit his office at the end of three months from the 25th of March, 1854, and a notice to that effect, signed by a majority of the trustees, was forthwith served on him. Notwithstanding the notice, he continued to act as schoolmaster until the 25th of March, 1855, and sued a trustee for the three quarters' salary ending at that date:—Held, that the trustees, without the assent of the parishioners, had power to give the notice to determine the appointment, as the plaintiff's contract was with them alone; that the notice need not be one that required the plaintiff to quit at the end of a current year, but that his holding might be terminated by a three months' notice to quit at any period of the year; consequently, that the plaintiff was not entitled to recover the three quarters' salary which he claimed. *Ryan v. Jenkinson*, 25 L. J., Q. B. 11.

Action by, for Cost of Schooling—Amount Recoverable.]—Under a count, stating, that in

consideration that the plaintiff had taken W. as a schoolboy into an academy kept by him, and that he had left it without having given due notice, the defendant promised to pay so much as the plaintiff reasonably deserved to have:—Held, that the plaintiff was entitled to recover for a quarter over the time which W. stayed, on the ground of a quarter's notice not having been given, that being one of the terms upon which he was taken. *Eardley v. Price*, 2 N. R. 333.

A child at school, for whom payment had been made quarterly, was sent home on account of illness four days after the commencement of a quarter, and did not return:—Held, that the master was entitled to a whole quarter's schooling, although there was no express contract for a quarter's notice, or a quarter's pay, and although the school was a day-school in which the child was the only boarder. *Collins v. Price*, 5 Bing. 132; 2 M. & P. 233.

— For Removal of Pupil without Notice.]

—A father sent his son to a school, on the terms that when he removed him from the school he would either give the schoolmaster a term's notice or pay him an equivalent in money. To an action against the father for removing his son without giving such notice or paying an equivalent, it is a good defence to shew that the removal was only a temporary one, whilst the son was unable, from illness, to return to the school. *Simcon v. Watson*, 46 L. J., C. P. 679.

— When Money becomes Due.]—School-money for education, payable half-yearly, is not a debt due until the end of the half year, so as to be recoverable under a commission against the parent, who became bankrupt a few days before the end of the half-year, though he had, just before his bankruptcy, taken his son home for the holidays, the contract not being thereby put an end to. *Parlow v. Dearlove*, 4 East, 438; 1 Smith, 281; 5 Esp. 78.

A schoolmaster sued the defendant for a quarter's schooling of his son, the payment of which was contracted to be made quarterly. The defendant became bankrupt during such quarter:—Held, that his liability to pay on the quarter-day was not a liability on a contingency within 12 & 13 Vict. c. 106, s. 178, nor a debt payable after the bankruptcy within s. 172, and that the claim was therefore not barred by the certificate. *Thomas v. Hopkins*, 29 L. J., C. P. 187; 6 Jur., N. S. 301; S. C., nom. *Hopkins v. Thomas*, 7 C. B., N. S. 711.

— Who Liable to Pay.]—A mother took her son to school, and saw the master, but no evidence was given of what passed at that time. Afterwards a bill was delivered to the boy's uncle, who said it was quite right to deliver the bill to him, for he was answerable:—Held, that the Statute of Frauds did not apply, and it was proper to leave it to the jury to say, under the circumstances, whether the original credit was given to the uncle. *Darnell v. Fealt*, 2 C. & P. 82.

— How far Necessary that Agreement should be Stamped.]—Where a schoolmaster brings an action on an agreement contained in a prospectus of terms, delivered to the defendant, it is necessary to get that identical copy stamped which has been delivered, and it is not sufficient

to get another copy stamped. *Williams v. Stoughton*, 2 Stark. 292.

But in another case a somewhat similar prospectus was allowed to be read to shew what the terms were, although it was not stamped. *Edgar v. Blick*, 1 Stark. 464.

In an action by a schoolmaster for a sum of money, in lieu of three months' notice of the removal of the defendant's sons from school, it appeared that the defendant's agent having expressed a wish to place his sons under the plaintiff's care, received from the latter a prospectus, which stated that the terms were sixty guineas per annum, and that three months' notice or payment was required previously to the removal of the pupil. The plaintiff, at the time of delivering the prospectus, agreed verbally that the boys should be charged for at the rate of fifty guineas per annum each. The boys were thereupon sent to the plaintiff's, and were taken away without the stipulated notice:—Held, that the prospectus was a proposal and not an agreement, and that no stamp was necessary. *Clay v. Crofts*, 20 L. J., Ex. 361.

— **Evidence in.]**—Where, to an action by a schoolmaster for the board and education of the defendant's sons, the defendant pleads that the plaintiff did not furnish his sons with proper instruction, board and lodging, and that he therefore removed them from the school, he must confine himself to evidence as to the treatment of his own sons, and cannot go either into general evidence of the plaintiff's mode of conducting the school, or into evidence of his conduct with reference to other particular boys. *Clement v. May*, 7 C. & P. 678.

— **Set-off.]**—In an action to recover a school bill, evidence of a collateral breach of agreement on the part of the schoolmaster cannot be given by the defendant in order to reduce the amount of the bill, such a collateral breach being the subject of a cross action and not of set-off. *Henniquin v. O'Dowd*, 21 L. T. 802.

— **For Price of Clothes.]**—A schoolmaster has no right to charge for wearing apparel which he has caused to be supplied to a scholar without the sanction, express or implied, of the parent or guardian of such scholar. *Clements v. Williams*, 8 C. & P. 58.

Compensation under Lands Clauses Act.]—By a royal charter persons were incorporated as the governors of the possessions, revenues, goods and chattels of a free grammar-school. By the charter, the governors were to find a house, to be called the school-house, in which the school should be fitly kept. They had also power to elect and remove the master as often as, according to their discretion, they might see necessary and convenient. They appointed a schoolmaster, and put him into possession of the school-house. The resolution by which he was appointed contained terms to which he subscribed his consent, and by which he was to keep the house in repair, to take certain articles at a valuation, and give them up at quitting, being paid for them at a valuation, and to give three calendar months' notice before relinquishing his appointment. Two-thirds of the governors, with the sanction of the bishop, were to have the power of removing him, giving three months' notice; but in either

case the office was to be vacated only on the 21st June or 21st December:—Held, that the schoolmaster had no greater interest in the house than as a tenant for a year, or from year to year, and therefore in seeking compensation under 8 & 9 Vict. c. 18 (Lands Clauses Act), was confined to the remedy given by s. 121. *Reg. v. Manchester, Sheffield and Lincolnshire Railway Company*, 4 El. & Bl. 88; 1 Jur., N. S. 419.

Actions against—Sanction of Charity Commissioners to.]—The governors of an endowed school commenced an action against the master to restrain him from presenting himself at the school or continuing to occupy the school-house, on the ground that he had never been properly appointed to the mastership, was unfit to fulfil its duties, and had been removed by a resolution of the governors. The master demurred, on the ground that it did not appear that the action had been sanctioned by the Charity Commissioners:—Held, that the sanction of the Charity Commissioners to a proceeding of this nature was not requisite. *Holme v. Guy*, 5 Ch. D. 901; 46 L. J., Ch. 648; 36 L. T. 600; 25 W. R. 547—C. A. Affirming 46 L. J., Ch. 223; 36 L. T. 306; 25 W. R. 390. See also cases under CHARITY.

— **For False Imprisonment of Pupil.]**—Where a master of a school refuses to deliver up the person of a boy to his parent, on account of a quarter's schooling not having been paid, according to contract, but there is no evidence that the boy was present at the refusal, or knew that his mother had wished to take him home, and been refused, or was in any way restrained, though kept at school during the Christmas fortnight, an action for false imprisonment cannot be maintained against the master. *Herring v. Boyle*, 1 C., M. & R. 377; 6 C. & P. 496; 4 Tyr. 801.

— **Ejectment after Dismissal.]**—The visitors and feoffees of a free grammar-school, who have dismissed the schoolmaster for misconduct, cannot maintain ejectment for the recovery of the possession of the school-house, till they have determined the master's interest therein, upon summons in the ordinary manner, when he may be heard in answer to the charges forming the ground of such dismissal. *Doe d. Thanet (Earl) v. Gartham*, 8 Moore, 368; 1 Bing. 357. And see *Rex v. Gushin*, 8 T. R. 103; and *Newman, Ex parte*, 9 Jur. 959.

In ejectment against a schoolmaster who has been removed by the sentence of the trustees of the school for misbehaviour, it is not necessary to prove the grounds of the sentence, nor can he disprove them. *Doe d. Davy v. Haddon*, 3 Dougl. 310.

He may give in evidence the declarations of a former trustee who signed the sentence, and who is since dead, for the purpose of shewing that his signature was corruptly obtained. *Ib.*

The master of an ancient endowed school is entitled to the school-house, unless he has been in due manner removed from his office by those having authority to do so. *Doe d. Coyle v. Cole*, 6 C. & P. 359.

The vicar of the parish cannot recover the school-house by ejectment, although it may have been built on what is evidently part of the churchyard, if it appears that the house was

built on the site of a very old school-house, the site of which might have been granted before the disabling statutes; but if a part of the house is built on ground taken from the churchyard recently, the vicar may remove that part. *Ib.*

II. SCHOOL BOARD.

Transfer of Schools to School Board—Appointment of Trustees.—By two deeds, made in 1838 and 1849, the two joint rectors of a parish were appointed trustees of a Church of England school. In 1871, it having become necessary to appoint a new master, the rectors could not concur in any appointment, and the school was closed. A school board having been elected in the district, it was then proposed that the school should be transferred to the board under the Education Act of 1870, s. 23, which requires a majority of two-thirds of the trustees to effect such a transfer. With this view a memorial was presented to the Charity Commissioners, asking them to appoint three additional trustees, so that the requisite majority might be obtained. This course was opposed by one and supported by the other of the two joint rectors. The commissioners, however, made an order appointing three additional trustees, all of whom were churchmen, one of them being chairman of the school board. On a petition by the opposing rector, by way of appeal from the order, praying for the discharge of the order:—Held, that it is no objection to such an order, notwithstanding the Charitable Trusts Act, 1860, s. 5, that the commissioners have made it on an application of a contentious character. *Burnham National Schools, In re, Bates, Ex parte*, 17 L. R., Eq. 241; 43 L. J., Ch. 340; 29 L. T. 495; 22 W. R. 198.

The Charitable Trusts Act, 1853, ss. 28, 32, gives the jurisdiction to appoint trustees to the Master of the Rolls and the vice-chancellors in cases in which it was previously necessary to file an information, bill, or petition, and by the Act of 1860 this jurisdiction is transferred to the Charity Commissioners:—Held, that the power to appoint additional trustees is clear under the ordinary jurisdiction of the Court of Chancery; that s. 32 of the Trustee Act, 1850, gives a statutory power for that purpose, and therefore that such a power is vested in the commissioners. *Ib.*

The court will not, upon appeal, interfere with the exercise of discretion by the commissioners, except in a very strong case of miscarriage of justice, and such discretion is properly exercised in a case where, in consequence of differences between the existing trustees, the school is closed, and education denied to the children of the district. *Ib.*

Objections to Transfer.—In the case of a school established by and united with the National Society, on the express condition that the children attending it were to be instructed in the Holy Scriptures, and in the Liturgy and Catechism of the Church of England, the instrument declaring the trusts of the school providing that the school was to be always in union with, and conducted according to the principles of, and in furtherance of the ends and designs of, the National Society, but containing no provision whatever for its alienation, the consent of

the National Society was not required to a transfer of the school to a school board, under the Elementary Education Act, 1870, s. 23; and the proper mode for the society to give effect to any objections to a transfer was by appealing before the Education Department. *National Society v. London School Board, Att.-Gen. v. English*, 18 L. R., Eq. 608; 44 L. J., Ch. 229; 31 L. T. 22; 23 W. R. 2.

The majority of two-thirds of the school trustees required by the Education Act anticipates any objection to the transfer of a school whose trustees are required to be churchmen. *Burnham National Schools, In re, Bates, Ex parte, supra.*

Application of Funds on.—Semble, in settling a scheme for the regulation of the funds of a charity school on its transfer to a school board, care should be taken to provide that the funds shall be applied for the advancement of learning in the school, as, for instance, by establishing exhibitions or scholarships, and not for the general purposes of the school, which would have the effect of a grant in aid of the local rates. *Poplar and Blackwall Free School, In re*, 8 Ch. D. 543; 39 L. T. 88; 26 W. R. 827.

By the terms of a scheme, approved in 1852, for appropriation of the increased revenues of a charity estate originally applicable to the relief of the poor, it was provided that a sum of 90*l.* should be paid by the charity trustees to the treasurer of a school association in aid of the expenses of a school in Flint-street, Walworth, "or any other school that may be established in its stead," provided that no sum should be paid to any denominational school; and that if such school should "become materially altered in discipline, number of children, or other circumstance," then the 90*l.* should, in the discretion of the trustees, be applied for educational purposes amongst other schools of a similar character in the parish. A transfer of the Flint-street school and its endowment having been made by the managers to the School Board for London:—Held, that the Flint-street school had not by the fact of such transfer become "materially altered in discipline, number of children, or other circumstance;" and that the trustees were bound to pay the endowment of 90*l.* a year to the School Board. *London School Board v. Faulconer*, 8 Ch. D. 571; 48 L. J., Ch. 41; 38 L. T. 636; 26 W. R. 652.

Election of Member—Validity, how Determined.—By the Elementary Education Act, 1870, s. 33, questions as to the right of any person to act as a member of a school board may be inquired into by the Education Department. A petition against his election cannot be sustained under the Corrupt Practices (Municipal) Act, 1872, for although the provisions of the Ballot Act, 1872, have been applied to school board elections by the Elementary Education Amendment Act, 1873, s. 26, Sched. 2, the provisions of the Corrupt Practices (Municipal) Act, 1872 have not been applied to such elections, notwithstanding the terms of s. 2 enacting that this act shall, so far as is consistent with the tenor thereof, be "construed as one" with the acts relating to boroughs and elections in boroughs. *West Bromwich School Board, In re*, 5 C. P. D. 191; 49 L. J., C. P. 641; 28 W. R. 766; 44 J. P. 426.

— **Returning Officer's Fees.**—Though it is not necessary that the person employed as returning officer at the first election of a school board should be a solicitor, nevertheless if he be so, the board, who is directed to pay his expenses, may have his bill taxed. *Jones, In re*, 13 L. R., Eq. 336; 41 L. J., Ch. 367; 20 W. R. 395.

— **Candidates, when Eligible.**—When under the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), Schedule 2, Part 1, r. 14, a member of a school board vacates his office by absenting himself during six successive months from all meetings of the board, such absence not being due to temporary illness, or other cause approved by the board, r. 12 does not render him ineligible for re-election at the next triennial election of the board. *Reg. v. Turmine*, 4 Q. B. D. 79; 48 L. J., Q. B. 5; 37 L. T. 255; 27 W. R. 150.

— **Personation of Voters.**—The Elementary Education Acts (33 & 34 Vict. c. 75, s. 90, and 36 & 37 Vict. c. 86, Second Schedule), which impose a penalty for the offence of personating any one entitled to vote at the election of a school board, do not include the offence of personating at the voting for a resolution for application for a school board; and an order in council purporting to be made under the acts, and imposing a penalty upon any one guilty of such offence, is invalid. *Reg. v. Sankey*, 3 Q. B. D. 379; 47 L. J., Q. B. 96.

— **Corrupt Practices at Election—Conviction for.**—An election for a school board was about to take place, and A. and a friend attended at a public-house in the district, and there met several inhabitants, many of whom were voters. His friend, after discussing various local matters, suggested A. as a fit and proper person to be elected to the school board. A. addressed those present upon the subject of a school board and of his candidature. He was then proposed by one of those present as a fit and proper person to be elected, and his health and success were drunk. Glasses round for those present were then ordered by four different persons in succession, A. having given and paid for one of such orders. He was afterwards a candidate, and went to the poll. An information having been laid against him under 33 & 34 Vict. c. 75, s. 91, for corrupt practices, and being convicted by the justices:—Held, that the conviction was correct. *Turnbull v. Welland*, 24 L. T. 730.

W. G. was charged in an information with having been guilty, at the election of members of the school board of S., of "corrupt practices, contrary to the sub-s. of s. 91 of the Elementary Education Act, 1870," and was thereon convicted:—Held, that the conviction was bad, as the information insufficiently described the offence, for that under the Elementary Education Act, 1873, s. 24, sub-s. 1, the offence ought to have been specified, and the time and place mentioned. *Reg. v. Ingall*, 42 L. T. 533; 29 W. R. 288; 44 J. P. 552.

— **"Conviction" includes "Summary Conviction."**—On a motion to quash a conviction of G. for treating at a school board election, the objection raised was that treating was an in-

dictable offence, and not punishable on summary conviction, the words in 33 & 34 Vict. c. 91, s. 91, being "conviction," and not, as in the previous sections, "summary conviction":—Held, that the word "conviction" in s. 91 meant "summary conviction," and the justices had jurisdiction, and that the conviction was good. *Reg. v. Gaunt*, 50 L. J., M. C. 32; 43 L. T. 696; 29 W. R. 289; 45 J. P. 222.

— **No Appeal to Court of Appeal from Decision of High Court.**—The Court of Appeal has no jurisdiction to hear an appeal from a decision of the High Court of Justice upon a case stated by justices as to an information for contravening the bye-laws of a school constituted under the Elementary Education Act, 1874: for the information relates to a criminal matter, within the meaning of the Supreme Court of Judicature Act, 1873, s. 47. *Mellor v. Denham*, 5 Q. B. D. 467; 49 L. J., M. C. 89; 42 L. T. 493; 44 J. P. 472—C. A.

— **School Fees.**—Money granted under the Elementary Education Act, 1873 (36 & 37 Vict. c. 86), s. 3, for the education of the children of persons receiving relief out of the workhouse, need not be paid to the parents, but may in the discretion of the guardians be directly applied in payment of the school fees. *Darlington Union (Guardians), In re*, 32 L. T. 320.

— **Bye-Laws for Attendance at School.**—A bye-law made by a school board, with the approval of the Education Department, under the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 74, provided that all children in the district subject to the act should attend school for thirty hours a week. The justices refused to convict a father for neglecting to cause his son, between five and thirteen years of age, to attend school as required by that bye-law, because the son was employed in a boot manufactory, and attending school more than ten hours a week, pursuant to the Workshops Regulation Act, 1867 (30 & 31 Vict. c. 146), s. 14:—Held, that this bye-law was not contrary to the section of the Workshops Act, which requires every child who is employed in a workshop to attend school for at least ten hours a week; and that the father ought to have been convicted. *Bury v. Cherrybohn*, 1 Ex. D. 457; 35 L. T. 403.

— **Enforcing—Factory Acts.**—A school board is not entitled to enforce the provisions of its bye-laws, with regard to the hours of attendance of children at school, in the case of children employed in factories who are attending efficient elementary schools pursuant to the Factory Acts. The Elementary Education Acts do not control the provisions of the Factory Acts regulating the education of children employed in accordance with those acts. *Mellor v. Denham*, 4 Q. B. D. 241; 48 L. J., M. C. 113; 40 L. T. 395; 27 W. R. 496.

— **Non-Attendance of Child at School—Liability of Father—"Reasonable Excuse."**—A bye-law made under the Elementary Education Acts provided that, "The parent of every child of not less than five nor more than thirteen years of age, shall cause such child to attend school, unless there be a reasonable excuse for non-attendance. Reasonable excuses: Any of

the following reasons shall be a reasonable excuse, viz.: (a) That the child is under efficient instruction in some other manner; (b) That the child has been prevented from attending school by sickness or an unavoidable cause; (c) That there is no public elementary school open which the child can attend within two miles. . . . From the 18th of May to the 23rd of September, the respondent, an engine-driver, caused his child to be sent daily from home in time to arrive at school when it opened. He did not receive any notice that the child had not duly attended, except on two occasions. On both occasions the respondent's wife corrected the child. Nevertheless it often failed to attend school. At the hearing of an information, which charged that the respondent on and ever since the 18th of May had neglected the bye-law in not causing his child to attend school, the justices found that he had done all that could reasonably be expected of him to secure the attendance of the child at school, and had reasonable grounds for believing, and did believe, the child was duly attending school, and had, therefore, a "reasonable excuse" for not causing the child to attend school:—Held, that there may be other "reasonable excuses" within the meaning of the bye-law besides the three reasons therein specified, and that the justices were right. *Belper School Board v. Bailey*, 9 Q. B. D. 259; 51 L. J., M. C. 91; 46 J. P. 438.

— **Liability of Mother.**—B. was the mother of a boy under thirteen years of age, and was charged with neglecting to cause the boy to attend school. The child was living with her and under her control, as her husband was at sea, and it was not stated that he was the father of the child. The justices refused to convict her, on the ground that she was a married woman:—Held, that they were wrong, and that B. should have been convicted, as having the actual custody of the child. *Hance v. Burnett*, 45 J. P. 54.

— **Residence apart from Parent.**—The respondent, a widow, was summoned for neglecting, as a parent, to comply with an order to send her child to a certified efficient school. She pleaded poverty, and that, being quite unable to maintain the child, she had sent her to an aunt at Fulham. The respondent also stated that the child was sometimes sent to stay with another aunt. The magistrate dismissed the summons on the ground that it was not proved that the child was residing with and under the control of the respondent, and that 33 & 34 Vict. c. 75, s. 3, by which the term "parent" includes "every person who is liable to maintain or has the actual custody of any child," contemplates that the liability should be with the person who had the actual custody of the child:—Held, that the magistrate was wrong, and that upon the above facts the respondent was liable to be convicted. *London School Board v. Jackson*, 7 Q. B. D. 502; 50 L. J., M. C. 134; 30 W. R. 47; 45 J. P. 750.

Quære, what would be the effect, if proved, of a permanent residence of a child apart from the parent. *Id.*

— **Habitual Neglect to send Child to School.**—H. was summoned for habitually neglecting, without excuse, to send his child to

school, contrary to a bye-law made in 1879. The magistrates thought it was a case of habitual neglect, and that proceedings should have been taken under 39 & 40 Vict. c. 79, s. 11 (Elementary Education Act, 1876), and not under the bye-law, which they held to be ultra vires, and they dismissed the summons:—Held, by Lush and Manisty, JJ. (Cockburn, C. J., dissenting), that the magistrates were right. *Morgan v. Heycock*, 44 J. P. 199.

When, upon application to a magistrate by a school board for a summons against the parent of a child for not causing it to attend school, contrary to bye-laws made by the board under the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), it appears that the parent has habitually neglected to provide instruction for the child within the meaning of the Elementary Education Act, 1876 (39 & 40 Vict. c. 79), s. 11, the magistrate is entitled, and it is his duty, to refuse to grant the board a summons under the bye-laws, and to require them to take out a summons under s. 11, for the offence given by the Elementary Education Act, 1876, s. 50, of proceeding either under the statute or the bye-laws applies only to offences punishable under the act, and the offence of habitual neglect is not so punishable. *London School Board, Ex parte, Murphy, In re*, 2 Q. B. D. 397; 46 L. J., M. C. 193; 36 L. T. 698; 25 W. R. 536.

Attendance Order—Child attending Board School without Fees—Liability of Parent.—A parent who, under an order by a court of summary jurisdiction that his child shall attend a board school, and that he do see that the order is complied with, causes the child to attend school, but without the school fees, and without having applied to the guardians under 33 & 34 Vict. c. 75, for payment of such fees, or to the school board under s. 17 for a remission of them, is liable to be convicted under the Elementary Education Act, 1876 (39 & 40 Vict. c. 79), s. 12, for non-compliance with the order. *Richardson v. Saunders* (*infra*) overruled; *Murphy, In re* (*supra*), discussed. *Saunders v. Richardson*, 7 Q. B. D. 388; 50 L. J., M. C. 137; 45 L. T. 319; 29 W. R. 800; 45 J. P. 782.

A parent who, under an order by a court of summary jurisdiction that his child shall attend a board school, and that he do see that the order is complied with, causes the child to attend the school, but without the school fees, is not liable to conviction under the Elementary Education Act, 1876 (39 & 40 Vict. c. 79), s. 12, for non-compliance with the order, although he may have failed to apply to the guardians, under s. 10, to pay the fees, and refused to obtain a remission of them under 33 & 34 Vict. c. 75, s. 17. *Richardson v. Saunders*, 6 Q. B. D. 313; 50 L. J., M. C. 65; 44 L. T. 474; 29 W. R. 631; 45 J. P. 344, overruled. See preceding case.

— **"Full Time Employment."**—By 39 & 40 Vict. c. 79, s. 11, sub-s. 1, if the parent of any child above the age of five years "who is under this act prohibited from being taken into full-time employment," habitually and without reasonable excuse neglects to provide efficient elementary instruction for his child, a court of summary jurisdiction may order that the child do attend school:—Held, that sub-s. 1 refers to s. 8, which applies certain sections of the Factory Acts to the employment and education of chil-

dren, and that, as those sections have been repealed by 41 Vict. c. 16, sched., there can be no child within the terms of 39 & 40 Vict. c. 79, s. 11, sub-s. 1, "who is under this act prohibited from being taken into full-time employment," and therefore sub-s. 1 has ceased to operate. *Saunders v. Crawford*, 9 Q. B. D. 612; 51 L. J., Q. B. 460; 46 L. T. 420; 46 J. P. 344. *But see next case.*

By s. 5 of the Elementary Education Act, 1876, a person shall not take into his employment any child (1) who is under the age of ten years, or (2) who, being of the age of ten years or upwards, has not obtained the certificate of proficiency, or of due attendance at school, prescribed by the act, unless such child, being of the age of ten years and upwards, is employed and attending school under the Factory Acts, or any bye-law made under the Elementary Education Act, 1870. By s. 11, if the parent of any child above the age of five years, "who is under this act prohibited from being taken into full-time employment," habitually, and without reasonable excuse, neglects to provide efficient elementary instruction for such child, an order that the child attend one of the prescribed schools may be obtained by the local authority of the district before a court of summary jurisdiction. By s. 48, "a child in this act means a child between the ages of five and fourteen years." An attendance order was applied for, under s. 11, in respect of two children aged nine and thirteen years respectively. Neither of the children were in any employment, nor attending any school, nor had either of them obtained any certificate under s. 5:—Held, that the words of s. 11 "any child who is under this act prohibited from being taken into full-time employment" applied to any child prohibited from being taken into employment by s. 5, and therefore that an attendance order could be made in respect of each child. *Saunders v. Crawford* (9 Q. B. D. 612) not followed. *Winyard v. Toogood*; *Hance v. Fortnum*, 10 Q. B. D. 218; 52 L. J., M. C. 25; 48 L. T. 229; 31 W. R. 271; 47 J. P. 325.

— **Enforcement against Mother on Father's Death.**—An attendance order, made on the father of a child under s. 11 of the Elementary Education Act, 1876, cannot, on the death of the father, be enforced against the mother under s. 12. *Hance v. Fairhurst*, 51 L. J., M. C. 139; 47 J. P. 53.

— **Jurisdiction of Justices—Union extending into several Counties.**—The effect of s. 34 of the Elementary Education Act, 1876 (39 & 40 Vict. c. 79), which incorporates for certain purposes all enactments relating to guardians and their officers, is to enable proceedings, before justices for non-compliance with attendance orders and for breach of bye-laws under the Elementary Education Acts, in cases where the parents proceeded against reside in a union extending into different counties, to be taken before the justices of either county. *Reg. v. Eaton*, 8 Q. B. D. 158; 51 L. J., M. C. 31; 46 L. T. 663; 30 W. R. 335; 46 J. P. 231.

Penalty and Costs not to exceed 5s.—Not including Costs of Distress Warrant.—By s. 74 of the Elementary Education Act, 1870 (33 & 34 Vict. c. 76), "no penalty imposed for the breach

of any bye-law shall exceed such amount as, with the costs, will amount to 5s. for each offence."—Held, that this does not include the cost of a distress to enforce payment under 11 & 12 Vict. c. 43, s. 19. *Cook v. Plaskett*, 46 L. T. 383; 47 J. P. 265.

Proof of Conviction for Non-Compliance with Attendance Order.—An order of a court of summary jurisdiction under the Elementary Education Act, 1876, imposing a penalty on the parent of a child for non-compliance with a previous order for the attendance of the child at school, may be proved in subsequent proceedings by the minute-books of the court containing an entry of the order; and it is unnecessary to produce a copy of the order signed by the clerk of the peace or other officer of the sessions. *London School Board v. Harvey*, 4 Q. B. D. 451; 48 L. J., M. C. 130; 27 W. R. 786.

Clerk to—Quo warranto.—A quo warranto will not lie for the office of clerk to a school board, as he holds his office during the pleasure of the board. *Bradley v. Sylvester*, 25 L. T. 459.

Powers of, to take Lands for Schools.—A school board taking lands under the Elementary Education Act, 1870, need not give notice to treat to the owners of easements over the land taken; but compensation in respect of such easements is to be given as for lands injuriously affected. *Clark v. London School Board*, 9 L. R., Ch. 120; 43 L. J., Ch. 421; 29 L. T. 903; 22 W. R. 354. Reversing 21 W. R. 723.

— **To borrow Money.**—A school board have not power, when the school fund proves insufficient, to contract a temporary loan for the purpose of meeting their current expenses until they can obtain money out of the rates. *Reg. v. Reed*, 5 Q. B. D. 483; 49 L. J., Q. B. 600; 42 L. T. 835; 28 W. R. 787; 44 J. P. 633—C. A.

School-owning District—Contributory District—School Attendance Committee—Burden of Expenses of Committee shared by Contributory District.—C. S., a parish in the union of P., had not a school board of its own, but was made, by an order of the Education Department, a contributory district of the neighbouring parish of C., in which there was a school board, and the children of C. S. were in the habit of attending the school board in C. In 1877 the guardians of the P. union appointed, under the authority of 39 & 40 Vict. c. 79, s. 7, a school attendance committee for certain parishes of the union, including C. S., and the school attendance committee appointed school attendance officers for the said parishes. In 1880 the school attendance committee incurred certain expenses in connection with enforcing the attendance of children at school, and issued a precept to the overseers of C. S., requiring contribution of the share of the parish in such expenses. The overseers refused to pay the said contribution on the ground that the parish of C. S. was under the jurisdiction and control of the parish of C., and not under that of the school attendance committee. The guardians then summoned the overseers of C. S. before two justices for the county of C., who took the same view as the overseers, and dismissed the summons. The guardians of the P.

union appealed:—Held, on appeal, that the justices were wrong, and that, notwithstanding that C. S. was a contributory district to C., it was not a parish "under any other local authority," within the meaning of the Education Act, 1876, and so was under the jurisdiction of the school attendance committee appointed by the guardians of the P. union, whose order for the payment of the contribution was right and proper. *Reg. v. Vane, Penrith Union v. Castle Sowerby (Overseers), In re*, 51 L. J., M. C. 114; 47 L. T. 21; 47 J. P. 69.

Enforcing Precept for levying Expenses of School Board.—The overseers of a parish refused to obey a precept of the school board under the Elementary Education Act, 1870, s. 54, on the ground that the deficiency arose in and about the providing school accommodation for children not resident in the district of the board, without alleging that any extra expense had been incurred on account of such children:—Held, that the return shewed no improper use of the funds and was bad. *Shelley School Board v. Shelley Overseers*, 22 W. R. 154.

—**Mandamus.**—The court will grant a rule nisi for a mandamus to the overseers of a parish, within the district of a school board, to pay precepts issued by such board, or to levy rates for the purpose of paying them. Ord. LII. of the Rules of the Supreme Court, 1883, does not apply to applications for writs of mandamus, inasmuch as by Ord. LII. r. 5, the practice in use before the making of the Rules of 1883 with regard to such application is preserved. *Gribthorpe School Board v. Gribthorpe Overseers*, 47 J. P. 727.

SCIRE FACIAS AND REVIVOR.

I. TO REVIVE JUDGMENTS.

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VIII. ABATEMENT OF ACTIONS BY DEATH.—See PRACTICE (Parties).

IX. CHANGE OF PARTIES BY DEATH.—See PRACTICE (Parties).

I. TO REVIVE JUDGMENTS.

1. GENERALLY.

What is a Sci. fa.—A scire facias is held to be in many cases an action. *Winter v. Kretchman*, 2 T. R. 46.

A sci. fa. to revive is not a new action, but a continuation of the old one; and, therefore, where the attorney of a testator had, before his death, agreed not to bring a writ of error in the old action:—Held, that his executors after his death could not do so. *Wright v. Nutt*, 1 T. R. 388.

A scire facias on a judgment is not a mere continuation of a former suit, but creates a new right. *Farrell v. Gleeson*, 11 C. & F. 702.

To a scire facias, issued in 1837, by the executors of a conusee of a judgment recovered in Ireland, in 1810, against the heirs and terre-tenants of the conuser, one of the terre-tenants pleaded the 3 & 4 Will. 4, c. 27, s. 40; to which the executors replied a judgment of revivor, recovered by themselves within twenty years before the issuing of the scire facias:—Held, first, that the plea was a sufficient answer to the claim stated in the writ. *Furran v. Beresford*, 10 C. & F. 319.

Held, secondly, that the replication was a departure from the writ, and, therefore, bad on general demurrer. *Id.*

Held, thirdly, that a new right accrued to the executors by the judgment of revivor recovered by themselves. *Id.*

Where a judgment was obtained in 1831, and the defendant went abroad, and remained there until 1842, and the plaintiff then sued out a scire facias to revive the judgment, and on such scire facias upon an affidavit of the presumed intention of the defendant to quit England, procured a capias, by order of a judge, and the defendant was arrested, the court ordered the defendant to be discharged out of custody; for, if proceedings by scire facias are merely a continuance of the original action, and do not constitute a new action, the power to arrest is taken away by the 1 & 2 Vict. c. 110, s. 5; and if they are to be viewed as the commencement of a fresh action, no capias can be granted, as ss. 2 and 3 of 1 & 2 Vict. c. 110, refer only to actions wherein the defendant was liable to arrest at the time of the passing of that act. *Agassiz v. Palmer*, 5 M. & G. 697; 6 Scott, N. R. 603; 1 D. & L. 18; 12 L. J., C. P. 245; 7 Jur. 972.

Ca. sa.—If a ca. sa. is set aside for irregularity, the plaintiff is not bound to proceed by scire facias or action on the judgment, but may at once take the defendant again on a fresh ca. sa. *Merchant v. Frankis*, 2 G. & D. 473; 3 Q. B. 1.

An arrest on a ca. sa. is no bar to a sci. fa. on the judgment, where the party has been discharged out of custody by reason of irregularity in issuing

the writ. *Collins v. Beaumont*, 10 A. & E. 225; 2 P. & D. 363.

2. AGREEMENT TO WAIVE.

Validity of.]—An agreement to waive a scire facias to revive a judgment upon a warrant of attorney, entered into after judgment has been signed upon the warrant, is valid, although not executed with the formalities rendered necessary for the execution of warrants of attorney by 1 & 2 Vict. c. 110, s. 9. *Cooper v. Norton*, 16 L. J., Q. B. 364.

Order by Consent.]—A judge's order may be made by consent, to issue execution on a judgment that requires reviving, without a scire facias. *Harmer v. Johnson*, 14 M. & W. 336; 3 D. & L. 38; 14 L. J., Ex. 292; 9 Jur. 669.

More than a year having elapsed after judgment had been entered upon a warrant of attorney, the defendant agreed to waive the necessity of a scire facias:—Held, that such agreement was no part of the defeasance or condition, and did not render the warrant of attorney void as against his assignees in bankruptcy, for want of enrolment under 3 Geo. 4, c. 39. *Ib.*

An agreement not to insist upon a sci. fa. to revive a judgment is valid, and execution sued out without a sci. fa. will be good. *Howell v. Stratton*, 2 Smith, 65.

Notwithstanding the 13 Edw. 1, stat. 1, c. 45, a ca. sa. might be issued on a judgment more than a year and a day old, if the defendant had, by parol, agreed to waive a sci. fa. *Morgan v. Burgess*, 1 D., N. S. 850. See *Morris v. Jones*, 3 D. & R. 603; 2 B. & C. 242.

3. ISSUING EXECUTION WITHOUT REVIVAL.

No Execution within a Year.]—A sci. fa. was necessary to revive the judgment after a year and a day before an elegit could be sued out. *Putland v. Newman*, 6 M. & S. 179; *S. C.*, nom. *Rutland v. Newnham*, 2 Chit. 384.

If a defendant was taken upon a ca. sa. sued out more than a year and a day after the judgment, without a scire facias, he might be discharged at any distance of time, and did not waive the objection, however long he might remain in custody. *Mortimer v. Piggott*, 4 A. & E. 363, n.; 2 D. P. C. 615.

A defendant might be taken in execution, after the expiration of a year from the judgment, upon a ca. sa. sued out within the year, although not returned and filed within the year; and no scire facias was necessary in such a case. *Simpson v. Heath*, 5 M. & W. 631; 7 D. P. C. 832.

Where a plaintiff, after an interval of ten years, sued out execution in ejectment, without reviving the judgment by scire facias, the defect was so material that the court set aside the execution. *Goodtitle d. Murrell v. Badtitle*, 9 D. P. C. 1000.

A writ of execution issued on a judgment more than a year old, without a scire facias, was not absolutely void, but voidable only; and if not actually avoided, such writ was a justification to the parties sued in trespass for causing it to be executed. *Blanchenay v. Burt*, 4 Q. B. 707; 3 G. & D. 613; 12 L. J., Q. B. 291; 7 Jur. 575.

A rule for setting aside an award was discharged, with costs, which were taxed, and the

allocatur was made a rule of court:—Held, that a ca. sa. under 1 & 2 Vict. c. 110, s. 18, might issue thereon after a year and a day, without a scire facias or leave of the court. *Spooner v. Payne*, 5 D. & L. 310; 17 L. J., Q. B. 68; 12 Jur. 282.

If final process, returnable upon execution, was issued within a year of the judgment, but produced no satisfaction, fresh process might be issued at any time afterwards, without previously returning the first or issuing a scire facias. *Franklin v. Hodgkinson*, 1 B. C. Rep. 51; 3 D. & L. 554; 17 L. J., Q. B. 132; 10 Jur. 249.

4. PRACTICE ON.

Validity of Judgment not Impeachable.]—Upon a motion to revive a judgment by scire facias, the validity of the judgment cannot be impeached for the purpose of opposing that motion, but a separate application must be made to set aside the judgment. *Thomas v. Williams*, 3 D. P. C. 655.

Lapse of Time.]—A scire facias might issue to revive a judgment, although more than twenty years had elapsed since it was signed, if payments within that time had been made on account. *Williams v. Welch*, 3 D. & L. 565; 1 B. C. Rep. 69.

Where a defendant suffered judgment by default in an action on a bond conditioned for the performance of covenants and payment of costs in chancery, and afterwards filed a bill for an injunction:—Held, that although the plaintiff delayed executing a writ of inquiry more than a year after interlocutory judgment was signed, still that it was not necessary to revive such judgment before execution, as the defendant attempted to delay it by the injunction. *Powis v. Powis*, 6 Moore, 517.

A rule nisi to set aside an execution, for want of a sci. fa. to revive, where it was occasioned by the defendant's own delay, was discharged with costs. *Michell v. Cue*, 2 Burr. 660.

Where final judgment had been obtained against a defendant who died before execution, and a scire facias issued (after a rule to shew cause) against his personal representative, to revive the judgment, and had been returned, a scire facias might issue, without a rule to shew cause, against the heir and terre-tenants, though the judgment was more than fifteen years old. *Wright v. Madocks*, 8 Q. B. 119; 15 L. J., Q. B. 81; 10 Jur. 266. See also *Farran v. Beresford*, ante, col. 1020.

After the lapse of seven years, it was too late to take objection, that a rule for a sci. fa. on a judgment more than ten years old had not been obtained. *Wilson v. Bacon*, 1 D. P. C. 118.

An application for a sci. fa., upon a judgment ten years old, will not be granted upon an affidavit of the plaintiff's attorney, which merely stated that the debt and costs were still unpaid; it must also have shewn that he was the attorney when the judgment was obtained, or there must have been an additional affidavit of the attorney then employed, or of the plaintiff himself. *Norfolk (Duke) v. Spencer or Leicester*, 4 D. P. C. 746; 1 M. & W. 204.

Executors—Probate Granted to.]—An affidavit

in support of a rule absolute for judgment on a scire facias at the suit of executors, must shew that the probate has been granted to them. *Vogel v. Thomson*, 1 Ex. 60; 5 D. & L. 114; 16 L. J., Ex. 309.

In a scire facias by executors to revive a judgment obtained by the testator, all who are named executors in the will may join, though one only has proved. *Scott v. Briant*, 6 N. & M. 381; 2 H. & W. 54.

A rule nisi to revive a judgment against the executors of a deceased defendant must be served on all the executors who have proved the will. *Punter v. Ssaman*, 5 N. & M. 679.

II. TO PUT PARTIES ON THE RECORD.

Upon Death of Parties.]—Where on the trial a verdict was taken for the plaintiff, with liberty, by consent of both parties, to the defendant to move to enter a verdict if the court should find him entitled to do so, and the defendant died after the trial and before the next term, a motion to enter a verdict for the defendant may be made, without putting the executors of the defendant on the record or making them parties to the rule. *Freeman v. Rosher*, 13 Q. B. 780; 13 Jur. 881.

After Interlocutory and before Final Judgment.]—Where a plaintiff brought an action against two, and proceeded to outlawry against one, and went on with the action against the other, who died after interlocutory and before final judgment:—Held, that he could not have a sci. fa. against his administrator; for, notwithstanding the outlawry, the action remained joint and therefore survived against the other. *Fort v. Oliver*, 1 M. & S. 242.

If a defendant died after a writ of inquiry executed, and before the return thereof, the sci. fa. against his executor must be to shew cause why the damages assessed should not be recovered. *Goldsworthy v. Southcott*, 1 Wils. 243.

A rule moved on 8 & 9 Will. 3, c. 11, s. 6, against an executor, for a sci. fa. to shew cause why damages should not be assessed and recovered on an interlocutory judgment signed twenty years ago against his testator, who had since died, is a rule nisi only. *Brown v. Evans*, 2 Tyr. 389.

Where a judgment was signed against a defendant, which was afterwards set aside on the terms of payment of costs, but he having died before the rule was made absolute, the plaintiff got that rule set aside, and commenced an action of sci. fa. on the judgment; the court allowed the administrator to come in and defend in the name of the original defendant, and set aside all proceedings subsequent to the declaration, on payment of costs, except those of the rule to rescind. *Cash v. Cock*, 2 D. P. C. 3.

On Marriage of Parties.]—Before 15 & 16 Vict. c. 76, s. 141, where an action was brought by a feme sole, who married after the commencement of the action but before trial, it was not necessary to issue a scire facias to make the husband a party to the action, in order to issue execution. *Walker v. Golding*, 11 M. & W. 78; 2 D., N. S. 776; 12 L. J., Ex. 185.

III. AT THE SUIT OF THE CROWN.

Plea.]—To a scire facias on bond to the crown for excise duties, a plea of payment after the day, but before writ issued, and acceptance by the crown in satisfaction, was held insufficient. *Ree v. Ellis*, 1 Price, 23.

Practice.]—For the mode of proceeding in scire facias on a forfeited recognizance, see *Ree v. Willin*, 2 C. & P. 10.

Validity.]—A scire facias against two, "that they severally be and appear to shew cause," &c., on a bond to the crown executed by three, is bad. *Ree v. Chapman*, 3 Anst. 811.

A scire facias against two on a joint and several recognizance of four to the crown, without averring the others to be dead, is bad, and may be taken advantage of without a plea in abatement, and is not cured by pleading over. *Ree v. Young*, 2 Anst. 448.

When it Lies.]—A scire facias will lie to repeal the grant of a franchise where the owner has neglected his duty. *Peter v. Kendal*, 6 B. & C. 703.

A charter of incorporation was granted by the crown to certain persons to form a company, for the purpose of purchasing and making a profit of lands and of working mines in an island. It directed that 100,000*l.*, half the intended capital of the company, should be subscribed within twelve months, and 50,000*l.* of it paid up within the same period; and that the company should not begin business until it should have been certified to the Board of Trade, by three directors, that the required capital had been subscribed, and the 50,000*l.* paid up. There were other directions respecting the preparing, executing and depositing a deed of settlement. Then followed a proviso to the effect, that if the company should fail to enter into, execute and deposit the deed of settlement within the time prescribed, or "shall not comply with any other the directions and conditions in our said letters-patent contained, it shall be lawful for us, our heirs or successors, to revoke and make void our said royal charter, and every clause, matter and thing therein contained, either absolutely or under such terms and conditions as we or they shall think fit." A second proviso empowered the crown, at any time after the expiration of twenty-one years, to revoke and make void the charter, or add modifications or conditions. The charter concluded with a statement, that it was granted on the express condition that the company should conform to the directions of a secretary of state, with regard to their intercourse and dealings with foreign powers. The company commenced business without having 50,000*l.* of their capital paid; but three of the directors had knowingly sent in a certificate to the Board of Trade, falsely stating that it had been paid up:—Held, by some of the judges, that the sending in the false certificate was a breach of a condition of the charter; by others, that, though not a breach of a condition, it was a misuser and an abuse of their franchise by the company; but that, on either view, the sending the certificate and commencing business without the prescribed capital, rendered the charter liable to forfeiture. *Eastern Archipelago Company*

v. Reg. (in error), 2 El. & Bl. 857; 23 L. J., Q. B. 82; 18 Jur. 481—Ex. Ch.

Held by all (excepting Parke, B.), that the first proviso did not limit the power of repealing the charter by scire facias, but was intended (though possibly without effect) to give the crown an additional power of revocation; consequently that a party might, on the fiat of the attorney-general, proceed by scire facias to repeal the charter without having previously obtained a revocation of it by the crown under the great seal or sign manual. *Ib.*

Parke, B., was, however, of opinion, that the nonpayment of the capital and the giving the false certificate were breaches of the directions and conditions in the charter; that, by the proviso, it became necessary for a party seeking to avoid the charter for such breaches, to obtain first a revocation in writing under the great seal or sign manual, and that it was lawful for the crown to annex such a condition to the charter. *Ib.*

IV. PROCEEDINGS.

1. WRIT OF REVIVOR, SCIRE FACIAS OR SUGGESTION.

Suggestion—When necessary.—Where one of several plaintiffs dies, and execution is issued in the names of the survivors, the absence of a suggestion on the record is not an irregularity which will entitle the defendant to be discharged out of custody. *Cooper v. Norton*, 16 L. J., Q. B. 364.

A public officer of a banking company, who was plaintiff, died after the issuing of a ca. sa., but before its execution:—Held, that it was not necessary to bring a scire facias, and that the defendant was therefore not entitled to be discharged, on the ground that the action had abated. *Todd v. Wright*, 16 L. J., Q. B. 311; 11 Jur. 471.

Where one of several co-plaintiffs dies, the surviving plaintiffs must, if they desire to bring that fact to the knowledge of the court in any proceeding in the cause, enter a suggestion of it upon the roll. *Larchin v. Buckle*, 1 L. M. & P. 740; *S. P.*, *Pinkus v. Sturch*, 5 C. B. 474.

Practice as to.—T., suing as public officer, died after issue joined. The nisi prius record was made up from the plea roll as though he was alive; the venire was awarded as between T. and the defendants, and no entry was made on the plea roll of the death of T., or of the appointment of B. as the new public officer. After the nisi prius was passed so made up, a memorandum was entered on it of the death of T., and of the appointment of B., not by way of suggestion, nor followed by confession by the defendants, or a "nient de dire." The cause was then entered for trial in the name of B. as plaintiff, and was tried by the jury returned to the venire awarded between T. and the defendants. On the evening of the commission-day, notice was given to the defendants of the death of T., and that such entry would be made and the cause tried. The defendants appeared under protest, and the plaintiff had a verdict:—Held, that the entry on the nisi prius record was irregular, and did not authorize the trial of the cause in the name of B. *Barnewall v. Sutherland*, 9 C. B. 380; 1 L. M. & P. 159; 19 L. J., C. P. 290; 14 Jur. 720.

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On a summons for leave to enter a suggestion on a judgment recovered fourteen years before, the defendant totally denying his identity, and the transaction out of which the cause of action arose, the judge first allowed time to answer the affidavits, and ultimately declined to make an order, and left the plaintiff to his remedy by action. *Wabey v. Wensley*, 1 F. & F. 415.

Revivor—Identity Denied.—When the identity of the defendant is denied, upon a summons to revive a judgment, the plaintiff's remedy is by an action on the judgment, and the proper course for the defendant is to deny the averment of identity. *Wabey v. Wensley*, 1 F. & F. 415.

Period of Limitation.—A writ of revivor is not an action upon a judgment within the Irish C. L. P. Act (16 & 17 Vict. c. 113, s. 20); and the period of limitation in such proceedings is still regulated by 3 & 4 Will. 4, c. 27, s. 40. *Wall v. Walsh*, 4 Ir. R., C. L. 103.

Affidavit.—An affidavit in support of a rule for a writ of revivor to revive a judgment more than twenty years old did not state that any part of the principal or interest had been paid within twenty years, or that there had been an acknowledgment in writing within the same period:—Held, insufficient. *Loveless v. Richardson*, 2 Jur., N. S. 716.

Scire Facias.—Notwithstanding the 1 & 2 Vict. c. 110, s. 18, it is no answer to a scire facias upon a judgment for 94l. 12s., that, after the obtaining of the verdict, and before the giving of the judgment for that sum, it was, by a rule of court, ordered that the verdict should be reduced to 1s., and that the defendant should pay to the plaintiff's attorney the costs of the action, and that the scire facias was sued out, after the making of the rule, fraudulently, and in breach of good faith. *Farmer v. Mottram*, 6 M. & G. 684; 7 Scott, N. R. 408; 1 D. & L. 781; 13 L. J., Q. B. 10; 7 Jur. 994.

The plaintiffs recovered a verdict on two bills of exchange for 68l. 6s. for damages and costs. After a fiat in bankruptcy issued against the defendant, they signed judgment. Afterwards, they proved under the fiat for the amount of the bills of exchange, the commissioners refusing to allow them to prove for the costs. The bankrupt never obtained his certificate, nor was any dividend paid under the bankruptcy. The plaintiffs subsequently sued out a scire facias to revive the judgment, solely with a view of recovering the costs. The court granted a rule to stay proceedings on the scire facias. *Woodward v. Meredith*, 2 D. & L. 136; 13 L. J., Q. B. 322.

A scire facias issued on a judgment should recite a previous scire facias on the same judgment signed thereon, although the previous scire facias has not been returned and filed. *Walker v. Thelwellson*, 1 D., N. S. 578; 6 Jur. 345.

Where a defendant was resident abroad, at Boulogne, in France, the court granted leave to sign judgment against him upon a sci. fa., on an affidavit of service of notice of the writ upon him at that place. *Stockport v. Hawkins*, 1 D. & L. 204; 12 L. J., Q. B. 317; 7 Jur. 1015. See *Macdonald v. MacLaren*, 11 M. & W. 465; 7 Jur. 404.

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2. PLEADINGS.

A defendant cannot plead any matter in bar to a scire facias on a judgment which he might have pleaded to the original action. *Baylis v. Hayward*, 5 N. & M. 613; 4 A. & E. 256; 1 H. & W. 609; *S. P., Cooke v. Jones*, Cowp. 728.

To a writ of revivor the defendant pleaded, on equitable grounds, payment of a small sum by a third person at the defendant's request, in accord and satisfaction of the entire sum due on the judgment:—Held, a good equitable plea. *Lawder v. Peyton*, 11 Ir. R., C. L. 41.

To a declaration in scire facias against a shareholder of a company, on a judgment recovered against the secretary of the company, a plea, that no memorial of the names, residences and descriptions of the directors and secretary had ever been inrolled in Chancery, as required by act of parliament, is bad, as containing matter which might have been pleaded to the original action. *Bradley v. Urquhart*, 2 D., N. S. 1042; 11 M. & W. 456; 12 L. J., Ex. 459; *S. P., Bradley v. Eyre*, 11 M. & W. 432; 12 L. J., Ex. 450; *Phillipson v. Egremont (Earl)*, 6 Q. B. 587; 14 L. J., Q. B. 25.

It was no ground for setting aside a scire facias as irregular, that there had been no return to an alias fi. fa. issued on the same judgment, although something had been done under that writ, because this might be the subject of a plea to the scire facias. *Holmes v. Newlands*, D. & M. 642; 5 Q. B. 634; 13 L. J., Q. B. 339; 8 Jur. 615.

It was no answer that a fi. fa. issued under the same judgment, within a year after the judgment, unless it appeared that the debt was satisfied by the levy which took place under such writ. *Id.*

If the original judgment was obtained collusively or fraudulently, such fraud and collusion may be pleaded in bar to a scire facias, or a motion may be made to set aside the proceedings as fraudulent. *Dodgson v. Scott*, 2 Ex. 457; 6 D. & L. 27; 17 L. J., Ex. 321; *S. P., Phillipson v. Egremont (Earl)*, 6 Q. B. 587; 14 L. J., Q. B. 25.

It is not a good plea, either in abatement or in bar to a declaration in scire facias, that a writ of error has been sued out before the return of the scire facias and is still depending. *Snooke v. Mattock*, 6 N. & M. 783; 5 A. & E. 239; 2 H. & W. 188.

To a declaration on a scire facias, suggesting the breach of a bond, the defendant pleaded, that by a judge's order it was ordered that the plaintiff should be at liberty to sign judgment in the action, with costs, and that the proceedings should be stayed on the costs being paid. Averment, that such costs were paid before the issuing of the scire facias:—Held, bad. *Tabor v. Edwards*, 4 C. B., N. S. 1; 28 L. J., C. P. 183; 4 Jur., N. S. 339.

3. PRACTICE AND TRIAL.

Quashing—Rule Nisi.—The rule for quashing a scire facias at the suggestion of the plaintiff himself is a rule nisi in the first instance. *Oliverson v. Latour*, 7 D. P. C. 605; 2 W., W. & H. 54; 3 Jur. 341.

— **On Payment of Costs.**—It is a matter of right to quash a scire facias on payment of costs. *Id.*

It can be quashed by the plaintiff before plea on payment of costs only. *Pickman v. Robson*, 1 B. & A. 486.

Where it is unnecessarily sued out, but the defendant's attorney, on his behalf, proposes terms of compromise, on which the party for a time acts, the defendant cannot afterwards object to pay the costs of the writ. *Brewster v. Meaks*, 2 D. P. C. 612.

Motion—When made.—A motion cannot be made in arrest of judgment on a scire facias, after the first four days of term. *Rex v. M'Leod*, 3 Price, 203.

Waiver of Irregularity.—Where a sci. fa. had been issued irregularly, to which an appearance was entered; and the plaintiff having delivered a declaration, to which a plea was filed pending a motion to set aside the writ:—Held, that the plea was a waiver of the irregularity. *Sloman v. Gregory*, 1 D. & R. 181.

Nonsuit.—In scire facias the plaintiff may be nonsuited. *O'Mealey v. Witson*, 1 Camp. 484.

Staying Proceedings.—The court will stay proceedings in sci. fa. on a judgment on a warrant of attorney, on a suggestion that matters occurred before the signing of the judgment, from which it would appear that nothing was due to the plaintiff, and will refer the case to the master to report. *Greenslade v. Vaughan*, 8 D. P. C. 687.

4. COSTS.

The 8 & 9 Will. 3, c. 11, s. 3, did not extend to a scire facias to repeal a patent prosecuted in the name of the king. *Rex v. Miles*, 7 T. R. 367.

In scire facias against the consor of a recognizance to the crown, no costs are recoverable by the defendant, though he succeeds on demurrer and in error. *Rex v. Bingham*, 1 Tyr. 262; 1 C. & J. 379; *S. C., nom. Hollis v. Bingham*, 1 D. P. C. 280.

An order, under the modern practice, allowing an executor to continue the proceedings in an action instituted by his testator, which order has been obtained by him after a judgment in favour of his testator, and after notice of an appeal against that judgment, is equivalent to the old order for revival, and subjects him to the same liabilities. He becomes in effect a substantive party to the suit, and is personally liable for costs. *Boynton v. Boynton*, 4 App. Cas. 733; 41 L. T. 450; 27 W. R. 825.

SCRIP.

See COMPANY.

SCULPTURE.

See COPYRIGHT.

SEA.

I. RIGHTS ON SEA-SHORE.

II. SEA-WALLS AND BANKS, 1036.

III. WRECK, 1039.

IV. SEA BIRDS.—See WILD BIRDS.

I. RIGHTS ON SEA-SHORE.

Private Rights of Crown subject to Public Rights.]—The crown may grant by letters patent to a corporation, a town and borough, being caput portus as Portsmouth, all the land between the high and low-water marks; but this subject-matter of grant, as being jus privatum in the king, must be subject to the jus publicum, or public right of the king and people to the easement of passing and repassing both over the water and the land. *Att.-Gen. v. Burridge*, 10 Price, 350.

Where a part of the sea coast or shore, being the property of the crown, and giving jus privatum to the king, is granted to a subject for uses, or to be enjoyed so as to be detrimental to the jus publicum therein, such grant is void as to such parts as are open to such objection, if acted upon so as to effect a nuisance by working injury to the public right; or it is a grant which does not divest the crown, or invest the grantee. *Att.-Gen. v. Parmeter*, 10 Price, 378.

— Arms of the Sea and Navigable Rivers.]

—The right of the crown to the soil in arms of the sea and public navigable rivers is subject to the public right of passage, and any grantee of the crown must take subject to such right. *Colchester (Mayor) v. Brooke*, 7 Q. B. 339; 15 L. J., Q. B. 59; 9 Jur. 1090.

The public right in this respect includes all such rights as, with relation to the circumstances of each river, are necessary for the convenient passage of vessels along the channel. *Ib.*

It is therefore no excuse if a vessel, which cannot reach her place of destination in a single tide, remains aground till the tide serves, although by custom or agreement a fine may be payable to the lord of the soil for such grounding. *Ib.*

The bed of all navigable rivers where the tide flows and re-flows, and of all estuaries or arms of the sea, is vested in the crown, but subject to the right of navigation which belongs by law to the subjects of the realm, and of which the right to anchor forms a part; and every grant made by the crown of the bed or soil of an estuary or a navigable river must be subject to such public right of navigation. *Gann v. Free Fishers of Whitstable Company*, 11 H. L., Cas. 192; 20 C. B., N. S. 1; 35 L. J., C. P. 29; 12 L. T. 150; 13 W. R. 589. Reversing 13 C. B., N. S. 853; 9 Jur., N. S. 1241; 9 L. T. 263; 11 W. R. 430.

If a payment is claimed from ships by the owner of the soil of an estuary or a navigable river as an anchorage due, some facts must be shewn which either prove, or from which it can be inferred, that the soil of such estuary or river was originally within the precincts of a port or a harbour, or that some service or aid to navigation

was rendered to the public in respect of which the grant of soil was made. *Ib.*

Such a claim cannot be supported on the ground of its having been immemorially made and submitted to. *Ib.*

Limit of Crown's Rights.]—In the absence of all evidence of particular usage, the extent of the right of the crown to the sea-shore landwards is *prima facie* limited by the line of the medium high tide between the springs and the neaps. *Att.-Gen. v. Chambers*, 4 De G., M. & G. 206; 23 L. J., Ch. 662; 11 Jur. 779.

Gradual Encroachments.]—If the sea or an arm of the sea, by gradual and imperceptible progress, encroaches upon the land of a subject, the land thereby covered with water belongs to the crown. *Hull and Selby Railway, In re*, 5 M. & W. 327.

Alluvion.]—Lands formed by alluvion, that is, by gradual and imperceptible deposit on the shore of the sea, belong to the owners of the adjoining demesne lands, and not to the king *jure coronæ*. *Re v. Yarborough (Lord)*, 2 Bligh, N. S. 147; 1 Dow & Clark, 178; 5 Bing. 163; 7 D. & R. 790; 3 B. & C. 91.

Accretion.]—Where there is a gradual accretion of land, which is the result of artificial causes produced by the lawful use of the land by the owner, such accretion does not belong to the crown. *Att.-Gen. v. Chambers*, 4 De G. & J. 55; 5 Jur., N. S. 745.

Where the accretions are of gradual and imperceptible progress, there is no distinction between accretions produced by natural and artificial causes. *Ib.*

If, however, the artificial causes can be shewn to have been intended to produce the accretion, the crown would be entitled. *Ib.*

Land formed by gradual accretion belongs to the owner of the adjacent soil. *Doe d. Seabrights v. East India Company*, 10 Moore, P. C. C. 140; 6 Moore, Ind. App. 267.

Property Passing by Grant.]—Queen Elizabeth, by royal letters patent, granted to the corporation of Hastings lands in and about Hastings, which were liable to forfeiture, as being affected by superstitious uses, and had been previously concealed, and "all that her parcel of land and her hereditaments called the Stone Beache, with the appurtenances in Hastings aforesaid, in her county of Sussex, and all messuages, houses, edifices, and buildings whatsoever, with their appurtenances, in and upon the aforesaid parcel of land called the Stone Beache:"—Held, first, that there was no presumption from the language of the grant against the extension of the grant to the part of the beach below high-water mark. *Hastings (Corporation) v. Teall, infra*.

Held, secondly, that inasmuch as it appeared that the expression "Stone Beach" was now applied to the entire part of the beach covered with shingle, which extended below as well as above high-water mark, and that the inferior boundary, called the "Stone's Foot," was liable to vary according to the state of the wind and tide, the whole present foreshore, whether now shingle or sand, must, as against a person not claiming any title in himself, be presumed to be

included in the grant, and injunction granted accordingly to restrain the deposit of earth on the sand below the Stone's Foot. *Ib.*

By an act reciting that a tract of land daily overflowed by the sea, and to which the king in right of his crown claimed title, might be productive if embanked, and that the king had consented to such embankment, a part of the land, called Lipson Bay, was granted to a company for that purpose. On one side of the bay was the northern side of an estate called Lipson Ground, forming an irregular declivity, in parts perpendicular, and in parts sloping down to the sea-shore, and overgrown with brushwood and old trees. The company in embanking the bay made a drain on this side, in the same direction with the cliff, cutting through it in parts, but leaving several recesses of small extent between the projecting points. These recesses used to be overspread with sea-weed and beach, and were covered by the high water of the ordinary spring tides, but not by the medium tides:—Held, in the absence of proof as to acts of ownership, that the soil of these recesses must be presumed to have belonged to the owner of the adjoining estate, and not to the crown; and did not, therefore, pass to the company by the act of parliament. *Lowe v. Gorrett*, 3 B. & Ad. 862.

The charter of 11 Edw. 3, as interpreted by 21 & 22 Vict. c. 109, conveyed to the Duke of Cornwall all the rights of the crown in the foreshore of the county of Cornwall, and not merely the foreshore attached to the manors granted by the charter. *Penryn (Mayor) v. Holm*, 2 Ex. D. 328; 46 L. J., Ex. 506; 37 L. T. 133; 25 W. R. 498.

By a royal patent (temp. Jac. II.), lands specifically described by name, adjoining a sea-shore, were granted, "and also all and singular lands, tenements, &c., to the aforesaid premises, &c., belonging, &c., or with the said premises or any part or parcel thereof used, occupied or enjoyed." The person in whom the estate of the grantee became invested brought an action for trespass on the adjacent sea-shore between high and low-water mark, and for trover and conversion of ungathered drifted sea-weed thereon, and at the trial proved convictions at petty sessions for trespasses on the locus in quo, and an award in his favour in a former action by him against an alleged trespasser:—Held, first, that the general words of the patent, explained by user and enjoyment, passed the sea-shore adjoining the lands granted down to low-water mark. *Brew v. Haren*, 11 Ir. R., C. L. 198—Ex. Ch. Affirming 9 Ir. R., C. L. 29.

Grant of Foreshore—Possessory Title—Evidence of.]—A possessory title sufficient against a trespasser may be established by persons claiming foreshore, without producing evidence sufficient to displace the title of the crown. *Hastings (Corporation) v. Icail*, 19 L. R., Eq. 558; 22 W. R. 724.

In a suit against a trespasser by persons claiming title to foreshore and giving evidence of acts of ownership in support of their title, it is not open to the defendant to prove any acts of ownership by the crown except such as can be shewn to have been done with the knowledge of the plaintiffs. *Ib.*

Evidence of acts of ownership on parts of the foreshore which were separated and divided from the part in dispute by the foreshore admitted to

belong to the crown, is admissible to prove the defendant's right to the whole of which they formed part. *Att.-Gen. v. Portsmouth (Mayor)*, 25 W. R. 559.

A patent of James I. granted the priory of Holmpatrick, situate at Skerries, and also the four islands to the priory belonging, to wit, the island called Skennick, containing three acres, &c.; and the patent used large general words granting wreck of the sea, flotsam, jetsam, &c.; and all the appurtenances, to the priory belonging:—Held, that these words, coupled with proof of enjoyment for seventy years of the foreshore, by letting to tenants to take sea-weed, &c., were sufficient evidence to support a finding that the shore passed under the grant. *Healy v. Thorne*, 4 Ir. R., C. L. 495.

In 1861, the trustees for sale under the will of A. (executed in 1854) purported to convey to M. the foreshore of a townland, and in 1865 he obtained a verdict against P. K., a tenant of adjoining lands, for trespassing on the foreshore and taking sea-weed therefrom. In that action, proof was given of exclusive acts of ownership over the foreshore by M. and his predecessors in title for above sixty years, but there was no positive evidence of a grant of it from the crown. In 1873, T. K. and others, who were also adjacent tenants, proceeded to carry off the sea-weed in assertion of an alleged public right, whereupon M.'s successors in title having filed a bill against them praying that the plaintiffs might be declared entitled to the foreshore and sea-weed, and be quieted in the exclusive possession and enjoyment thereof, and for the usual injunction:—Held, that upon the facts, the plaintiffs were entitled to the relief sought; and that as the defendants and P. K. were members of the same local class, asserting an adverse public right, the record and judgment in the action of 1865 were properly receivable in evidence. *Mulholland v. Killen*, 9 Ir. R., Eq. 471.

A. claimed the sea-shore in front of his land, upon the ground of uninterrupted enjoyment for sixty years, evidence of user being that his cattle had been allowed to stray over the invisible line of boundary separating his land from the sea-shore:—Held, that where property is of a nature that it cannot be easily protected against intrusion, and if it could it would not be worth the trouble of preventing it, mere user is not sufficient to establish a right. *Att.-Gen. v. Chambers*, 4 De G. & J. 55; 5 Jur., N. S. 745.

A grant of wreck from Hen. II., to an abbey upon all their lands by the sea, confirmed by inspeimus by Hen. VIII., and a subsequent grant by him of the island of B. and its shores, belonging to the late abbey, supported by evidence, that between forty and fifty years back the proprietor of the island of B. raised an embankment across a small bay, and had ever since asserted an exclusive right to the soil, without opposition:—Held, that although the usage of forty years' duration could not of itself establish such exclusive right, or destroy the rights of the public; yet, that it was evidence from which prior usage to the same effect might be presumed, and which, coupled with the general words contained in those grants, served to establish such right. *Chad v. Tised*, 5 Moore, 185; 2 B. & B. 403.

So, where the lessees of a fishery had publicly landed their nets on the shore at A. for more than twenty years, and had frequently repaired

the landing-place, although both the fishery and landing-place had originally belonged to one person, but no evidence was offered in an action for the disturbance of the lessor's rights, to shew that he or those who owned the shore at A. under him knew of the lessees of the fishery landing their nets there:—Held, that it was properly left to the jury to presume a grant of the right of landing to the lessees by some former owner of the shore at A. *Gray v. Bond*, 5 Moore, 527; 2 B. & B. 667.

Lords of Manors—Ownership of Foreshore.—The foreshore below high-water mark may be parcel of the adjoining manor, and where, by an ancient grant of the manor, its limits are not sufficiently defined, acts of ownership are admissible evidence that such foreshore is parcel of the manor. *Walton-cum-Trimley Manor, In re, Tomline, Ex parte*, 28 L. T. 12; 21 W. R. 475.

The sea-shore between high and low-water mark may be parcel of the adjoining manor. *Beaufort (Duke) v. Swansea (Mayor)*, 3 Ex. 413.

Where, by an ancient grant of the manor, its limits are not defined, modern usage is admissible to shew that such sea-shore is parcel of the manor. *Ib.*

On a trial of an information of intrusion, the question being as to the title of the defendant, as against the crown, to a portion of the sea-shore between high and low-water mark, adjacent to Cemmaes, in the Isle of Anglesea, he gave in evidence a grant by James I. of the manor of Cemmaes to an ancestor of the present lord of the manor, and also gave evidence of acts of ownership over the sea-shore both by himself and the lord of the manor; and there was also evidence of acts of ownership on the part of the crown. The judge told the jury that the grant of the manor did not pass the sea-shore, and he left it to the jury to say whether they were satisfied by the evidence of user that the defendant had acquired a title as against the crown:—Held, a misdirection; and that the proper question was, whether the evidence of user coupled with the grant satisfied the jury that the defendant had such title. *Att.-Gen. v. Jones*, 2 H. & C. 347; 33 L. J., Ex. 249; 6 L. T. 655.

Acts of ownership exercised by a lord of a manor upon the sea-shore adjoining, between high and low-water mark, such as the exclusive taking of sand, stones and sea-weed, may be called in aid, to shew that the shore is parcel of the manor, where an ancient grant under which the manor appears to have been held, and which professes to grant the manor, with "wreck of the sea," "several fishery," and other rights of an extensive description, does not expressly purport to convey "littus maris." *Calmdy v. Rowe*, 6 C. B. 861.

In an action by the lord of a manor for taking shell-fish and shingle on the foreshore of the manor, between high and low-water mark, his title being under a royal grant of the manor, with anchorage and groundage, but with no express mention of the shore:—Held, that this grant afforded of itself a presumption that it included the soil of the shore; and the jury was directed that, upon matters of that nature, they would properly be guided by the opinion of a judge. *Le Strange v. Rowe*, 4 F. & F. 1048.

An earlier grant from the crown to a corporation of rights of anchorage, groundage and bal-

last over the shore of the locus in quo would not weigh much against positive evidence of the exercise of rights of ownership over the shore by the ancestors of the present lord of the manor, under the grant of the manor. *Ib.*

Evidence of such acts of ownership as licences to take shingle, sand and sea-weed, is receivable to support the presumption of a grant of the soil of the shore. *Ib.*

A lord of a manor, by lease and release, bargained and sold certain sea grounds, oyster layings, shores, and fisheries, extending from the south, at low-water mark, to north, at high-water mark, and containing, in the whole, by estimation, 800 acres of land, covered with water, or thereabouts, as the same are beacons, marked, and stubbed out; since the date of the deed, the sea had imperceptibly encroached upon the land, and the high and low-water marks had varied in the same proportion:—Held, that so much of the soil of the shore as from time to time lay between high and low-water mark had passed to the grantee under this deed. *Scrutton v. Brown*, 6 D. & R. 636; 4 B. & C. 485.

Right to Sea-weed.—The lord of a manor cannot establish a claim to the exclusive right of cutting sea-weed on rocks situate below low-water mark, except by a grant from the crown, or by such long and undisturbed enjoyment of it as to give him a title by prescription. *Benest v. Pipon*, 1 Knapp, P. C. C. 60.

By a royal patent (temp. Jac. II.), lands specifically described by name, adjoining a sea-shore, were granted, "and also all and singular lands, tenements, &c., to the aforesaid premises, &c., belonging, &c., or with the said premises or any part or parcel thereof used, occupied or enjoyed." The person in whom the estate of the grantee became vested brought an action for trespass on the adjacent sea-shore between high and low-water mark, and for trover and conversion of ungathered drifted sea-weed thereon, and at the trial proved convictions at petty sessions for trespasses on the locus in quo, and an award in his favour in a former action by him against an alleged trespasser:—Held, that trover lay by the owner of the shore for the wrongful taking of sea-weed cast by the sea upon the shore between high and low-water mark, though such sea-weed had been left ungathered by the plaintiff. *Brew v. Haren*, 11 Ir. R., C. L. 198—Ex. Ch. Affirming 9 Ir. R., C. L. 29.

Held, secondly, that the convictions and award were properly received in evidence. *Ib.*

There is not, at common law, a general right in the public in entering the sea-shore for the purpose of taking sea-weed. *Howe v. Stowell*, 1 Alcock & Napier, 548.

Grant of Lands to be Reclaimed.—A grant of lands to be recovered from the sea must be reduced into possession within a reasonable time. *Att.-Gen. v. Richards*, 2 Anst. 614.

Right to Shingle.—A surveyor of highways cannot justify under a prescriptive right or a custom to take stones from the waste, whether adjoining the sea-shore between high and low-water mark or otherwise, for the purpose of repairing the highways of a parish. *Padwick v. Knight*, 7 Ex. 854; 22 L. J., Ex. 198.

In an action for taking stones and sand from the sea-shore, the defendant pleaded a custom in

the inhabitants of a township, of which he was a member, and also a prescriptive right for the inhabitants and overseers of the highways of that township, to take such stones and sand for the repair of the highways:—Held, that such a custom was bad, being a profit à prendre in alieno solo; and that the overseers of the highways, and the inhabitants of a township, not being a corporation, were not capable of taking by grant, and therefore could not claim such right by prescription. *Constable v. Nicholson*, 14 C. B., N. S. 230; 11 W. R. 698.

It is the duty of the crown to protect the realm from the inroads of the sea by maintaining the natural barriers, or by raising artificial barriers; and therefore no subject is entitled to destroy a natural barrier against the sea. And if the destruction of such natural barrier would cause an injury to a neighbouring landowner, he is entitled to an injunction to restrain it. In an action by the owner of a piece of land adjoining the foreshore, an injunction was granted to restrain the defendant, the owner of the foreshore, from removing shingle therefrom, so as to expose the plaintiff's land to the inroads of the sea; although the shingle was removed for sale in a natural and ordinary user of the land. *Attorney-General v. Tomline*, 14 Ch. D. 58; 49 L. J., Ch. 377; 42 L. T. 880; 28 W. R. 870; 44 J. P. 617—C. A.

Right to Sand.]—A custom for the inhabitant landholders of a parish to dig or take, from closes adjoining the sea-shore, sand which had been from time to time drifted from the shore, and carried by the wind from the shore into and deposited upon such closes, is bad. First, because the sand when deposited becomes a part of the soil of the closes, and therefore the custom is for taking a profit in alieno solo; and, secondly, for uncertainty, it being impossible to distinguish between the original soil of the closes and the sand from all time drifted upon it. *Blewett v. Tregonning*, 5 N. & M. 234; 3 A. & E. 554; 1 H. & W. 431.

Right of Bathing.]—The powers conferred upon local commissioners or local boards of health under 10 & 11 Vict. cc. 34, 89, or under any special act, for regulating the mode of bathing on the sea-shore, and licensing bathing-machines there, do not warrant the licensees of such machines in placing them on any part of the foreshore which is private property. *Mace v. Philcox*, 15 C. B., N. S. 600; 33 L. J., C. P. 124; 10 Jur., N. S. 680; 9 L. T. 766; 12 W. R. 670.

The public at large has no common-law right to bathe in the sea; and, as incident thereto, of crossing the shore on foot, or with bathing-machines for that purpose. *Blundell v. Cattefall*, 5 B. & A. 268.

Parochiality of Shore.]—The portion of land on the sea-shore between ordinary high-water mark and ordinary low-water mark may form part of the parish coming down to the shore, but there is no *prima facie* presumption that it does so; and, in the absence of evidence that it does form part of the parish, it must be taken not to be part of it. *Reg. v. Musson*, 8 El. & Bl. 900; 27 L. J., M. C. 100; 4 Jur., N. S. 111.

There is no presumption that any part of the

sea-shore is parochial, and it lies on those who assert its parochiality to prove it. *Bridgwater Trustees v. Bootle-cum-Linacre*, 2 L. R., Q. B. 4; 36 L. J., Q. B. 41; 15 L. T. 351; 15 W. R. 169.

That part of the sea-shore which lies between high and low-water mark is within and part of the adjoining county, so that the justices of the county have jurisdiction to take cognizance of offences committed thereon, whether the land is covered with water or not at the time the offences are committed. *Embleton v. Brown*, 3 El. & Bl. 234; 30 L. J., M. C. 1; 6 Jur., N. S. 1298.

II. SEA-WALLS AND BANKS.

Right to Erect.]—Persons occupying lands adjoining the sea may erect such defences as are necessary for the preservation of their own lands, although such erections may render it necessary for their neighbours to do the like. *Rea v. Pagham (Commissioners)*, 2 M. & R. 468; 8 B. & C. 353.

Commissioners of Sewers.]—Commissioners of sewers for certain levels may erect defences for the preservation of land within those levels. *Id.*

Repairs.]—The 23 Hen. 8, c. 5, s. 17, having directed that laws, acts, decrees, and ordinances, made by commissioners of sewers, shall stand good and be put in execution so long time as their commission endureth, and no longer, except the said laws and ordinances be engrossed on parchment, and certified under the seals of the commissioners into chancery, and have the royal assent; and 13 Eliz. c. 9, having directed all commissions of sewers to continue in force for ten years, unless sooner determined by supersedeas or any new commission; and that all laws, ordinances, and constitutions, made by force of such commission, being written on parchment, indented, and under seals, shall, without such certificate or royal assent, continue in force notwithstanding the determination of the commission by supersedeas, until repealed or altered by new commissions; and that all such laws, ordinances, and constitutions, written on parchment, indented, and sealed, shall, without certificate or royal assent, continue in force for one year after the expiration of such commission by lapse of ten years from its teste:—Held, first, that the laws, acts, decrees, and ordinances, mentioned in 23 Hen. 8, c. 5, s. 17, mean the same as the laws, ordinances, and constitutions mentioned in 13 Eliz. c. 9; and, secondly, that a decree made by commissioners under a former commission, which had expired by lapse of ten years, directing a sea-wall to be refounded, which had been destroyed by a violent tempest and inundation, and the sums necessary for its construction to be advanced by those who were before bound to sustain it *ratione tenuræ* (and who did advance the money accordingly), and that a rate should be made on the level for their reimbursement (although such decree had been written on parchment, indented, and sealed, which this was not), could not be enforced by commissioners under a new commission, issued more than a year after the expiration of the former commission, as to so much of it as remained unexecuted; though good to the extent to which it had been executed.

Rex v. Somerset (Commissioners of Sewers), 9 East, 109; 3 Smith, 105.

— **Liability of Adjoining Owners for Expenses.**—If a sea-bank or a wall, which the owners of particular lands are bound to repair, is destroyed by tempest, without any default of such owners, the commissioners of sewers may order a new one (even in a different form, if necessary) to be erected at the expense of the whole level. *Rex v. Somerset (Commissioners of Sewers)*, 8 T. R. 312.

A landowner may be liable, by prescription, to repair sea-walls, *ratione tenuræ*, though destroyed by extraordinary tempest. *Reg. v. Leigh*, 10 A. & E. 398; 2 P. & D. 357.

A mortgagor, not in actual possession, but in receipt of the rents and of the profits of lands charged with repair of a sea-bank, is liable for default of reparation. *Reg. v. Baker*, 2 L. R., Q. B. 621; 36 L. J., Q. B. 242; 15 W. R. 1144.

Notwithstanding 3 & 4 Will. 4, c. 22, s. 15, the commissioners of sewers, under 23 Hen. 8, c. 5, s. 3, have power to repair a sea-bank, and fine the person whose lands are charged with the repair, without giving him any notice; therefore, a presentment, which does not allege notice to repair, but states that the costs and charges of repairing amount to a certain sum, and a judgment thereon, ordering that payment, are good. *Ib.*

A rule obtained by the conservators of the Bedford Level, for a mandamus to parties liable, *ratione tenuræ*, to repair the banks of the Ouse, was discharged on a preliminary objection, that by 15 Car. 2, c. 17, the applicants were commissioners of sewers, and might therefore put in force against the parties another remedy. *Reg. v. Gamble*, 3 P. & D. 122; 11 A. & E. 69.

The commissioners of sewers cannot maintain an action against the commissioners of a harbour, for breaking down a wall or a dam erected by the former, as such commissioners, across a navigable river, as the authority to be exercised by them on behalf of the public does not vest in them such a property or possessory interest as will enable them to maintain such action. *Newcastle (Duke) v. Clark*, 2 Moore, 666.

— **Orders of.]**—Orders of the commissioners of sewers, requiring landowners to repair and alter sea-walls, may be given in evidence as adjudications by a court of competent jurisdiction, without proof of their having been acted upon. *Reg. v. Leigh*, *supra*.

Reimbursement of Owner.]—Where the owner of marsh lands was bound by the custom of a sewage-level to repair the sea-walls abutting on his own land, and by an extraordinary flood-tide the wall was damaged, the court refused to grant a mandamus to the commissioners of sewers to reimburse him the expense of the repairs; it appearing by affidavit that the wall had been previously presented for being in bad repair, and was out of repair at the time the accident happened; nor can the other landowners in the level be called upon to contribute to the repairs of such wall. *Rex v. Essex (Commissioners of Sewers)*, 2 D. & R. 700; 1 B. & C. 477.

Liability of Purchaser.]—The purchaser of

lands situate below the level of the sea is bound to inquire how all walls necessary for the protection of his property against the encroachments of the sea are maintained. *Morland v. Cook*, 6 L. R., Eq. 252; 37 L. J., Ch. 825; 18 L. T. 496; 16 W. R. 777.

Proceedings by Individual who is Damified.]

—An individual who has suffered loss in consequence of a decay of sea-walls, which a corporation is directed to repair under the terms of a grant from the crown, conveying a borough and pier or quay tolls to the corporation, may sue the corporation for damages. *Lyne (Mayor) v. Henley*, 3 B. & Ad. 77; 5 Bing. 91. Affirmed, 1 Scott, 29; 1 Bing. N. C. 222; 2 C. & F. 331; 8 Bligh, N. S. 690.

So, as the obligation concerns the public, an indictment will lie for the general default. *Ib.*

So, when the obligation arises from prescription. *Lynn (Mayor) v. Turner*, Cowp. 86; *S. P.*, *Anon*, Loftt, 556.

The owners of lands fronting the sea are under no liability at common law to repair sea-walls. *Hudson v. Tabor*, 1 Q. B. D. 225; 45 L. J., Q. B. 190; 34 L. T. 249; 24 W. R. 579. Affirmed, 2 Q. B. D. 298; 46 L. J., Q. B. 463; 36 L. T. 492; 25 W. R. 740—C. A.

The fact that an owner of sea frontage has always repaired the sea wall by which his property is protected is in itself no evidence of liability to repair by prescription or *ratione tenuræ*. *Ib.*

A. was the occupier of land and B. the proprietor of adjoining land fronting to a creek communicating with the sea. It was necessary that each proprietor having land fronting the creek should maintain a sea bank or wall to keep out the sea, and such a sea wall had been maintained upon the creek time out of mind. The wall protecting A.'s land was continuous with that protecting B.'s land, and the level of B.'s land was higher than that of A.'s. These walls had a tendency to gradually subside, and it became necessary from time to time to raise them to the proper height by placing fresh materials on the top. Owing to an extraordinary high tide, the water flowed over B.'s wall, and spread not only over his land, but also over the land of A., doing considerable damage. In an action to recover the amount of the damage, the jury found that the mischief had happened through B.'s neglect to keep his wall at the proper level:—Held, first, that the mere fact that each frontager had always maintained the wall in front of his own land, and that no one had thought it necessary to erect a wall or bank to protect himself from the water coming from his neighbour's land, was not sufficient evidence to establish a prescriptive liability on the part of B. to maintain the wall not only for his own protection but for that of the adjoining landowners. *Ib.*

Held, secondly, that by the common law, apart from prescription, no such liability was cast on B. *Ib.*

A railway was carried along an embankment upon low lands lying between a river and A.'s land. The low lands were separated from his land by a bank which, before the railway embankment was placed there, sufficed to protect his land from the floodwaters of the river; but in consequence of the embankment, the floodwaters were unable to spread themselves over the low lands as formerly, and flowed over the bank into his land:

—Held, that although the company was not required by their act to make flood openings to their embankment, and would not be compellable by mandamus to make them, yet, as they might by proper caution have prevented the injury sustained by A., an action was maintainable against them for such injury. *Lawrence v. Great Northern Railway Company*, 16 Q. B. 643; 6 Railw. Cas. 656; 20 L. J., Q. B. 293; 15 Jur. 652.

No obligation arises from the erection of a sea-wall to erect other works for the protection of neighbours, nor to indemnify them against loss. *Rees v. Pagham (Commissioners)*, *supra*.

Rates for Repairs to.]—A parish consisting of two districts had immemorably been assessed to the repairs of a sea-bank (which was necessary for the protection of lands from the sea in both districts) by one assessment collected by one dyke-reeve. The commissioners of sewers, without any presentment of a jury, appointed two dyke-reeves, one for each district, and made a rate on one district exclusively for the repairs of the sea-bank:—Held, that the rate was void for want of a presentment, and that the commissioners were without jurisdiction, and were liable for the taking of cattle under a distress warrant issued by them for arrears of such rate. *Wingate v. Waite*, 6 M. & W. 739; 4 Jur. 860.

Right of Way acquired on Sea-walls.]—There is no such inconsistency between the powers and duties of commissioners of sewers to keep up a sea or a river wall, and a right of way enjoyed by the public along such a wall, as to prevent such a right of way being acquired. *Greenwich Board of Works v. Maudslay*, 5 L. R., Q. B. 397; 39 L. J., Q. B. 205; 23 L. T. 121; 18 W. R. 948.

Evidence of long and uninterrupted user may establish the right of way in such a case as well as in the ordinary case of a right of way claimed and used over the land of an individual. *Ib.*

Repairs of Highway Swept away by Sea.]—A highway originally ran down to the sea to the water's edge. The action of the waves in process of time swept away a portion of the land, and destroyed a part of the road, so that the road ran to the edge of a cliff twenty feet high. The road up to this point was in good repair. Upon an indictment against a parish for non-repair of the highway:—Held, that the road beyond the edge of the cliff having been swept away by natural causes, there was nothing which the parish could reasonably be called on to repair. In fact, as regarded that part, there was no road in existence, and therefore nothing to repair. *Reg. v. Hornsea*, Dears. C. C. 291; 23 L. J., M. C. 59; 18 Jur. 315.

III. WRECK.

What is.]—Timber found floating without an apparent owner at sea, having drifted from the place where it was moored in a river, is not wreck within 17 & 18 Vict. c. 104, s. 458, and therefore persons securing such timber cannot enforce a claim for salvage in respect of their

services. *Palmer v. Rouse*, 3 H. & N. 505; 27 L. J., Ex. 137.

The term "wreck," in 3 & 4 Will. 4, c. 52, s. 50, is intended to apply to goods thrown on shore by the violence of the waves. *Legge v. Boyd*, 1 C. B. 92; 9 Jur. 307; 14 L. J., C. P. 138.

And it is not confined to goods that would pass to the crown or the crown's officer by virtue of the prerogative. *Barry v. Arnaud*, 10 A. & E. 646; 2 P. & D. 633.

A ship cannot be considered wreckum maris, nor the claim of a lord of a manor to wreck sustained, unless at the time of taking possession she is either on the actual shore itself, or left high and dry on land. *The Pauline*, 2 Rob., Adm. Rep., 358; 9 Jur. 286.

Right to Wreck.]—The grantee of wreck has a special property in all goods stranded within his liberty, and may maintain trespass against a wrong-doer for taking them away, though such goods were part of a cargo of a ship from which some persons escaped alive to land, and though the owners within a year and a day claimed and identified them; and though the taking was before any seizure on behalf of the grantee. *Dunwich (Bailiffs) v. Sterry*, 1 B. & Ad. 831.

Parol evidence cannot be resorted to in order to support a prescriptive right to wreck, if it appears that the property in respect of which wreck is claimed was in the crown in the time of Charles the First, as a jury could not infer that it was in those under whom the party claims from time of legal memory. *Alcock v. Cooke*, 2 M. & P. 625; 5 Bing. 340.

If Spanish dollars, more than 100 years old, are found in the sands of a sea-shore, it will be presumed that they came there by the loss of some vessel which was wrecked, although no part of any vessel is found near them. *Talbot v. Lewis*, 6 C. & P. 603.

A log of wood found floating in the sea near the shore was drawn on a rock by a person wading into the water; another log having been cast upon the beach, and by the next tide swept out to the sea, and then taken while floating, these are both droits of admiralty, and do not belong to the grantee by patent of wreck on the coast. *Stackpole v. Reg.*, 9 Ir. R., Eq. 619.

The log cast on the beach having been marked by a knife, with the design of claiming property in it for the grantee of wreck before it was swept back to sea, does not prevent its becoming a droit of admiralty when afterwards found floating. *Ib.*

The jurisdiction of the Admiralty subsists as long as the shore is covered with water. The rights of lords of manors can exist only as long as the land is left dry. *The Pauline*, 2 Rob. Adm. Rep. 358; 9 Jur. 286.

SEAMEN.

See SHIPPING.

SEARCH WARRANT.*See* JUSTICE OF THE PEACE.**SECRETARY OF STATE.***See* PUBLIC OFFICER.**SECURITY FOR COSTS.**I. OF APPEALS.—*See* APPEAL.II. ON WINDING UP OF COMPANIES.—*See* COMPANY.III. IN OTHER CASES.—*See* PRACTICE.**SEDUCTION.***See* MASTER AND SERVANT.**SEPARATION DEEDS.***See* HUSBAND AND WIFE.**SEQUESTRATION.***See* ECCLESIASTICAL LAW—EXECUTION.**SERVANT.***See* MASTER AND SERVANT.**SERVICE OF WRIT.***See* PRACTICE.**SESSIONS.***See* JUSTICE OF THE PEACE.**SET-OFF.**A. SINCE JUDICATURE ACTS.—*See* PLEADING.

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B. BEFORE JUDICATURE ACTS.

I. IN WHAT ACTIONS.

1. IN ACTIONS ON BONDS.

In what Cases.—A set-off may be pleaded to an action on a bond, the condition of which is for the payment of an annuity or a growing sum. *Collins v. Collins*, 2 Burr. 820; 2 Ld. Ken. 530.

But to an action on a bond conditioned for replacing stock, a set-off cannot be pleaded. *Gillingham v. Washett*, M'Clel. 198; 13 Price, 484.

Nor to an action on a bond conditioned to indemnify generally. *Atwool v. Atwool*, 1 El. & Bl. 21; 1 C. L. R. 242; 22 L. J., Q. B. 287; 17 Jur. 789.

The plaintiff and the defendant were partners; they dissolved the partnership, the plaintiff agreeing to take all the debts of the firm upon himself, and to release the defendant from liability, and the defendant giving him a bond for a certain sum, payable by instalments. The plaintiff failed to pay a debt due from the firm, whereupon the creditors sued the defendant and obtained judgment, and issued a *fi. fa.*, under which the sheriff seized and sold the defendant's goods, and out of the proceeds paid the debt:—Sembles, that, in an action on the bond, the defendant was entitled to set off as money paid the sum so paid by the sheriff. *Rodgers v. Maw*, 15 M. & W. 444; 4 D. & L. 66; 16 L. J., Ex. 137.

Pleadings.—A defendant must set forth in the plea what is really due on the bond, before he is entitled to set off any cross demand. *Symons v. Knox*, 3 T. R. 65. And see *Grimwood v. Barrit*, 6 T. R. 460.

To an action on a bond, conditioned for payment of interest half-yearly, and the principal sum six months after notice, the defendant pleaded a set-off exceeding the interest due, which set-off accrued before the commencement of the action, but after the interest became payable, with an allegation that notice to pay the principal had not been given:—Held, that the plea was an answer to the action. *Lee v. Lester*, 7 C. B. 1008; 7 D. & L. 137; 18 L. J., C. P. 312.

2. IN ACTIONS ON COVENANTS.

When Allowed.—In an action on a covenant for unliquidated damages, damages arising from the breach of other covenants to be performed by the plaintiff cannot be pleaded by way of set-off. *Howlett v. Strickland*, Cowp. 56; *S. P.*, *Oldershaw v. Thompson*, 5 M. & S. 164; 1 Stark. 311.

To an action on a covenant for rent by a landlord, the defendant cannot set off any uncertain damages that he may be entitled to recover

against the landlord on any of the other covenants in the lease. *Weigal v. Waters*, 6 T. R. 488.

In an action on a covenant for not indemnifying a person against taxes, no plea of set-off can be sustained. *Cooper v. Robinson*, 2 Chit. 161.

In an action on a covenant, the defendant cannot set off a sum alleged to be due on a guarantee under seal. *Williams v. Flight*, 2 D., N. S. 11; 7 Jur. 197.

3. IN REPLEVIN.

The statutes of set-off do not extend to replevin. *Laycock v. Tuffnell*, 2 Chit. 531; *S. P.*, *Absalom v. King*, Bull. N. P. 181.

Therefore, a plaintiff in replevin cannot plead in bar a set-off to an avowry for rent. *Id.*

But a tenant may plead payment of ground-rent in bar of an avowry for rent. *Sapsford v. Fletcher*, 4 T. R. 511.

4. IN THE ADMIRALTY COURT.

No set-off is allowed in this court, save in the exceptional case of suits for mariners' wages. *The Don Francisco*, Lush. Adm. Cas. 468; 31 L. J., Adm. 14.

II. AGREEMENTS AS TO SET-OFF.

Creditor Borrowing from Debtor.—If a creditor borrows money of his debtor on the security of a note, even under an express promise of repayment, he may nevertheless set off the amount of his original debt. *Lechmere v. Hawkins*, 2 Esp. 626. And see *Preston v. Shotton*, 1 Anst. 50.

A set-off was allowed in equity where a creditor had borrowed from the debtor under an express promise to pay. *Taylor v. Okey*, 13 Ves. 180.

In Writing.—If a creditor consents that his debtor shall set off the debt against a debt due from the creditor to another person, it seems that the agreement, although not in writing, is valid. *Coren v. Chadley*, 5 D. & R. 417; 3 B. & C. 596; 1 C. & P. 174, 478.

Delivery of Goods.—If A. agrees to make a waggon for B., and makes it accordingly, but refuses to deliver it unless the money is paid on delivery, the money which was to be paid for the waggon may be set off against any demand of B. against A. for goods bargained and sold. *Dunmore v. Taylor*, Peake, 41.

B., a creditor of A., employed A. to repair a carriage, undertaking to pay ready money for the repairs:—Held, that B. could not, upon offering to set off an adequate portion of the debt, require the re-delivery of the carriage without payment of the repairs. *Clarke v. Fell*, 1 N. & M. 244; 4 B. & Ad. 404.

Made by Broker.—An agreement by a broker that he will sell goods for his principals, and pay over the proceeds, without setting off a debt then due from the principals to him, is not binding on the broker so as to deprive him of his legal right of lien or set-off. *McGillivray v. Simpson*, 9 D. & R. 35; 2 C. & P. 320.

But if he also agrees not to set off a debt due from a prior firm, which by a previous letter the

principals had agreed to pay him, the principals having assumed the funds of that firm; the letter and the agreement must be set against each other, and the broker will not be allowed to set off that debt against the proceeds of the goods. *Ib.*

Proof of.]—An allegation of an agreement to set off a specific joint debt against specific separate debts previously accrued, is in substance proved by evidence of an agreement, prior to the debts accruing, to set off all joint debts that should thereafter arise against all separate debts. *Kinnerley v. Hossack*, 2 Taunt. 170.

III. SUBJECT-MATTER OF SET-OFF.

1. GENERALLY.

Enforceable by Action.]—The right of a defendant in an action to set off a debt due from the plaintiff to him, under 2 Geo. 2, c. 22, s. 13, exists only where the debt sought to be set off is enforceable by action. *Rawley v. Rawley*, 1 Q. B. D. 460; 45 L. J., Q. B. 675; 35 L. T. 191; 24 W. R. 995—C. A.

Where a defendant sought to set off a debt, arising upon the promise of an infant, such promise not having been ratified in accordance with 9 Geo. 4, c. 14, s. 5:—Held, that the replication of infancy to the plea of set-off was a sufficient answer, and that the plaintiff was entitled to recover. *Ib.*

The words in 9 Geo. 4, c. 14, s. 5, "no action shall be maintained," extend to cases of set-off; so that a defendant may not set off a promise of an infant supported merely by a parol ratification after full age in an action brought against him by the infant, any more than he might sue the infant upon such promise, both being equally precluded by the above section. *Ib.*

Debt Due at Time of Action brought.]—A defendant can set off those debts only which were due to him from the plaintiff at the time of action brought, as well as at the time of plea pleaded. *Braithwaite v. Coleman*, 4 N. & M. 654.

A debt accruing due since action cannot be the subject of a set-off in such action. *Richards v. James or Jones*, 6 D. & L. 52; 2 Ex. 471; 17 L. J., Ex. 277.

There can be no set-off in an action brought upon a contract for the sale of goods on credit for a bill at a certain time, when the action is brought before the expiration of the time which the bill had to run. *Hutchinson v. Reid*, 3 Camp. 329.

A. remitted a bill of exchange to B., to be paid to a third person on A.'s account. B. discounted the bill, but did not pay over the proceeds, upon which A. sued him for money had and received:—Held, that a set-off was admissible. *Thorpe v. Thorpe*, 2 B. & Ad. 580.

Debt must be Due at Trial.]—A debt sought to be set off must continue due up to the time of trial. *Eyton or Eaton v. Littleddale*, 7 D. & L. 55; 4 Ex. 159; 18 L. J., Ex. 369.

The plaintiff sold for the defendant a horse, and received the price. The purchaser afterwards rescinded the contract, on the ground of fraud, and was repaid the purchase-money. In an action by the plaintiff for the keep of the

horse:—Held, that the defendant could not set off the price as money received for his use, it having ceased to be so when the contract was defeated by the purchaser, although the defendant was ignorant of the fraud. *Murray v. Mann*, 2 Ex. 538; 17 L. J., Ex. 256; 12 Jur. 634.

Where Estoppel operates.]—Where the paymaster of a regiment gave credit in a running account with an officer on a foreign station, for sums of money as increased pay and allowances, to which, from a misconstruction of a general order, he supposed the officer was entitled, and after having been apprised by the Board of Ordnance that such sums would not be allowed, suffered the officer to remain in ignorance of this fact for four years:—Held, in an action by the officer's personal representatives, for pay remaining due, that the paymaster was concluded by the account in which he had erroneously given credit for the increased allowance, and was not at liberty to set off the latter against the demand. *Skyring v. Greenwood*, 6 D. & R. 401; 4 B. & C. 281; 1 C. & P. 517.

Payment into Court in another Action.]—It is no objection to a plea of set-off, that the defendant has brought an action against the plaintiff for the same sum, in which the plaintiff has paid the amount of the demand into court. *Evans v. Prosser*, 3 T. R. 186.

2. DEBTS IN SAME RIGHT.

Rule as to, must be complied with.]—One debt cannot be set off against another if due in different rights. *Whitaker v. Rush*, Amb. 407.

There can be no set-off either at law or in equity, where either of the debts is a debt in autre droit. *Gale v. Luttrell*, 1 Y. & J. 180; *S. P.*, *Harvey v. Wood*, 5 Madd. 459.

A joint debt cannot be set off against a separate debt at law; but may in equity, under particular circumstances, as where there is a clear series of transactions in which joint credit has been given. *William v. Noble*, 3 Mer. 618.

A guarantee to the amount of a certain sum of money given for a third person cannot be set off. *Crawford v. Stirling*, 4 Esp. 207.

The clerk of the course at a race cannot set off a claim of an unpaid stake due from the plaintiff on one race against the stake of another race won by the plaintiff's horse. *Charlton v. Hill*, 5 C. & P. 147.

The plaintiff, in payment of bets on horse races, gave the defendant three cheques on the plaintiff's bankers payable to bearer on demand, which were indorsed by the defendant to third persons, to whom they were paid by the plaintiff's bankers; in an action to recover back the sums so paid, the defendant sought to set off the amount of a cheque drawn by M., payable to bearer on demand, which was given by the defendant to the plaintiff in payment of a bet and was cashed by him:—Held, that the payment of the cheques by the plaintiff's bankers, being a payment by his direction, on his account, and in discharge of his liability, was a payment by the drawer of the cheque to the indorsee thereof within s. 2, and that, therefore, the plea of set off could not be sustained, inasmuch as M., and not the defendant himself, paid the amount. *Lynn v. Bell*, 10 Ir. R., C. L. 487.

A corporation, in addition to the ordinary functions of a municipal corporation, performed those of managers of baths and washhouses, and also those of a local board of health, and kept at a bank three separate accounts, corresponding to these three classes of transactions. At the time of the bank suspending payment, there was due to it on the account of the municipal affairs of the corporation a large sum of money, and there was due from the bank to the corporation, in respect of the local board of health account, a similar sum:—Held, that the corporation might set off these claims one against the other, inasmuch as though the accounts were separate, the corporation was a debtor in the one, and creditor in the other, and in the same right. *Pedder v. Preston*, (*Mayor*), 11 C. B., N. S. 535; 31 L. J., C. P. 291; 9 Jur., N. S. 496; 6 L. T. 540; 10 W. R. 773.

A. has a joint demand against B. and C., who are also creditors of A. B. by letter having made himself separately liable to A. on account of the demand originally joint, cannot, either at law or in equity, set off the joint debt due from A. to himself and C. *Ross, Ex parte*, Buck, 125.

In an action of contract by A. against B., a joint and several promissory note, made to B. by A., C., D. and E., may properly be set off. *Owen v. Wilkinson*, 5 C. B., N. S. 526; 28 L. J., C. P. 3; 5 Jur., N. S. 102.

Cross-demands existing in separate rights cannot be set off one against the other, in equity, except under special circumstances. *Stammers v. Elliott*, 3 L. R., Ch. 195; 37 L. J., Ch. 353; 18 L. T. 1; 16 W. R. 489.

The plaintiff drew a bill nominally for a particular use, which he was authorized to do, and discounted it with some bankers, who held the joint guarantee of both the defendants for those particular bills; the plaintiff then used the money for the purpose of releasing one of the defendants from arrest; the other defendant was obliged to pay the bill under the guarantee. In an action for wages, one of the defendants set off this payment:—Held, that he could not do so. *Jones v. Fleming*, 7 B. & C. 217.

There is no rule that a debt due to joint creditors, which has been contracted by fraud, can be set off against a separate debt due from one of the joint creditors. *Middleton v. Pollock, Knight and Raymond, Ex parte*, 20 L. R., Eq. 515; 44 L. J., Ch. 618.

P., the solicitor of K. and R. (who were trustees of a marriage settlement), received on their behalf 4,000*l.*, and represented that he had invested the whole of it on mortgage. He did invest on mortgage two sums of 2,200*l.* and 850*l.*, part thereof; but he never invested the balance of 950*l.* The debt of 2,200*l.* was (with the knowledge of K. and R.) paid off and received by P., and retained by him for reinvestment; but no reinvestment was ever made. P. died insolvent:—Held, that neither of the sums of 2,200*l.* and 950*l.* due from his estate could be set off against a separate debt due to the estate from K. *Id.*

See further *infra*, IV. 8, PARTNERS.

3. MUTUAL DEBTS.

What are.]—The 8 Geo. 2, c. 24, s. 5, applies only where the debts between the parties are mutual legal debts, the object of the statute

being to prevent cross-actions between the same parties. *Isberg v. Bowden*, 8 Ex. 852; 1 C. L. R. 722; 22 L. J., Ex. 322.

To an action for freight due upon a charter-party, the defendant pleaded that the plaintiff entered into the charterparty as master of the vessel, and for and on behalf of and as agent for the vessel; that the plaintiff never had any beneficial interest in the charterparty, nor had he any lien whatever on the freight, and that he brought the action solely as agent and trustee for the owner. The plea proceeded to state that the owner was indebted in a sum of money to the defendant, which he offered to set off against the plaintiff's claim:—Held, that such debt was not a mutual debt within 2 Geo. 2, c. 22, s. 13, and 8 Geo. 2, c. 24, s. 5, and therefore that the plea was bad. *Atwool v. Atwool*, 1 EL. & BL. 21; 1 C. L. R. 242; 22 L. J., Q. B. 287; 17 Jur. 789.

4. PAYMENT OR SET-OFF.

In what Cases.]—The defendant being indebted to the plaintiff on a bill of exchange for 25*l.*, and being unable to pay the full amount, left 9*l.* 10*s.* in cash, and a bill for 17*l.* in renewal of the balance, at the plaintiff's house in discharge of the debt. A few days afterwards he met the plaintiff, who then refused to take the bill in renewal, and stated he should retain the cash as payment of another debt, which he said was due. The defendant then demanded back the money in addition to the bill; but the plaintiff refused to return it. The plaintiff shortly afterwards sued the defendant on the original bill:—Held, per Pollock, C. B., and Platt, B., that, under the circumstances, the receipt and retainer of the money by the plaintiff were evidence of payment. Per Parke, B., and Martin, B., that they did not amount to a payment, but to a set-off. *Thomas v. Cross*, 7 Ex. 728; 21 L. J., Ex. 251.

On a settlement of accounts between the plaintiff and the defendant, the plaintiff was found to have been overpaid by 1*l.* 11*s.* 5*d.*, which sum (as the jury found) it was agreed should go to the defendant's credit in their future dealings. This claim, however, was barred by the statute of limitations. The plaintiff afterwards did work for the defendant, to the amount of 5*l.* 6*s.* 6*d.*, and brought an action to recover that sum. The defendant paid 4*l.* into court:—Held, that he had a good answer to the balance of 1*l.* 6*s.* 6*d.* under never indebted. *Smith v. Winter*, 12 C. B. 487; 21 L. J., C. P. 158; 16 Jur. 908.

If A. agrees to do work for a certain sum of money, and afterwards B. purchases some of the materials which are worked up by A., the money expended on that account must be set off. *Allinson v. Davies*, Peake's Add. Cas. 82.

If a landlord directs a tenant, who is overseer of the poor, to pay on the landlord's account rates irregularly assessed on him, and promises that the levies shall eat out the rents, the tenant may set them off, or prove them as payment, in an action for use and occupation. *Roper v. Bumford*, 3 Taunt. 76.

5. UNLIQUIDATED OR LIQUIDATED CLAIMS.

Ascertained Amount necessary so as to be Set-off.]—Damages cannot be recovered by set-off. *Freeman v. Heggett*, 1 W. BL. 394; *S. P., Howlett v. Strickland*, Cowp. 56.

A plaintiff having given a guarantee for the payment of 1,600*l.*, and any other sums which might be advanced to his son by the defendant, a claim in respect of money so advanced on the guarantee is not the subject of a set-off. *Morley v. Inglis*, 6 D. P. C. 202; 5 Scott, 314; 4 Bing. N. C. 58; 3 Hodges, 270.

Where damages are unliquidated and there is not a mutuality, there cannot be a set-off. *Grant v. Royal Exchange Assurance Company*, 5 M. & S. 439.

— **Illustrations.**—By a charterparty A. agreed to pay B., the master of a vessel, one-third of the freight at the final sailing of the vessel, the same to be returned to A. if the cargo should not be delivered at the port of destination, A. insuring at the owner's expense and deducting the costs out of the first payment. A. paid the one-third freight, deducting the costs of insurance. The ship and cargo were lost; and A. brought an action to recover back the one-third freight. B. pleaded that the loss of the one-third freight was a loss which A. was to be insured against; that A. insured so negligently, that the insurance was useless; and that by such negligence A. became liable to B. for the same amount which he claimed from B., and to make good the same to B. —Held, that the plea was bad; that the conclusion of law as to A.'s liability was not warranted by the facts stated, as the amount to be recovered by B., as damages for A.'s negligence, was not necessarily identical with that sued for by A. *Charles v. Alton*, 15 C. B. 46; 23 L. J., C. P. 197; 18 Jur. 1105.

The defendant at the plaintiff's request became a shareholder and director of a company on receiving from the latter the following guarantee: "In consideration of your having at my request agreed to become a shareholder of the Surrey Gas Company, and to be and act as a director, I hereby undertake to and agree to guarantee, indemnify, and save you harmless from and against all losses, costs, charges, damages and expenses which you may bear, incur, sustain or be put to by reason thereof, or on account of your acting as such director":—Held, in an action against the defendant, that he was entitled to set off as money paid his expenses of travelling from the country to London to attend the meetings of the company as director. *Hutchinson v. Sidney*, 10 Ex. 438; 24 L. J., Ex. 25.

Where a declaration stated that in consideration that the plaintiff, for the accommodation and at the request of the defendant, would accept certain bills of exchange, and would deliver them so accepted to the defendant, in order that he might negotiate them for his own benefit, he undertook to provide money for the payment of the bills as they became due, and to indemnify the plaintiff for any loss or damage by reason of the acceptance thereof; and assigned for breach, that he did not provide money for the bills, nor indemnify the plaintiff from damage, by reason whereof he, as acceptor, was forced and obliged to pay to the holders of the bills certain sums of money, with interest, charges, and expenses:—Held, that, as the plaintiff might be entitled on this declaration to recover special damage, a set-off was not a good plea. *Hardcastle v. Netherwood*, 5 B. & A. 93.

A declaration stated that, in consideration that the plaintiff would accept, for the defendant's

accommodation, a bill of exchange drawn by him on the plaintiff, and would deliver it to the defendant in order that he might negotiate it for his own use, he promised the plaintiff to indemnify and save him harmless from any consequent loss or damage; and that the plaintiff accepted the bill and delivered it to the defendant. Breach, that he did not indemnify or save harmless the plaintiff from loss or damage: and the plaintiff, as acceptor, was obliged to and did pay W., the holder, the amount of the bill and interest, and costs of an action on the bill by W. against the plaintiff, as acceptor; and the plaintiff also incurred costs and expenses in defending and settling the action. Plea, first, to so much of the declaration as related to the claim in respect of the payment to W. of the amount of the bill and interest, a set-off; and a plea, secondly, to so much of the claim as related to the costs of the action brought by W. against the plaintiff and the costs and expenses incurred in defending and settling the action, that the whole of the costs and expenses was incurred by the plaintiff at the defendant's request; concluding with a set-off:—Held, that the first plea was good, for that the plaintiff's claim in respect of the amount of the bill and interest was a liquidated demand, capable of being ascertained with precision at the time of pleading, and was separated from the rest of the claim, though mixed up with it in one count, but that the second plea was bad, being pleaded to costs and expenses incurred by the plaintiff, but not paid, and therefore not constituting a liquidated demand to which a set-off could be pleaded. *Crampton v. Walker*, 3 El. & El. 321; 30 L. J., Q. B. 19; 9 W. R. 98.

So where under a declaration on an agreement to indemnify the plaintiff against the costs which he might be obliged to pay in an action conducted by the defendant as the attorney of the plaintiff, with an allegation that he was compelled to pay in such action a certain sum for costs; and breach, that the defendant had not indemnified the plaintiff, or paid such sum:—Held, that a plea of set-off, pleaded to so much of the declaration as related to the plaintiff's claim in respect of the payment of the sum for costs, was good. *Brown v. Tibbits*, 11 C. B., N. S. 855; 31 L. J., C. P. 206; 6 L. T. 385; 10 W. R. 465. See also *cases post*, col. 1067.

Equitable Set-off.—In an action by assignees of a bankrupt to recover the price of machinery supplied by the bankrupt, the court allowed the defendant to plead an equitable set-off for unliquidated damages arising out of the same contract. *Makeham v. Crow*, 15 C. B., N. S. 847.

To a declaration for money lent and paid and commission the defendant pleaded for a defence on equitable grounds, that it was agreed between the plaintiffs and himself, on the following terms, viz., that he should consign certain rice to the plaintiff's firm at Buenos Ayres and Monte Video, for sale by the plaintiffs for him upon commission; that the plaintiffs should make certain advances against the rice and pay the expenses of the consignment; and that the plaintiffs should sell the rice, and satisfy out of the proceeds the advances, expenses, and commission, and pay to the defendant the balance remaining out of such proceeds. The plea further stated that the rice was duly consigned to

the plaintiffs under the agreement; that the claims in the declaration were the advances, expenses, and commission contemplated by the agreement; and that the plaintiffs were guilty of such negligence and improper conduct in the care of the rice and the management of the sale of it, that it fetched much less than it ought to have done, and was insufficient to satisfy the advances, expenses, and commission, whereas it would, but for their negligence and misconduct, have realized sufficient, and much more than sufficient, to have fully paid and satisfied the same, and the deficiency arising upon the sale, which was the claim for which the action was brought, had therefore entirely arisen from the plaintiffs' negligence, default, and misconduct:—Held, a bad plea. *Best v. Hill*, 8 L. R., C. P. 10; 42 L. J., C. P. 10; 27 L. T. 490; 21 W. R. 147.

6. GROUND OF CROSS ACTION.

Whether Right Enforceable by Cross Action or Set-off.—To an action for freight, the defendant pleaded, by way of an equitable defence, that the plaintiff, in the course of his employment by the defendant, undertook to carry coal of the defendant, and by his negligence and unskilfulness the coal was lost, and that the cost price of the coal was equal to the plaintiff's demand, and claiming equitably to set off the one against the other:—Held, that the plea was bad, as it only afforded ground for a cross action for negligence. *Stimson v. Hall*, 1 H. & N. 831; 26 L. J., Ex. 212.

A consignee of goods under a bill of lading has no right to deduct from the freight the value of goods contained in the bill of lading, but not delivered to him; his remedy is by cross action. *Meyer v. Dresser*, 16 C. B., N. S. 646; 33 L. J., C. P. 289; 10 L. T. 612; 12 W. R. 983.

Consignments of oil were made from Colombo to parties resident in England. During the voyage several of the casks in which the oil was contained leaked. Some part of the oil which so escaped was wholly lost, but the greater part was collected together and sold in one mass by the captain in the course of the voyage for 750*l*. The consignees then agreed to share the proceeds in proportion to their respective losses:—Held, that in an action brought by the shipowners against an individual consignee for freight and average, the latter could not set off his share (as ascertained by the agreement) of the moneys arising from the oil sold. *Jones v. Moore*, 4 Y. & C. 351.

To an action for money lent, the court refused to allow a defendant to plead: first, that the claim was for moneys advanced by the plaintiffs to the defendant upon security on goods consigned by the defendant to them; that it was agreed that they should cause the goods so consigned to be sold on account of the defendant for the best prices which could be got for the same, and out of the proceeds to retain the moneys advanced; that the plaintiffs might have sold the goods for prices more than sufficient to reimburse them the moneys advanced, but they wrongfully and in violation of the agreement sold the goods for prices less than the best prices which might have been got; and by reason of such wrongful act they were prevented from reimbursing themselves the moneys advanced out of the proceeds of the sales; secondly, that the defendant consigned to the plaintiffs goods, to be

by them sold at New York for commission at prices not less than the best market price; that they, not regarding their duty, wrongfully sold the goods for prices less than the best market price, whereby the defendant sustained losses; that afterwards it was agreed that they should set off such losses against so much money as might be due from the defendant to the plaintiffs; and that the amount of such losses was equal to the claim of the plaintiffs. *Atterbury v. Jarrie*, 2 H. & N. 114; 26 L. J., Ex. 178.

In an action to recover a school bill, evidence of a collateral breach of agreement on the part of the schoolmaster cannot be given by the defendant in order to reduce the amount of the bill, such a collateral breach being the subject of a cross action and not of set-off. *Hennequin v. O'Dowd*, 21 L. T. 802.

7. BILLS AND NOTES NOT DUE.

When Allowed.—In an action for goods sold and delivered, the defendant may set off money due upon the plaintiffs' acceptance, of which the defendant has become holder since the sale and before delivery of the goods, though he has agreed to give the plaintiff ready money for them. *Cornforth v. Rivett*, 2 M. & S. 510.

Where A., two months before his death, accepted a bill payable at his bankers' in London, which was discounted by them for a customer, who did not indorse it, and they were the holders on the day it became due, on the morning of which they wrote it off, and an hour afterwards received intelligence by post of the death of A.:—Held, that they were entitled to reimburse themselves out of the funds of A., and pass the amount of the bill to their own account; but the bankers having been in the habit of advancing 1,000*l*. to A. by way of loan, for which sum he gave his promissory note, which was renewed every three months, when they debited him with the full discount:—Held, in an action brought against them by the executors of A. for money had and received, that they could not set off the amount of such note before it became due, upon allowing a rebate of discount for the time it had to run, on the ground that such advance was to be considered as a separate transaction, and not one continued loan; and that no action could be maintained on the note until it became due. *Rogerson v. Ladbroke*, 7 Moore, 412; 1 Bing. 93.

On the 2nd of January, 1832, the defendants, who were bankers, received from B. C. a bill of exchange for 760*l*., drawn by M. on his partners, indorsed by him to B. C., and by B. C. to the defendants. On the 6th the bill became due, and M. having failed the same day, the bill was dishonoured. On the 7th, the defendants, who then had in their hands sufficient assets of B. C. to cover the bill, returned it to B. C. with a receipt for the amount indorsed on it, and having on the 2nd entered the bill to the credit of B. C., now entered it as a debit. The defendants were also the acceptors of a bill for 1,000*l*., drawn by B. C., indorsed to M., and due on the 12th of January. On the 9th, B. C. sent back the 760*l*. bill to the defendants, with instructions to carry into effect views expressed by B. C. in a letter addressed to the defendants on the 6th, in anticipation of M.'s failure. That letter was as follows:—"We think that you would be entitled to retain the 1,000*l*. as a set-off for the 760*l*. at

all events we will trust to your doing the best for us in this matter." In an action brought against the defendants by the assignees of M. on the 1,000*l.* bill, the jury having found that the transaction between the defendants and B. C. on the 760*l.* bill was closed on the 7th :—Held, that they could not set off that bill against the 1,000*l.* *Belcher v. Lloyd*, 10 Bing. 310; 3 M. & Scott, 822.

8. OVERDUE BILLS AND NOTES.

In what Cases.—An indorsee of an overdue bill or note takes it, subject to all the equities arising out of the bill or note transaction itself, but not subject to any collateral claim existing between the earlier parties to it. Therefore, to an action by an indorsee of an overdue note against the payee a distinct debt due to the payee from a former indorsee cannot be set off. *Whitehead v. Walker*, 10 M. & W. 696; 12 L. J., Ex. 28. See *Cripps v. Davis*, 12 M. & W. 159; 13 L. J., Ex. 217.

The right of an indorsee of an overdue bill of exchange to sue the acceptor is not defeated by the existence of a debt due from the drawer to the acceptor, and notice by the latter to the drawer before indorsement of his election to set off the amount against the bill; nor is the indorsee of such overdue bill of exchange affected by the existence of a right to set off as between the acceptor and the drawer, although the bill was indorsed without value and for the purpose of defeating the set-off. *Oulds v. Harrison*, 10 Ex. 572; 24 L. J., Ex. 66.

To an action on a bill of exchange it is a good answer to plead that the defendant accepted the bill, and deposited it with the drawer, along with some canvas, in consideration of a loan, upon the terms that the drawer should have the option of selling the canvas, and applying the proceeds to the payment of the bill; and that after the bill was due the drawer sold the canvas for a sum equal to the amount of the bill which he still retained, and indorsed the bill to the plaintiff, who took it, overdue, and without value. *Holmes v. Kidd*, 3 H. & N. 891; 28 L. J., Ex. 112; 5 Jur., N. S. 295—Ex. Ch.

To an action by indorsees against the acceptor of a bill for 3,000*l.*, he pleaded that the bill was accepted for the price of goods, and on the faith of their being shipped for the defendant by the drawer; that the drawer shipped certain of the goods, a portion only of which the defendant received and accepted, amounting in price to 1,200*l.*; that by reason of the non-completion of the shipment the goods actually shipped became useless, and that there never was any value or consideration for the acceptance or payment of the bill; that the drawer paid the full amount of the bill to the plaintiffs; and that the drawer was indebted to the defendant in 1,200*l.*, which he was willing to set off against the plaintiffs' claim :—Held, that the plea was good, since it shewed a failure of consideration except as to 1,200*l.*; and as the plaintiffs had been paid the full amount of the bill by the drawer, and sued as trustees for him, the defendant was entitled to set off the debt due to him from their cestui que trust. *Agra and Masterman's Bank v. Leighton*, 4 H. & C. 656.

9. PENALTY OR LIQUIDATED DAMAGES.

Liquidated Damages but not Penalty may be

Set off.—If two persons agree to perform certain work in a limited time, or to pay a stipulated weekly sum for such time afterwards as it should remain unfinished, and a bond is prepared in the name of both, but is executed by one only, with a condition for the due performance of the work or the payment of the weekly sum, and the work is not finished in the time; such weekly payments are not by way of penalty, but in the nature of liquidated damages, and may be set off by the obligee in an action against him by the obligor who executed. *Fletcher v. Dyche*, 2 T. R. 32.

The whole penalty incurred by the non-performance of articles of agreement cannot be pleaded by way of set-off. *Nedriffe v. Hogan*, 2 Burr. 1024.

A. and B. entered into an agreement, for the true performance of which each party bound himself to the other in the penal sum of 500*l.*, to be recoverable on breach of the agreement in a court of law as and by way of liquidated damages :—Held, in an action against A. by B., for a breach of the agreement, that the 500*l.* was a penalty, and that A. could not plead it by way of set-off as liquidated damages. *Davis v. Penton*, 9 D. & R. 369; 6 B. & C. 216.

By articles of agreement for altering and repairing a warehouse for a fixed price, it was stipulated, that in the event of the work not being completed in three months, the builder should forfeit and pay to the person with whom he contracted to do the work, 5*l.* weekly and every week, such penalty to be deducted from the amount which might remain due on the completion of the work :—Held, in an action brought for extra work, that the employer was entitled, after having paid the contract price, to set off the penalty against the extra work; and that he had a double remedy, either to deduct it or recover it. *Duckworth v. Alison*, 1 M. & W. 412; 2 Gale, 11.

A declaration stated a contract, by which the plaintiff covenanted to complete buildings by 23rd October, and the defendant to pay him 418*l.* on the completion; and if the defendant should order any extra work, he should pay to the plaintiff its value; or if he ordered any diminution or omission the plaintiff should allow the value out of the 418*l.* Also, that if the buildings should not be finished on the 23rd October, the plaintiff should pay the penalty of 1*l.* per day for every subsequent day employed, as liquidated damages, provided that if the defendant should require any additional work the plaintiff should be allowed so much extra time beyond 23rd October as might be necessary for completing the same. The plaintiff averred that the defendant ordered extra work, which required thirty-one days of additional time, and the value of which was 84*l.*, and that the contract would have been fulfilled by October 23rd but for such orders. And he demanded the 418*l.* (minus a sum for diminution), and 84*l.* for the extra work. The defendant pleaded, as to 22*l.* parcel of the debt, that the extra time necessary for completing the additional work was nine days only, but that the plaintiff had exceeded the time ending on 23rd October by thirty-one days, whereby he became liable to pay the defendant 22*l.*, according to the deed; which he offered to set off :—Held, that the clause for payment of 1*l.* per day applied to the covenant for extra time in respect of extra work, as well as to the clause

which fixed a day for completing the contract as originally defined; and that the defendant might deduct, in the form of set-off, 11. per day for the number of days by which the plaintiff had exceeded the necessary time for completing the extra work. *Legge v. Harlock*, 12 Q. B. 1015; 18 L. J., Q. B. 45; 13 Jur. 229.

The plaintiffs contracted to complete the erection of certain buildings for the defendants within a fixed time, and in default to pay to the defendants as liquidated damages, 3l. for every day from the time fixed for completion, until the work should be completed; and also within the same time, unless an extension of time was granted, to complete all alterations, additions, &c., which might be ordered by the defendants' agents:—Held, that the plaintiffs were bound to pay the 3l. for each day that elapsed from the time fixed for completion until the works were completed, even where the alterations and additions, ordered by the defendants' agents, were so mixed up with the building to be erected, that performance of the contract within the prescribed time became impossible. *Jones v. St. John's College, Oxford*, 6 L. R., Q. B. 115; 40 L. J., Q. B. 80; 23 L. T. 803; 19 W. R. 276.

Ascertainment by Arbitrator.—To a declaration stating that the defendant covenanted that he or A. would pay the plaintiff 6,800l., by instalments, with interest at 4l. per cent., with a proviso that, in a certain event, there should be deducted from the five last instalments, sums not exceeding 4,800l., and that, in that event, the plaintiff should repay to the defendant and A. all interest which should have been paid in respect of the sums deducted, and that, in default of payment of any of the instalments, the whole should be recoverable, and averring that default had been made, and that no sum was deductible under the proviso; the defendant set out the deed, which contained a mutual covenant between the plaintiff, the defendant and A., that if any differences should arise touching the sums which should be deductible under the proviso, it should be referred to an arbitrator, and that the parties should abide by his award; the defendant then pleaded to the five last instalments, and interest, that differences had arisen between the parties to the deed, touching the sums deductible from the five last instalments; and that the plaintiff, the defendant and A., in pursuance of the covenant in the deed, referred the differences to the arbitrator, to determine what sum (if any) not exceeding 4,800l., should be deducted by the defendant and A., or either of them, from the five last instalments; that the arbitrator awarded that the whole of the 4,800l., being the total amount of the five instalments, should be deducted from the five last instalments; and that the defendant, therefore, claimed to deduct, and deducted the 4,800l. from the five instalments:—Held, a good plea in bar, as to the 4,800l., and interest. *Parke v. Smith*, 15 Q. B. 297; 19 L. J., Q. B. 405; 14 Jur. 761.

10. BY WAY OF DEDUCTION FROM CONTRACT PRICE.

When Deduction may be made without Set-off.—Where a person is employed to do work for a certain sum, and part of the work is afterwards done by the employer, the amount of the

latter work is matter not of set-off but of deduction. *Turner v. Diaper*, 2 M. & G. 241; 2 Scott, N. R. 447.

The plaintiff contracted in writing to do work for the defendant, and to find the materials for it, for a fixed sum. The defendant afterwards supplied a portion of the materials, which the plaintiff accepted, and used up in the work. In an action for the work done by the plaintiff:—Held, that the defendant was entitled to deduct from the damages the value of the materials supplied by him, without pleading a set-off. *Newton v. Forster*, 12 M. & W. 772.

If A. employs B. to make bricks for him at a stipulated price per thousand, and B. does so, and some of the bricks are so badly made as to be good for nothing, A. will be entitled to make a deduction for those badly-made bricks out of the stipulated price, and may make such deduction in an action by B. for the stipulated price; but if the bricks are badly made in a trifling degree, only so as merely to be less valuable than they otherwise would have been, A., in an action for the stipulated price, will not be entitled to make any deduction on this account. *Pardow v. Webb*, Car. & M. 531.

In all actions for goods sold and delivered with a warranty, or for work done, as well as in actions for goods agreed to be supplied according to a contract, it is competent for the defendant to shew how much less the subject-matter of the action is worth by reason of the breach of the contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract; and he is precluded from recovering in another action to that extent, but no more. *Mondel v. Steel*, 8 M. & W. 858; 1 D., N. S. 1; 10 L. J. Ex. 426.

Where, by the custom of the hat trade, the amount of the injury sustained by the hats in the process of dyeing is always to be deducted from the charge for dyeing, the defendant is entitled to such deductions in an action brought by the dyer, without giving any notice of set-off, although there has not been any previous adjustment of the amount of the damage. *Bamford v. Harris*, 1 Stark. 343.

A. contracted to build a shed for B. Terms, everything to be completed to the satisfaction of B.'s engineers, payment ninety per cent. on completion of works, ten per cent. to be held over for six months to answer defects in work. A. sent in his bill in February as for a completed shed with a letter containing these words, "as the shed will be completed before the close of the month," and was paid ninety per cent. of the price. In October, B., who had done repairs to the shed, which A. declined to do, offered to pay the residue, after deducting the cost of such repairs. In an action by A. for the whole of the residue:—Held, that the defendants were not stopped by the payment in February from shewing that the work was not completed, nor from going into the amount of the defective work; that the amount paid by the defendants for repairs was not the subject of a set-off; that there was evidence to go to a jury of work done by A. since February, and that till October six months had not elapsed since the completion of the work. *Moss v. London and North-Western Railway Company*, 22 W. R. 532. *Compare cases ante*, cols. 1054, 1055.

11. JUDGMENTS.

In what Cases Allowed.]—In a cross action, the defendant may set off the debt against a judgment for a greater sum, and the court will stay proceedings thereon. *Peacock v. Jeffery*, 1 Taunt. 426.

A verdict against a plaintiff in a prior action may be set off against a present demand. *Baskerville v. Brown*, 2 Burr. 1229; 1 W. Bl. 293.

By order of Nisi Prius, a verdict having been entered for the plaintiff, and the plaintiff having by the order agreed to pay the defendant 70l., the court allowed that sum to be set off against the plaintiff's judgment. *Newton v. Newton*, 8 Bing. 202; 1 M. & Scott, 366; 1 D. P. C. 264.

After verdict for the plaintiff in trover, the goods were seized in the hands of the defendant for rent due to A., which the plaintiff was liable to pay; the defendant having paid the rent, the court allowed him to deduct the amount from the verdict found for plaintiff. *Plevin v. Henshall*, 10 Bing. 24.

No set-off against a judgment in one suit can be allowed of a claim arising out of another separate and distinct suit. *Thompson v. Parish*, 5 C. B., N. S. 685; 28 L. J., C. P. 153; 5 Jur., N. S. 986.

Where Parties not the Same.]—Although where one of the parties in two cross actions has assigned his interest to a third party, there may be no right to set off the judgment; yet where the assignee being the real plaintiff in one action is also the real defendant in the other, there is such right of set-off. *Standeven v. Murgatroyd*, 27 L. J., Ex. 425.

The plaintiff sued out a fi. fa. against E.'s effects. E. having previously assigned all his effects to trustees, for the benefit of his creditors, the sheriff (under an indemnity from the trustees) returned nulla bona. The plaintiff sued the sheriff for a false return. The sheriff obtained a verdict. The court refused to allow the plaintiff's judgment to be set off against the costs of the action against the sheriff. *Hewitt v. Pigott*, 1 D. P. C. 250; 1 M. & Scott, 122; 8 Bing. 61.

The court will permit the defendants to set off a judgment recovered by them against the plaintiff, against a judgment obtained by the plaintiff against them, notwithstanding the plaintiff may also have a separate demand on one of the defendants. *Glaister v. Hever*, 8 T. R. 69.

A judgment recovered by A. against B. and C. will not be set off on application to the general jurisdiction of the court, against another judgment recovered against A. by the assignees of B., under an insolvent debtors act; the interest of third persons intervening, who have peculiar trusts by the statute. *Doe v. Darnton*, 3 East, 149.

A. having obtained a verdict against B. & Co., his bankers, for the amount of his cash balance and nominal damages for dishonouring his cheque, and B. & Co. having brought actions against A. upon bills of exchange to a larger amount which they had discounted for him, the judge stayed the execution in A.'s action until the fifth day of the following term. B. & Co.'s actions in the meantime ripened into judgments. The court allowed the judgments to be set off against each other (subject to the lien, if any, of A.'s attorney), notwithstanding A. had in the

meantime become bankrupt, and thus the interests of third parties had intervened. *Alliance Bank v. Holford*, 16 C. B., N. S. 460.

The court allowed one of the defendants, who was chiefly concerned and bound to indemnify his co-defendants, to set off a debt due by the plaintiff to him on a cognovit against a judgment due in an action of trespass against several defendants. *Bourne v. Bennett*, 1 M. & P. 141; 4 Bing. 423.

Effect of Solicitor's Lien.]—Declaration on an order of the Queen's Bench in Ireland (in an action by the now defendant against the plaintiff) by which the plaintiff was dismissed, and the defendant ordered to pay costs, and which order had the effect of a judgment upon a nonsuit. Plea, a set-off under other Irish judgments. Replication, that the plaintiff retained C., an attorney, to conduct his case in the Irish courts, and that the money ordered to be paid to the plaintiff was due to C. for costs in the action, and therefore became due to the plaintiff as a trustee for C., and that the action was brought in the name of the plaintiff for the benefit of C.:—Held, that the replication was bad, as the lien of the attorney did not constitute the relation of trustee and cestui que trust between him and his client so as to prevent the defendant pleading a set-off, but was at most only ground for the summary interference of the court on an application to set off cross judgments. *Meccer v. Graves*, 7 L. R., Q. B. 499; 41 L. J., Q. B. 212; 28 L. T. 551; 20 W. R. 605. See *Alliance Bank v. Holford*, *supra*, and cases sub tit. SOLICITOR.

Judgment obtained after Declaration.]—A judgment obtained by a defendant against the plaintiff, after the declaration, and before plea, may be pleaded as a set-off. *Reynolds v. Beerling*, 1 Dougl. 112; 4 Dougl. 181.

Error depending.]—A judgment may be pleaded by way of set-off, although a writ of error is depending thereon. *Id.*

Judgment against some by Default.]—Where there are many defendants, and some go to trial and obtain a verdict, but others suffer judgment by default, the court will permit the costs and damages on the judgment by default to be deducted from the costs taxed on the postea to those defendants who had a verdict. *Schoole v. Noble*, 1 H. Bl. 23.

New Trial.]—Where two actions were brought by and against the same parties, in the first of which the defendant obtained an award in his favour, and in the other the plaintiff obtained a verdict with damages, the court refused to stay proceedings in the first action until a motion for a new trial in the other was disposed of, in order that the damages and costs in the action might be set off against the costs of the other. *Johnson v. Lakeman*, 2 D. P. C. 646.

Execution Issued.]—A tenant having obtained judgment, and issued execution against his landlord, afterwards became indebted to him for arrears of rent and dilapidations:—Held, that the landlord was not entitled in equity to restrain proceedings upon the judgment on the ground of set-off. *Maw v. Ulyatt*, 31 L. J., Ch. 33; 7 Jur., N. S. 1300; 5 L. T. 251; 10 W. R. 4.

Payment into Court.—In an action for freight, and cross action for unliquidated damages against a foreign seaman, the court refused to permit the freight to be paid into court, as a fund liable to payment of the damages when ascertained. *Sherborne v. Siffkin*, 3 Taunt. 525.

Verdict recovered merely.—The amount of a verdict recovered cannot be set off against the amount of a judgment. *Garrick v. Jones*, 2 D. P. C. 157.

Defendant in Execution.—The taking a debtor in execution on a judgment may be replied to a plea of set-off on such judgment. *Taylor v. Waters*, 2 Chit. 303; 5 M. & S. 103.

B. cannot, in an action brought against him by A., set off a judgment recovered by him against A., for which A. is charged in execution. *Id.*

Taking the defendant in execution is not an absolute extinguishment of the debt so as to preclude the plaintiff applying to the equitable discretion of the court to set off interlocutory costs due to the defendant in the same suit. *Thompson v. Parish*, 5 C. B., N. S. 685; 28 L. J., C. P. 153; 5 Jur., N. S. 986.

Where a prisoner in execution is discharged by the consent of his creditor, upon giving a fresh security to satisfy the judgment, and that security is afterwards defeated on account of a mere informality, the judgment is satisfied, and cannot be set off against a demand of the prisoner. *Jacques v. Whitby*, 1 T. R. 557.

Judgments in Different Courts.—It is no objection to an application to set off two judgments against each other, that they are in different courts in this country, provided the parties are respectively beneficially, as well as legally, interested in such judgments. *Bristowe v. Needham*, 8 Scott, N. R. 366; 7 M. & G. 648.

Common Law Courts.—A judgment in King's Bench may be set off against a judgment in Common Pleas so as to narrow the execution to the balance due. *Barker v. Braham*, 2 W. Bl. 869; 3 Wils. 396.

The defendant was allowed to enter satisfaction on the roll upon a judgment obtained against him in King's Bench on his acknowledging satisfaction for the amount upon a judgment obtained by him in Common Pleas against the plaintiff for a larger amount, although he had the plaintiff in custody in execution of that judgment. *Simpson v. Hadley*, 1 M. & S. 696.

A judgment for the plaintiff in Common Pleas may be set off against a judgment for the defendant in King's Bench although plaintiff is dead, and the judgment assets in the hands of her administrator. *Bridges v. Smith*, 8 Bing. 29; 1 M. & Scott, 93; 1 D. P. C. 242.

In December, 1854, A., as attorney for the plaintiffs, commenced an action at their suit in the Queen's Bench against the defendant, in which they had a verdict for 50*l.*, and on the 28th March, 1855, judgment was signed for the damages and costs, together amounting to 85*l.* 4*s.* All the proceedings, down to final judgment inclusive, were carried on in the name of A., as attorney for the plaintiffs, but before the trial an arrangement was made between A. and B., another attorney, by which the proceedings were

carried on by B. in the name of A. until the 26th February, 1856, when an order to change the attorneys was made, and B. was substituted for A. as the plaintiff's attorney. On the day after the trial B. purchased the interests of the plaintiffs in the verdict for 50*l.*, and gave notice to the defendant's attorney. In July, 1855, the plaintiffs were nonsuited in another action which they brought in the Common Pleas against the defendant, and on the 21st January, 1856, judgment of nonsuit, with 7*l.* 1*s.* 6*d.* costs, was signed against the plaintiffs. Upon an application by the defendant to set off that sum against the damages and costs in the action in the Queen's Bench:—Held, first, that there was no absolute right to have one judgment set off against the other. *Simpson v. Lamb*, 7 El. & El. 84; 26 L. J., Q. B. 121; 3 Jur., N. S. 412.

Held, secondly, that an attorney could not purchase anything in litigation, of which litigation he had the management; and therefore B. (who was to be considered as the attorney having the management of the cause for the plaintiffs) had no claim as purchaser of the damages. *Id.*

In Chancery and Common Law Court.—The costs of a suit in equity may be set off against the costs of an action. *Webber v. Nicholas*, 4 Bing. 16; 12 Moore, 87.

The costs of a bill in chancery, dismissed in favour of the defendant, may be set off against the plaintiff's costs of a suit in K. B. for the same cause of action, and where he had recovered a verdict, subject to the general lien of the attorney, upon the sum for which judgment was obtained. *Harrison v. Bainbridge*, 4 D. & R. 363; 2 B. & C. 800. And see *Hall v. Ody*, 2 B. & P. 28.

IV. BY AND AGAINST WHOM.

1. AGENTS, FACTORS, AND BROKERS.

Broker.—The character of broker is materially different from that of factor; and, therefore, where a broker sells goods, without disclosing the name of his principal, in so doing he acts beyond the scope of his authority, and the buyer cannot set off a debt due from the broker to him against the demand for goods made by the principal. *Baring v. Corrie*, 2 B. & A. 137.

Del credere.—A broker, who pays to A. the price of goods sold by him for A. under a del credere commission, is entitled to set off the amount against the assignees of B., for whom he bought the goods. *Morris v. Cleasby*, 1 M. & S. 576.

Where a person purchased, as broker for B., the goods of A., for whom he sold them under a del credere commission, and did not disclose at the time the name of A., but disclosed it soon after, and afterwards paid A. the price:—Held, that, in an action by the assignees of B. to recover the balance due upon a re-sale of the goods made by the broker on account of B., he was not entitled to set off either under 2 Geo. 2, c. 22, s. 13, or 5 Geo. 2, c. 30, s. 28, the payment made to A. *Morris v. Cleasby*, 4 M. & S. 566.

And where a broker has effected policies in the name of his principal under a del credere commission, he cannot set off losses which have happened on those policies, although those claimed are total, and he has accounted for them

with his principal. *Cumming v. Forrester*, 1 M. & S. 494.

But where the broker has guaranteed the payment of an average loss adjusted by an underwriter, to the persons insured under a del credere commission, he may set it off. *Wienholt v. Roberts*, 2 Camp. 586.

— **Advanced Money.**—A defendant cannot set off a debt due from a principal against a claim by a broker who had advanced money on goods, and declared on a special contract respecting the sale of them as his own goods, though the sale-note mentioned the name of the principal. *Atkyns v. Amber*, 2 Esp. 493.

Agent acting beyond Authority.—A ship's husband and part owner in this country employed an agent in Quebec to obtain freight. The agent did so, made it payable to himself at Quebec, and set it off against a debt due to him by the ship's husband:—Held, that the agent was liable, and that he had no right either to make the freight so payable or so to set it off. *Walshe v. Provan*, 1 C. L. R. 823; 8 Ex. 843; 22 L. J., Ex. 355.

Agent from Necessity.—The plaintiffs, who were merchants at Dieppe, sold to the defendant, a merchant at Wisbeach, a cargo of oil-cake, and delivered the same at Wisbeach, in December, 1841. The defendant paid for the cargo; but afterwards, considering that it did not answer the sample, landed a portion of it for the purpose of examination, and afterwards landed the whole, and lodged it in the public granaries. He then informed the plaintiffs that it lay there at their risk and costs, and required them to take it back. This the plaintiffs refused to do. After some negotiation, the defendant, in May, 1842, gave notice to the plaintiffs that the cargo was lying at the granaries at their disposal, and if no directions were given by them would be sold, and the proceeds applied in part payment of the defendant's damages; the plaintiffs answered, that they considered the transaction at an end, and demanded payment of the price, whereupon the defendant offered the cargo for sale in his own name, and afterwards sold it in his own name to a third party:—Held, that the defendant had accepted the goods, and was not to be considered an agent of the plaintiffs from necessity; and, therefore, that he could not, in an action against him for the price of the goods, set off the money paid by him for the goods as money received by the plaintiffs for his use. *Chapman v. Morton*, 11 M. & W. 534; 12 L. J., Ex. 292.

Payment by Agent—Ratification.—It is a good answer to a plea of set-off, that the amount has been paid by a person professing to act as agent for and on account of the plaintiff, though without his authority, and that the latter ratified the act at the time of the trial. *Simpson v. Eggington*, 10 Ex. 845.

The treasurer of a corporation paid their clerk the amount of his year's salary, both parties believing at the time that the treasurer had the authority of the corporation to make such payment; but the treasurer had no such authority, and the corporation afterwards repudiated the payment and dismissed the clerk from their service. In an action against him for the recovery of incomes paid to him on account of the corpora-

tion:—Held, that the corporation was entitled, at the trial, to ratify the act of their treasurer, and consequently that the clerk could not set off the amount of his salary as due to him from the corporation. *Id.*

Sale without Notice that it is for Principal.]

—If a factor, who sells under a del credere commission, sells goods as his own, and the buyer knows nothing of any principal, the buyer may set off any demand he may have on the factor, against the demand for the goods made by the principal. *George v. Clagett*, 7 T. R. 359; 2 Esp. 557; Peake's Add. Cas. 131.

A factor was employed to sell a cargo of goods consigned to him, and on the 6th February sold to A. one parcel of the goods, and delivered to him an invoice in his own name. On the 13th A. applied to purchase another parcel, but some difference occurring as to the price, the factor said he must write to his principals. He did so, and on the 20th informed A. of their answer. A. bought the goods at the price named by the principals, and the factor delivered to him an invoice and a bought-note in the name of the principals; the payment to be at four months in cash. On the same day, and on other occasions within that period, A. made payments to the factor, not expressly on account of these goods. It appeared that it was the factor's practice, when he sold goods on his own account to pay himself advances, to deliver an invoice in his own name; when he sold merely as a broker, to deliver a bought-note. In an action by the owners of the goods against A., for the price of the parcel sold on the 6th February, the jury found that the factor communicated to A. that he sold the goods for other persons as principals, but that A., until the 20th February, bona fide believed that he sold to pay himself advances; and that, using the ordinary precaution of merchants, A. was not bound to make further inquiry:—Held, that A. was entitled to set off the payment made by him to the factor. *Warner v. McKay*, 1 M. & W. 591; 2 Gale, 86.

Merchants in London, upon the instruction of shipping agents at Havannah with respect to a cargo of tobacco to be consigned to the London merchants and after receiving the shipping documents, effected policies of marine insurance in the ordinary form on behalf and for the benefit of all parties whom it might concern. The Havannah agents shipped and consigned the tobacco in their own names, but were in fact acting as commission agents for Havannah merchants to whom the tobacco belonged; and the London merchants before effecting the policies had notice that the Havannah agents had an unnamed principal. A total loss having occurred the London merchants received the policy moneys, but before receipt had notice that the moneys were claimed by the Havannah principals:—Held, that an action lay by the Havannah principals against the London merchants for the policy moneys; that the London merchants were not entitled to a lien upon the moneys for the balance of their general account with the Havannah agents, and could not in that action set off their claim to that balance, or set off anything, except the premiums, stamps, and commission in respect of the insurance. *Mildred v. Maspons*, 8 App. Cas. 874; 53 L. J., Q. B. 33; 32 W. R. 125—H. L. (E.). Affirming 9 Q. B. D. 530; 51 L. J., Q. B. 604; 47 L. T.

318; 30 W. R. 862—C. A., sub nom. *Herrano v. Mildred*.

When a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him, to all intents and purposes, as the principal; and though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal. *Rabone v. Williams*, 7 T. R. 360, n.

Otherwise, if, before they are all delivered, or any part of them paid for, the purchaser is informed that they belong to a third person. *Moore v. Clementson*, 2 Camp. 22. See also *New Zealand Land Company v. Watson*, 7 Q. B. D. 374; 50 L. J., 433; 44 L. T. 675; 29 W. R. 694—C. A.

If a buyer purchases goods of a factor, with the knowledge that he sells as factor and not as principal, the buyer cannot set off a debt due to him from the factor, in an action for the price of the goods bought by the principal. *Fish v. Kempton*, 7 C. B. 687; 18 L. J., C. P. 206; 13 Jur. 750.

One who buys goods of a person whom he knows to be selling them as an agent, cannot set off in an action by the principal for their price a debt due to him from the agent, even though he did not at the time of the purchase know and had not the means of knowing who was the real owner. *Semenza v. Brinsley*, 18 C. B., N. S. 467; 34 L. J., C. P. 161; 11 Jur., N. S. 409; 12 L. T. 265; 13 W. R. 634.

When a factor sells goods to an agent without stating at the time that he is selling as a factor, and not on his own account, the principal of the agent has a right to set off a debt due to him from the factor against the price of the goods, he being ignorant of the fact that the factor was not selling on his own account, although his agent, by previously-acquired knowledge, knew it. *Dunn v. Norwood*, 14 C. B., N. S. 574; 32 L. J., C. P. 201; 8 L. T. 247; 11 W. R. 624.

A. placed timber in the hands of H., a factor, for sale on a del credere commission. B. bought it through the agency of C., a broker, who (as H. was aware) had prior knowledge of the fact that the timber was the property of A., and that H. was selling as factor only. C.'s knowledge of the relative position of A. and H., however, was not communicated to B., who made the purchase bona fide, although he was aware that H. was in the habit of selling timber as factor:—Held, in an action by A. against B. for the price of the timber, that B. was affected by the knowledge of his broker C., and therefore could not set off against the price of the timber so bought for him a debt due to him from H. *Dresser v. Norwood*, 17 C. B., N. S. 466; 34 L. J., C. P. 48; 10 Jur., N. S. 851; 12 W. R. 1030—Ex. Ch.

To an action for money received, the defendants pleaded that they, at the request and with the consent of the plaintiff, dealt with and treated F. as the principal in the transaction in respect of which the moneys were received by the defendants, and as the party with whom alone they were dealing; that the plaintiff authorized and requested the defendants to receive any moneys resulting from the transaction on account of and as the moneys of F., and on

the terms that they might deal with such moneys as his moneys; averment, that the moneys, being the moneys resulting from the transaction, were afterwards in pursuance of the request, authority, and consent of the plaintiff, received by the defendants in respect of and as the result of the said transaction, and on account of and as the moneys of F.; that, upon the faith, and in consequence of the request, authority, and consent of the plaintiff, the defendants afterwards gave credit to F. in respect of divers other transactions, and were induced to allow F. to incur debts to them which were still due; and that, before and at the time when the moneys were so received by the defendants, on account of and as the moneys of F., he, F., was and still remained indebted to the defendants for and in respect of the debts thereinbefore mentioned in an amount equal to the plaintiff's claim, which amount the defendants were willing to set off:—Held, bad. *Ferrand v. Bischoffsheim*, 4 C. B., N. S. 710; 27 L. J., C. P. 302.

When an agent is permitted to, and does, sell goods, as if he is a principal, and becomes bankrupt, it is no defence to an action by the principal against the vendee for not accepting the goods, that there were mutual credits, not alleged to be the subject of an ordinary set-off, between the agent and vendee, resulting in a balance in favour of the latter. *Turner v. Thomas*, 6 L. R., C. P. 610; 40 L. J., C. P. 271; 24 L. T. 879 19 W. R. 1170.

It being within the ordinary scope of a factor's authority to sell his principal's goods in his own name, a purchaser who has no knowledge of the agency is entitled to set-off against the price of the goods a debt due to him from the factor personally. *Dixon, Ex parte, Henley, In re*, 4 Ch. D. 133; 46 L. J., Bk. 20; 35 L. T. 644; 25 W. R. 105—C. A.

—**What is Notice.**—A principal had stipulated with his factor that bills of exchange for the price of goods sold should be made payable in such a manner as to shew the factor's connexion with the principal, and they were, in fact, stamped "Agent for W. Dixon (Lim.), Calder and Govan Ironworks, Glasgow," in pale blue ink, but so that the stamp was concealed or obscured by the agent's signature:—Held, that the purchase being from a factor, and not a mere agent, the stipulation was immaterial as regarded the purchaser, unless he was affected with notice, and that the stamping of the bills was not sufficient evidence of notice against the purchaser's uncontradicted oath that he was unaware of any agency. *Id.*

—**Pleading—Form of.**—In order to constitute a valid defence within the rule in *George v. Clagett* (7 T. R. 359), the plea should shew that the contract was made by a person whom the plaintiff had intrusted with the possession of the goods, that that person sold them as his own goods in his own name as principal with the authority of the plaintiff, that the defendant dealt with him as, and believed him to be, the principal in the transaction, and that before the defendant was undecieved in that respect the set-off accrued. It is not necessary, in such a plea, to negative "means of knowledge" that the seller was dealing as an agent. *Borries v. Imperial Ottoman Bank*, 9 L. R., C. P. 38; 43 L. J., C. P. 3; 29 L. T. 689; 22 W. R. 92.

2. SOLICITORS.

Costs—No Bill Delivered.—An attorney may set off the amount of his costs, although he has not delivered a bill one month before the action. *Brown v. Tibbitts*, 11 C. B., N. S. 855; 31 L. J., C. P. 206; 6 L. T. 385; 10 W. R. 465.

The defendant, under a plea of set-off, put in an account rendered to him by the plaintiff, by which he charged himself with items due to the defendant. On the other side of the account were items due to the plaintiff for costs as an attorney, but for which no signed bill was proved to have been delivered; and which left a balance due to the plaintiff.—Held, that the plaintiff was entitled to avail himself of the amount of the bill of costs, as the non-delivery of a signed bill did not extinguish the debt, but only prevented an action being brought to recover it. *Harrison v. Turner*, 10 Q. B. 482; 16 L. J., Q. B. 295; 11 Jur. 817.

Money out of Pocket—Negligence.—An attorney undertook to conduct a cause, charging his client only money out of pocket. The client advanced money to the attorney during the progress of the cause, which was properly expended in carrying it on. By subsequent negligence in the attorney the cause failed.—Held, first, that attorney was not entitled to recover money out of pocket, paid by him subsequently to the negligence of which he had been guilty; and, secondly, that the client was not entitled to set off the money advanced and expended previously to such negligence. *Lewis v. Samuel*, 3 Q. B. 685; 15 L. J., Q. B. 218; 10 Jur. 429.

3. EXECUTORS AND ADMINISTRATORS.

Debt due from or to—Debt to or from Testator.—A debt from the testator cannot be set off in an action for money had and received to the use of the plaintiff as executor. *Schofield v. Corbett*, 6 N. & M. 527; 11 Q. B. 779, n.

A set-off for money due from the plaintiff to a testator in his lifetime may be pleaded in answer to a declaration on a cause of action which accrued to the plaintiff from the defendant, as executor, after the death of the testator. *Blakesley v. Smallwood*, 8 Q. B. 538; 15 L. J., Q. B. 185; 10 Jur. 470.

In an action by an administrator for the balance of the intestate's banking account at the time of his death, the defendants sought to avail themselves of a debt due to them from the intestate as one of the several makers of a promissory note which did not become due until after the intestate's death.—Held, that the claim could not be relied on as a set-off. *Newell v. National Provincial Bank of England*, 1 C. P. D. 496; 45 L. J., C. P. 285; 34 L. T. 538; 24 W. R. 458.

To an action by an administrator, who sues in his representative character for a debt due after the death of the intestate, the defendant cannot set off a debt due to him from the intestate in his lifetime. *Watts v. Rees*, 9 Ex. 696; 2 C. L. R. 1278; 23 L. J., Ex. 238; 18 Jur. 433. Affirmed, 11 Ex. 410; 25 L. J., Ex. 30; 1 Jur., N. S. 1023—Ex. Ch.

An executor, sued as such for a debt which accrued to the plaintiff from the testator in his lifetime, cannot set off a debt for money had

and received to the defendant's use, as executor, and money due on an account stated with him, as executor, since the death of the testator, the debt sued for, and the debt sought to be set off, not being mutual. *Wardall v. Thellusson*, 6 El. & Bl. 976; 3 Jur., N. S. 314—Ex. Ch.

A creditor of an intestate purchased part of the intestate's goods of his administrator.—Held, that he could not set off the amount against a debt due to him from the intestate at his decease. *Lambarde v. Older*, 17 Beav. 542; 23 L. J., Ch. 18; 17 Jur. 1110.

To an action against an executor for a debt due by his testator, he pleaded that, at the death of the testator, the plaintiff was indebted to him in an equal amount, which being still due, the defendant was willing to set off against the plaintiff's claim. The plaintiff replied on equitable grounds, that the testator devised and bequeathed to him a freehold estate and a sum of money, and devised and bequeathed other property, real and personal, to his other children, and declared that the money and other effects already advanced and delivered by him to his children should be deemed advancements, and that they should not be required to account for the same; averring that the matters of set-off were money and effects so advanced.—Held, a bad replication. *Gulliver v. Gulliver*, 1 H. & N. 174; 25 L. J., Ex. 341; 2 Jur., N. S. 1051.

To a declaration in an action on a covenant by husband and wife as administratrix, a set-off of money due to the intestate cannot be supported. *Warn v. Bickford*, 7 Price, 550.

The trustee in bankruptcy of bankers sued their customer for the balance due upon his private account. The customer had another account with the bank as executor, and at the time of the bankruptcy the balance on this account was in his favour. Under the will of his testator the customer was both executor and residuary legatee, and at the time of the bankruptcy he had assets in his hands, exclusive of the balance in the bank, more than sufficient to provide for all bequests which remained unpaid, and to leave a balance due to him as residuary legatee.—Held, that he was entitled to set off the balance due to him on the executorship account, since the bank might have sued him in his own name if he had overdrawn it, the only effect of opening the account as executor being to give notice that there might be equitable rights. *Bailey v. Finch*, 7 L. R., Q. B. 34; 41 L. J., Q. B. 83; 25 L. T. 871; 20 W. R. 294.

In an action by the executors of an underwriter against a broker, for premiums due on policies subscribed by the testator, the broker cannot set off returns of premium, which returns became due after the testator's death. *Houston v. Robertson*, 2 Marsh. 138; 6 Taunt. 448; 4 Camp. 342; Holt, 88.

Even though the policies were effected under a del credere commission. *Houston v. Bordenave*, 2 Marsh. 141; 6 Taunt. 451.

4. HUSBAND AND WIFE.

Action by or against—Debt due from or to.—A debt due to a man in right of his wife cannot be set off in an action against him on his own bond. *Paynter v. Walker*, Bull. N. P. 179.

Nor can a debt, due from a wife dum sola, be set off in an action by the husband alone. *Wood v. Akers*, 2 Esp. 594.

Unless he has promised to pay the debt after marriage, and thereby made it his own. *Ib.*

Where a promissory note is given to a married woman, the husband may sue on it in his own name only, and then a debt due to the maker from the wife dum sola cannot be set off. *Burrough v. Moss*, 10 B. & C. 558; 5 M. & R. 296.

In an action by assignees of a bankrupt on a promissory note given to his wife before marriage, the maker cannot set off a debt due to him from the bankrupt. *Yates v. Sherrington*, 11 M. & W. 42; 2 D., N. S. 803; 12 L. J., Ex. 216.

5. INSOLVENTS.

A discharge under the Insolvent Debtors Act (1 & 2 Vict. c. 110), s. 91, is a legal answer to a plea of set-off. *Francis v. Dodsworth*, 4 C. B. 202; 17 L. J., C. P. 185.

6. INSURANCE CASES.

Underwriter and Broker—Fraudulent Loss.]

—Three underwriters, on a representation of a loss, paid their subscriptions, amounting to 600*l.*, into the hands of the broker, who, by their joint authority, paid over 300*l.* The loss turned out to be fraudulent, and one of the underwriters brought an action against the broker to recover back his 200*l.* :—Held, that the broker was entitled to set off the 300*l.* paid over against this demand, and that the court could not enter into the account to see what each party was entitled to respectively. *Silva v. Linder*, 2 Marsh. 437.

—**Premiums.**—An insurance broker, being sued for premiums received by him on policies subscribed by the plaintiff, was allowed to set off a loss on one of those policies effected in the name of the broker, at the request of a third person, on goods in which such third person was interested, but on which the broker had a lien to a greater amount than the set-off claimed. *Davies v. Wilkinson*, 4 Bing. 573; 1 M. & P. 502.

Upon an action against the underwriter for a loss, the underwriter cannot set off the premiums, although they have never been paid, unless he can make it appear that the state of the relative accounts between assured, broker, and underwriter, is such as to take the case out of the ordinary rule, which is, that the receipt of the underwriter for the premium is conclusive evidence for the assured, that he has paid the premium to the underwriter. *De Gaminde v. Pigou*, 4 Taunt. 246.

Damages must be Liquidated.—Notwithstanding that a marine policy of insurance is a contract of indemnity, it is to be taken with this qualification, that the parties may agree beforehand in estimating the value of the subject insured by way of liquidated damages. *Irving v. Manning*, 6 C. B. 391. See *Dalby v. India and London Life Assurance Company*, 15 C. B. 365; 24 L. J., C. P. 2; 18 Jur. 1024.

Action to recover a partial loss on a valued policy of insurance. Plea, that the loss was adjusted between the plaintiff and the defendant at a certain rate per cent., and that the amount payable by the defendant to the plaintiff was thereby liquidated, and ascertained to be a sum certain; against which the defendant has a set-off for premiums of insurance :—Held, a bad action being for unliquidated damages,

which were not liquidated by the adjustment, as it would not be conclusively binding on the parties. *Luckie v. Bushby*, 13 C. B. 864; 1 C. L. R. 685; 22 L. J., C. P. 220; 17 Jur. 625.

A declaration on a policy of insurance on a ship and cargo alleged an average damage or loss on a portion of the cargo insured, and a breach by reason of the non-payment of the defendant's proportion of the average loss. Plea, set-off for premiums :—Held, bad, as the action was for unliquidated damages. *Boddington v. Castelli*, 1 El. & Bl. 879; 1 C. L. R. 281; 23 L. J., Q. B. 31; 17 Jur. 781—Ex. Ch.; *S. P.*, *Pellas v. Neptune Marine Insurance Company*, 5 C. P. D. 34; 49 L. J., C. P. 153; 42 L. T. 35; 28 W. R. 405—C. A.

Underwriters and Assured.—The assured had subsequently to the date of a policy of insurance on goods executed a deed of inspectorship under the Bankruptcy Act (24 & 25 Vict. c. 134), s. 192, and was suing on behalf of third persons who had made advances upon the shipping documents :—Held, that he was entitled to recover, and that the underwriters were not entitled to set off the amount of a debt due from the assured to them under the mutual credit clause of 12 & 13 Vict. c. 106, s. 171. *De Mattos v. Saunders*, 7 L. R., C. P. 570; 27 L. T. 120; 20 W. R. 801.

7. MASTER AND SERVANT.

What may be Set off against Wages.—In an action by a servant against his master for wages, the latter cannot generally set off the value of goods lost by the negligence of the former; but if it was part of the original agreement and understanding between them, that the servant should pay out of his wages for his master's goods lost through his negligence, the value of the goods so lost may be deducted from the amount of the wages. *Le Loir v. Bristow*, 4 Camp. 134.

In an action for work and labour, and goods sold and delivered, the defendants pleaded that the services were performed, and the goods sold, in pursuance of an agreement between the plaintiff and defendants, that the former should navigate certain barges for the defendants, who were common carriers by water; and that the plaintiff should be responsible for the safety and due delivery of all goods taken on board by him; and that the amount of any pilferages or damage sustained should be deducted from his wages, and might be pleaded or set off accordingly; and concluded by averring a loss by pilferage of wine delivered to the plaintiff in the course of his employment; and that the defendants were rendered liable to pay in respect thereof a sum exceeding the amount of the plaintiff's wages, and offered to set off the difference :—Held, that the plea was good in substance. *Cleworth v. Pickford*, 7 M. & W. 314; 8 D. P. C. 873.

The defendant was a clerk to the plaintiffs under an agreement for an annual salary determinable by three months' notice, or on payment of three months' salary. The plaintiffs, discovering that the defendant had written letters reflecting on them, and communicating information which he had received in his capacity of clerk, dismissed him without notice or salary. They subsequently sued him in a county court to recover money which he had received to their

use. The defendant admitted the receipt of the money, but relied as a defence by way of a set-off on a claim for three months' salary, for having been dismissed without notice. The plaintiffs contended that the defendant's conduct justified their dismissing him without notice or salary. The judge ruled that the plaintiffs were not justified in dismissing him without his salary, and allowed the set-off:—Held, that although there were no sufficient grounds for depriving the defendant of his salary, yet as the dismissal was not a wrongful dismissal, but an event contemplated by the agreement, the three months' salary became on the dismissal a debt to the defendant, and was a proper subject of set-off. *East Anglian Railway Company v. Lythgoe*, 2 L. M. & P. 221; 10 C. B. 726; 20 L. J., C. P. 84.

8. PARTNERS.

One Partner a separate Trader.—Where one was a partner in a firm, and also carried on a separate trade himself, and the firm, being indebted to him, remitted to him a note given to them by a third person:—Held, that in an action on the note by him as indorsee, against the maker, the latter might set off a demand which he had against the firm. *Puller v. Roe*, Peake, 197.

Incoming Partner.—F. & H., attorneys, sued the defendant for work and labour; the defendant pleaded a set-off, for money received by F. before H. became a member of the firm:—Held, that the plea was no answer to the action, notwithstanding F. had, after the commencement of the partnership, admitted the receipt of the money. *France v. White*, 8 Scott, 257; 8 D. P. C. 53; 6 Bing. N. C. 33.

Surviving Partner.—A debt due to a surviving partner may be set off against a demand on him in his own right. *Slipper v. Stidstone*, 1 Esp. 47; 5 T. R. 493; *S. P., French v. Andrade*, 6 T. R. 582.

Only Apparent Partner.—So, a debt due from one who was the only apparent trader may be set off in an action by himself and partners. *Stracey v. Deey*, 2 Esp. 469, n.; 7 T. R. 361, n.

Between Partners.—Where in an action for use and occupation of stables, it appeared that, the plaintiff and defendant having formerly been engaged in running a stage-coach, weekly accounts were delivered by the former to the latter, by which it appeared that the plaintiff received the profits for the purpose of dividing them, and which stated the sum due to the defendant for the work done:—Held, that they were not evidence of set-off; for that to become a matter of set-off, the balance in such partnership account must be final. *Fromont v. Copland*, 2 Bing. 170; 9 Moore, 319; 1 C. & P. 275.

Upon a dissolution of partnership, the defendant agreed to pay to his co-partners 6,817l. 9s. 8d., as his share of the liabilities of the firm, they taking the effects and assets, and undertaking to pay a debt of 51,891l. 12s., due from the firm to H. After the dissolution they became bankrupts, and never paid H.:—Held, that in an action by their assignees for the 6,817l. 9s. 8d., the defendant could not set off their undertaking to pay

the 51,891l. 12s. to H. *Albott v. Hicks*, 5 Bing. N. C. 578; 7 Scott, 715.

Disclosure of Partnership.—A. and B., in Australia, entered into an agreement to buy gold dust on a joint speculation, on the terms that the profits should be divided, so that A. should have half the profits on the sale of the dust bought by B., and B. should have half the profits on the dust bought by A. They each bought quantities of gold dust according to such agreement. They afterwards entered into another agreement, that each should consign his gold dust to the plaintiffs for sale, by a consignment on the joint account of them, A. and B., and that each should instruct the plaintiffs to divide the net proceeds, and to credit A. with one moiety and B. with the other moiety, in their respective accounts with the plaintiffs. B. accordingly consigned to the plaintiffs, as on the joint account of himself and A., the gold dust so bought by him, and gave directions to sell it, and to give credit for one moiety of the proceeds to A., and for the other moiety to himself. Also, A. consigned the gold dust so bought by him to the plaintiffs for sale, but inadvertently omitted to advise the plaintiffs that it was consigned on the joint account of A. and B., and to instruct the plaintiffs respecting the division of the profits; and B. wrote to the plaintiffs, telling them that in case A. should so omit to instruct the plaintiffs, they were not to pass the one-half profits of B.'s gold dust to the credit of A. The plaintiffs wrote to A., informing him that they would pass to his credit half the proceeds of the gold dust; and they subsequently received both consignments, and sold them, and gave credit to B. as well for the moiety of the proceeds sent by A. as also for the whole proceeds of the gold dust sent by B., setting the same off against a debt due to them from B., who had become bankrupt between the date of his consignment and the sale of it. After this giving of credit to B. for the whole of the proceeds of B.'s consignment, and after the bankruptcy, B. informed the plaintiffs that A. was entitled to a moiety:—Held, that A. had a right in equity to such moiety, and to set off the same by way of equitable defence in an action of debt by the plaintiffs against him. *Elkin v. Baker*, 11 C. B., N. S. 526; 31 L. J., C. P. 177; 8 Jur., N. S. 915.

Bond by Firm for Partner.—Set-off is allowed of a debt of the bankrupt's to one partner separately, against a joint debt of him and his partner, on their bond to secure the separate debt of the former. *Hanson, Ex parte*, 18 Ves. 233; 1 Rose, 156.

Bond to Partner in Trust for Firm.—It seems that money due for advances made by a banker to his customer upon a bond given by the customer to one of the partners, in trust for the rest, may be set off in an account current between them. *Crosse v. Smith*, 1 M. & S. 545.

Joint and Separate Debts.—A plea of set-off alleged that the debt claimed from the defendant was due by him and A. jointly; and that the plaintiff was indebted to the defendant and A., which debt the defendant and A. were ready and willing to set off. On special demurrer, on the ground that the Statute of Set-off applied only to mutual debts between the plaintiff and the de-

defendant, exclusively of any third person, the plea held good. *Stackwood v. Dunn*, 3 G. & D. 115; 3 Q. B. 822; 12 L. J., Q. B. 3.

Where the employment of the plaintiffs, which was the subject of the action, was made by the defendant alone, he cannot set off a debt due from the plaintiffs to the firm of which the defendant was a member. *Toplis v. Grane*, 2 Arn. 110; 5 Bing. N. C. 636; 7 Scott, 620.

To an action for money had and received the defendants pleaded, as a set-off, that the plaintiffs were partners; and that, before the receipt of the money, G., one of the plaintiffs, applied to the defendants, who were auctioneers, to sell some property; and that the defendants, at the time of the application, and at the time of the selling, and at the time when the set-off accrued, believed G. to be the sole owner of the property, and had no notice that the plaintiffs had any interest in it; that the money was received upon the sale of the property; and that, after G. had so employed the defendants, and before they had notice that G. was not the sole owner, he became indebted to the defendants for money lent:—Held, that the plea was bad; that it did not shew that G. appeared as sole owner, with the consent or by the default of the other plaintiffs; and that it amounted merely to a set-off of a debt due from one partner to a demand from several partners. *Gordon v. Ellis*, 2 C. B. 821; 3 D. & L. 803; 15 L. J., C. P. 178; 10 Jur. 359.

9. TRUSTEES AND ASSIGNEES.

Action by Trustees—Debt from Cestui que Trust.—In an action by a trustee to recover a debt for the benefit of the cestui que trust, a debt due from the cestui que trust cannot be set off. *Tucker v. Tucker*, 1 N. & M. 477; 4 B. & Ad. 745.

Where A. has a money demand against B., and B. (though a trustee) has a money demand against A., which but for the intervention of the trust would have constituted a good legal set-off against A.'s demand, the latter may be pleaded by way of equitable set-off. *Cockrane v. Green*, 9 C. B., N. S. 448; 30 L. J., C. P. 97; 7 Jur., N. S. 548; 3 L. T. 475; 9 W. R. 124.

When a plaintiff is suing merely as trustee, and the defendant has a claim against the cestui que trust, which, but for the intervention of the trust, would have been a legal set-off, such claim can be set off in equity, and, therefore, in an action can be set off by an equitable plea. *Thornton v. Maynard*, 10 L. R., C. P. 695; 44 L. J., C. P. 382; 33 L. T. 433.

A declaration contained nine counts on nine bills of exchange, of which the plaintiffs were indorsees, R. & Co. drawers, and the defendant acceptor. Plea, upon equitable grounds as to 425*l.*, parcel of the amount claimed, that the drawers liquidated their affairs by arrangement, and the plaintiffs received 425*l.* as a dividend on the amount of the bills due from the drawers to the plaintiffs as indorsees, and that, as regards the 425*l.*, the plaintiffs sued only as trustees for the drawers' estate. The plea then alleged a set-off of a debt due to the defendant, the acceptor, from the drawers of the bills:—Held, a good plea. *Ib.*

A demand, in the character of trustee or executor, cannot be set off against a debt due from the trustee or executor personally, although the executor gives evidence to shew that he is, in

fact, personally beneficially entitled to the amount which is due to him in the character of executor. *Middleton v. Pollock, Nuger, Ex parte*, 20 L. R., Eq. 29; 44 L. J., Ch. 584; 33 L. T. 240; 23 W. R. 766.

The only cases in which such a set-off of claims arising in different rights can be allowed are those where the person claiming the benefit of it can shew some equitable ground (other than the mere claim of set-off) for being protected against the legal demand. *Ib.*

A. was an executor and trustee of a fund to which as to one moiety he was entitled beneficially. The fund was in the hands of P., who died insolvent; at the time of P.'s death A. was indebted to P.:—Held, that A. could not set off the debt to the trust against his debt due to P. *Ib.*

Assignees of Debt or Bond.—The defendant cannot plead by way of set-off a bond debt of the plaintiff assigned to the defendant by another, to whom and for whose use it was originally given. *Wake v. Tinkler*, 16 East, 86.

S. gave a bond conditioned for the payment of money. The obligee made C. his executrix and residuary legatee, and died. C. proved his will, assented to the bequest, and died, not having fully administered, leaving E. executrix of the executrix C. in trust for her (E.'s) own benefit. A sum due on the bond in the first testator's time remained unpaid. C., during her lifetime, in consideration of a marriage about to take place between her and the father of S., gave a bond to a trustee, conditioned for the payment of a sum of money to the use of S. if C. should marry and survive her intended husband. She did marry and survive him, and the money not having been paid in her lifetime, the trustee's executor sued E., the executrix of C., upon that bond:—Held, that, in this action, the claim of E. upon S.'s bond could not be set off. *Tucker v. Tucker*, 4 B. & Ad. 745; 1 N. & M. 477.

A company, in an action upon certain debenture bonds, sought to set off the amount of calls due from the obligee of the bonds, upon shares in their company. The amounts of the debentures were therein expressed to be made payable to him, his executors, administrators, or assigns. He transferred the debentures to C. and S., on whose behalf the action was really brought. The company registered the transfers and issued certificates of registration to the transferees, stating that they had been entered as registered proprietors of the debentures. Neither C. nor S. had any notice, when the debentures were transferred, that the company had or would claim any right of set-off against the debentures. Previously to the falling due of the debentures the obligee and holder became indebted to the company in various sums for calls due upon shares held by him in the company from the date of its coming into existence. Subsequently to the accruing due of part of such calls the secretary wrote a letter to the transferees acknowledging them to be the owners of the debentures, and requesting time for payment, and the company accepted two of the debentures in payment of calls due from the transferees as shareholders in the company. The company also paid interest to the transferees up to the time of the debentures falling due. The articles of association of the company provided that the company should have a lien upon the shares or debentures of any member indebted to the

company, and should be entitled to sell the same and apply the proceeds in discharge of his debt:—Held, on a special case raising the question whether the company was entitled in equity to set off the calls due to them from the obligee as against the transferees, that they were not so entitled on the ground that the terms of the debentures and the articles of association appeared to contemplate the transfer of the debentures free from all claims against the original holder, and that the company, by their subsequent conduct, had recognized and dealt with the transferees as absolute owners of the debentures transferred to them. *Higgs v. Northern Assam Tea Company*, 4 L. R., Ex. 587; 38 L. J., Ex. 233; 17 W. R. 1125.

To an action for non-payment of 45l., the balance due upon a building agreement, the defendant pleaded a set-off of a judgment for 10l. 2s. against the plaintiff. The plaintiff replied, that, before the recovery of the judgment, he for a good consideration assigned the debt of 45l. to S.; that the defendant before the recovery of the judgment had notice of the assignment, and that the plaintiff was suing as a trustee for S.:—Held, that the replication was bad, and disclosed no legal answer to the plea. *Watkins v. Clark*, 12 C. B., N. S. 277.

In an action for freight, the defendant pleaded a set-off, to which the plaintiff replied, on equitable grounds, that while the freight was in the course of being earned, he assigned it for value to A., of which the defendant, before the debt became due, and before the action was brought, had notice; and that the plaintiff was suing only as trustee for A.:—Held, no answer to the plea. *Wilson v. Gabriel*, 4 B. & S. 243; 8 L. T. 502; 11 W. R. 803.

A railway company bound themselves to the plaintiffs by Lloyd's bonds, to pay certain sums of money and interest at the expiration of a year. A few days afterwards the company granted the plaintiffs a lease; they then assigned away the bonds. In an action by the plaintiffs for the benefit of the assignees on the bonds, the company claimed to be entitled to set off rent which accrued due under the lease after such assignment and notice thereof:—Held, that the company was not so entitled either at law or in equity. *Watson v. Mid-Wales Railway Company*, 2 L. R., C. P. 593; 36 L. J., C. P. 285; 17 L. T. 94; 15 W. R. 1107.

Assignee in Scotch Bankruptcy.—To an action by a trustee of a Scotch bankrupt for money received by the defendant for the use of the trustee, after the bankruptcy, and for interest upon money due from the defendant to the trustee, forborne to the defendant at his request, it is a good defence that there were mutual credits between the bankrupt and the defendant, and by the Scotch law the trustee is only entitled to sue for the balance. *Macfarlane v. Norris*, 2 B. & S. 783; 31 L. J., Q. B. 245; 9 Jur., N. S. 74; 6 L. T. 492.

V. IN EQUITY.

Set-off—When Enforceable.—Where there are cross demands between two parties, of such a nature, that, if both were recoverable at law, they would be the subject of legal set-off, then, if either of the demands is matter of equitable jurisdiction, the set-off will be enforced in equity. *Clark v. Cart*, 1 C. & P. 154.

Equitable set-off exists in cases where the party seeking the benefit of it can shew some equitable ground for being protected against his adversary's demand. The mere existence of cross demands is not sufficient. Still less will the court interfere, on the ground of equitable set-off, to prevent a party from recovering a sum awarded to him by a jury as damages for a breach of contract, merely because there is an unsettled account pending between him and the party against whom the action is brought, although the subject-matter of the account consists of dealings and transactions arising out of the contract, the breach of which is the subject of the action. *Ib.*

Cross demands, existing in separate rights, are not, in equity (except under special circumstances), allowed to be set off one against the other. *Freeman v. Lomas*, 9 Hare, 109; 20 L. J., Ch. 564; 15 Jur. 648; *S. P.*, *Stammers v. Elliott*, 3 L. R., Ch. 195; 37 L. J., Ch. 353; 18 L. T. 1; 16 W. R. 489.

Therefore an executor and trustee of a legacy, who was also residuary legatee, and had become a creditor of the husband and administrator of a deceased legatee, was not, in the absence of any special agreement, allowed to set off his debt against the legacy to which the husband (having survived his wife the legatee) was, as such administrator, entitled. *Ib.*

Cross demands are not alone a sufficient foundation for equitable set-off. *Fisher v. Baldwin*, 11 Hare, 352.

If a customer borrows money from his bankers, and gives a bond to secure its repayment, and the balance from the general banking account is afterwards in favour of the customer, a right to set off such balance against the amount due on the bond exists both at law and in equity. *Cuvendish v. Geares*, 24 Beav. 163; 27 L. J., Ch. 314; 3 Jur., N. S. 1086.

But if the firm is altered, and the bond is assigned by the obligees to the new firm, with notice of the assignment to the obligor, and the balance upon the general banking account is afterwards in favour of the customer, no right of set-off exists at law; but in equity the customer is entitled to set off the balance due on the banking account against the amount due on the bond. *Ib.*

So, if the bond is assigned to a stranger, without notice to the obligor, the same right of set-off exists, and the assignee takes the assignment subject to all the equities which affected the assignors. *Ib.*

Two sons had, as against their father, a lien on his estate, for an outlay made thereon by them; on the other hand, the father had a claim against the sons in respect of a suretyship entered into by him for them:—Held, that these demands might be set off in equity. *Unity Joint-Stock Mutual Banking Association v. King*, 25 Beav. 72; 27 L. J., Ch. 585; 4 Jur., N. S. 1257.

VI. PLEADINGS AND EVIDENCE.

1. PLEA.

Must be Plead.—Set-off must be specially pleaded, and cannot be given in evidence under a plea of never indebted. *Graham v. Partridge*, 1 M. & W. 395; 5 D. P. C. 108.

Not covering Plaintiff's Claim.—Where the

amount proved under a plea of set-off pleaded to the whole declaration did not cover the plaintiff's demand, the defendant could not have had a verdict on a plea for the amount proved, but it went in reduction of damages. *Rodgers v. Mau*, 15 M. & W. 444; 4 D. & L. 66; 16 L. J., Ex. 137.

Debt Accrued after Action.]—A defendant cannot set off, by plea to the further maintenance of the action, a debt which accrued after action, and before plea. *Richards v. Jones or James*, 2 Ex. 471; 6 D. & L. 52; 17 L. J., Ex. 277.

A plea of set-off, that the plaintiff was indebted to the defendant "at the time of the plea pleaded," is bad; it should state that he was indebted "at the commencement of the action." *Evans v. Prosser*, 3 T. R. 186; *S. P.*, *Braithwaite v. Coleman*, 4 N. & M. 654.

A plea which states that "before and at the time of the commencement of the action, the plaintiff was indebted to the defendant," without inserting the words "and still is indebted," is bad. *Dendy v. Powell*, 3 M. & W. 442; 6 D. P. C. 577.

Plea to an action for goods sold and delivered, that the goods were, with the privity of the plaintiff, sold and delivered to the defendant by S., the agent of the plaintiff, in the name and as the goods of S., and that the defendant never knew the plaintiff as the owner; that at the time of the sale and delivery S. was and still is indebted to the defendant in a sum exceeding the price of the goods, and that the defendant is ready and willing to set off and allow to the plaintiff the price of the goods out of the money so due and owing from S.:—Held, good on special demurrer. *Carr v. Hinchliffe*, 7 D. & R. 42; 4 B. & C. 547; *S. P.*, *Purchell v. Salter*, 1 Q. B. 197, 209; 1 G. & D. 682.

2. REPLICATION AND REJOINDER.

Validity of.]—In an action for goods sold and delivered, the defendant pleaded a set-off of more money due to him from the plaintiff; replication, that the goods were agreed to be paid for in ready money, which replication was holden bad, being no answer to the plea. *Eland v. Karr*, 1 East, 375.

The defendant pleaded as to 55*l.*, parcel, &c., a tender. Replication, that a larger sum than 55*l.* was due upon one entire contract, and that the plaintiff, at the time of the tender, required payment of such larger sum, which the defendant refused to pay. Rejoinder that the defendant had a set-off to the extent of such larger sum, except 55*l.*, and refused to pay the whole of such larger sum:—Held, that the rejoinder was bad, and that the set-off ought to have been pleaded in the first instance, and that the replication was good. *Searles v. Sadgrove*, 5 El. & Bl. 639; 25 L. J., Q. B. 15; 2 Jur., N. S. 21.

A replication that since the plea of set-off the plaintiff paid the defendant the amount of the set-off, is good. *Eaton or Eyton v. Littledale*, 7 D. & L. 55; 4 Ex. 159; 18 L. J., Ex. 369.

To an action by payee against the maker of a note for 15*l.* 9*s.* 4*d.* payable on demand, the defendant pleaded as to 3*l.*, parcel, a set-off at the time of demand; and as to the 12*l.* 9*s.* 4*d.*, a tender of that sum at the time of demand. Replication to the first plea denied the set-off, at the time of the commencement of the suit; as to the second plea, that before the making of the tender,

the sum of 15*l.* 9*s.* 4*d.*, including the 12*l.* 9*s.* 4*d.*, was due upon the note, which sum the plaintiff demanded, but the defendant refused to pay the same, and that no set-off or other just cause existed for the non-payment:—Held, that the replication was good. *Cotton v. Godwin*, 7 M. & W. 147; 9 D. P. C. 763.

Evidence—When Admissible.]—Where the plaintiff replied "that he was not, at the commencement of this suit, nor is, indebted to the defendant as alleged:"—Held, that he could give evidence of payment in answer to the proof in support of the plea of set-off, although such evidence would not be admissible under a replication of never indebted to a plea of set-off. *Harvey v. Holtman*, 2 D., N. S. 683; 12 L. J., Q. B. 185; 7 Jur. 398.

Payment cannot be given in evidence under a replication of never indebted to a plea of set-off. *Miller v. Atlee*, 3 Ex. 799; 13 Jur. 431; *S. P.*, *Stockbridge v. Sussams*, 2 G. & D. 591; 3 Q. B. 239; 6 Jur. 437.

Special Pleas.]—The Statute of Limitations must be specially replied to a plea of set-off. *Chapple v. Durston*, 1 C. & J. 1.

The plaintiff, on a replication of the Statute of Limitations to a plea of set-off, cannot, on the trial, reduce the amount of the set-off by shewing payment of part; the payment of part ought to be replied. *Moore v. Wood*, 2 M. & Rob. 407.

A discharge, under the Insolvent Debtors Act (1 & 2 Vict. c. 110), s. 91, to a plea of set-off, must be specially replied. *Ford v. Dornford or Dunsford*, 8 Q. B. 583; 15 L. J., Q. B. 172; 10 Jur. 285.

Nil debet.]—To an action against a public officer of a banking copartnership for money lent, he pleaded, by way of set-off, that the plaintiff was the holder of shares in the copartnership under their deed, and after setting out the deed under which the copartnership was formed, averred that a sum was owing for calls made in pursuance of the deed. To this the plaintiff replied, nil debet:—Held, that the replication was bad, inasmuch as the debt arising from the calls was founded solely on the deed. *Milvain v. Mather*, 5 Ex. 55; 1 L., M. & P. 220; 19 L. J., Ex. 227.

Held, also, that a similar replication to a like plea of set-off, which stated the plaintiff to be holder of shares obtained by purchase, was bad. *Id.*

Under nil debet to a plea of set-off, the plaintiff might object that the debt sought to be set off was not due from himself alone, but from himself and a third party. *Arnold v. Bainbridge*, 9 Ex. 153; 23 L. J., Ex. 59.

3. EVIDENCE AND TRIAL.

Particulars—Effect of, &c.]—Particulars of set-off are merely explanatory of the plea, and the plaintiff, by putting them in evidence to prove his case, as, for instance, to rebut the defence of the Statute of Limitations, does not thereby admit the correctness of their contents. *Burkett v. Blanshard*, 3 Ex. 89; 18 L. J., Ex. 34; *S. P.*, *Buckmaster v. Meiklejohn*, 8 Ex. 634; 1 C. L. R. 839.

An order for delivery of particulars of set-off, and in default precluding the defendant from giving evidence of his set-off, makes such evi-

dence inadmissible at the trial. *Young v. Geiger*, 6 C. B. 552; 6 D. & L. 337; 18 L. J., C. P. 43.

So, an order for delivery of particulars of set-off with dates is not complied with by a delivery of particulars without dates, although not objected to by the plaintiff, and the defendant will, in such case, be precluded at the trial from giving evidence of his set-off. *Ibbett v. Leaver*, 16 M. & W. 770; 4 D. & L. 716; 16 L. J., Ex. 208.

Motion to Enter Verdict.—Action by payee against the maker of a note. Plea, set-off. At the close of the defendant's case it was submitted that there was no evidence to go to the jury in support of his case. The judge declined to stop the case, and the plaintiff gave evidence; a verdict was found for the defendant:—Held, that the plaintiff could not afterwards move to enter a verdict, on the ground that the cause should have been stopped at the end of the defendant's case. *Allen v. Carew*, 7 El. & Bl. 463; 3 Jur., N. S. 1146.

Proof by Plaintiff.—Where there are cross demands, and the defendant pleads a set-off, the plaintiff is not obliged to prove the whole of his account in the first instance, but may prove only the balance which he claims, and after the defendant has proved his set-off, the plaintiff may prove other parts of his account to shew that a larger sum was due. *Williams v. Davies*, 1 C. & M. 464; 1 D. P. C. 647; 3 Tyr. 383.

Proof by Defendant.—A plea of set-off on a bill of exchange, payable to the order of the defendant, and accepted by the plaintiff, is not supported by evidence of a bill answering to the description in the plea, which at the time of action brought was in the hands of a third party, although before plea pleaded the bill had got back to the hands of the defendant. *Braithwaite v. Coleman*, 4 N. & M. 654.

Where a defendant pleaded by way of set-off a bond given to him by the plaintiff conditioned for payment of an annuity to a third person, which had been previously granted by the defendant, and that a certain sum was in arrear:—Held, that he was not bound to prove that he had paid the money in order to set it off, but that on production of the bond the plaintiff was bound to prove payment. *Penny v. Foy*, 8 B. & C. 11.

A payment which has been made in bills is good evidence under a set-off, and it shall be presumed that they were paid unless the contrary is shewn. *Hobden v. Hartsink*, 4 Esp. 46.

Where a plaintiff sues on a quantum meruit for work and labour, the defendant may, without pleading a set-off, give in evidence that he provided the plaintiff's men, who did the work, with their beer, as it may be that the plaintiff deserves to be paid the less because his men had their beer provided for them by the defendant. *Grain-ger v. Raybould*, 9 C. & P. 229.

Distributively.—A plea of set-off of a particular amount is not supported by proof of a set-off of a less amount; but the plea may be taken distributively, and found, as to the part not proved, for the plaintiff; and, as to the part proved, for the defendant. *Cousins v. Paddon*, 2 C., M. & R. 547; 4 D. P. C. 488; 5 Tyr. 535; 1 Gale, 305.

Before the 15 & 16 Vict. c. 76, s. 75, where a

defendant failed on the whole record, he was not entitled to have the verdict entered for him as to a part proved on a plea of set-off. *Tuck v. Tuck*, 5 M. & W. 109; 7 D. P. C. 373.

To a declaration for a debt, the defendant pleaded, first, never indebted; secondly, a set-off; thirdly, as to 3*l.*, parcel, &c., payment after action; and fourthly, a defence under the Tippling Act. At the trial the set-off proved was less than the plaintiff's claim as it stood at the commencement of the action, but exceeded it when the payment pleaded, after the action, was taken into account:—Held, that the plaintiff was entitled to the verdict, on the plea of set-off. *Spradberry v. Gillam*, 2 L., M. & P. 366; 6 Ex. 422; 20 L. J., Ex. 237.

Defendant not Appearing.—Where a defendant has a set-off against the plaintiff, and does not appear at the trial, the plaintiff may either take a verdict for the whole sum he proves due, subject to be reduced to the sum due on the balance of accounts, if the defendant will afterwards enter into a rule to bring no action for the set-off, or he may take a verdict for the smaller sum, with a special indorsement on the postea, as a foundation for the court to stay proceedings, if another action should be brought for the amount of the set-off. *Laing v. Chat-ham*, 1 Chit. 178, n.; 1 Camp. 252.

VII. EFFECT OF SET-OFF.

Whether Pleading a Set-off Compulsory.—There is no compulsion upon a defendant to plead a set-off, and if he pleases he may bring a cross action, provided he and his attorney choose to incur the odium of an obstinate and litigious character, and the censure of the court which will follow, unless good reason can be shewn for not pleading such set-off. *Green v. Law*, 2 Smith, 668.

B. brought an action against A. for the benefit of F., to whom he assigned all moneys owing from A., whereof A. had notice; the action was referred, and a sum of money was awarded, together with costs. A second action was brought on the award by B., for the benefit of F., to which A. pleaded a set-off of matters that had not been brought forward at the time of making the award:—Held, that A. was entitled to do so, and that it was not a good reply in equity, that the matter might have been brought forward at the time of making the award, and that F. had thereby been induced to think there was no further set-off. *Baker v. Alexander*, 35 L. J., C. P. 217; 12 Jur., N. S. 692.

Action for Set-off in prior Action.—A party cannot bring an action for what has been the subject of a set-off in a former action by the defendant against him:—but if the set-off was more than sufficient to cover the demand in the former action, he may maintain an action for the surplus. *Hennell v. Fairland*, 3 Esp. 104.

A plea to an action for a debt, alleging that in a former action brought by the defendant against the plaintiff the latter pleaded a set-off, in respect of the same money now sought to be recovered, but the jury found for the plaintiff, on which judgment was given:—Held, a good plea of estoppel; and a replication that the plaintiff was not prepared to support his plea of set-off at the former trial:—Held, ill. *East-*

mure v. Lawes, 5 Bing. N. C. 444; 7 D. P. C. 431; 7 Scott, 461.

To a declaration for goods sold and delivered, the defendant pleaded, that in an action brought by the now defendant in a county court, against the now plaintiff, the now plaintiff set up a set-off as a defence, and gave notice to the now defendant that he would claim a set-off for 15l.; that it was adjudged that the now defendant was not indebted to the now plaintiff in that sum, or any part thereof, and that the now plaintiff had no claim against the now defendant, averring the identity of the two debts. Replication, that by the rules of the county court, made in pursuance of the statute, any defendant desirous of setting off a debt was bound to give notice of set-off to the clerk of the court, and that the now plaintiff did not give such notice:—Held, that the replication was good. *Stanton v. Styles*, 5 Ex. 578; 1 L. M. & P. 575; 19 L. J., Ex. 336; *S. P., Danks v. Farley*, 1 C. L. R. 95.

SETTLEMENT.

I. OF PAUPERS.—*See* POOR LAW.

II. ON MARRIAGE.—*See* HUSBAND AND WIFE.

III. FRAUDULENT AND VOID.—*See* FRAUDULENT CONVEYANCES.

SEWERS.

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I. COMMISSIONERS.

1. JURISDICTION AND POWERS.

Over Navigable Streams.—A commission of

sewers extends only to navigable streams, unless within two miles of London. *Yean v. Holland*, 2 W. Bl. 717. And see *Anon.*, 2 Chit. 137.

The commission of sewers has jurisdiction over a sewer communicating with a navigable stream, or with the sea above the point where the tide ebbs and flows, if the place over which the jurisdiction is exercised is, or is likely to be, benefited by it. *Dore v. Grey*, 2 T. R. 258.

Erecting and Maintaining Sea-walls.—*See* SEA.

When Empowered to make a new Sewer.—The commissioners, under an improvement act, were empowered to make new sewers, but prohibited from making any new sewer to drain into a public river above a certain point:—Held, that they ought to be restrained at the suit of the private owners of a weir in and part of the soil of the river below that point, from enlarging and deepening an old sewer running into the river above that point, so as to make it virtually a new sewer. *Holt v. Rochdale (Mayor)*, 10 L. R., Eq. 354; 39 L. J., Ch. 761; 23 L. T. 43; 18 W. R. 885.

Held, also, that the plaintiffs' suit, being based upon their statutory rights, was maintainable without making the attorney-general a party thereto, or proving special injury. *Id.*

By an act empowering certain persons to make a floating harbour at Bristol, it was enacted, that it should and might be lawful for the directors of the Bristol Dock Company, and they were thereby authorized and required to make a common sewer in a direction therein specified, and also to alter and reconstruct all or any of the sewers of the city, at the mouths thereof, so and in such manner that the sewers might be discharged considerably under the surface of the water in the floating harbour; and also to make such other alterations and amendments in the sewers of the city as might or should be necessary in consequence of the floating of the harbour. The directors altered several of the sewers so as to discharge them considerably under the surface of the water in the floating harbour, but the sewerage there discharged was so offensive as to be a nuisance to the neighbourhood:—Held, that, under the latter part of the clause set forth, the directors were authorized and required to make a new sewer, if necessary, to remove the nuisance. *Re v. Bristol Dock Company*, 6 B. & C. 181; 9 D. & R. 309.

Making Sewers through Private Lands.—Commissioners were empowered under a local act to make drains through private inclosed lands, after giving twenty-eight days' public notice, with power to persons interested to object and to appeal. They were also, as such commissioners, by s. 3 of the Nuisances Removal Act, 1855, the local authority; and, as the local authority, were, by s. 22 of the same act, and by s. 67 of the Highway Act (5 & 6 Will. 4, c. 50), empowered to make drains through private inclosed lands adjoining a highway, for the purpose of removing an existing nuisance. A watercourse used as a sewer being a nuisance, and a new sewer being necessary to remove the nuisance, the commissioners, without giving notice, made a new sewer through inclosed land adjoining a highway, not in the line of the watercourse:—Held, that the commissioners were entitled to act under either the local act or the general act, at their election;

and that the making of the sewer in that manner was within their powers under the general act. *Derby (Earl) v. Bury Improvement Commissioners*, 4 L. R., Q. B. 222; 38 L. J., Ex. 100; 20 L. T. 927; 17 W. R. 772—Ex. Ch.

The Nuisances Removal Act, 1855, s. 22, construed with s. 67 of the Highway Act, empowers the local authority, where a new sewer is necessary, to make the same in any direction they think fit through private inclosed lands adjoining a highway, although no sewer previously existed there. The same sections provide compensation for damage caused by the making of such a sewer, to the owner or occupier of the land through which the same is made. *Ib.*

Taking Private Houses.]—The commissioners of sewers, acting under the powers of 57 Geo. 3, c. xxix., cannot take compulsorily the whole of a house unless they have formally adjudged that possession of the whole is necessary for the purpose of executing their powers. *Thomas v. Davo*, 2 L. R., Ch. 1; 36 L. J., Ch. 201; 15 L. T. 200; 15 W. R. 113.

Enforcing Penalties for acting without Consent.]—A local act provided that no ditch, &c., should be arched over, &c., without the consent of the trustees under the act, under a penalty of 50*l.* :—Held, that a surveyor, who, after a sewer had been commenced, directed it to be continued (without the consent of the trustees), incurred the penalty. *Woodward v. Cotton*, 1 C., M. & R. 44; 6 C. & P. 489; 4 Tyr. 689.

The arching over an old ditch of smaller dimensions than were mentioned in a consent to the making of a sewer in writing, by certain trustees under an act, was held to be a breach of a section, providing that no ditch, drain, or other watercourse should be narrowed, filled up, altered, covered in, or arched over, without the consent of such trustees, nor in any other manner than should be expressed in such consent. *Ib.*

Grant of Licences for Hoardings.]—B. having contracted to erect a building (the new post-office), which would take two years in its erection, applied to the commissioners of sewers of the city for a licence to erect a hoarding to inclose the space, under the City of London Sewers Act, 1848, which hoarding would run into four streets. The commissioners refused to grant a licence, except upon the terms that there should be a distinct licence for the hoarding in each of the four streets, that it should continue for two months, that a fee of 10*l.* should be paid for each licence, and that no placards or other materials for advertising should be placed against the hoarding :—Held, first, that the commissioners ought not to have required four licences for the hoarding, but only one licence. *Reg. v. City of London Sewers Commissioners, Brass, Ex parte*, 22 L. T. 582.

Held, secondly, that they ought not to have limited the duration of the licence to two months, but should have granted the licence for such a length of time as would be reasonably requisite for the erection of the building. *Ib.*

Held, thirdly, that they had no right to impose the condition that no placards, or other materials, should be placed against the hoarding. *Ib.*

Filing a Bill in Chancery.]—The Court of Chancery has jurisdiction to entertain a bill at

the suit of the commissioners of sewers appointed under 23 Hen. 8, c. 5, notwithstanding that such commissioners are a court of record. *Crossman v. Bristol and South Wales Union Railway Company*, 1 Hem. & M. 531; 11 W. R. 981.

2. APPOINTMENT.

By Secretary of State—Default of Sewer Authority.]—A sewer authority having made default in providing the necessary sewers for the district, the secretary of state, under the Sanitary Act, 1866 (29 & 30 Vict. c. 90), s. 49, made an order, which recited that the sewer authority had "made default in providing a proper system of main drainage," and proceeded, "I do order the authority to do its duty, and begin to set about the works for the purpose within one month from the date of this order, and proceed therewith until completion." After the month, the sewer authority having done nothing, the secretary of state made a second order appointing B. "to perform the duty of the sewer authority in respect of sewerage as he shall be directed by me :"—Held, that the two orders were justified by s. 49. *Reg. v. Cockerell*, 6 L. R., Q. B. 252; 40 L. J., M. C. 153; 19 W. R. 1133.

II. PROPERTY IN SEWERS.

Sewer, what is.]—A natural watercourse, for the greater part of its course, flowed through cultivated land of certain landowners, and in that part of its course was solely supplied by the drainage—natural and artificial—of those lands; it then passed through a town and received the drains of two or three inhabited houses :—Held, that this watercourse could not be considered as a sewer, within the Public Health Act, 1848 (11 & 12 Vict. c. 63), and did not vest in the local board of health. *Reg. v. Godmanchester Local Board of Health*, 1 L. R., Q. B. 328; 35 L. J., Q. B. 125; 14 L. T. 104; 14 W. R. 375; 5 B. & S. 936—Ex. Ch.

Vesting—Sea-wall.]—Commissioners of sewers cannot maintain an action against the commissioners of a harbour for breaking down a wall or a dam erected by the former, as such commissioners, across a navigable river, as the authority to be exercised by them, on behalf of the public, does not vest in them such a property or possessory interest as will enable them to maintain such action. *Newcastle (Duke) v. Clark*, 2 Moore, 666. See also sub tit. SEA.

Construction of Statute.]—The 3 & 4 Will. 4, c. 22, s. 44, enacts, that "the property of and in all lands, tenements, hereditaments, buildings and erections, works and other things, which shall have been or shall hereafter be purchased, obtained and erected, constructed or made, by or by order of, or which shall be within or under the view, cognizance or management of any commissioners of sewers, with the several conveniences, &c., shall be and the same are hereby vested in the commissioners of sewers :"—Held, that this section had not the effect of vesting in the commissioners of sewers the property in all lands, under their "view, cognizance or management." *Stracey v. Nelson*, 12 M. & W. 533; 13 L. J., Ex. 97.

Extent of.]—The usual clause in local

acts vesting sewers in the sewer authority confers an absolute property in that part of the subsoil occupied by any sewer, and not merely an easement or right of sewerage. *Taylor v. Oldham Corporation*, 4 Ch. D. 395; 46 L. J., Ch. 105; 35 L. T. 696; 25 W. R. 178.

Right of User—Landlord and Tenant.—Lease of land by A. to B., reserving to A. power to enter upon the land, and to dig and make a covered sewer and watercourse through it, in order to convey away any drainage from A.'s premises. A. made a sewer accordingly, and B. made a drain from his own premises, and carried it into the sewer:—Held, that A. was entitled to the exclusive use of the sewer, and that he could recover damages in an action against B. for so interfering with such exclusive use. *Lee v. Stevenson*, El. Bl. & El. 512; 27 L. J., Q. B. 263.

III. COMPENSATION FOR INJURIES.

Arbitration—Liability Disputed.—By 11 & 12 Vict. c. 112, s. 69, full compensation shall be made, out of such rates as the commissioners shall direct, to all persons sustaining any damage by reason of the exercise of the powers of the act; and in case of dispute as to amount, the same shall be settled by arbitration. On mandamus to enforce the award of an arbitrator appointed by a party claiming compensation, the commissioners having failed to appoint one:—Held, that the mode of proceeding by arbitration was given by s. 69, where the amount of compensation, and not where the liability, was disputed, and that therefore the award was invalid. *Reg. v. Metropolitan Commissioners of Sewers*, 1 El. & Bl. 694; 22 L. J., Q. B. 234; 17 Jur. 787.

Amount Disputed.—A local board of health made a sewer through the land of B. He claimed compensation. The board maintained that the land was not damaged, and consequently that he was not entitled to any compensation. B. called upon them to appoint an arbitrator to settle the amount of compensation. The board refused to do so. B. appointed an arbitrator, who ultimately made an award ex parte:—Held, that it appearing that the local board did not deny that they had made the sewer, and were liable to make compensation, if there was any damage, the dispute was only as to the amount of the compensation, and was therefore under the act to be settled by arbitration; and that arbitrators, if of opinion that there was no damage, might award that the amount of compensation was nothing. *Bradby, In re*, 4 El. & Bl. 1014; 24 L. J., Q. B. 239; 1 Jur., N. S. 778.

Liability for, in Metropolis.—In 1854, the commissioners of sewers under 11 & 12 Vict. c. 112, gave notice to A., the occupier of land under a lease granted by a tenant for life, that they were about to construct a new sewer across the same; and, in the early part of 1855, the work was done, no notice having been given to the owner of the fee. The 18 & 19 Vict. c. 120, passed after the work was to be done, and came into operation on the 1st of January, 1856. On the expiration of A.'s lease, in 1862, B., who had succeeded to the estate on the death of the tenant for life (in November, 1855), for the first time became aware of the existence of the sewer,

which it was agreed had depreciated the value of the property for building purposes to the extent of 1,500*l.*:—Held, that the liability of the commissioners of sewers to compensate B. for such damage was transferred to the metropolitan board of works by virtue of the provisions of the 18 & 19 Vict. c. 120, and that the claim was not too late. *Petticard, In re*, 19 C. B., N. S. 489; 34 L. J., C. P. 301; 11 Jur., N. S. 932; 12 L. T. 764.

IV. PERSONS LIABLE FOR DAMAGE.

1. COMMISSIONERS.

For Negligence—Proof.—In order to render commissioners acting in the bonâ fide performance of a public duty liable to an action for an injury to an individual resulting from an act so done by them, it must appear that they have been guilty of negligence or want of skill in the conduct of it. *Grocers' Company v. Donne*, 3 Scott, 356; 3 Bing. N. C. 34; 2 Hodges, 120.

— Obligation to Fence.—Commissioners of sewers used for the purpose of sewerage an ancient tidal-ditch, which ran along the side of a highway:—Held, that they were under no obligation to fence the sewer so as to protect persons frequenting the highway. *Cornwell v. Metropolitan Commissioners of Sewers*, 10 Ex. 771; 3 C. L. R. 417.

Primary Cause of Damage.—By an act of parliament commissioners were the proprietors of a cut for conveying water from the Middle Level into the River Ouse, protected by banks and a wall, and by their negligence the cut burst, and the water flooded the neighbouring land. The plaintiff was in occupation of a farm, which the water did not at first reach, but as the tides daily became higher, he, in order to keep the water from his land, closed a culvert, which had been constructed by the commissioners in pursuance of the act for the purpose of draining the water from the land about the plaintiff's farm into the lower ground, which was first flooded. The proprietors of the lower ground, fearing this might cause greater damage to their property, opened the culvert, and the plaintiff's farm became flooded and his crops injured:—Held, that, whether the proprietors of the lower ground were justified or not in opening the culvert, the primary and substantial cause of injury was the negligence of the commissioners, and they were therefore liable for the damage to the plaintiff. *Collins v. Middle Level Commissioners*, 4 L. R., C. P. 279; 38 L. J., C. P. 236; 20 L. T. 442; 17 W. R. 929.

Where Plaintiff elects to run Risk.—Where commissioners of sewers had made a dangerous trench in the only outlet from a mews, putting up no fence, and leaving only a narrow passage, on which they heaped rubbish, and a cabman, in the exercise of his calling, attempted to lead his horse out over the rubbish, and the horse fell and was killed, for which loss he brought an action against the defendant as acting under the commissioners:—Held, that the plaintiff was not disentitled to recover, because he had at some hazard, created by the defendant, brought his horse out of the stable, and that the case was properly left to the jury on the question, whether or not the plaintiff had persisted, contrary to

express warning at the time (as to which there was contradictory evidence), in running upon a great and an obvious danger. *Clayards v. Dethick*, 12 Q. B. 439.

Pollution of Stream—Prescriptive Right.—Where a man has a right to the use of an ancient stream of water flowing through his land, and sewage matter is so precipitated into it as to pollute it and to prevent his using it, he may apply to a court of equity for an injunction to restrain the pollution before it becomes an undoubted nuisance; and it is not competent to claim as against him a prescriptive right to discharge the sewage into the stream. *Goldsmid v. Tunbridge Wells Improvement Commissioners*, 1 L. R., Ch. 349; 35 L. J., Ch. 382; 12 Jur., N. S. 308; 14 L. T. 154; 14 W. R. 562.

For Acts of Persons Employed.—By a local act, a duty was cast upon commissioners of making and maintaining a sluice and a cut for the discharge of drainage waters; owing to the negligence of the persons employed by them the sluice and cut were not maintained, and a private individual sustained damage by reason of the water overflowing his land:—Held, that although the commissioners were a public body bound to discharge a public duty without reward and without funds, yet they were answerable for the negligence of those whom they had employed. *Coe v. Wise*, 1 L. R., Q. B. 711; 37 L. J., Q. B. 262; 14 L. T. 891; 7 B. & S. 831—*Ex. Ch.*

—Thorough Work skilfully Done.—Where bricklayers, employed by the commissioners of sewers to repair a public sewer, performed the work in such a manner as to occasion a damage to a neighbouring house:—Held, that they were liable to an action, although the work itself appeared to be performed in a skilful manner. *Jones v. Bird*, 1 D. & R. 497; 5 B. & A. 837. See *Drew v. New River Company*, 6 C. & P. 754.

2. CONTRACTORS.

Statutory Exemption.—Contractors acting under the authority of the Metropolitan Commissioners of Sewers, and bonâ fide acting for the purpose of executing the 11 & 12 Vict. c. 112, by negligence injured premises:—Held, that, under s. 128, they were exempted from all liability. *Ward v. Lee*, 7 El. & Bl. 426; 26 L. J., Q. B. 142; 3 Jur., N. S. 557.

—Who entitled to.—By a local act commissioners were empowered to cause any "present or future sewers, ditches, drains, &c., to be opened, enlarged, altered or cleansed;" and it was enacted, that in case any action should be brought against any person for anything done in pursuance of the act, or in relation to the matters therein contained, the plaintiff should not recover in any such action, if tender of amends should have been made to him, or his attorney, by or on behalf of the defendant, before such action brought; and in case no such tender should be made, that it should be lawful for the defendant, by leave of the court, to pay money into court; and if the matter should appear to have been done in pursuance and under the authority of the act, and after sufficient satisfaction made or tendered, then that the jury should find for the defendant. The commissioners, of whom

the defendant was one, appointed a committee to inspect a ditch, with a view to widening the same, and to report thereon. The committee having reported thereon in favour of widening the ditch, the commissioners appointed a second committee, of whom the defendant was one, to confer with a surveyor respecting the work, with power to two of them to act. The defendant, being afterwards told by the clerk to the commissioners that he might proceed without further instructions from the commissioners, took the plaintiff's land for the purpose of widening the drain, without having given him notice or obtained his consent. The land was taken for the bonâ fide purpose of widening the drain. The defendant, before action, tendered 10*l.* as amends, which the plaintiff refused to accept; but no tender was pleaded, nor was the amount paid into court. The jury found the trespass, and that the damage amounted to 5*l.*:—Held, first, that although neither the defendant was nor the commissioners were authorized to take the land without his consent in writing, yet the defendant was entitled to the protection of the act. *Jones v. Gooday*, 9 M. & W. 736; 1 D., N. S. 914.

Held, secondly, that the defendant was not bound to plead the tender, or pay the amount tendered into court. *Id.*

3. PRIVATE PERSONS.

Escape of Sewage—Adjoining Owners.—The tenant and occupier of a house is liable for damage done on adjoining premises from the escape of sewage owing to the defective state, under his house, of a drain which receives the sewage from his own and adjoining houses, though he is ignorant of the existence of the drain and has not been guilty of negligence. *Humphrey v. Cousins*, 2 C. P. D. 239; 46 L. J., C. P. 438; 36 L. T. 180; 25 W. R. 371.

The defendant occupied a house under which was an old drain, which, after receiving the sewage of such house, ran under and received the sewage of several other houses, then turned back and came again under his house, and ran from it under the cellar of the plaintiff's house, which adjoined that of the defendant, and from thence it went away to a public sewer. The drain got out of repair by reason of age and wear and tear, and the consequence was that water and sewage escaped and came into the plaintiff's cellar, and injured his goods there. The defendant did not know that the drain turned back and ran through his premises under those of the plaintiff, nor was the defective state of the drain attributable to any negligence of the defendant:—Held, that the defendant was, however, liable for the damage the plaintiff had so sustained, as it was the defendant's duty to keep the sewage from passing from his own premises to those of the plaintiff otherwise than along the whole drain through which only the plaintiff, as the occupier of the servient tenement, was bound to receive it. *Id.*

When a Nuisance.—See NUISANCE.

V. OBLIGATION TO CLEANSE AND REPAIR.

Owner or Occupier.—The cleansing and repairing of drains and sewers is primâ facie the

duty of him who occupies the premises, and does not devolve upon the owner, merely as such. *Russell v. Shenton*, 3 Q. B. 449; 2 G. & D. 573; 6 Jur. 1083.

If an owner of land on which is a house constructs on the other part of the land a sewer, and lets the house, and afterwards by reason of the original faulty construction of the sewer, and the continued use of it by the owner, in such a faulty state, the house is injured, the owner is liable to his lessee for keeping and continuing the sewer so constructed. *Alston v. Grant*, 3 El. & Bl. 128; 2 C. L. R. 933; 23 L. J., Q. B. 163; 18 Jur. 332.

Dispute between Authorities—Proceedings—Mandamus to the Judge of County Court to Hear and Determine.—By s. 93 of 33 & 34 Vict. c. c.—an act the main object of which was the diverting of the sewage of Brighton from the existing storm-outfalls and carrying it to a distance from the town—it was enacted that “any dispute which might from time to time arise between the sewers board and any local authority with respect to carrying into effect the provisions of the act or incidental thereto might, at the instance of either party, be referred to the judge for the time being of the Sussex County Court, who should hear and determine such dispute, and whose decision should be final and conclusive.” A dispute having arisen between the sewers board and the Hove commissioners (one of the local authorities) with respect to the mode of carrying out the provisions of the act, and the sewers board requiring it to be referred to the county court judge.—Held, that the county court judge was bound to hear and determine the matter, and that a mandamus was the proper course to compel him to do so, and not a rule or order under 19 & 20 Vict. c. 108, s. 43—this not being a matter within his ordinary jurisdiction, but a special duty imposed upon him by statute. *Brighton Sewers Act, In re*, 9 Q. B. D. 723.

VI. PRESENTMENTS.

Precept to Sheriff—When Invalid.—A jury summoned by the sheriff to make a presentment should come from the body of the county, and not from the district over which the commissioners have jurisdiction; and where the precept to the sheriff was to summon “good and lawful men of your county, and resident within the Tower Hamlets,” that being the district over which the commissioners had jurisdiction, it was bad; and a presentment made by that jury, and all the subsequent proceedings founded on it, were declared to be void. *Birkett v. Crozier*, 3 C. & P. 63; M. & M. 119.

Summoning the Jury.—By 23 Hen. 8, c. 5, the jury, by whom a presentment is made to commissioners of sewers concerning what lands are within a level, and subject to a certain rate, ought to be summoned by the sheriff from the body of the county, in pursuance of a precept directed to him from the commissioners for that purpose. *Re v. Somerset (Commissioners of Sewers)*, 7 East, 71; 3 Smith, 105.

A presentment made by a standing jury, constituted according to ancient usage, originally returned by the sheriff at the commencement of

every new commission of sewers, from certain parishes or districts, composed of landowners there interested in disclaiming the general charges of the level, which jurymen acted for life, unless removed for cause, and only the foreman of whom was summoned by the sheriff on the particular occasion, which foreman thereupon convened the other jurymen, is illegal and void; and the want of jurisdiction of such presenting jury cannot be waived by traversing their presentment and going to trial before another jury properly returned from the body of the county, by whom such presentment was confirmed. *Id.* See also *Taylor v. Loft*, post, col. 1090.

Form of.]—The presentment need not contain the name of every person benefited: if it finds “all Fore-street” to be benefited, that is enough to include every one having a house there; and any one so having a house might traverse such presentment, he stating in his traverse, that his property is so situated, and that he is aggrieved by the presentment. *Warren v. Dix*, 3 C. & P. 71.

The warrant of distress need not recite the presentment. *Id.*

A defendant is not entitled to recover his treble damages under 23 Hen. 8, c. 5, s. 12, in case of a verdict in his favour, or a nonsuit, unless he claims them on the record. *Id.*

By Local Commissioners—Neglect of Jurymen to Attend.—A local act, enacting, that, for the better and more effectual execution of the act, all the lanes, &c., within a certain district (previously within the jurisdiction of the general commissioners of sewers), and the works, drains, sewers, &c., thereof, should be subject only to the control and jurisdiction of local commissioners thereby appointed, and not to the control, direction, survey, or order of any commissioners of sewers, does not discharge the inhabitants of the district from their liability to serve on juries at the sessions of sewers, without an express provision; nor will the court discharge the estreats of fines imposed by the sessions, and levied on such inhabitants, for refusing to attend when summoned. *Oust, Ex parte*, 9 Price, 117.

Fines of Jurymen.—Where A. was fined by commissioners of sewers for refusing to be re-sworn upon a standing jury, the court discharged the fine, it being admitted that it was not usual to re-swear the jury, except upon the issuing of a new commission. *Taylor, Ex parte*, 3 Y. & J. 91.

The court will not, upon an application to discharge an amercement, enter into a disputed question as to the validity of the court of sewers. *Id.*

Not Disputed.—A jury empanelled to inquire and present at a court of commissioners of sewers, presented that A. was benefited by the sewers; and he received a summons to shew cause why he should not pay; he neglected to traverse the presentment, and a distress was levied for the amount of the rate.—Held, that these facts were a justification in an action for taking the distress, as the presentment, if duly made and not traversed, justified the commis-

sioners in issuing the warrant of distress. *Warren v. Dix*, 5 C. & P. 71, n.

Rate Void for Want of.]—A parish consisting of two districts had immemorially been assessed to the repairs of a sea-bank (which was necessary for the protection of lands from the sea in both districts) by one assessment, collected by one dyke-reeve. The commissioners of sewers, without any presentment of a jury, appointed two dyke-reeves, one for each district, and made a rate on one district exclusively for the repairs of the sea-bank:—Held, that the rate was void for want of a presentment, and that the commissioners were without jurisdiction, and were liable for the taking of cattle under a distress warrant issued by them for arrears of such rate. *Wingate v. Waite*, 6 M. & W. 739; 4 Jur. 860.

An order of commissioners of sewers is void, unless it is founded on a presentment shewing the existence of some public let, impediment, or annoyance. *Reg. v. Matthias*, 2 Jur. 13.

Amending Traverse to.]—On a presentment to the commissioners of sewers, the party charged appeared on a proper day in a court of sewers, and tendered his traverse in writing. The clerk to the commissioners (according to the alleged practice of the court) filed a demurrer to this traverse, on the ground of informality. The party charged applied for leave to amend his traverse, which the court refused, and gave judgment against him on the demurrer. On this a rate was made:—Semble, that the commissioners were wrong in admitting the demurrer to the traverse on the ground of informality, or, at all events, that they should have given the party leave to amend. *Reg. v. Tower Hamlets (Commissioners of Sewers)*, D. & M. 232; 5 Q. B. 375.

Validity under particular Act—Construction.]

—In 1819 a level was taken and survey made of lands in Bilsby, in Lincolnshire, liable to be rated to a drain called the Boy Grift, and the court of sewers directed a precept to the sheriff requiring him to summon jurors de corpore comitatûs to appear at a place and time, and make a presentment. The sheriff summoned a jury from the hundred of Calceworth in the county in 1819; they made a presentment that the Boy Grift was ruinous, and that works therein were absolutely necessary, and that lands in the occupation of various persons, including the plaintiff, received benefit or avoided danger by the drainage, and ought therefore to bear the charges thereof, and they accordingly assessed a rate which the commissioners confirmed. No appeal was made against this presentment or assessment, and in 1823 a special law of sewers was enrolled containing the presentment, and from that time to 1837 all rates were made under such law. No level had been taken or survey made since 1819, nor had any presentment of a jury been made since 1837. In 1840 a new commission of sewers issued, and at the first court holden under it, it was ordered that all laws, acts, deeds, constitutions and ordinances of sewers for the county of Lincoln, and which had not been repealed, altered or superseded, should be confirmed. In 1846, at a meeting of the commissioners, the dyke-reeve required them to authorize him to make a rate according to the

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above-mentioned survey by level, and without any presentment of a jury, which the commissioners authorized him to do. In 1847 and 1848 similar rates were made without any presentment of a jury:—Held, first, that the confirmation of the special law of 1823, by the order of the new commissioners in 1841, rendered the presentment of 1819 operative and applicable to the rates in question, and consequently that they were valid. *Taylor v. Loft*, 8 Ex. 269.

Held, secondly, that it was no objection to the presentment that the sheriff summoned the whole of the jury from the hundred of Calceworth. *Id.*

Change of Owners during Continuance of Commission.]—A., having been presented by a jury, summoned under a commission of sewers, to be liable to do certain repairs as owner of certain lands:—Held, that 3 & 4 Will. 4, c. 22, s. 13, did not authorize the commissioners, during the continuance of the same commission, to make an order for the repairs upon a person who had become owner since the presentment; and that such order was void. *Reg. v. Warton*, 2 B. & S. 719; 31 L. J., Q. B. 265; 9 Jur., N. S. 325.

When Award Ultra vires.]—By an inclosure act, commissioners were required to set out or appoint "such private ways or roads, hedges, fences, ditches, bridges, causeways, banks, sluices, drains, sewers, cloughs, &c., within a township as they should think convenient." The act provided "that all such public roads, bridges, sewers, and drains should be made, repaired and kept in repair in such manner as the other public highways, bridges, sewers, and drains within the township were by law to be repaired and kept in repair." The act also provided that all such private ways, &c., should be supported and repaired by all or any of the proprietors of lands within the township, in such manner as the commissioners should by their award appoint, and required the commissioners by their award to describe "all manner of public highways, bridges, sewers, and drains," and all "private ways, cloughs, banks, bridges, sewers, and drains," within the inclosed lands. The commissioners awarded two public sewers, and directed that they should be kept in repair and preserved of a certain width and depth by the owners and proprietors of the inclosed lands according to an acreage rate. Up to the time of the passing of the act, the owners and proprietors contributed to the repairs of one of these sewers, and they contributed to the repairs of the other eighty years after the act:—Held, that a presentment, that one of these sewers ought to be made of an increased gauge and repaired by the proprietors of the inclosed lands, according to an acreage rate, without disclosing any liability upon the part of these owners *ratione tenuræ*, or by reason of benefit, was illegal, as the act did not alter the law regulating the repairs of public sewers, and the award, if it purported to do so, was ultra vires, and that it did not lie upon any one assessed in pursuance of the presentment to do more than negative the particular liability which it assumed. *Biglin v. Wylie*, 36 L. J., Q. B. 307.

Removal for Invalidity—Certiorari.]—If a person against whom a presentment is made by a court of sewers obtains a certiorari to remove

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it into the Queen's Bench he must, before the allowance of the writ, enter into the recognizance required by 5 & 6 Will. 4, c. 33. *Reg. v. Baker*, 28 L. J., Q. B. 377; 7 W. R. 476.

VII. RATES.

1. GENERALLY.

Nature of.]—A sewers rate is not a parliamentary tax, not being imposed directly by act of parliament. *Palmer v. Earith*, 14 M. & W. 428; 14 L. J., Ex. 256.

Deduction of—How Calculated.]—A. demised land to B., upon a building lease, at the yearly rent of 60*l.*, clear of all rates and assessments, the sewers rate and land-tax only excepted, with the usual covenants for payment of rent. B. having, by building on the land, increased its rateable value to 800*l.* per annum:—Held, that he was only entitled to deduct the sewers rate and land-tax upon the original rent, and not in respect of the improved value. *Smith v. Humble*, 15 C. B. 321.

2. MAKING.

For what Purposes—Law Expenses.]—In 1844 the landowners in the Middle Level of the Fens, the drainage of which, on its outfall, passed through another district under the jurisdiction of the commissioners of sewers for a county, introduced into parliament a bill to enable them to make a new cut through the district, for the purpose of more effectually draining the level. The commissioners, apprehending that the bill would, if passed, occasion an injury to the land within their jurisdiction, instructed their clerk to oppose the progress of the bill, unless clauses for the indemnity and protection of the district were introduced into it. Upon return to a mandamus (which was applied for in 1849), commanding the commissioners to make a rate upon the lands within their jurisdiction, for paying their clerk the costs and expenses incurred by him in opposing the bill:—Held, that it was within the jurisdiction of the commissioners acting under 3 & 4 Will. 4, c. 42, to employ their clerk to oppose the bill in parliament at the costs of the commission; that by s. 16 they were empowered to make a rate for paying their clerk the costs, charges and expenses incurred in opposing the bill; and the proceedings of the commissioners having been conducted bonâ fide for the benefit of the district, and with discretion and prudence, the court issued a peremptory mandamus. *Reg. v. Norfolk Commissioners of Sewers*, 15 Q. B. 549; 15 Jur. 121.

— Past Expenses.]—The commissioners may make a rate to defray the expenses of works already done: in order to justify such a rate it is not necessary that there should have been a previous presentment by a jury of those works. It is no valid objection to such a rate that it is made to defray previous law expenses of the commission, bonâ fide incurred by the commissioners in the discharge of their duty. Nor that the rate is in the alternative, to defray the expenses of works done or to be done; for the word "or" must be read "and." *Reg. v. Tower Hamlets (Commissioners of Sewers)*, 1 B. & Ad. 232.

Benefit to Property, how considered.]—The 11 & 12 Vict. c. 112, s. 76, has not altered the principle of rating to the sewers rate; and in assessing property under that statute the commissioners must consider whether any benefit is derived by the property from the sewers. *Metropolitan Board of Works v. Vauxhall Bridge Company*, 7 El. & Bl. 964; 26 L. J., Q. B. 253; 3 Jur., N. S. 1216.

Where commissioners of sewers had effected a union of the sewers of one level with the sewers of another, which was not beneficial to the latter, though after the union it derived benefit from the sewers in the entire united level, a rate upon the whole of the united level, assessing the owners and occupiers in the latter in respect of their property benefited, is valid. *St. Katharine Dock Company v. Higgs*, 10 Q. B. 641; 16 L. J., Q. B. 377; 11 Jur. 991—Ex. Ch.

Rate in Gross.]—A sewer rate assessed in gross on a township at large is bad. *Emmerson v. Saltmarsh*, 7 A. & E. 266; 2 N. & P. 446.

The rate must be assessed on individuals. *Id.*

Repair of Wall.]—A rate for the repair of a wall is bad, unless the want of repair appears upon the proceedings to have been found by a jury. *Reg. v. Matthias*, 2 Jur. 13.

3. LIABILITY TO.

Persons Benefited—Who are.]—All persons whose property derives any advantage from the works of the commissioners, may be assessed in respect of that property. *Soady v. Wilson*, 4 N. & M. 777; 3 A. & E. 248; 1 H. & W. 256.

And property drained by sewers, and drains originally made and always repaired by persons independently of the commissioners of sewers, and deriving no immediate benefit from the works of such commissioners, may be assessed by reason of the general benefit and advantage resulting from such property becoming thereby accessible, and of its approaching and neighbouring public ways being properly drained and cleansed. *Id.*

By 52 Geo. 3, c. 48, s. 7, all persons are liable to be rated to the sewers rate, as occupiers of premises rateable thereto, who are de facto rated in respect of such premises to the poor rates of the parishes to which that act applies. *Id.*

If commissioners of sewers have jurisdiction to rate a particular district, the court will not minutely inquire into the way in which they have exercised that jurisdiction. *Id.*

Where a district within one commission of sewers is divided into separate levels, each drained by a separate line of sewers, and deriving no benefit from the sewers in the others, each level must be separately rated. *Reg. v. Tower Hamlets (Commissioners of Sewers)*, 4 M. & R. 365; 9 B. & C. 517.

When Person cannot be Benefited.]—The commissioners of sewers cannot assess a person in respect of drains which communicate with other drains which fall into the great sewer, if the level of his drains is so much above the sewer, that the stopping of the sewer could not possibly throw back the water so as to injure his premises, and if he is not, and it does not appear

that he is likely to be, benefited by the works done upon the sewer. *Masters v. Scroggs*, 3 M. & S. 447.

After Presentment.—Under 3 & 4 Will. 4, c. 22, s. 13, no order in respect of repairs can be made upon a person who becomes owner of lands subsequently to the date of the commission, and who, consequently, has not been presented by a jury as the person liable thereto. *Reg. v. Wharton*, 2 B. & S. 719; 31 L. J. Q. B. 265; 9 Jur., N. S. 325.

Decree of Commissioners not Conclusive.—A decree by the commissioners of sewers is not conclusive against the party assessed for the payment of a rate, and who resides within the district over which they have jurisdiction; but such party may prove in an action brought by him against one of the collectors of the rates, for taking his goods to satisfy such rate, that he derived no profit from the sewer in respect of which the assessment was made; and such evidence having been rejected, the court granted a new trial. *Stafford v. Hamston*, 5 Moore, 608; 2 B. & B. 691. See *Neave v. Wrather*, *infra*.

Public Building.—A tenement in the king's dockyard, deriving a benefit from public sewers, and occupied by an officer of government, who pays no rent, is still liable to be rated. *Nether-ton v. Ward*, 3 B. & A. 21.

The apartments in Somerset House, appropriated to the office of the commissioners for auditing the public accounts, are rateable by the commissioners of sewers for the city and liberty of Westminster and parts of Middlesex, although Somerset House is declared by act of parliament to be vested in the crown, free from all incumbrances, for the purpose of establishing within the same that amongst other public offices. *Soady v. Wilson*, *supra*.

Necessity of Occupation.—It is not alone sufficient, in order to justify an assessment to the sewers rate, that the property should derive benefit from the drainage, but it is also necessary that there should be an occupier of the property assessed. *Neave v. Wrather*, 3 G. & D. 221; 3 Q. B. 984; 12 L. J., Q. B. 32; 7 Jur. 168; *S. P.*, *Tracey v. Taylor*, 3 Q. B. 966; 3 G. & D. 14; 12 L. J., Q. B. 26; 7 Jur. 170.

Occupier—Who is.—A clerk of the works of Chelsea hospital dwelt in the hospital, in apartments in which he was permitted by the Commissioners of Woods and Forests to dwell, in respect of his office, and which were separately rated for the sewers by an undisputed rate. He was appointed by the commissioners, and his duty was to see that the hospital was not out of repair, and, under their directions, to superintend any repairs of the buildings; he also superintended part of the land. The building and land received benefit from the sewers:—Held, that the clerk of the works was not an occupier of the land, or of any part of the building, except the apartments separately assigned to him. *Ib.*

Held, also, that he was not concluded from disputing his liability by a judgment of the commissioners of sewers, on a traverse by him before them of his liability to be rated. *Ib.*

The bridewell or house of correction for the city and liberty of Westminster is a prison of our

lady the Queen, and is vested in the justices of the peace for the city and liberty; a part of the bridewell was merely used for the purpose of keeping prisoners therein, and no persons resided therein except such prisoners, and the servants whose duty it was to guard and attend to the prisoners:—Held, first, that an assessment or a rate could not be made in respect of the part of the bridewell upon the governor of the bridewell, who resided in the governor's house, which was separately rated to the sewers rate. *Tracey v. Taylor*, *supra*.

Held, secondly, that there being no other occupiers of that part, except the prisoners, it was not liable to be assessed to the sewers rate. *Ib.*

Proprietors of a Bridge.—The proprietors of a suspension bridge over the Thames were rated to the sewers rate under 18 & 19 Vict. c. 120, in respect of the bridge itself and the approaches. The bridge itself derived no direct benefit from the system of sewers, to maintain which the rate was levied, but the approaches were drained by means of such system, notwithstanding that other and sufficient drainage was provided for the purpose by the owners of the bridge:—Held, by a majority of the court, that the bridge was not properly entitled to exemption from a sewers rate under 18 & 19 Vict. c. 120, s. 164, preserving the former exemptions under 11 & 12 Vict. c. 112. *Hammersmith Suspension Bridge (Trustees) v. Hammersmith (Churchwardens and Overseers)*, 6 L. R., Q. B. 230; 40 L. J., M. C. 79; 24 L. T. 267; 19 W. R. 750.

New Street—What is.—S., about 1866, built houses abutting on the Harrow-road, and about the same time the vestry of the parish constructed a sewer along the Harrow-road. Sewer rates had been levied in respect of the land upon which the houses were built for more than five years prior to the 1st of January, 1866. Before 1866 no sewer existed in the Harrow-road, which was and continued to be a turnpike-road until the 1st of July, 1864, on which day the vestry took charge of it for the first time:—Held, that the Harrow-road was a new street within the meaning of 25 & 26 Vict. c. 102, s. 112; that s. 53 did not apply to new streets, as defined by 25 & 26 Vict. c. 102, s. 112, and that S. was therefore liable to be rated under s. 52. *Sawyer v. Paddington (Vestry)*, 6 L. R., Q. B. 164; 40 L. J., M. C. 8; 23 L. T. 662; 19 W. R. 96.

Land Covered with Water—Canals.—By 30 & 31 Vict. c. 113, s. 17, the occupier of any land covered with water . . . shall pay to the sewers rate in respect of his property one-fourth part only of the rate in the pound payable in respect of houses and other property. A water-works company was possessed of a canal, of filter beds supported on brick arches, and sometimes covered with water, at other times not, and of land used for keeping sand for the filter beds; and they also occupied land by iron pipes, mains and service pipes:—Held, that the canal and the filter beds were land covered with water within the meaning of s. 17, and ought to be assessed at one-fourth of the amount to be imposed on houses; but that the land used for the purpose of keeping sand, and the land occupied by iron pipes, mains, and service pipes, did not come within that description, and ought to be assessed at the full value. *East London Water-*

works Company v. Leyton Sewer Authority, 6 L. R., Q. B. 669; 40 L. J., M. C. 190; 20 W. R. 98.

Tithe Rent-Charge.—Semble, that a commutation tithe rent-charge is not liable by law to contribute to a sewers rate. *Reg. v. Goodchild*, El., Bl. & El. 2; 27 L. J., M. C. 251; 4 Jur., N. S. 1050.

In the City of London.—See METROPOLIS.

4. APPORTIONMENT.

By Majority of Assessors—Validity.—By a local act for draining a particular district, the commissioners were authorized to assess and tax upon the whole district such sums as should be necessary for carrying into effect the objects of the act, and to elect assessors to apportion such sums of money amongst the several parishes and townships within the district. The commissioners having appointed three assessors, the three met to agree upon an apportionment; two out of the three agreed, but the third would not concur:—Held, that the making of the apportionment being a matter of public duty and trust, an apportionment made by two, at a meeting of the three, was valid. *Rex v. Whitaker*, 9 B. & C. 648.

5. INSPECTION.

Of Documents.—The commissioners of sewers for the Tower Hamlets united two levels, which theretofore had separate drains and sewers, and had been separately rated for drainage and sewerage, and then made a joint rate on the united levels. With the object of obtaining evidence in support of a motion to bring up the rate by certiorari and quash it, an occupier of property within one of the levels so united applied to the commissioners for an inspection of all commissioners' plans, rates, presentments, decrees, account-books, proceedings and minutes relating to the Tower Hamlets. The commissioners gave inspection of all documents relating to the rates on the united level. The mandamus was refused to compel them to allow inspection of the other documents and proceedings. *Reg. v. Tower Hamlets (Commissioners of Sewers)*, 3 G. & D. 92; 3 Q. B. 670; 6 Jur. 1059.

6. IMPEACHING VALIDITY.

A sewers rate laid on an occupier by the Metropolitan Commissioners of Sewers, under 11 & 12 Vict. c. 112, can be impeached only by appeal to the commissioners. *Metropolitan Board of Works v. Vauxhall Bridge Company*, 7 El. & Bl. 964; 26 L. J., Q. B. 253; 3 Jur., N. S. 1216.

7. DISTRAINING FOR.

When Allowed.—An amercement on a township generally, and a distress on one of the parties liable, by commissioners of sewers, for neglect to repair, is good. *Ramsey v. Nornabell*, 3 P. & D. 253; 11 A. & E. 383.

Royal Palace.—A distress cannot be levied for sewers rates within the precincts of a royal palace, occupied as the residence of the sovereign; and Kensington Palace is within this description. *Att.-Gen. v. Donaldson*, 10 M. & W. 117; 11 L. J., Ex. 338.

An information of intrusion stated, that the defendants intruded and made entry on a dwelling-house, parcel of the Royal Palace of Kensington, in the occupation of the Queen, and which was in the possession of the Queen in right of her crown. The defendants pleaded in the form given by 23 Hen. 8, c. 5, s. 11, that they committed the trespasses under the authority of a commission of sewers, for a tax assessed by the commissioners:—Held, that this form of plea was not allowable in an information of intrusion at the suit of the crown. *Id.*

By Collector—General Authority.—Where a collector for the commissioners of sewers receives from them a warrant directing him to distrain and afterwards sell the goods of A., he cannot, if he distrains the goods of A.'s tenant, justify the distress on the ground of his general authority of collector; whatever that general authority may be, it is taken away in the particular case by the warrant directing him to do a specific thing. *Sabourin v. Neale*, 2 H. & W. 103.

SEXTON.

See ECCLESIASTICAL LAW.

SHARES.

See COMPANY.

SHERIFF.

I. RIGHTS OF.

II. DIRECTION AND DELIVERY OF WRITS TO, 1098.

III. LIABILITY FOR ACTS OF OFFICER.

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I. RIGHTS OF.

Disqualified as Justice of the Peace during Shrievalty.—The 1 Mary, sess. 2, c. 8, s. 2, which provides that no person exercising the office of sheriff of any county shall use or exercise the office of justice of the peace by force of any commission or otherwise, in any county where he shall be sheriff during the time of his exercising the office of sheriff, has not been affected by any subsequent addition to the duties of justices of the peace, and continues to disqualify a justice from acting as such while he

holds office as sheriff. *Colville, Ex parte*, 1 Q. B. D. 133; 45 L. J., Q. B. 133; 24 W. R. 456.

When Judge is Presiding at Assizes.—While a judge of assize is presiding in court, the high sheriff has no right to address the jury, and his doing so against the prohibition of the judge is a contempt of court. *Surrey (Sheriff), In re*, 2 F. & F. 234.

To Sue as Trustee for Officer.—An officer of the sheriff having, by payment of his own money, settled an action against the sheriff for an illegal arrest, produced by a false representation made to him:—Held, that the sheriff was competent to sue, for the benefit of his officer, the party who made such representation. *Evans v. Collins*, 5 Q. B. 805; D. & M. 72; 12 L. J., Q. B. 339; 7 Jur. 743.

To Costs on Appeal from an Interpleader Order.—A sheriff seized, under an execution, goods which were claimed by the holder of a bill of sale. In interpleader proceedings the bill of sale was held to be void, and the holder thereof was ordered to pay the costs of the sheriff who had appeared at the hearing. The bill of sale holder appealed from the decision against the validity of his bill of sale, and served the sheriff with notice of appeal, which asked that the execution creditor might be ordered to pay the sheriff's costs. There was no suggestion that the execution creditor was less able than the bill of sale holder to pay the costs. The sheriff appeared on the hearing of the appeal, and asked for his costs:—Held, that it was an error to serve him with notice of appeal, but that he ought not to have appeared on the appeal, and was not entitled to costs. *Webster, Ex parte, Morris, In re*, 22 Ch. D. 136; 52 L. J., Ch. 375; 48 L. T. 295; 31 W. R. 111.

See also INTERPLEADER.

II. DIRECTION AND DELIVERY OF WRITS TO.

Direction.—A writ of capias directed to the sheriff of London, instead of sheriffs, is irregular. *Barker v. Weedon*, 2 D. P. C. 707; 1 C., M. & R. 396; 4 Try. 860.

But if directed to the sheriffs of London, the subsequent insertion of the word sheriff in the singular will not vitiate it. *Irving v. Heaton*, 4 D. P. C. 638; 2 Scott, 798.

A writ of capias directed to the sheriffs of Middlesex is irregular. *Jackson v. Jackson*, 3 D. P. C. 182; 1 C., M. & R. 438; 5 Tyr. 136.

It is no objection that a writ is directed to the constable of "the castle of Dover," instead of "Dover castle." *Frank v. Jam's*, 5 D. P. C. 723.

A writ directed to the coroner need not shew upon the face of it the reason why it is so directed. *Bastard v. Gutch*, 5 N. & M. 109; 3 A. & E. 451.

Where the sheriffs and coroners are members of a corporate body, who sue in such character, the court will direct the prothonotary to name and appoint elisors to whom the process may be directed; and the rule is absolute in the first instance. *Norwich (Mayor) v. Gill*, 1 M. & Scott, 91; 8 Bing. 27; 1 D. P. C. 246.

The sheriff of the city of Oxford has not the

execution in Oxford of writs from the superior courts. *Granger v. Taunton*, 3 Bing. N. C. 64; 5 D. P. C. 190; 3 Scott, 393; 2 Hodges, 196.

— **Description of, in Pleading.**—A writ directed generally to the sheriff of a county may be described in pleading as directed to the individual by name who was in fact sheriff of the county when it issued. *Batchellor v. Salmon*, 2 Camp. 525.

— **Delivery.**—A delivery of a writ to the sheriff's deputy in London, appointed under 3 & 4 Will. 4, c. 42, s. 20, is a delivery to the sheriff. *Woodland v. Fuller*, 3 P. & D. 570; 11 A. & E. 859; 4 Jur. 743.

It is no defence to an action for a false return of nulla bona to a fi. fa. to shew that it was delivered at the sheriff's office at a quarter-past five o'clock on the day on which it was returnable. *Towne v. Crowder*, 2 C. & P. 355.

— **Of several Writs at same Time.**—An attorney, acting for seven separate plaintiffs in different actions, delivered seven writs of fi. fa. contemporaneously and in one packet to the sheriff:—Held, that the sheriff could not call on the plaintiffs or their attorney, to say which writs should have the priority. *Ashworth v. Uxbridge (Earl)*, 2 D., N. S. 377; 12 L. J., Q. B. 39; 7 Jur. 237.

III. LIABILITY FOR ACTS OF OFFICER.

1. IN WHAT CASES.

— **Generally.**—All actions for breach of duty of the office of sheriff must be brought against the high sheriff, though by default of the under-sheriff or bailiff. *Cameron v. Reynolds*, Cowp. 403.

A sheriff is liable for the acts of his officer acting under colour of his warrant. *Anon.*, Loft, 81.

The sheriff is responsible for the acts of his officer, though not within the line of his duty, provided such acts are afterwards assented to or adopted by the sheriff. He is civilly liable for the misconduct of his officer in executing a writ, though the act done is contrary to the express terms of the writ; as if he takes the person under a fi. fa. *Smart v. Hutton*, 8 A. & E. 568, n.; 2 N. & M. 426.

On the 26th January, 1846, a sheriff, under a fi. fa., sued out by the plaintiff, seized the defendant's goods. At the plaintiff's request the sale was deferred. On the 9th May the plaintiff paid all expenses up to that date, and wrote to the officer in possession, "Provided the defendant satisfies all future claims the sale may be postponed." The officer remained in possession till September, and, after a peremptory order from the plaintiff, sold the goods on the 20th of that month. On being ruled, the sheriff returned, on the 24th October, that, after deducting various sums for expenses (among which was an item of 20*l.* possession money), he had 34*l.* ready to pay to the plaintiff. The plaintiff applied to the court to order the sheriff to pay him the 20*l.* possession money, as well as the 34*l.*:—Held, that the plaintiff, by his communications with and directions to the officer, did not thereby discharge the sheriff, and that the proper course to enforce the sheriff's liability was by summary

application, and not by an action. *Botten v. Tomlinson*, 16 L. J., C. P. 138.

A bailiff to whom the sheriff had given his warrant to execute a fi. fa., sent a bailiff's assistant to execute it in the bailiff's absence, which was done:—Held, that the ruling of the judge at the trial that the sheriff was answerable for this act, as being done by colour of the warrant, was correct. *Gregory v. Cotterell*, 5 El. & Bl. 571; 25 L. J., Q. B. 33; 2 Jur., N. S. 16—Ex. Ch.

The judgment debtor paid the amount at the office of the bailiff, who held the warrant, in the absence of the bailiff, to an assistant of the bailiff, authorized by the bailiff to receive the money. This assistant did not pay it over to the bailiff, and the sheriff never in fact received the money:—Held, that the ruling of the judge at the trial that a payment under such circumstances was good as against the sheriff, and satisfied the writ, was correct. *Id.*

Officer Receiving the Amount of the Debt.]

—A sheriff's officer who arrests a party on a bailable capias, is not bound to receive the amount of the debt and costs indorsed on the writ; but if he receives it he does so on behalf of the sheriff, and the sheriff is liable for it to the plaintiff. *Woodman v. Gist*, 8 C. & P. 213.

A party arrested by a bailiff acting under the warrant of the sheriff, paid into the hands of the bailiff the amount of the debt and costs, to be by him paid over to the execution creditor. The bailiff having failed to pay over the money, a second ca. sa. was issued and the debtor again arrested:—Held, that the sheriff was not liable for this breach of contract on the part of his bailiff: the plaintiff's remedy being against the bailiff. *Woods v. Pignis*, 7 Ex. 363; 21 L. J., Ex. 138; 16 Jur. 936.

— Receiving Money without Authority.]—

If a sheriff's officer takes money colore officii for anything done in the course of his duty, and to which he is not entitled by law, an action lies against the sheriff, though there is no evidence that the money came to his hands. *Jones v. Perchard*, 2 Esp. 507.

Where more than the sum allowed by statute had been taken for a bail-bond by an officer of the sheriff who kept a lock-up house, but was not the officer to whom the warrant was directed, but to whose house the debtor was brought after the arrest:—Held, that no action would lie against the sheriff. *George v. Perring*, 4 Esp. 63.

In Action for Pound Breach and Rescue.]—

Where a bailiff in possession of goods under a landlord's distress receives a fi. fa. from a sheriff, and sells the goods under it, the sheriff is liable in an action for pound breach and rescue, at the suit of the landlord. *Reddell v. Stovey*, 2 M. & Rob. 358.

— **Illegal Entry.**—Assistants of a sheriff's officer, for the purpose of executing a fi. fa., illegally entered the plaintiff's premises on a Sunday by breaking open a window. They afterwards, by the officer's direction, obtained possession on the Monday following. On the Thursday afterwards, the officer himself entered the same premises to execute a distress warrant:—Held, that he was not barred by the act of his assistants from selling the goods when seized

on a second time. *Perceval v. Stamp*, 9 Ex. 167; 23 L. J., Ex. 25.

Improper Conduct of Sale.—The sale of goods under a fi. fa. having been fixed for the 26th July, the sheriff's officer, at the request of the debtor, delayed issuing advertisements till the 25th. On that day a further delay of some hours was granted at the request of the debtor's attorney, who ultimately instructed the officer to go on and sell at the same time, under another writ which had been delivered to the officer during the day. The goods were thereupon sold together, without being lotted, at a considerable loss:—Held, that the interference of the debtor did not make the officer his agent, and that the sheriff was not relieved from his liability in respect of the negligent conduct of his officer in conducting the sale. *Wright v. Child*, 1 L. R., Ex. 358; 35 L. J., Ex. 209; 15 L. T. 141; 4 H. & C. 529.

2. EVIDENCE TO CONNECT THE SHERIFF.

Warrant—Production of.—In an action against the sheriff, whose officer has seized the goods of A., under a fi. fa. against B., it is sufficient to produce the warrant without producing the writ; and it lies upon the sheriff to shew that no such writ issued. *Gibbins v. Phillips*, 2 M. & R. 238; 7 B. & C. 529, 535, n.

In an action against the sheriff for the wrongful act of a bailiff, it is not enough, in order to affect the sheriff, to prove him a general bailiff, and that he had given a bond of indemnity to the sheriff as such, together with proving the copy of the warrant under which he entered and seized the plaintiff's goods; but the privity between such bailiff and the sheriff must be established in the particular transaction on the best evidence, by proving the original warrant of execution directed by the sheriff to such bailiff; or at least by proving such notice to produce it, as will, in case of non-production, let in secondary evidence of its contents. *Drake v. Sykes*, 7 T. R. 113.

In an action against the sheriff for seizing the plaintiff's goods, to connect him with the trespass, it is sufficient to prove the warrant under which the goods were seized by the bailiff. *Grey v. Smith*, 1 Camp. 387.

In an action against a sheriff's officer for an illegal arrest, it is evidence against him that the warrant was directed to him. *Slack v. London (Sheriffs)*, 1 Esp. 42.

In an action against a sheriff for seizing and converting goods as the goods of A., in which the plaintiff claimed property under a prior bill of sale from A., the plaintiff, to connect the sheriff with the transaction, put in evidence his warrant to his officer to levy on the goods of A., which warrant recited a fi. fa. at the suit of an execution creditor:—Held, that the recital in the writ was sufficient evidence, and that the sheriff was not obliged to put in the judgment or the fi. fa. *Bessey v. Windham*, 6 Q. B. 166; 14 L. J., Q. B. 7; 8 Jur. 824. See *White v. Morris*, 11 C. B. 1,015; 21 L. J., C. P. 185.

When Production will be Dispensed with.—The regular way of connecting the sheriff with his officer, so as to make him responsible, is by the production of the warrant; but any recognition by the sheriff, that the

officer acted under his authority, will dispense with the necessity of producing it. *Jones v. Wood*, 3 Camp. 228.

Where the sheriff of the county palatine of Lancaster was sued for goods alleged to have been wrongfully seized and sold under an execution, and the defence was, that the plaintiff claimed the goods by virtue of an assignment, which was void as against creditors:—Held, that the sheriff could take advantage of this defence without, as in ordinary cases, shewing his authority by proof of the writ, and that proof of the mandate to him from the chancellor of the county, was sufficient for the purpose. *Ogden v. Hesketh*, 2 C. & K. 772.

In an action against a sheriff for not arresting under a ca. sa., in order to connect the sheriff with the transaction, the bailiff (who had not been served with a subpoena duces tecum) proved, that when the defendant went out of office the warrant was sent to the persons who, while the defendant was sheriff, acted as the London agents, and who were also his attorneys on the record:—Held, that notice to them to produce the warrant, after the defendant had gone out of office, was sufficient to entitle the plaintiff to give secondary evidence of its contents. *Suter v. Burrell*, 2 H. & N. 867; 27 L. J., Ex. 193.

In order to charge the sheriff with the act of the bailiff in an action for extortion, it is not sufficient to produce a copy of the precept with the bailiff's name indorsed upon it, although the sheriff has returned cepi corpus; the plaintiff in such case must either produce the warrant, or prove some recognition of the act of the bailiff by the sheriff. *Martin v. Bell*, 1 Stark. 413.

In an action for a penalty against the sheriff for taking the plaintiff, who had been arrested by the sheriff, to a public drinking-house without the plaintiff's consent, the plea traversed the taking the plaintiff to the drinking-house without his consent. Evidence was given at the trial that the same officer of the sheriff who arrested the plaintiff also took him to the drinking-house against his consent:—Held, that as the plea admitted the officer who arrested was the sheriff's agent, and the evidence shewed that the same officer took the plaintiff to the drinking-house, it was not necessary to produce the warrant to make him liable. *Barsham v. Bullock*, 2 P. & D. 241; 10 A. & E. 23.

When Warrant has been Lost.—A sheriff's officer proved that he had seized goods under a warrant on a fi. fa., which was brought to him by his man, who told him that he had obtained it from the sheriff's office. The officer also stated, that he knew the handwriting on the warrant, which he had subsequently lost:—Held, that this was sufficient evidence to prove that the officer acted under the authority of the sheriff. *Moon v. Raphael*, 2 Scott, 489; 2 Bing. N. C. 310; 1 Hodges, 289; 7 C. & P. 115.

A sheriff's officer, after making a seizure, handed over the warrant to the auctioneer by whom the goods were sold. Diligent search had been made for the warrant among the papers of the auctioneer (who was deceased), but it could not be found, nor was it annexed to the returns of the sale delivered into the excise office:—Held, sufficient to let in secondary evidence of the contents of the warrant, in order to connect the sheriff with the officer, and that it

was not necessary to produce the supervisor for the district through whom the returns were made to the excise office, or to shew that a search had been made among his papers. *Minshall v. Lloyd*, 2 M. & W. 450.

— **Effect of Plea of Not Guilty by Sheriff.**]

—In an action against a sheriff, for removing goods, without paying a year's rent in arrear, the plea of not guilty admits the seizure by the sheriff, and it is not necessary to produce the warrant in order to connect him with the officer. *Reid v. Poyntz or Thoyts*, 8 D. P. C. 410; 6 M. & W. 412; 9 C. & P. 515.

— **Officer need not be Sworn.**—A sheriff's officer subpoenaed to produce his warrant, need not be sworn. *Rea v. Menlis*, M. & M. 515, n.; *S. P., Shepherd v. Wheble*, 8 C. & P. 534.

Indorsement on Writ.—In an action against the sheriff, for not arresting a party, proof of the indorsement of the officer's name on the writ by a clerk in the under-sheriff's office, is sufficient to connect such officer with the sheriff, and shew that the indorsement was made with his authority, without calling the officer himself, or producing the warrant under which he acted. *Francis v. Neave*, 6 Moore, 120; 3 B. & B. 126.

In order to connect the sheriff with the act of his bailiff, it is sufficient to produce the writ with the name of the bailiff indorsed upon it, in the sheriff's office, without proving an authority to indorse upon the writ the name of the bailiff by whom it is to be executed. *Tealby v. Gascoigne*, 2 Stark. 202.

But it was afterwards held that it was not sufficient. *Morgan v. Brydges*, 2 Stark. 314; 1 B. & A. 647.

An indorsement upon the writ (returned and filed by the sheriff) of the name of the officer is not sufficient to make the sheriff responsible without proving that his name was written upon it by the authority or with the privity of the sheriff. *Hill v. Middlesex (Sheriff)*, Holt, 217; 7 Taunt. 8.

In an action against the sheriff for the extortion of his officer, the plaintiff proved an examined copy of the writ on which the officer's name was indorsed, and that a person of that name actually executed the writ, and that the course of the sheriff's office was that the name of the officer to whom the warrant was granted was usually indorsed on the writ:—Held, sufficient *prima facie* evidence to connect the sheriff with the acts of the officer. *Scott v. Marshall*, 2 C. & J. 238; 2 Tyr. 257.

Where, in an action for an escape against the sheriff, the writ in the former action was produced to connect him with his officer, on which was indorsed "warrant to B.," who, on being called, stated that he had delivered the warrant to another who did not produce it:—Held, that it should have been left to the jury to say whether B. acted under the sheriff's authority, the indorsement being *prima facie* evidence that he did so act. *Fermor v. Phillips*, 5 Moore, 184, n.; 3 B. & B. 27, n.; Holt, 537.

A sheriff obtained judgment against A., in an action on a bail-bond. On this a *fi. fa.* issued, directed to the coroner. S., who was attorney for the sheriff, and also for others, indorsed the name of the sheriff's officer on the writ; the coroner's broker seized a barge, which was bought

by B., and the price paid to the officer; subsequently the barge was claimed by others, and B. lost his purchase:—Held, that under these circumstances the officer was not the agent of the sheriff, so as to make the sheriff liable for money had and received at the suit of B., although it was proved to be the practice at the sheriff's office to indorse the name of the officer on the writ. *Sarjeant v. Cowan*, 5 C. & P. 492; 1 C. & M. 491; 3 Tyr. 538.

Sheriff's Return.—The writ with the sheriff's return upon it is only evidence against him to the extent of his duty under it, and it is no part of his duty to annex the officer's name to the return. *Hill v. Middlesex (Sheriff)*, Holt, 217; 7 Taunt. 8.

In an action by the assignees of a bankrupt, for goods taken by the sheriff under an execution, it appeared that the goods were taken at about that period of the year when the sheriffs were changed; and it was proved that a witness, after the cause was set down for trial, saw a form of return indorsed on the writ, which had never been returned. This form of return was signed by the sheriff:—Held to be sufficient evidence that he was the sheriff who executed the writ; and that if the writ, when produced at the trial, has his name erased, and the name of the previous sheriff substituted, it will be a question for the jury, whether that substitution was made to correct a mistake, or to defeat the plaintiff. *Whitehouse v. Atkinson*, 3 C. & P. 344.

In an action against a surviving sheriff of London, a return to a writ directed to both the sheriffs, purporting to be the return of both, is conclusive to shew that the return was authorized by the survivor. *Carlile v. Parkins*, 3 Stark. 163.

A written memorandum of an arrest, and of the place where it occurred, made by a sheriff's officer at the time of the caption, and sent by him immediately to the sheriff's office, and there filed in the course of business, is not, after the death of the officer, evidence of the place of arrest in an action, between a bankrupt and his assignees. *Chambers v. Bernasconi*, 1 Tyr. 335; 1 C. & J. 451; (affirmed in error), 1 C., M. & R. 347; 4 Tyr. 531.

Evidence as to Time of Execution.—A sheriff's officer, having a *fi. fa.* against A., called at his house when he was from home, waited till he returned, and then informed him of his business:—Held, sufficient evidence to warrant the jury in finding that the writ was executed at the time of the officer's entry. *Bird v. Bass*, 6 M. & G. 143; 6 Scott, N. R. 928.

Admissions by Officers.—In an action against the sheriff, admissions by the under-sheriff are not evidence, unless they accompany some official act of the latter, or tend to charge himself. *Snowball v. Goodricke*, 4 B. & Ad. 541.

Therefore, in an action against the sheriff for taking illegal poundage, declarations of the under-sheriff, after he was out of office, are not admissible to prove that the bailiff charged with having committed the extortion was the sheriff's authorized agent. *Id.*

In an action against the sheriff for taking the goods of the plaintiff, an affidavit made by the officer under the Interpleader Act, respecting the goods, is admissible to prove that the officer who

seized the goods is the servant of the sheriff. *Brickill v. Hulse*, 2 N. & P. 426; 7 A. & E. 454. See *Gardner v. Moult*, 2 P. & D. 403; 10 A. & E. 464.

In an action against the sheriff for a false return to a writ, what was said by the bailiff, to whom the warrant under it was directed, when asked by the plaintiff's attorney, before the return of the writ, why he did not execute it, is evidence against the sheriff. *North v. Middlesex (Sheriff)*, 1 Camp. 389.

So, declarations made by him whilst the party was in his custody may be given in evidence in an action for an escape against the sheriff. *Bousher v. Wilts (Sheriff)*, 1 Camp. 391.

Declarations made by an officer whilst in possession of goods, after the return of the fi. fa., are evidence against the sheriff; and no new warrant is necessary after a venditioni exponas to connect the officer with the sheriff. *Jacobs v. Humphrey*, 2 C. & M. 413; 4 Tyr. 272.

Notice to Under-Sheriff—How far Notice to Sheriff.]—In an action against the sheriff for not arresting a person on mesne process, notice of this person being within the defendant's bailiwick, given to the under-sheriff's agent in town, is no evidence of such notice to the sheriff. *Gibbon v. Essex (Sheriff)*, 2 Camp. 189.

3. SPECIAL BAILIFFS.

Appointment of—Discharge of Sheriff.]—Where a plaintiff appoints his own bailiff to execute a writ, the sheriff is relieved from all responsibility, until the party is arrested and delivered into the actual custody of the sheriff. *Ford v. Leche*, 1 N. & P. 737; 6 A. & E. 699.

F., commencing an action against D., wrote to the sheriff, "F. v. D.: I inclose you a writ herein, and shall feel obliged by your granting a warrant thereon, directed to M. and B.; I shall write to B. in a day or two." The warrant was accordingly made out, and was afterwards directed to B.:—Held, sufficient evidence, that B. was employed by F. as a special bailiff. *Ib.*

Appointing a special bailiff, or giving special directions to a particular bailiff for the execution of a fi. fa., discharges the sheriff. *Porter v. Viner*, 1 Chit. 613, n.

So, the sheriff is discharged by the plaintiff's appointing a special bailiff and agent to manage the sale of goods seized under a fi. fa., although the sheriff had returned that he had sold, and that he had paid a sum illegally deducted for the auction. *Pallister v. Pallister*, 1 Chit. 614, n.

—What sufficient to constitute.]—The plaintiff's attorney being about to issue a ca. sa. against H. at the suit of the plaintiff, requested of the sheriff a particular sheriff's officer; delivered the warrant to that officer; took him in his carriage to the scene of action, and then encouraged an illegal arrest, from which H. afterwards escaped:—Held, that the plaintiff could not sue the sheriff for such escape, and that the officer must be taken to be his special bailiff. *Doe v. Trye*, 5 Bing. N. C. 573; 7 D. P. C. 636; 7 Scott, 704.

A mere request that a particular officer may be employed in the execution of process, does not constitute that officer a special bailiff of the

party. *Corbet v. Brown*, 6 D. P. C. 794; *S. P.*, *Balson v. Meggat*, 4 D. P. C. 557.

Judgment having been signed against a defendant, the plaintiff's attorney sent two writs of ca. sa. to a sheriff's officer, with directions to arrest the party, and instructions as to where he was likely to be found. The officer having sent back these writs, they were then sent to the under-sheriff, with directions to forward warrants to the same officer:—Held, that these facts did not amount to an appointment of that officer as a special bailiff, so as to exonerate the sheriff. *Alderson v. Darnport*, 1 D. & L. 966; 13 M. & W. 42; 13 L. J., Ex. 352; 8 Jur. 650.

Seemingly, the mere writing of the name of a particular officer on the back of a fi. fa. or a ca. sa., in the place where the directions to levy or arrest are written, coupled with a letter by the plaintiff's attorney, directing the particular officer to hold possession after a levy, is not sufficient to constitute an appointment as special bailiff. *Seal v. Hudson*, 2 B. C. Rep. 55; 4 D. & L. 760; 11 Jur. 610.

Effect as regards Ruling the Sheriff to Return.]

—The general rule is, that, where a plaintiff appoints a special bailiff, he cannot rule the sheriff to return a writ of fi. fa.; but where such a rule had been obtained, and the object was to procure a return of nulla bona, with a view to sue out a ca. sa., the court discharged a rule on the part of the sheriff to set the rule aside upon payment of costs by the plaintiff, the plaintiff also undertaking not to bring an action. *Harding v. Holder or Holden*, 9 D. P. C. 659; 3 Scott, N. R. 293; 2 M. & G. 914.

Plaintiff Attending when Goods Seized.]—If a man employing an officer attends with the officer, who seizes in his presence the goods of a third person, under an execution which he has sued out, he makes himself responsible for the officer's acts. *Meredith v. Flaaxman*, 5 C. & P. 99.

4. SURETIES FOR OFFICERS.

Extent of Liability of.]—The sureties of a sheriff's officer are only liable for the due performance of the officer's duty. *Cook v. Palmer*, 6 B. & C. 739; 9 D. & R. 723.

Therefore, where the officer entered into an agreement on the sale of goods taken in execution, and thereby exceeded his authority, they were held not to be liable for money had and received under this agreement. *Ib.*

Where a keeper of a county gaol covenanted with the sheriff "that he would personally attend the assizes and general quarter sessions of the county, and convey prisoners, when ordered to be removed by habeas corpus, safely and without escape, from the gaol to such place as the writ should direct;" and he and two sureties gave the sheriff a bond for the due performance of such covenants; and the former being in attendance at the quarter sessions, the sheriff, on receiving a habeas corpus for the removal of a prisoner, directed a warrant for that purpose to the defendant and S., "by him (the sheriff) for that time only thereto specially appointed;" and S., who was the defendant's turnkey, proceeded with the prisoner towards the place of destination, but allowed him to escape:—Held, that the sheriff having specially directed the warrant to S., and

appointed him for that particular purpose, neither the gaoler nor his sureties were liable on the bond, for a breach of the covenants contained in the indenture. *Ryland v. Lavender*, 9 Moore, 71.

An action by a sheriff against the sureties of his bailiff, on a deed to indemnify the sheriff from costs, touching or concerning any matter wherein the bailiff should act as bailiff, and to indemnify him from all damage, loss, costs, &c., by reason of any return, and against all loss, costs, &c., the sheriff should be liable to by reason of returning, not returning, or misreturning any writ, by the act or default of the bailiff, may be maintained, where costs or loss have been incurred by the sheriff in defending an action, if he has been damaged by consequence of the act of the bailiff, although the bailiff may not have done anything wrong in the matter wherein he acted, in respect of which the action had been brought against the sheriff, or the loss had been sustained. *Farebrother v. Worsley*, 1 Tyr. 424; 1 C. & J. 549; 5 C. & P. 102.

If a sheriff defends an action for a false return as well as he can, he may recover his costs from the sureties of his bailiff who executed the writ; though he has a verdict against him, on the ground that evidence was not produced, which, in another and subsequent suit between other parties, involving the same question, was obtained. *Ib.*

— **When Sheriff Compromises an Action brought against him.**—If, after he has obtained a rule nisi for a new trial, he compromises the suit, with the assent of some of the sureties, by paying a less sum for damages than would be recoverable, and a less sum for costs than were incurred, he may recover his own costs against the surety who did not assent, if it appears that the compromise was, under the circumstances, reasonable. *Ib.*

Indemnity Bond procured by Fraud of Sheriff's Officer.—A sheriff cannot recover on an indemnity bond which has been procured by the fraud of his own officer. *Raphael v. Goodman*, 3 N. & P. 547; 8 A. & E. 565; 1 W., W. & H. 363.

A plea to an action on such a bond, that it was obtained by the sheriff and others in collusion with him by fraud and covin, is a good plea. *Ib.*

How Discharged.—A man who becomes surety for an officer to the sheriff cannot discharge his obligation within the year, without the consent of the sheriff and of the other sureties. *Martin v. Wenman*, Loft, 225.

Pleadings against.—In a declaration on a covenant brought by a sheriff against a surety for one of his officers who has not arrested a person under his warrant, it is necessary to aver that the warrant was delivered by the sheriff to such officer. *Des Anges v. Priestley*, 3 Moore, 246.

By a deed, after reciting the appointment of W. T. as bailiff to the plaintiff, sheriff of Middlesex, the defendant, W. T. and his sureties, covenanted to save harmless the plaintiff from any action brought against him touching or concerning any matter "wherein the bailiff shall act, or assume to act as bailiff," or "for or by reason of any extortion or escape happening by the act or default of the bailiff." The declaration, after

stating an escape, averred that it happened "by the default of W. T., and not otherwise, he, the defendant W. T., being the bailiff of the plaintiff as such sheriff." The defendant, after setting out the deed, pleaded that the default "was not the default of him, W. T., as such bailiff of the plaintiff:"—Held, that the plea was bad for ambiguity before the 15 & 16 Vict. c. 76, s. 51. *Cubitt v. Thompson*, 5 Ex. 811; 20 L. J., Ex. 49.

IV. DUTY AND LIABILITY OF.

1. ON CROWN PROCESS.

The duty of the sheriff with respect to the roll of fines sent to him by the clerk of the peace pursuant to 3 Geo. 4, c. 46, is not purely ministerial, and the sheriff is not justified in levying a fine stated in the roll to be unpaid, when the amount has been paid to the sheriff himself before receiving the roll. *Wildes v. Morris*, 22 L. J., M. C. 4; 16 Jur. 1115.

If a deputy sheriff in possession of goods seized under an immediate extent, on receiving a subsequent fi. fa., at the suit of a subject, contracts with the judgment-creditor to deliver him a certain quantity of the goods on his paying into the sheriff's hands the debt due to the crown, which is accordingly paid, and if, afterwards, whilst his officer is in the act of delivering and measuring the quantity, the goods are rescued, the sheriff is liable on such contract to the judgment-creditor, who may maintain an action on the contract, or recover on a common count for goods sold and delivered, or money had and received; and a beginning to measure and deliver is not such a delivery as will satisfy this particular contract. *Thomas v. Pearce*, 5 Price, 578.

2. ON ARREST.

a. By whom to be made.

By Person authorized by Bailiff.—An arrest must be made by the authority and direction of the bailiff, but it need not be his hand which actually arrests; nor need it take place in his presence and in his sight; nor is there any precise distance from the person arrested within which he must be at the time. *Blatch v. Archer*, Cowp. 65.

By Person to whom Warrant is Directed.—A sheriff's officer cannot justify an arrest made without a warrant by procuring a warrant previously issued to another sheriff's officer, but not executed, to be delivered to himself with his name inserted after the arrest. *Collins v. Yewens*, 2 P. & D. 439; 10 A. & E. 570.

An arrest under a ca. sa. by a bailiff, to whom the warrant is not addressed, in the absence of the officer to whom it is addressed, even though such officer has engaged him to assist him in his absence, he himself being at a considerable distance at the time of the arrest, is irregular, and the defendant will be discharged out of custody. *Rhodes v. Hull*, 26 L. J., Ex. 265.

A rule to discharge him is properly directed to the plaintiff, and not to the sheriff. *Ib.*

Validity of Warrant.—The sheriff having directed a warrant to A. and all his other officers to arrest B., A. afterwards inserted the name of C.:—Held, that the warrant was illegal, and the

arrest by C. consequently void. *Housin v. Barrow*, 6 T. R. 122.

But a mistake in the warrant will not invalidate the arrest. *Williams v. Lewis*, 1 Chit. 611.

It is not necessary that the sheriff's warrant issued upon a *capias* should specify the court out of which the process issues. *Astley v. Goodyer*, 2 D. P. C. 619; 2 C. & M. 682; 4 Tyr. 414.

A sheriff's warrant on a *capias*, filled up by an attorney after the writ is signed and sealed, is bad. *Burslem v. Fern*, 2 Wils. 47.

In an action against the bailiff of the liberty of P., in the county of Y., for the escape of a prisoner in execution, the declaration alleged a mandate by the sheriff of Y. to the defendant, "as chief bailiff of the liberty of P., or his deputy," to take T., if found in his liberty. The instrument produced in proof of the averment was in the form of a common sheriff's warrant, and was addressed by the sheriff "to the keeper of the county gaol, the chief bailiff of P., his deputies, and J. D., my bailiffs," and commanded them, jointly and severally to take T., if found "in my bailiwick," &c., "that I may have the body." The deputy of the defendant thereupon arrested and conveyed T. to the county gaol, out of the liberty:—Held, that the averment was not proved; for that the precept was not a mandate to the defendant as bailiff of a liberty, but a warrant to him as a sheriff's bailiff, and acted upon as such; though it was shewn that the defendant, when ruled by the plaintiff to return "the mandate," had obtained time to do so, and had not then set it up as a common warrant. *Jackson v. Hill*, 10 A. & E. 477; 2 P. & D. 455.

Warrant to Four, jointly but not severally.]

—If the sheriff makes a warrant to four, jointly and not severally, and one makes the arrest, the court will not interfere to discharge the defendant. *Boyd v. Durand*, 2 Taunt. 161.

A warrant to four, jointly and not severally, clearly will not authorize an arrest by one. *Id.*

b. Where made.

In Wrong County.]—To set aside an arrest in a wrong county, there must be an affidavit that it did not take place on the borders of the county, and that there is no dispute as to boundaries. *Webber v. Manning*, 1 D. P. C. 24.

Privileged Places—Kensington Palace.]—Kensington Palace, being kept in a constant state of preparation for the king's reception at all times, and some of the royal family having apartments there, is privileged as a royal palace against the intrusion of the sheriff for the purpose of executing process. *Winter v. Miles*, 10 East, 578; 1 Camp. 475. n. See *Att.-Gen. v. Donaldson*, 10 M. & W. 117.

—**Hampton Court Palace.]**—But Hampton Court Palace is not. *Att.-Gen. v. Dakin*, 4 L. R., H. L. 338; 39 L. J., Ex. 113; 23 L. T. 1; 18 W. R. 1111.

—**Within the Verge of Palace.]**—An arrest within the verge of the palace is no ground for discharging the defendant out of custody. *Sparks v. Spink*, 7 Taunt. 311.

A man arrested within the verge of the court is not entitled to be discharged, an arrest in a

franchise being only a breach of the privilege of the lord of the franchise. *Kirkpatrick v. Kelly*, 3 Dougl. 30.

—**The Tower.]**—Arrests cannot be made within the Tower. *Batson v. McLean*, 2 Chit. 48, 51. And see *Bell v. Jacobs*, 4 Bing. 523.

—**Other.]**—A sheriff, to whom a bailable latitat not containing a non omittas clause was directed, was not bound for the purpose of arresting the party named in it to enter a franchise, within which the lord has the return and execution of writs. *Adams v. Osbaldeston*, 3 B. & Ad. 489.

By letters patent, James the First granted to A., his heirs and assigns, that he and they, by his or their bailiff or bailiffs for that purpose by him and them from time to time to be deputed, should have the full return of all writs, mandates, and precepts within a certain district, and that no sheriff or other officer of the king concerning the same returns within the district should intermeddle, nor enter in execution of the premises, unless through default of the bailiff or bailiffs of A., his heirs or assigns, or some of them:—Held, that, under a grant containing this special provision, the grantee might return writs by his bailiff for that purpose deputed; and that, under an exception in case of default by such bailiff, the bailiff so deputed might return writs and mandates in his own name. *Newland v. Cliffe*, 3 B. & Ad. 630.

In Gaol.]—It is no objection to an arrest, that it takes place in a gaol, if the party is there for his own purposes. *Lovett v. Hill*, 4 D. P. C. 579.

Evidence as to.]—A written memorandum of an arrest, and of the place where it occurred, made by a sheriff's officer, contemporaneously with effecting the arrest, sent immediately to the sheriff's office, and there filed in the course of business, is not admissible evidence of the place at which the arrest took place after the death of the officer, in an action between third persons. *Chambers v. Bernasconi*, 1 C., M. & R. 347; 4 Tyr. 531—Ex. Ch.

c. When can be made.

After Writ is Returnable.]—If a person is arrested after the writ is returnable, the officer cannot legally detain him (though for the shortest time) till the writ is continued. *Lovridge v. Plastow*, 2 H. Bl. 29.

A gaoler is bound to receive a prisoner tendered to him after the return day of the writ on which he is arrested. *Brandling v. Kent*, 1 T. R. 60.

Warrant to Arrest Party "to appear at the next Sessions."]—A warrant to arrest the party "to the end that he may become bound, &c., to appear at the next sessions, &c.," means the next session after the arrest, and not after the date of the warrant: therefore, the officer executing it may justify an arrest after the sessions next ensuing the date of the warrant. *Mayhew v. Parker*, 8 T. R. 110.

On Sunday.]—A. was arrested at the suit of B. and discharged, the sheriff not knowing that there was also a detainer in his office at the suit of C.; on the Sunday following he was arrested

at C.'s suit, and discharged by the court, by virtue of the statute. The arrest on the Sunday was considered as an original taking, and not as a retaking after an escape. *Atkinson v. Jameson*, 5 T. R. 25.

Where, by the contrivance of a plaintiff's attorney, a party had been arrested on a Sunday on criminal process, for the purpose of effecting his arrest on civil process, and he was detained in custody till Monday, and then arrested on the civil process, the court ordered him to be discharged out of custody. *Wells v. Gurney*, 8 B. & C. 769.

Where a defendant was seized on a Sunday, and detained till next morning, and then arrested upon process out of the Exchequer:—Held, that the arrest was void, and could not be made good even by a subsequent consent. *Lyford v. Tyrrel*, 1 Anst. 85.

E., having been dismissed from the office of town clerk of a borough, was, at the instance of the town council, convicted before justices, under 5 & 6 Will. 4, c. 76, s. 60, of wilfully refusing to deliver accounts, books, &c., after notice; and thereupon the justices issued their warrant for his imprisonment in the common gaol of the county (within which the borough was situate), which was delivered to P., who arrested E. on a Sunday, and on the next day delivered him to the keeper of the gaol:—Held, that this was substantially a civil proceeding, and the arrest therefore illegal under 29 Car. 2, c. 7, s. 6, and that the execution was not made legal by the delivery to the keeper, after the arrest, of another warrant upon the same conviction. *Eggington, Ex parte*, 2 El. & Bl. 717; 23 L. J., M. C. 41: 18 Jur. 224.

The order for the discharge of E. was delivered to the gaoler on the 3rd November; but he was detained under a warrant which had been obtained by a town council, acting as commissioners under a local act for cleansing, paving and lighting the streets of the borough, for not delivering up the books in his custody as clerk to the commissioners, and which had been lodged with the gaoler on the 31st October, and under a ca. sa. sued out by a judgment creditor of E., which was delivered to the gaoler on the 4th November:—Held, that he was entitled to be discharged from custody under the warrant, because it was obtained substantially by the same parties who procured the unlawful arrest; but that he was not entitled to be discharged from custody under the ca. sa. *Ib.*

After the keeper received the order, but E. not having been discharged, the sheriff lodged with the keeper his warrant under a ca. sa. at the suit of H. against E.:—Held, that E. might be lawfully detained under the ca. sa. no collusion appearing between the sheriff or H. and the town council. *Ib.*

Before Officer has Warrant—Before Delivery of Writ to Sheriff.—A bail-bond was ordered to be delivered up to be cancelled, where the defendant was arrested before the officer had any warrant, and before the writ was delivered to the sheriff. *Hall v. Roche*, 8 T. R. 187. And see *Ball v. Jacobs*, 4 Bing. 523.

d. How made.

i. What Amounts to Arrest.

Generally.—A sheriff's officer, having a writ

which had been issued against A., communicated that fact to him by saying, "I arrest you;" upon which he said, "Very well, I will come to you immediately;" and shortly afterwards made his escape, without having been touched by the officer:—Held, that this was no arrest; but, if he had acquiesced, or afterwards gone with the officer, it would have been sufficient to constitute an arrest. *Russen v. Lucas*, 1 C. & P. 153; R. & M. 26.

Placing a party under restraint of a sheriff's officer, who holds a capias, is an arrest without proceeding to actual contact. *Grainger v. Hill*, 4 Bing. N. C. 212; 5 Scott, 561.

A sheriff's officer in execution of a ca. sa., put his hand into the debtor's dwelling-house, by an opening in a window caused by a pane having been broken in the scuffle, but not by the officer, touched the debtor, who was inside the house, and said, "You are my prisoner." He was unable then to secure the person of the debtor; but he thereupon broke open the outer door of the house, and seized the debtor:—Held, that the officer had acted legally, the arrest having been effected by touching the debtor, and the subsequent breaking of the outer door being justifiable for the purpose of taking into custody the debtor so arrested. *Sandon v. Terrie*, El. Bl. & El. 935; 28 L. J., Q. B. 156; 5 Jur., N. S. 860—Ex. Ch.

An officer, who had a writ against a man, sent to him to say so, and asked him to appoint a time to come to his office and execute a bail-bond, which he did:—Held, that there was no arrest so as to support an action for a malicious arrest. *Berry v. Adamson*, 6 B. & C. 528; 2 C. & P. 503.

Where two bailiffs kept watching a defendant at a particular house, and had a warrant to arrest him, and in fact would have arrested him if he had endeavoured to get away, but did not produce the warrant or act on it:—Held, that it did not constitute an arrest. *Hender v. Robins*, 1 H. & W. 204; *S. C.*, nom. *Robins v. Hender*, 3 D. P. C. 543.

Evidence as to.—Evidence that a bailiff's assistant apprehended a party on a false pretence, and that the bailiff being at hand took advantage of the apprehension to arrest him on a ca. sa., is sufficient to establish an issue that the bailiff illegally seized and imprisoned the party. *Humphrey v. Mitchell*, 2 Bing. N. C. 619; 3 Scott, 44; 2 Hodges, 72.

ii. Breaking open Doors.

Civil Process.—The maxim of "Every man's house is his castle," is confined to those who are owners of the house, which is not the sanctuary of a stranger; and the privilege of the outer door belongs only to one door, and not to others, although belonging to the separate apartments of lodgers. *Lee v. Gansell*, Lofft, 374; Cowp. 1.

And therefore a bailiff, in the execution of mesne process, may break open the door of a lodger, having first gained peaceable entrance at the outer door of the house. *Ib.*

So he may break open the window of the apartment of a person residing in the house of another, having first gained peaceable entrance at the outer door of the house, if such person refuses to open the door of his apartment after being informed by the officer that he has process

to serve on him. *Lloyd v. Sandilands*, 2 Moore, 207.

But an officer cannot justify breaking the inner doors of the house of a stranger, upon suspicion that a defendant is there, to search for him in order to arrest him on mesne process. *Johnson v. Leigh*, 1 Marsh. 565; 6 Taunt. 246.

The sheriff is justified or not in entering the house of a stranger by the event. *Ib.*

Semble, that a sheriff's officer acting under civil process may justify breaking the inner doors of the defendant's house, though he is not therein at the time. *Ratcliffe v. Burton*, 3 B. & P. 223.

But in such case the officer must first demand admittance. *Ib.*

It is no objection that a bailiff gains admittance under false pretences; and any resistance after he is once in will be punishable. *Rex v. Backhouse*, Lofft, 61.

Where the plaintiff's house stood in a stable-yard, which was surrounded by a wall, and there was a hatch gate at the foot of a staircase, at the top of which there was a door across part of a gallery which led to the plaintiff's chamber, the under part of the house being stables:—Held, that an officer was not justified in breaking open such door after he had gained admission into the yard. *Hopkins v. Nightingale*, 1 Esp. 99.

In an action for breaking into the plaintiff's house, which was an unfinished house, the defendants justified under a ca. sa. against the plaintiff, and averred, that they peaceably entered the house through a hole in the wall. It appeared that this hole in the outer wall of the house opened into a small room or closet, which had a room over it, and a room under it, and that having entered this place the defendants tore down some boards, by which a staircase window, which opened into this place, was boarded up. It was proved by the builder, that this hole in the outer wall was not intended to have either a door or a window put into it, but was to remain open, so that the place in question should be used as a conservatory:—Held, that if this hole in the wall had been intended to have had a door or a window put into it, it must be considered that the outer fence of the house was left open, and that the defendants were justified in entering; but that, if this hole was always intended to be left open, the staircase window must be considered as the outer fence of the house, and that the defendants were therefore not justified in forcing it. *Whalley v. Williamson*, 7 C. & P. 294.

Action for breaking and entering the plaintiff's dwelling-house, and assaulting and imprisoning him. Pleas—first, not guilty; and, secondly, as to all the trespasses alleged, except the breaking of the house, a justification under a ca. sa. and warrant thereon, by virtue of which the defendants entered the house, the outer door being open, and arrested the plaintiff. It was proved that the defendants, who were bailiffs, in execution of the warrant broke open the outer door of the house, and so gained an entrance, and arrested him:—Held, first, that the averment in the plea that the outer door was open, was a material averment, for that the door being open was a condition precedent to the defendants' right to enter and arrest the plaintiff in his own house. *Kerhey v. Denby*, 1 M. & W. 336; 2 Gale, 81. See *Oakes v. Wood*, 2 M. & W. 791.

Held, secondly, that the defendants having

become trespassers ab initio, by the breaking of the door, the jury was rightly directed, that they might (even on the plea of not guilty) give damages in respect of all the injuries complained of in the declaration. *Ib.*

A sheriff's officer, having a ca. sa., went to a house in which the execution debtor was, and climbing up a ladder against the house, put his hand through an aperture in a broken pane of glass, and touched the debtor, saying to him, "You are my prisoner:"—Held, that this was a good arrest, and justified the officer in breaking open the outer door of the house and carrying off the debtor to prison. *Sandon v. Jervis*, 27 L. J., Q. B. 279; 4 Jur., N. S. 737. Affirmed, El., Bl. & El. 935; 28 L. J., Ex. 156; 5 Jur., N. S. 156—Ex. Ch.

Process for Contempt.]—In a proceeding against a member for a breach of privilege, the speaker of the House may issue his warrant to an officer, under which, if the party refuses to open his door and admit the officer, after demand made and notice of his business, the officer may break into the house in like manner as he may in executing process of contempt issued by courts of justice. *Burdett v. Abbot*, 14 East, 1; 5 Dow, 165; 4 Taunt. 410. See *Howard v. Gossett*, 1 Car. & M. 380.

On Escape or Expulsion.]—If a prisoner, after an arrest in the street, escapes, the bailiff may justify on a fresh pursuit breaking open the door of the house to retake him. *Anon.*, Lofft, 390.

A sheriff's officer, in execution of a bailable writ, peaceably obtained entrance through the outer door, but before he could make an actual arrest, was forcibly expelled from the house and the outer door fastened against him. The officer obtained assistance, forced open the outer door, and made the arrest:—Held, that he was justified in so doing. *Aga Kurboolie Mahomed v. Reg.*, 3 Moore, P. C. C. 164.

Held, also, that a demand of re-entry under such circumstances was not requisite to justify his breaking open the outer door. *Ib.*

Criminal Process.]—In the execution of criminal process against any man in the case of a misdemeanor, it is necessary to demand admittance, before the breaking of the outer door of the house can be legally justified. *Launock v. Brown*, 2 R. & A. 592.

Operation on Execution of Process.]—Where a defendant has been taken in execution on a ca. sa., to execute which the sheriff's officer has broken open an outer door, the court will discharge him out of custody on a summary application. *Hodgson v. Towning*, 5 D. P. C. 410.

iii. Other Matters as to.

Generally.]—A party, who issues a capias, is not under any legal duty to give information to the sheriff as to the person of the defendant. *Dyke v. Duke*, 4 Bing. N. C. 197; 5 Scott, 536; 1 Arn. 11.

A person may under particular circumstances lay hands on another, in order to serve him with process. *Harrison v. Hodgson*, 10 B. & C. 445; 5 M. & R. 392.

Where a sheriff's officer having received a writ

to arrest the defendant, let him at large, on his promising to put in good bail, and afterwards finding that they were not forthcoming, put in bail himself without the consent of the defendant; and, accompanied by them, arrested him the day previously to that on which the defendant's time for putting in bail expired: the court ordered the defendant to be discharged, and the sheriff's officer to pay the costs; on the ground that the proceedings had been highly improper. *Taylor v. Evans*, 8 Moore, 398; 1 Bing, 367.

A sheriff was bound, in executing a capias under 1 & 2 Vict. c. 110, s. 3, to provide such a force as would enable him to effect a caption, in spite of any resistance which he had reason to anticipate. *Howden v. Standish*, 6 D. & L. 312; 6 C. B. 504; 18 L. J., C. P. 33; 12 Jur. 1052.

Use of Violence in order to Serve Process.—An attachment for non-payment of money to A. having issued against B., and the process being in the hands of an officer who had not been able to serve B. therewith, B. was met by A. in the street, and carried by violence to the chambers of C., who was A.'s attorney, and there detained while the original process was sent for and served upon him; the officer also was sent for (but not by A.), and on B.'s leaving the chambers of C. he was arrested; the court held this arrest illegal, and discharged B. *Birch v. Prodder*, 1 N. R. 135.

Searching House of Stranger.—A sheriff's officer is not justified in entering and searching a stranger's house to arrest a defendant under a ca. sa., although he may have resided there immediately before the entry, and although the officer has reasonable cause to suspect that he is in the house, if the fact turns out to be that he was not in the house at the time of the entry and search. *Morrish v. Murray*, 2 D. & L. 199; 13 M. & W. 52; 13 L. J., Ex. 261.

Where Sheriff holds two Writs, one Valid and one Invalid.—Although the sheriff is an agent for those who put writs into his hands to execute, he is also a public functionary, having at the same time duties to perform towards those against whom such writs are directed. *Hooper v. Lane*, 6 H. L. Cas. 443; 27 L. J. Q. B. 75; 3 Jur., N. S. 1026; *S. C.*, in Q. B., 10 Q. B. 546; 17 L. J., Q. B. 189, affirmed.

If the sheriff, having two writs in his hands, one valid, the other invalid, arrests on both at the same time, he may rely on the valid writ, and treat as detainers any number of valid writs which he may then have, or which may afterwards come to his hands. *Ib.*

But if, having two such writs, he arrests on the invalid writ alone, he cannot afterwards justify the arrest by the good writ. *Ib.*

The sheriff cannot, while a person is unlawfully in his custody by virtue of an arrest on an invalid writ, arrest that person on a good writ; to permit him to do so would be to allow him to take advantage of his own wrong. *Ib.*

Sheriff holding several Writs—Discharge as to one only—Effect of.—A party privileged from arrest *reduendo*, was arrested on a writ of capias *ad respondendum*, and applied for and obtained a judge's order for his discharge in that action, on the ground of his privilege at the time of his arrest. Other writs of ca. sa. against him were

in the hands of the sheriff:—Held, that the sheriff was justified in detaining him on those writs, notwithstanding notice of the judge's order, which made no mention of any writ but the first. *Watson v. Carroll*, 4 M. & W. 592; 7 D. P. C. 217.

Calling in Military Assistance.—The officer charged with making the arrest may, if he finds it necessary to the execution of his warrant, and to prevent personal danger to himself and his ordinary assistants from a mob assembled in extraordinary numbers, and with a shew of force to overawe the civil power, call in the assistance of the military. *Burdett v. Colman*, 14 East, 188; 13 East, 27.

e. Notice not to Arrest.

Disobedience of Sheriff—Effect of.—If, after a ca. sa. has been delivered to a sheriff, the plaintiff directs him not to execute the writ, and he notwithstanding does so, he becomes a trespasser; so, also, if he detains the debtor after notice from the creditor that he has released the debt. *Barker v. St. Quintin*, 12 M. & W. 441; 1 D. & L. 542; 13 L. J., Ex. 144.

Notice from the plaintiff's attorneys to the bailiff, charged with a warrant under a ca. sa. that it is withdrawn, is sufficient to render the bailiff liable for an arrest. *Futcher v. Hinder*, 3 H. & N. 757; 28 L. J., Ex. 28.

Where Party is Arrested at Suit of another Creditor.—A plaintiff having issued a ca. sa. on a judgment against the defendant, directed the sheriff not to execute the writ until further notice; the defendant having been arrested at the suit of another creditor and paid the debt, was detained by the sheriff's officer until instructions were obtained from the plaintiff, who thereupon directed the officer to let him go:—Held, that there was no lawful arrest or discharge under the plaintiff's writ, and consequently that the debt was not satisfied. *Semple v. Keen*, 3 H. & N. 753; 28 L. J., Ex. 151.

A ca. sa. had been delivered to the sheriff. By the direction of the plaintiff's attorney, the sheriff issued a warrant to his officer, to whom notice was subsequently given by the plaintiff's attorney not to execute the writ, which, however, remained in the sheriff's hands. The defendant having subsequently, at the suit of another person, been arrested by the same officer:—Held, that the defendant could not insist, under these circumstances, that he had been ever in custody under the first writ. *Howard v. Cauty*, 2 D. & L. 115; 13 L. J., Q. B. 294; 8 Jur. 984.

Indorsement on Writ "to be returned non est inventus."—Where a ca. sa. is issued, with an indorsement "to be returned non est inventus," the sheriff is nevertheless bound to arrest and detain the party, if he either renders himself to the sheriff or is rendered by his bail after the writ has come to the sheriff's hands. *Magnay v. Monger or Mongor*, 4 Q. B. 817; D. & M. 24; 12 L. J., Q. B. 306; 7 Jur. 625.

The meaning of such indorsement is, that the sheriff is not to look for the party. *Ib.*

f. Privileged and Protected Persons.

Witness.—No action lies against a sheriff or

his officer for arresting a person attending court as a witness, although it is alleged that the sheriff and his officer knew that he was privileged, and arrested him maliciously. *Magnay v. Burt*, D. & M. 652; 5 Q. B. 381; 7 Jur. 1116—Ex. Ch.

Minister of Religion.]—Where a clergyman was arrested on Christmas-day, whilst he was officiating in a chapel, and he afterwards gave a bail-bond, the court ordered the writ and subsequent proceedings to be set aside. *Goddard v. Harris*, 5 M. & P. 122; 7 Bing. 320.

But without costs, it appearing that neither the plaintiff nor his attorney ordered the arrest to be made on Christmas-day. *Id.*

Certificated Bankrupt, Peer, or Discharged Insolvent.]—A sheriff or his officer is not liable to an action for arresting a certificated bankrupt, a peer, a discharged insolvent, or a person who took advantage of the 20 Geo. 3, c. 64, made on the occasion of the prisons in London being burnt by the rioters, although the party in such cases was privileged from arrest. *Turlton v. Fisher*, 2 Dougl. 671.

A sheriff is not liable for arresting or detaining a debtor who has executed a deed of assignment under the Bankruptcy Act, 1861, s. 192, after production of a certificate of registration; the debtor's remedy being by application to the court or a judge for his discharge from custody. *Ames v. Waterlow*, 5 L. R., C. P. 53; 39 L. J., C. P. 41; 21 L. T. 393; 18 W. R. 67.

Action against Sheriff for Escape—Plea under Bankruptcy Acts.]—To an action against a sheriff for an escape, he pleaded that he suffered the plaintiff's debtor to depart out of custody by reason of the production by him (the debtor) of a certificate, duly signed and registered by the chief registrar of bankruptcy, of the filing and registration of a deed of arrangement with his creditors. The deed of arrangement was invalid:—Held, that the production of the certificate was an answer to the action. *Lloyd v. Harrison*, 1 L. R., Q. B. 502; 35 L. J., Q. B. 153; 12 Jur., N. S. 701; 14 L. T. 799; 14 W. R. 737; 6 B. & S. 36—Ex. Ch.

By the Bankruptcy Act, 1849, s. 27, a registrar in bankruptcy may act in the commissioner's absence, as commissioner; but the rules issued under authority of the statute provided, that he shall not so act, unless by a request in writing, except in case of emergency, the nature whereof shall be entered on the proceedings. To an action for escape, the sheriff pleaded that the debtor had been released by order of a registrar. The plaintiff replied that the registrar had not been requested in writing to act for him as commissioner, nor had any emergency arisen, nor the nature thereof been entered on the proceedings:—Held, that if the order was voidable, it was not void, and protected the sheriff. *Hargreaves v. Armitage*, 4 L. R., Q. B. 143; 38 L. J., Q. B. 46; 17 W. R. 140.

Action against Sheriff for Arresting Person whilst Privileged—Pleading.]—A declaration stated, that the plaintiff sued out a writ of attachment against J., which it became the defendant's duty as sheriff to execute carefully; but that he wrongfully, and without the plaintiff's consent, attached J. by his body, at a time when he was privileged; that J. was discharged,

and that the plaintiff thereby lost the benefit of the attachment:—Held, that the declaration was bad, for not setting out the particulars of the alleged privilege. *Lloyd v. Wood*, 6 N. & M. 822; 5 A. & E. 228; 2 H. & W. 158.

g. Arrest by Wrong Name.

Duty of Sheriff to Release Prisoner on Discovery of Mistake.]—The sheriff, having a writ against G. B., arrested M. B., who was the real debtor, and at the time of contracting the debt had represented himself as G. B.:—Held, that the sheriff having been informed of these circumstances while he had the real debtor in his custody was not bound to detain him, and therefore that an action would not lie against him for an escape. *Morgan v. Bridges*, 1 B. & A. 647; 2 Stark. 214.

S. D. having induced the sheriff to arrest her instead of E. D., against whom he had a ca. sa., by representing herself to be E. D., afterwards gave the sheriff notice that she was not the E. D. mentioned in the writ:—Held, that S. D. was not estopped from shewing that she was not E. D., and that the sheriff was therefore not justified in detaining her in custody after he had had notice that she was not the person mentioned in the writ. *Dunston v. Paterson*, 2 C. B., N. S. 495; 26 L. J., C. P. 267; 3 Jur., N. S. 982.

When Name in Writ is the same as that in Judgment.]—A sheriff is justified in taking a defendant in execution under a writ which pursues the name in the action in which the judgment has been obtained, though that is not his true name. *Fisher v. Magnay*, 1 D. & L. 40; 5 M. & G. 779; 6 Scott, N. R. 588; 12 L. J., C. P. 276.

h. Arrest of Wrong Person.

Knowingly.]—A writ of summons issued in an action by A. against his debtor I. W. K., was by mistake served on M. K., who stated that he was not I. W. K. M. K. did not appear to the writ, and took no notice of it, but judgment was entered up in the action against I. W. K., and a ca. sa. issued on the judgment, commanding the sheriff to take I. W. K. The sheriff thereupon arrested M. K.:—Held, that the sheriff was liable to an action for false imprisonment at the suit of M. K., and that the facts would not warrant the sheriff in alleging by way of justification that the ca. sa. directed him to arrest M. K. by the name of I. W. K. *Kelly v. Lawrence*, 3 H. & C. 1; 33 L. J., Ex. 197; 10 Jur., N. S. 636; 10 L. T. 195; 12 W. R. 413—Ex. Ch.

Misleading Sheriff as to the Person to be Arrested.]—A sheriff, upon the representation of the attorney of a plaintiff in an action, having detained a party as the party against whom he held a ca. sa., and damages having been recovered against the sheriff by that party for an illegal detainer, an action lies by the sheriff for the false representation, although such representation was not false within the knowledge of the attorney. *Evans v. Collins*, D. & M. 72; 5 Q. B. 805; 12 L. J., Q. B. 339; 7 Jur. 743.

The attorney of an execution creditor in an action against W. F., caused a fi. fa. to be issued and indorsed on the writ. The defendant is a —, and resides at Redcar. The writ was delivered to the sheriff, who executed it against W.

F., who resided at Redcar, and was son of the real defendant, W. F., who resided at Coatham, near Redcar. The attorney and the sheriff both acted *bonâ fide*:—Held, that the indorsement on the writ was a mere statement by the attorney of the execution creditor for the purpose of affording information to the sheriff, and left him to his own discretion as to how he should act, and that it was not a requirement to the sheriff which made him the agent of the attorney for the purpose of seizing the goods of the son. *Childers v. Wooler*, 2 El. & El. 287; 29 L. J., Q. B. 129; 6 Jur., N. S. 444; 2 L. T. 49; 8 W. R. 321.

Liability of Officer for.—Officers arresting a wrong person are not justifiable by 24 Geo. 2, c. 44, s. 6. *Money v. Leach*, 1 W. Bl. 563; 3 Burr. 1742.

And if they knowingly arrest a man by a wrong name, they are trespassers, and are liable to an action. *Rex v. Middlesex (Sheriff)*, 2 Chit. 357.

The sheriff, and not the plaintiff, is subject to the costs of an illegal arrest, unless the plaintiff is privy. *Anon.*, 1 Chit. 580.

Pleading.—A declaration alleged that Frederick S., who before his arrest was known as well by the name of William as of Frederick, whereof the defendant had notice, and who, before the accruing of the debt, oftentimes admitted to the plaintiff that he was known by the name of William, was arrested by the defendant as sheriff, under a writ issued at the plaintiff's suit, describing S. as William S., and that the defendant took an insufficient bail-bond, and released him. The plea traversed that the defendant had notice that S. was as well known by the name of William as of Frederick:—Held, that as the plea denied that the defendant had notice as above, it was an answer to the cause of action in the declaration; for that the allegation as to S.'s admissions to the plaintiff was mere evidence, and that, as the sheriff would have been justified in letting the prisoner go at any time, he had not, by taking a bail-bond, rendered himself liable on the ground that he had exercised his election to treat the arrest as valid. *Brunskill v. Robertson*, 2 P. & D. 269; 9 A. & E. 840.

i. Taking to Prison.

What is a Beginning to Carry to Gaol.—Carrying an arrested party to public-houses within twenty-four hours after the arrest, without lodging him in gaol within that time, is not a beginning to "carry to gaol." *Summers v. Moseley*, 4 Tyr. 158; 2 C. & M. 477.

The beginning to carry, and not the arrival at the prison, is to be considered as the carrying to prison. *Dewhurst v. Pearson*, 1 D. P. C. 664; 1 C. & M. 365; 3 Tyr. 243.

Duty of Officer on Arrest.—The officer who makes the arrest ought to require the party arrested to nominate some convenient dwelling-house to be taken to; for the latter cannot be said to refuse till the proposal has been made; and a mere omission by him to nominate a place, does not justify carrying him immediately to gaol. *Simpson v. Renton*, 5 B. & Ad. 35; 2 N. & M. 52.

The sheriff is entitled to exercise a reasonable

discretion in determining whether a house, nominated by a prisoner, as a safe and convenient dwelling-house, is a safe house for the custody of the prisoner. *Silk v. Humphrey*, 4 A. & E. 959.

If a prisoner requests to be taken to a house, for the purpose only of consulting a person there, that is not a nomination of a house within the statute. *Id.*

In one case it was held that the omission of the party to name such dwelling-house entitled the officer to carry him direct to prison. *Pitt v. Middlesex (Sheriff)*, 4 M. & P. 726; 1 D. P. C. 201.

A sheriff's officer making an arrest must not carry the party to prison within twenty-four hours, unless such party has first been informed that he may, if he will, be carried to a safe and convenient house of his own nomination, and has refused to nominate. And it is not a refusal if the party, without being so informed, asks if he may go to a spunging-house, and being told that there are none, makes no further proposal, and suffers himself to be taken to one of the two prisons previously named by the officer. *Gordon v. Laurie*, 9 Q. B. 60; 16 L. J., Q. B. 98; 11 Jur. 98.

Action for Penalty under 32 Geo. 2, c. 28, s. 1.]

—In an action for the penalty of 50*l.* for carrying the plaintiff to a prison under *meane* process, within twenty-four hours, the defendant pleaded that it was by the plaintiff's own consent. Replication, that the plaintiff did not consent:—Held, that the defendant should begin, as the plaintiff did not go for unliquidated damages. *Silk v. Humphrey*, 7 C. & P. 14.

The sheriff or any of his officers concerned in acting contrary to the statute is liable to the penalty. *Dewhurst v. Pearson*, 1 D. P. C. 664; 1 C. & M. 365; 3 Tyr. 243.

In order to justify a sheriff's officer in taking a party arrested to a tavern, the consent of the party arrested to be taken there is necessary; and the mere submission or acquiescence of such party to the dictation of the officer is insufficient. *Id.*

While the officer was illegally carrying a prisoner to gaol, within twenty-four hours after arrest, he, to avoid being taken to gaol, consented to go to a tavern, and there draw up an agreement for the purpose of getting discharged:—Held, that a consent so obtained was not free and voluntary within 32 Geo. 2, c. 28, s. 1. *Barsham v. Bullock*, 10 A. & E. 23; 2 P. & D. 241.

— When two Actions brought against Sheriff for same Offence—Stay of Proceedings.]

—The court will not stay the proceedings in an action against a sheriff's officer on 32 Geo. 2, c. 28, s. 12, though a similar action has been commenced against the sheriff for the same offence. *Pechell v. Layton*, 2 T. R. 512, 712.

j. Discharge from Custody.

By Solicitor.—Before 15 & 16 Vict. c. 76, s. 126, the attorney of the plaintiff had no authority to order the discharge of a defendant out of custody upon final process, upon any other terms than those of payment of the debt and costs. *Connop v. Challis*, 2 Ex. 484; 6 D. & L. 48; 17 L. J., Ex. 319.

The plaintiff's attorney directed the sheriff's officer, who had arrested the defendant, not to let him go at large, without an express consent, as

he had a lien for his costs: the sheriff's officer did, by the authority of the plaintiff, but without that of the attorney, let the defendant go at large:—Held, that the sheriff was not liable to the attorney for his costs. *Martin v. Francis*, 2 B. & A. 402; 1 Chit. 241.

By the Sheriff.—A defendant, in custody on a ca. sa., received on Saturday an order from the creditor for his discharge. The order, on being shewn to the gaoler, was by him forwarded to the sheriff, who lived at some distance from the gaol. On the Sunday, a warrant of detainer, founded on a ca. sa. which had been issued on the previous day, was served upon the gaoler, who thereupon detained the defendant:—Held, that he had no right to his discharge, as the sheriff was entitled to a reasonable time to search his office for other writs against him; and that the service of the warrant on the Sunday made no difference. *Simuel v. Buller*, 1 Ex. 439; 17 L. J., Ex. 54; 11 Jur. 978.

Under an Attachment.—Trespass will not lie against a sheriff for refusing to discharge a prisoner in custody on an attachment for contempt, under 11 Geo. 4 & 1 Will. 4, c. 36, s. 15, rule 5, where he has received no notice of the nature of the attachment. *Smith v. Eggington*, 2 N. & P. 143; 6 D. P. C. 38; 7 A. & E. 167.

A. having been guilty of a contempt in chancery was arrested by the sheriff under a writ of attachment, and delivered into the custody of the governor of a county gaol, under a warrant commanding him to keep her in custody, so that the sheriff might bring her before the Court of Chancery to answer her contempt. The governor having detained her in custody beyond the prescribed period, although the plaintiff in chancery had not brought her to the bar according to 11 Geo. 4 & 1 Will. 4, c. 36, s. 15:—Held, first, that in proceedings against the governor for the undue detention, the proper form of action was trespass, and not case. *Moore v. Rose*, 4 L. R., Q. B. 486; 38 L. J., Q. B. 236.

Held, secondly, that such an action was not within the limitation in 4 Geo. 4, c. 64, s. 75, which applied only to proceedings for acts done in a supposed exercise of the powers of the statute. *Ib.*

See also cases under EXECUTION, XII.

K. Form of Return to Writ.

Cepi Corpus.—Where a defendant was in custody under an extent, and a capias was issued against him at the suit of the plaintiff, and delivered to the sheriff, who returned "that he had taken the defendant, whose body remained in prison under his custody," the court refused to allow the return to be amended by striking it out, and making another according to the fact. *Rex v. Worcestershire (Sheriff)*, 7 Moore, 552; *S. C.*, nom. *Ibbotson v. Tindall*, 1 Bing. 156.

Where the sheriff, on being ruled to return a writ, gave notice to the plaintiff that the writ was lost, and that the defendant was in custody, the plaintiff should have proceeded as if the sheriff had returned cepi corpus; and the court set aside an attachment issued against the sheriff for not returning the writ. *Rex v. Kent (Sheriff)*, 1 Marsh. 289.

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Non est inventus.—"Not to be found" is an improper return to a writ of capias. *Rex v. Kent (Sheriff)*, 5 D. P. C. 451; 2 M. & W. 316.

If a sheriff returns non est inventus when the defendant is visible, and pursuing his business as usual, he is liable to an action for a false return. *Beckford v. Wilts (Sheriff)*, 2 Esp. 475.

But an attachment for not returning the writ was discharged without costs, upon an affidavit that the defendant was not seen in the county, and that the return of non est inventus was made too late by mistake. *Saxton v. West*, 2 Anst. 479.

Rescue.—Semble, that a return by the sheriff to a bill of Middlesex, stating that he took and detained the defendant until he rescued himself, was sufficient, without naming the rescuers, or stating them to be people of the county; but the return not stating the arrest to have taken place in the county was held to be bad. *Rex v. Middlesex (Sheriff)*, 1 B. & A. 190; *S. P.*, *Fermor v. Phillips*, Holt, 537; 5 Moore, 184, n.; 3 B. & B. 27, n.

Where a defendant has been rescued from a bailiff, the sheriff may return the rescue as from his bailiff, and not from himself. *Gobbey v. Dewes*, 3 M. & Scott, 556; 2 D. P. C. 747.

Where a defendant is brought up on an attachment for a rescue, it is the practice of the court to put interrogatories to him, though he does not deny the charge in the affidavits, unless the prosecutor waives putting them. *Rex v. Horseley*, 5 T. R. 362.

Languidus.—By the return of languidus, the illness of the defendant at the return of the writ should appear. *Perkins v. Meacher*, 1 D. P. C. 21.

Where the return stated, that the defendant upon being arrested in his own house was confined to his bed by illness, and could not be removed without danger to his life, and so continued ill at and after the return of the writ, and for such cause the custody of the defendant was relinquished; the court refused to grant an attachment against the sheriff, and allowed him to amend his return upon payment of costs. *Baker v. Davenport*, 8 D. & R. 606.

When a party in custody under a ca. sa. was too ill to be removed, the court enlarged the time for the return of the writ, but could afford the sheriff no relief for the extra costs of keeping up the caption. *Jones v. Robinson*, 11 M. & W. 758; 2 D., N. S. 1044; 12 L. J., Ex. 415.

Insane.—Where a return to a latitat stated that the defendant was insane, and could not be removed without great danger, and continued so until the return of the writ:—Held, that an attachment would not lie against the sheriff. *Cavenagh v. Collett*, 4 B. & A. 279.

1. Action for a False Return.

Sheriff of Colony—Capias ad respondendum.—The sheriff of a colony is liable, without proof of malice or want of probable cause, in an action for a false return of rescue made by him upon a writ of capias ad respondendum, for the damage which results to the plaintiff therefrom. *Brasyer v. Maclean*, 6 L. R., P. C. 398; 44 L. J., P. C. 79; 33 L. T. 1.

O O

Estoppel by Return.—Such return was conclusive at that stage of the proceedings as to the truth of the alleged rescue by the plaintiff, whom it rendered liable to attachment for a contempt of court, without his being allowed to shew that the facts returned were untrue, and constituted a misfeasance by a public ministerial officer in the discharge of his duties. *Ib.*

Sufficiency of Pleading.—In an action against the sheriff for a false return to a ca. sa., it is not necessary to aver in the declaration that the sheriff had notice from the plaintiff that the defendant was within his bailiwick, so that he might arrest him. *Hereford (Dean) v. Macnamara*, 5 D. & R. 95.

In an action by an execution creditor against a sheriff for not arresting the debtor, the declaration alleged, that the sheriff did not, although often requested so to do, arrest; and that he falsely returned non est inventus:—Held, first, that the allegation of his being requested to do so was immaterial, and did not require to be proved, as the wrongful act complained of was, that the sheriff omitted to arrest, and made a return of non est inventus. *Hovden v. Standish*, 6 C. B. 504; 6 D. & L. 312; 18 L. J., C. P. 33; 12 Jur. 1052.

Held, secondly, that the plea of not guilty operates to deny the wrongful act complained of by way of denial only, and does not authorize the introduction of affirmative matter in excuse for the breach of duty complained of; therefore, that, under that plea, evidence that the plaintiff directed the sheriff not to arrest was inadmissible. *Ib.*

Held, thirdly, that this evidence was not admissible under a plea that the sheriff might not nor could arrest; as the effect of that plea was merely to deny that the debtor was in the sheriff's bailiwick under such circumstances that there was an opportunity to arrest him. *Ib.*

m. Other Matters.

Costs of Defending Action for Wrongful Arrest.—A sheriff, sued for a wrongful arrest, defended the action without communicating with the execution creditor, who was liable to indemnify him:—Held, in a subsequent action by the sheriff against the execution creditor, that, to entitle the sheriff to recover the costs of defending the former action, it should be submitted to the jury to say whether the course pursued in defending the former action was reasonable, under all the circumstances of the case. *Caldbeck v. Boon*, 7 Ir. R., C. L. 32.

Amount of Liability for Neglecting to Arrest.]

—A sheriff is liable to an action for a neglect of duty in omitting to arrest a debtor upon a ca. sa., without proof of actual damage; but, if the jury negatives actual damage, the plaintiff is entitled only to a verdict with nominal damages. *Clifton v. Hooper*, 6 Q. B. 468; 14 L. J., Q. B. 1; 8 Jur. 958.

Action against Judgment Creditor—Indorsing Ca. sa. for larger Sum than Due.—An action will lie against a judgment creditor for maliciously and without reasonable or probable cause indorsing a ca. sa., issued on a judgment, with directions to levy a larger sum than due, and causing the debtor to be arrested thereunder; and it is not necessary that the illegality

of the arrest should have been ascertained before the action by the debtor's obtaining an order of a court or of a judge for his discharge from custody, as such illegality must depend altogether on the amount for which it was made being greater than the sum due, which is a fact to be only conclusively decided by a jury. *Gilding v. Eyre*, 10 C. B., N. S. 592; 31 L. J., C. P. 174; 7 Jur., N. S. 1105.

Receipt of Debt and Costs.—It is no part of the duty of a sheriff, in executing a ca. sa., to receive the amount of the debt and costs, in order to pay them over to the execution creditor. *Woods v. Finnis*, 7 Ex. 363; 21 L. J., Ex. 138; 16 Jur. 936.

Therefore, where the debtor makes a voluntary payment to the bailiff of the debt and costs, to be paid over to the execution creditor, and the bailiff fails to do so, and, in consequence thereof, the debtor is a second time arrested under a fresh writ issued upon the same judgment, the sheriff is not liable as for a breach of duty in not paying over the money to the execution creditor. *Ib.*

Taking Bail.—A sheriff's officer arrested the plaintiff at the suit of P., having also a writ against him at the suit of L. The plaintiff gave a regular bail-bond in the action at the suit of P.; he also paid the officer the fees as upon a bail-bond, in the action at the suit of L.; but the instrument signed by the plaintiff was, in fact, unsealed, and the blanks not filled up, whereupon the plaintiff was liberated; but it did not appear which instrument was signed first:—Held, that the officer was not liable in trespass, there being no evidence that the plaintiff was detained longer than was justifiable under the lawful suit. *Blessley v. Sloman*, 3 M. & W. 40; M. & H. 304.

In an action against a sheriff's officer, he cannot justify entering the house of a defendant under a writ of trespass quare clausum fregit, and continuing there till the defendant pays him a sum of money as and by way of surety for his appearance. *Moore v. Beaumont*, 6 T. R. 137.

Inquisition of Jury—Finality of.—The court will not set aside the inquisition of a jury summoned by the sheriff to inquire in whom the property of goods seized by him is vested. *Roberts v. Thomas*, 6 T. R. 88.

3. ON WRIT OF FIERI FACIAS.

a. Manner of Executing.

Amount to be Seized.—The duty of a sheriff, in the first instance, is to seize so much goods as will be reasonably sufficient, if sold, to satisfy the sum indorsed on the writ; and his duty to seize in respect of rent does not arise until the landlord has made a claim, when, on the refusal of the tenant to pay the rent, the sheriff is bound to levy it under the writ, and, consequently, to seize to a larger amount. *Gawler v. Chaplin*, 2 Ex. 503; 18 L. J., Ex. 42.

Breaking open Doors.—A sheriff having entered at the open doors of a house need not demand to have the inner doors opened to him before he breaks them, in order to take, under a fi. fa., goods which are within the house. *Hutchin-*

son v. Birch, 4 Taunt. 619. And see *Johnson v. Leigh*, 1 Marsh. 565; 6 Taunt. 246.

Where the sheriff was lawfully in a room occupied by an under-tenant of the plaintiff in his dwelling-house, and had entered the residue of the dwelling through an open door communicating between the two tenements, in order to seize the plaintiff's goods; and having seized the goods, was unable to carry them away without himself opening the outer door, which was locked, neither the plaintiff nor any one on his behalf being present whom the sheriff could request to open the door:—Held, that he was justified in breaking the outer door and the lock thereof, in order to carry away the goods. *Pugh v. Griffith*, 3 N. & P. 187; 7 A. & E. 827.

Searching House of Administratrix.]—Under a fi. fa. against the goods of an intestate, in the hands of his administratrix, or of the husband of the administratrix in her right since her marriage, the sheriff may justify entering the house of the husband to search for goods of the intestate, though none are found therein, because that is the most natural place of custody for them. *Cooke v. Birt*, 5 Taunt. 765; 1 Marsh. 333.

Seizure on Sunday—Withdrawal—Subsequent Seizure on Thursday—Effect of.]—A warrant having been directed to the defendant as bailiff on a fi. fa. against the plaintiff's goods on Sunday, some assistants employed by the defendant broke into the plaintiff's house and seized his goods. They continued in possession until the following Tuesday, when they withdrew. They returned on the following Thursday and proceeded to lot the goods for sale, and remained in possession until the Saturday, when the defendant, for the first time, came on the premises and sold the goods under the writ and warrant:—Held, that the sale was not vitiated by the previous illegal seizure of the goods, since the principle which governs an arrest of the person does not apply to an execution against goods. *Percival v. Stamp*, 9 Ex. 167; 23 L. J., Ex. 25.

b. Notice to Withdraw.

What Amounts to.]—Under a fi. fa. at the suit of P. lodged with the sheriff of Hants, the goods of the execution debtor were seized. Before the return of the writ, P. issued a ca. sa., under which the debtor was arrested in Middlesex. The attorney of P. by letter directed the sheriff of Hants to withdraw the fi. fa. There was at the time another fi. fa., at the suit of W., lodged with the sheriff, and no directions were in fact given to the bailiff in possession to withdraw, and he continued in possession holding both warrants; an order was subsequently made by a judge that, upon payment of the debt to P. on a day mentioned, no ca. sa. should be issued against the debtor; but that in the meantime P. should be at liberty to proceed on the fi. fa. already issued:—Held, that the writ never was, in fact, withdrawn, and consequently that P. was entitled to the proceeds of the sale of the goods in the sheriff's hands as against W. who claimed them under a bill of sale executed by the judgment debtor before the direction to withdraw the fi. fa. *Withers v. Parker*, 4 H. & N. 524; 28 L. J., Ex. 292.

Subsequent Delivery of Writ by Second Creditor.]—If a fi. fa. is delivered to a sheriff, with directions to suspend the execution, and in the meantime another writ is delivered by another creditor, the sheriff is bound to levy under the latter writ in preference to the former, although the former writ was not delivered with any fraudulent intent to protect the goods of a debtor. *Hunt v. Hooper*, 12 M. & W. 664; 1 D. & L. 626.

Retaining Possession after.]—Goods having been seized under a fi. fa. against a plaintiff, at the suit of G., a claim was made under a bill of sale, with a schedule annexed. The clerk of G.'s attorney, in consequence, called on the officer, and was told by him, that the goods were being compared with the schedule; and, subsequently, in the course of the day, G. being indisposed to contest the claim, the clerk gave the following notice to the officer:—"W. r. W., withdraw under the fi. fa. herein, the goods having been claimed." The officer afterwards discovered, that part of the goods were not included in the schedule, and these he retained and sold; and he for some time retained possession of part of the goods claimed, which, when seized, were in the plaintiff's possession. Three days afterwards, in consequence of the plaintiff's application, the clerk called on the officer, to inquire why he did not withdraw; and being told that these were goods which did not belong to the claimant, expressed his approbation of their detention:—Held, first, that the terms of the order, though *prima facie* giving a direction to the sheriff to withdraw generally, were to be interpreted with reference to the circumstances under which it was given, and that they sufficiently negatived an intention on the part of G., that it should be treated as a general order. *Walker v. Hunter*, 2 C. B. 324; 15 L. J., C. P. 12; 9 Jur. 1079.

Held, secondly, that the act of detention having been done for G.'s use and benefit, a ratification by him had a retrospective operation, and would have rendered him liable to an action of trespass, had it not been justifiable. *Id.*

Sessions discharging Defendant before Money paid over.]—Where, upon a recognizance forfeited at quarter sessions, the sheriff has levied part of the penalty and has the defendant in execution for the residue, the sessions have jurisdiction over the whole recognizance; and if the sheriff has notice that they have discharged the defendant wholly therefrom, before the money levied had been paid over to the Treasury, an action lies against the sheriff for the amount. *Harper v. Hayton*, 5 M. & R. 307.

c. Withdrawing from Possession and Rescue.

Withdrawal from Possession.]—Where a sheriff has taken possession of goods and chattels under a fi. fa., his officer should continue in possession; or, if he may abandon it even necessarily for a time, he must clearly and satisfactorily account for so doing, in order to sustain his right against others, afterwards claiming under legal authority to seize the same goods; and, in case of an abandonment on the return day of the writ, possession cannot afterwards be resumed. *Ackland v. Paynter*, 8 Price, 95.

A sheriff returned that he seized the defendant's goods, and kept possession until he received from the attorney of the plaintiff an order to withdraw from possession:—Held, that the return was good, for the attorney of the plaintiff meant the attorney in the action; and that he had power to order the sheriff to quit possession. *Levi v. Abbott*, 4 Ex. 588; 7 D. & L. 185; 19 L. J., Ex. 62.

After the sheriff had seized under a fi. fa., the execution debtor executed a deed under the Bankruptcy Act of 1861, which was duly registered and gazetted. On an application by the debtor to the court, the sheriff was directed to withdraw. *Rogers v. Roberts*, 2 L. R., Ex. 35; 36 L. J., Ex. 40; 15 L. T. 254; 15 W. R. 340; *S. P., Marks v. Hall*, 2 L. R., Q. B. 31; 36 L. J., Q. B. 40; 15 L. T. 242; 15 W. R. 155.

Rescue.—If A., under a pretence of a purchase, obtains possession of B.'s goods with a preconceived design not to pay for them, and absconds to avoid a suit for the value, and the sheriff seizes such goods in execution immediately after the delivery to A., it seems that B. may lawfully rescue them out of the hands of the sheriff even by stratagem; but the validity of the purchase by A. is a question for a jury, as it depends upon whether the vendee had obtained possession of the goods with a preconceived design not to pay for them. *Bristol (Earl) v. Wilmore*, 2 D. & R. 755; 1 B. & C. 514.

A bailiff, under a sheriff's warrant addressed to him alone, and not to him and his assistants, seized goods in execution, left them in charge of keepers, and went away; during his absence, the goods were rescued by the prisoner from the keepers:—Held, that, under these circumstances, he could not be convicted of having by threats and violence compelled the bailiff to abandon the seizure. *Reg. v. Noonan*, 10 Ir. R., C. L. 505.

d. Sale of Goods.

(Compare cases post, ACTION FOR WRONGFUL OR NEGLIGENT EXECUTION.)

Amount to be Offered for Sale.—It is the duty of the sheriff's officer to stop the sale as soon as sufficient money is raised. *Cook v. Palmer*, 6 B. & C. 739; 9 D. & R. 723.

A sale by a sheriff is for ready money and immediate delivery; and he is not justified, after he has sold as much as will apparently satisfy the writ, in selling more, on the speculation that the actual delivery of the goods sold may be prevented by loss or accident. *Aldred v. Constable*, 8 Jur. 956; 6 Q. B. 370.

Excessive Sale.—See post, ACTION FOR WRONGFUL OR NEGLIGENT EXECUTION.

Indemnity to Execution Creditor in order to Delay Sale.—An undertaking to indemnify an execution creditor, if he will allow the sheriff to delay selling, cannot be made a rule of court, even by consent, where the person who so undertakes is neither party nor attorney in the suit. *Lyall v. Lamb*, 4 B. & Ad. 468.

Not Selling within Reasonable Time.—An action lies for a judgment creditor against a sheriff for not selling within a reasonable time

after a seizure. *Bales v. Wingfield*, 2 N. & M. 831; *S. P., Aireton v. Davis*, 3 M. & Scott, 138; 9 Bing. 740.

But the plaintiff can recover nominal damages only, unless actual injury is proved. *Id.*

A sheriff must sell the goods within a reasonable time, and before the return of the venditioni exponas, or he will be liable to an action. *Jacobs v. Humphrey*, 4 Tyr. 272; 2 C. & M. 413.

Remaining on Premises after Sale.—Action against a sheriff for breaking and entering a dwelling-house; plea, that he entered under a fi. fa., and seized a lease under which the plaintiff held the house, and, before the return of the writ, sold the term, and continued in possession of the house for the further execution of the writ. The plaintiff new assigned, that the sheriff continued in possession an unreasonable time after he had seized and sold the lease. The term was sold by auction, but there was no assignment executed:—Held, that the action was maintainable; that the seizure did not vest the term in the sheriff until he executed an assignment to the purchaser; that, whether the word "sold" meant an actual assignment or not, the sheriff could not remain in the house after he had sold the term. *Playfair v. Musgrove*, 14 M. & W. 239; 3 D. & L. 72; 15 L. J., Ex. 26; 9 Jur. 783. See also cases post, col. 1142.

Failure of Delivery to Purchaser.—A party purchased goods of the sheriff under an execution, with a knowledge that they were deposited at the manufacturer's, but did not apply for a delivery till after the time the sheriff was bound to pay over the money:—Held, that he could not maintain an action against the sheriff, upon the manufacturer refusing to deliver them up. *Duncan v. Garratt*, 1 C. & P. 169.

A fi. fa. directed to the coroner issued on a judgment obtained by a plaintiff, and the plaintiff's attorney indorsed thereon the name of S., an officer of the sheriff, who, after the goods seized under the fi. fa. had been sold, received the proceeds from the broker, and did not hand them over. A person who bought goods at the sale which had been seized under the fi. fa., but which were afterwards claimed by a third party, and taken away from him, brought an action against the sheriff for the purchase-money paid by him, the consideration having failed:—Held, that S. was not the officer of the sheriff, but of the coroner, and that the defendant was not connected with the proceedings so as to be liable. *Serjeant v. Cowan*, 1 C. & M. 491; 3 Tyr. 538; 5 C. & P. 492.

Selling Goods not wholly belonging to Execution Debtor.—See post, ACTION FOR WRONGFUL OR NEGLIGENT EXECUTION.

Partnership Property.—One partner cannot maintain trover against a sheriff for a mere sale of his share of the partnership property under a fi. fa. issued against the other partner for a separate debt. The sheriff in such case is in the same position, so far as regards his liability in trover, as if the sale had been by the execution partner; and upon a plea of not guilty the partnership is good evidence. *Mayhew v. Herriek*, 7 C. B. 229; 18 L. J., C. P. 179; 13 Jur. 1078.

Liability for not Selling Goods.]—A sheriff who, having seized goods under a *fi. fa.*, receives notice in general terms that the execution debtor has committed an act of bankruptcy, may take reasonable time to inquire whether the statement is true before proceeding to sell, unless he is aware of circumstances which cause him to think that the notice is a mere pretence. *Ayshford v. Murray*, 23 L. T. 470.

At the trial of an action by an execution creditor against a sheriff, for not levying a debt of 60*l.*, the landlord of the debtor was called as a witness, and stated that the sum of 46*l.* was due from the debtor for rent; and it appeared that the sheriff had withdrawn the execution, upon notice from the landlord, who had subsequently distrained and realized less than the rent due:—Held, that the plaintiff was entitled to recover from the sheriff the amount realized under the distress. *Augustin v. Challis*, 1 Ex. 279; 17 L. J., Ex. 73.

Sale by Sheriff to Defendant of Goods not belonging to Execution Debtor—Sale by Defendant of his Bargain to Plaintiff—Validity of latter Sale.]—The defendant, at a sheriff's sale, bought goods from the sheriff for 18*l.* The plaintiff, who was also at the sale, bought the defendant's bargain of him for 5*l.*, and paid him 23*l.* The defendant paid the sheriff the 18*l.*, and the sheriff began to deliver the goods to the plaintiff, but they were then claimed as not being the property of the execution debtor, and were recovered by the true owner:—Held, that there was no implied warranty by the defendant that he had title, nor any failure of consideration, the plaintiff having paid the 23*l.* to the defendant, not for the goods, but for the right which the defendant had acquired by his purchase, and that this consideration had not failed. *Chapman v. Speller*, 14 Q. B. 621; 19 L. J., Q. B. 239; 14 Jur. 652.

Purchase of supposed Interest in Land, which turns out worthless—Return of Deposit.]—In 1861, C., tenant from year to year of lands, died intestate, leaving several children, and a widow, who continued in possession, and in 1864 married P. No administration was taken out to C., and P. remained in possession, letting and subletting the lands, but the landlord declined to recognize him, and gave receipts for the rent, which was always paid by P.'s wife, to the representatives of C. In 1874, writs of *fi. fa.* issued against P. were lodged with R., who, as subsheriff, thereupon announced a public sale of P.'s "interest" in the premises, the advertisement stating that they had been seized under the writs; and referring to B., the auctioneer, for further particulars. B. and R. deposed that at the auction they announced they were selling P.'s interest, "whatever it is." This, however, was not admitted by the plaintiff, who became the purchaser for 900*l.*, and paid 300*l.* deposit, but afterwards refused to complete, on the ground that P. had no interest in the premises. The plaintiff then brought an action for money had and received against R., to recover his deposit, when the jury found that R. had sold a subsisting term in the lands, on the supposition that C.'s interest was vested in P., and that as R. had no right to sell that interest, the plaintiff was entitled to recover:—Held, that P. had no interest in the lands which the sheriff could

seize and sell, and that consequently the plaintiff was entitled to repudiate his contract, and have his deposit returned. *Kearney v. Ryan*, 2 Ir. L. R. 61—C. A. Reversing 10 Ir. R., C. L. 309.

Injunction restraining Sale by Sheriff.]—Goods having been taken in execution under a *fi. fa.* against W., the trustee of Mrs. W.'s settlement claimed them as separate estate of the wife. The sheriff thereupon took out an interpleader summons in the Common Pleas Division, upon which an order was made that upon the trustee paying 115*l.* into court within a limited time, the sheriff should withdraw, but in default of such payment being made, should sell and pay the proceeds into court, and that the parties should proceed to the trial of an issue as to the title to the goods. The money was not paid into court by the trustee within the time, and the sheriff advertised the goods for sale. Mrs. W. thereupon commenced an action in the Chancery Division to have the trusts of the settlement carried into execution, a new trustee appointed, and, in the meantime, for the appointment of a receiver. An injunction to restrain the sheriff from selling the goods or remaining in possession of them was granted by Malins, V.-C.:—Held, on appeal, that this order was a restraining by injunction a proceeding pending in the Common Pleas Division, and was inconsistent with the Judicature Act, 1873, s. 24, sub-s. 5, and must be discharged. *Wright v. Redgrave*, 10 Ch. D. 24; 40 L. T. 206; 27 W. R. 562—C. A.

The court will not interfere to restrain a sheriff from selling goods seized by him, on an offer of indemnity by a third person, claiming the goods. *Harrison v. Foster*, 4 D. P. C. 588; 1 H. & W. 650.

On the 20th of August the sheriff, under a *fi. fa.* against A., took possession of B.'s furniture in A.'s house. Both before and after seizure B. gave formal notice to the sheriff that the furniture was his, and on the 23rd issued the writ in this action against the sheriff for an injunction and damages. On the 25th of August the sheriff issued an interpleader summons, under which an issue was directed and an order made for the sheriff withdrawing from possession on payment of 100*l.* into court. The sheriff accordingly withdrew from possession on the 1st of September. B.'s title was afterwards admitted by the judgment creditor, and the 100*l.* paid out of court to B. B. now brought this action to trial against the sheriff for damages and costs:—Held, that the sheriff had not exceeded the scope of his duty in retaining possession till ordered to withdraw under the interpleader order, and that the action must be dismissed, but without costs, on the ground that the sheriff might have applied to the judge, under the interpleader order, to dispose of the matters in question between him and the plaintiff. *Aylwin v. Evans*, 52 L. J. Ch. 105; 47 L. T. 568.

Duty of Sheriff's Officer receiving Telegram as to.]—It is the duty of a sheriff's officer who receives notice by telegram, purporting to be sent by solicitors in London, of an injunction being granted by the Court of Bankruptcy to restrain a sale in the country under an execution, to telegraph to the Court of Bankruptcy, or to the London agents of the sheriff, to ascertain whether an injunction has really been

granted. *Langley, Ex parte, Smith, Ex parte, Bishop, In re*, 13 Ch. D. 110; 49 L. J., Bk. 1; 43 L. T. 187; 28 W. R. 174.

— **Liability of Sheriff's Officer for Acts of Deputy.**—A sheriff's officer, who is not himself present at the sale, and who has no actual notice of the injunction, is not responsible for the act of his deputy who allows the sale to be continued after receiving notice by telegram. *Id.*

— **Payment of Proceeds—Rule for Payment of Money Levied.**—A rule calling on a sheriff to shew cause why he should not pay to the plaintiff's solicitors the money levied under a fi. fa. is a rule or an order to shew cause in an action within Ord. LIII. r. 2; and the application cannot be heard unless notice of motion has been given to the sheriff under Ord. LIII. rr. 3 and 4. *Delmar v. Freemantle*, 3 Ex. D. 237; 47 L. J., Ex. 767; 26 W. R. 683.

— **How far Demand is necessary.**—After a return to a fi. fa. that the money is levied, the sheriff is liable to an action for it, without any demand of payment. *Dale v. Birch*, 3 Camp. 347.

But when the action was brought without any previous demand of the sum levied, the court stayed the proceedings on the payment of that sum without costs. *Jefferies v. Sheppard*, 3 B. & A. 696.

— **When Writ has been issued Fraudulently to defeat Bonâ fide Creditor.**—Although there is strong reason to believe that a fi. fa. had been issued in order to defraud the execution of a bonâ fide creditor, and that the sheriff is a party to the fraud, the court will not interfere summarily to compel the sheriff to pay over the proceeds of the levy to the bonâ fide creditor, but the question of fraud must be tried by a jury. *Barber v. Mitchell*, 2 D. P. C. 574.

— **To Assignees in Bankruptcy.**—A fi. fa. issued against B. When the officer went to B.'s premises, on the 11th July, to execute the warrant, he found a man in possession on behalf of trustees under a deed of assignment executed by B. for the benefit of his creditors. The officer thereupon returned without making a levy. On the 14th a fiat issued against B., under which he was declared bankrupt. On the 15th August the officer again entered and made an inventory of the goods on the premises, asserting that he considered himself in possession. On the 2nd September the assignees paid the sum claimed under the writ, in order to prevent the sheriff from proceeding to a sale, which he threatened to do:—Held, that the assignees were entitled to recover the money so paid, and that, if necessary, it must be assumed as against the sheriff, that he was, at the time, in possession of the goods. *Valpy v. Manley*, 1 C. B. 594; 14 L. J., C. P. 204; 9 Jur. 452.

Defendants suffered judgment by default, and the sheriff levied upon their goods for the amount of the damages and costs. A rule nisi was obtained, calling on them to shew cause why the same should not be paid over to the plaintiff. On behalf of the sheriff, it was then stated, that, by a resolution of the House of Commons, he was ordered to refund to the defendants, who were printers to the House of Commons, the amount levied upon their goods; and that, for

disobedience thereto, the sheriff had been committed to the custody of the serjeant-at-arms. It also appeared, that the plaintiff, being an insolvent debtor, his assignees claimed the amount of damages, and required the sheriff to pay the same over to them:—Held, that the resolution of the House of Commons did not authorize the sheriff to withhold the payment of the proceeds of the levy to the plaintiff; that the imprisonment of the sheriff for disobeying that resolution was no ground for the court to discharge the rule; and that the assignees of the plaintiff should have applied to the court. *Stockdale v. Hansard*, 3 P. & D. 330; 8 D. P. C. 522; 11 A. & E. 253.

— **Payment of Interest on.**—Where a sheriff retained for several years a sum of money in his hands, the balance of the produce of the effects of a crown debtor, seized by him and sold under an extent after the crown debt had been satisfied, claiming himself a lien thereon for poundage, the court ordered that he should pay interest on the amount of such balance to the parties from whom he had withheld it from the time when the court had determined, on a former occasion, that the claim of the sheriff was unfounded; notwithstanding which determination he had continued to keep the question before the court; and that, although the sheriff should not have made interest, or any use or advantage of the money in the meantime, the court proceeding wholly on the ground of the injury done to the party entitled to it. *Re v. Villers*, 11 Price, 575.

e. Execution of Bill of Sale.

Goods seized by a sheriff were valued and delivered to the execution creditor upon a bonâ fide purchase by him, but no bill of sale was executed:—Held, that there was a valid sale of the goods. *Hernaman v. Bowker*, 11 Ex. 760; 25 L. J., Ex. 69.

A bill of sale or a warrant, signed by a deputy of the under-sheriff, is valid. *Cookson v. Fryer*, 1 F. & F. 328.

Where a bill of sale of chattels was proved to have been executed by an under-sheriff in the name of the sheriff, it was held unnecessary to prove the power of attorney or other authority enabling the under-sheriff to assign the property in the name of the sheriff. *Wood v. Houcliffe*, 11 Jur. 707.

An action does not lie against the sheriff upon a promise to execute a bill of sale to the plaintiff's nominee. *Cameron v. Reynolds*, Cowp. 406.

See also **BILLS OF SALE.**

f. Operation of Notice of Allowance of Writ of Error.

The allowance of a writ of error is sufficient to render a sheriff, executing a fi. fa. after notice of such allowance, liable in an action of trespass, without any writ of supersedeas being issued; and notice to the sheriff is notice to the officers executing the process. *Belshaw v. Marshall*, 1 N. & M. 689; 4 B. & Ad. 336.

In an action against a sheriff for returning nulla bona to a fi. fa., which had been lodged with him at seven o'clock in the evening to be levied and no writ of error had been allowed at

half-past six in the evening of that day, but it appeared that the allowance was made within the day:—Held, that the sheriff should not have returned nulla bona, but that a writ of error had been allowed, and that therefore the plaintiff was entitled to recover nominal damages. *Cleghorn v. Desanges*, 3 Moore, 83; Gow, 66.

g. Return to Writ.

Form of—Value of Goods.]—The court will not compel the sheriff to give a specific return of the particulars and proceeds of goods sold under a fi. fa., on the ground that his officer has wasted the goods. *Willett v. Sparrow*, 2 Marsh. 293; 6 Taunt. 576.

A return to a fieri facias must state the value of the goods. *Barton v. Gill*, 1 D. & L. 593; 12 M. & W. 315; 13 L. J., Ex. 83.

In making a return, a reasonable degree of certainty is sufficient. *Reynolds v. Barford*, 8 Scott, N. R. 233; 7 M. & G. 449; 2 D. & L. 327; 13 L. J., C. P. 177; 8 Jur. 961.

Where a sheriff returns that he has retained a sum for possession money, it is no ground for quashing the return, that the plaintiff is charged with more possession money than the amount payable by him for keeping possession. *Ib.*

— When Several Writs are Issued.]—If a sheriff returns a seizure under that and another writ, it is bad. *Wintle v. Chetwynd (Lord)*, 7 D. P. C. 554; 1 W., W. & H. 581.

Where there are two writs, and the goods remain in the sheriff's hands for want of buyers, he must make some return as to the value of the goods, although he will not be bound by the amount stated. *Ib.*

It is a sufficient return that he has seized goods of the defendant by virtue of several previous writs of fi. fa., according to their priority. *Chambers v. Coleman*, 9 D. P. C. 588.

— Nulla bona.]—Nulla bona is a proper return, where the sheriff has paid the proceeds of an execution, either in discharge of rent or of a prior writ. *Wintle v. Freeman*, 1 G. & D. 93; 11 A. & E. 539.

Where, before the issuing of a fi. fa., a fiat in bankruptcy was issued against a debtor, and before a return of the writ an order was made by the court of review for annulling the fiat, and after the return the order was confirmed by the lord chancellor, the sheriff's return of nulla bona was well founded. *Smallcombe v. Olivier*, 13 M. & W. 77; 2 D. & L. 217; 13 L. J., Ex. 305; 8 Jur. 606.

The meaning of a return of nulla bona is, that there are no goods applicable to the plaintiff's writ. *Shattock v. Carden*, 6 Ex. 725; 2 L., M. & P. 466; 21 L. J., Ex. 200.

A declaration, after stating the delivery of the writ to the sheriff to be executed, alleged that the sheriff by virtue thereof "seized and took in execution goods and chattels of the debtor, of great value, to wit, of the moneys indorsed on the writ, and directed to be levied, and levied the same thereout." The defendant pleaded that he did not seize or take in execution any goods or chattels, nor levy thereout the moneys as alleged:—Held, that the allegation as to the seizure must be understood as the allegation of a seizure of goods of the debtor that were liable to the plaintiff's execution, and that

the same meaning must be ascribed to the plea; and consequently, that the goods seized under the plaintiff's writ being exhausted by the payment of rent and satisfaction of a writ previously delivered to the sheriff, the return of nulla bona was a proper return, and the defendant entitled to a verdict. *Heenan v. Evans*, 4 Scott, N. R. 2; 1 D., N. S. 204; 3 M. & G. 398.

— Sufficient Goods originally Sold—Insufficient after Payment of Claim of Landlord subsequently made.]—Where a sheriff, after being ruled to make a return to a fi. fa., made a return that he had sold the goods seized, and had received for them sufficient to satisfy the moneys directed to be levied; but that he afterwards had notice from the landlord that two quarters' rent was due; that he had applied to the landlord, but had not been permitted by him to have evidence of his claim; and that though he, the sheriff, had used due diligence, he was unable to ascertain whether the landlord had any just claim in respect of the rent, the court quashed the return for insufficiency, and allowed an attachment to issue. *Hall v. Crawley*, 11 W. R. 344.

— No Power of Ascertaining as to whether Defendant had Goods.]—If the sheriff returns, that the premises of the defendant are so barricaded that he is unable to ascertain whether the defendant has goods within the bailiwick on which a levy may be made, it is a bad return, as he should state either that the defendant has goods, or that he has none. *Munk v. Cass*, 9 D. P. C. 332.

— Ordered to Withdraw.]—To a fi. fa. the sheriff returned that he received from E. L. L., the attorney of the plaintiff in the writ named, an order to withdraw from possession, and that he thereupon withdrew:—Held, good. *Lery v. Abbott*, 7 D. & L. 185; 4 Ex. 588; 19 L. J., Ex. 62.

Pending Interpleader.]—On a levy by a sheriff under a fi. fa. three persons claimed different portions of the goods. The sheriff interpleaded, and three separate orders were made directing that, on payment of certain distinct sums into court by the claimants within seven days, the sheriff should withdraw and issues should be tried; in default of payment he should sell and pay the proceeds into court. One of the claimants paid money into court, and the interpleader issue in his case was set down for trial. The other two abandoned their claims, but the sheriff withdrew from possession:—Held, that the execution creditor, pending an interpleader issue, had no right to the immediate return of the writ. *Angell v. Baddeley*, 3 Ex. D. 49; 47 L. J., Ex. 86; 37 L. T. 653; 26 W. R. 137—C. A.

A return that he, the sheriff, had seized goods which were claimed by a third party, and thereupon he applied under the Interpleader Act, and an order was made for the trial of an issue, whether the goods were the property of the claimant; and that, afterwards, the plaintiff directed him to deliver up possession of the goods to the claimant, is insufficient. *Cleaver v. Fisher*, 2 D., N. S. 292.

Amending Return.]—A sheriff having returned that the goods seized by him remained in his hands for want of buyers, an action was brought

against him for a false return, when he obtained an order for time to plead on the usual terms, taking short notice of trial. Having subsequently applied to amend his return, by the insertion of the words *nulla bona* in lieu of the return first made, the court refused to allow the amendment. *Wylie v. Pearson*, 1 D., N. S. 807; 6 Jur. 806.

The plaintiff's attorneys having ceased to act for him, and become attorneys for the defendant, fraudulently procured the sheriff to return on a *fi. fa.* a sum larger than that actually levied and accounted for to the plaintiff; the court (at the expense of the attorneys) ordered the return to be amended according to the fact. *Green v. Glassbrooke*, 2 Scott, 261; 2 Bing. N. C. 143; 1 Hodges, 193.

Upon a writ of false judgment from a county court, the sheriff's return of his proceedings appearing to be no more than minutes, and not full entries of the pleadings, the court made absolute a rule calling on the sheriff to complete the entries, or to state what was understood by them. *Overton v. Swettenham*, 3 Bing. N. C. 786; 4 Scott, 483; 5 D. P. C. 641; 3 Hodges, 142; 1 Jur. 381.

Effect in Evidence.—A return of *nulla bona*, made by the sheriff to a *fi. fa.* against A., is admissible upon the trial of a question as to the property in goods at the time of such return between A. and a succeeding sheriff. *Aeril v. Warwick (Sheriff)*, 3 N. & M. 871.

So, although the bailiff intrusted with the execution of such writ did not himself search for goods of A., but sent his assistant. *Id.*

h. Action for a False Return.

Mode of Trying.—The court will not try, on affidavits, whether the return made by a sheriff to a writ is false, even though a strong case is made out shewing fraud and collusion, but the party must resort to his remedy by action. *Goubot v. De Crouy*, 2 D. P. C. 86; 1 C. & M. 772; 3 Tyr. 906.

When it Lies.—If the sheriff takes on himself to state facts which constitute a good return in point of law, the only remedy is by an action for a false return. *Id.*

Actions against sheriffs for false returns are transitory, for they may make and deliver their returns anywhere; and that which is false is universally so. *Griffith v. Walker*, 1 Wils. 336.

Only Part of Debt Levied—Acceptance by Creditor on Account.—If, after a return to a *fi. fa.*, that part only of a debt has been levied, and that the debtor has not goods whereon the whole can be levied, the creditor accepts that part on account, he does not thereby waive his right of action for a false return. *Holmes v. Clifton*, 4 P. & D. 112; 10 A. & E. 673; 2 P. & D. 556.

Charge of Defendant in Execution.—An action lies against the sheriff for a false return to a *fi. fa.*, notwithstanding the plaintiff, before commencing the suit, has charged the original defendant in execution. *Wordall v. Smith*, 1 Camp. 332.

Seizure of Goods on Writ founded on Judgment Fraudulent against Creditors—Return of Nulla bona to subsequent Writ.—Where

goods seized under a former writ, founded on a judgment fraudulent against creditors, are capable of being seized by the sheriff, he is compellable, under the 13 Eliz. c. 5, to seize and sell such goods under a writ received by him subsequently, and founded on a *bona fide* debt; and if, after notice of such fraud, he neglects to sell, and returns *nulla bona* to the latter writ, he is liable to an action for a false return. Nor does the fact that the sheriff has assigned the goods upon the prior execution to a supposed *bona fide* purchaser (but who is in truth a party to the fraud) innocently and in ignorance of the fraud, excuse the sheriff from such liability. *Christopherson v. Burton*, 3 Ex. 160; 18 L. J., Ex. 60.

Bankrupt Debtor—Return of Nulla bona—Bankruptcy subsequently Annulled.—A *fi. fa.* having been lodged with the sheriff after a debtor had been declared bankrupt and assignees appointed, the sheriff returned *nulla bona*. Before the return was made, the court of review had ordered that the fiat be annulled, if the lord chancellor should think fit; and, after the return, the lord chancellor made an order accordingly:—Held, that the return was not false, since the annulling of the fiat had not a retrospective effect, and that, even if it had, the sheriff, being a public officer, and having made the only return which he could at the time have made, ought to be protected. *Smalcombe v. Olivier*, 2 D. & L. 217; 13 M. & W. 77; 13 L. J., Ex. 305; 8 Jur. 606.

Of Nulla bona when Sheriff has not Levied.—In an action against a sheriff for a false return of *nulla bona* to a *fi. fa.* for 125*l.*, it appeared that the sheriff had not levied at all. There were goods of the execution debtor of the value of 50*l.* upon which he might have levied. There were two writs of *fi. fa.* against the execution debtor for more than 50*l.* lodged with the sheriff prior to the plaintiff's writ; but these prior writs were proved to be fraudulent as against creditors; the sheriff had, however, no information as to this fact:—Held, that the plaintiff was entitled to recover the 50*l.*; that it was the sheriff's duty to have levied, and the plaintiff might then have disputed the validity of the prior writs, and so obtained the proceeds of the levy. *Dennis v. Whetham*, 9 L. R., Q. B. 345; 43 L. J., Q. B. 129; 30 L. T. 514; 22 W. R. 571.

Allowing that the award of a writ of sequestration out of chancery has the same obligatory effect to bind the goods as a *fi. fa.*, yet, if the party at whose prayer such sequestration is issued takes no measure to compel the execution of it in due time, and the sequestrators do not in fact possess themselves of the goods, it is no excuse to a sheriff, to whom, at the distance of eighteen months, a *fi. fa.* is directed against the goods of the party, for not executing such writ, and selling the goods; the plaintiff in the sequestration having at all events lost his priority by such laches; and therefore the sheriff, who had seized under the *fi. fa.*, having, on notice of such supposed obstacle, returned *nulla bona*, was holden liable to the plaintiff in an action for a false return. *Payne v. Drew*, 4 East, 523; 1 Smith, 170.

In an action against a sheriff for returning *nulla bona* to a *fi. fa.*, which had been lodged with him at seven o'clock in the evening to be

levied and no writ of error had been allowed at half-past six in the evening of that day, but it appeared that the allowance was made within the day:—Held, that the sheriff should not have returned nulla bona, but that a writ of error had been allowed, and that therefore the plaintiff was entitled to recover nominal damages. *Cleghorn v. Desanges*, 3 Moore, 83; Gow, 66.

How far Damage must be Shewn.—A declaration in an action against a sheriff alleged, that although he could have levied of the goods of the execution debtor within his bailiwick the moneys indorsed on the writ, yet he, disregarding his duty, did not levy of the goods the moneys, or any part thereof; and that he, further disregarding his duty, falsely returned, &c.:—Held, that the first allegation sufficiently charged a breach of duty, and applied to improper conduct of the sheriff in the sale of the goods, as well as to negligence in omitting to levy; and that the declaration was good without stating special damage. *Mullett v. Challis*, 16 Q. B. 239; 20 L. J., Q. B. 161; 15 Jur. 243.

Held, also, that though the execution debtor had other goods, which the sheriff had not seized or not sold, the proper estimate of the damages was what the goods would have realized if sold for the best price which the sheriff could have obtained. *Id.*

No action is maintainable, without an averment of special damage, against a sheriff for a false return to a fi. fa., where no damage could necessarily result to the creditor, it appearing that the goods in question had become vested in the assignees of the debtor, who had become bankrupt. *Wylie v. Birch*, 3 G. & D. 629; 4 Q. B. 566; 12 L. J., Q. B. 260.

To sustain an action against a sheriff for false returns to writs of fi. fa. and venditioni exponas, damage to the plaintiff must be shewn. *Lery v. Hale*, 29 L. J., C. P. 127; 6 Jur., N. S. 702; 1 L. T. 132; 8 W. R. 125.

S., having obtained a judgment against F., issued a fi. fa. and placed it in the hands of the sheriff for execution, who, on proceeding to make a levy, found the goods claimed by his brother under a bill of sale; S. being informed of this, requested the officer to remain on the premises, which he did until after the goods were sold under the bill of sale, and then at S.'s request withdrew. The sheriff being ruled to make a return to the writ, returned that he had seized the goods and chattels of the debtor and kept them safely until ordered by S. to withdraw from possession. S. thereupon brought an action against the sheriff for not levying, and for making a false return thereto, but on the trial gave no evidence of having sustained any damage by the sheriff's neglect. The defence set up was the validity of the bill of sale, and the jury found that it was valid, and returned a verdict for the sheriff:—Held, that the circumstance of the sheriff being a public officer to whose services the plaintiff was entitled did not constitute the case an exception to the rule that in an action for tort actual damage must be proved or a presumption of law implying damage established. *Stimson v. Farnham*, 7 L. R., Q. B. 175; 41 L. J., Q. B. 52; 25 L. T. 747; 20 W. R. 183.

Held, under the facts stated above, that the sheriff was not estopped by the admission in his formal return from setting up as a defence that the goods were not the goods of the debtor at

the time of the attempted seizure, and that consequently he had not sustained actual damage, and that the facts were not such as from which the law would imply damage necessarily resulting. *Id.*

Sufficiency of Pleadings—Claim.—A declaration stated that a fi. fa., indorsed to levy 66*l.* 9*s.* 8*d.*, besides 16*s.* for the writ, officer's fees, poundage, &c., was delivered to the sheriff, who, by virtue thereof, seized and took in execution goods of great value, to wit, of the value of the moneys so indorsed on the writ, and could and might and ought to have levied the whole of the moneys thereout; yet he did not levy the whole of the moneys so indorsed, but only a portion, to wit, 60*l.*, and falsely returned that he had levied 43*l.* 15*s.* 9*d.*, and that the debtor had no more goods:—Held, first, that the words "moneys so indorsed" meant not only the debt, but the debt together with officer's fees, sheriff's poundage, &c. *Slade v. Hawley*, 2 D. & L. 700; 13 M. & W. 757; 14 L. J., Ex. 217.

Held, secondly, that the breach was defective, in not alleging that a reasonable time had elapsed for converting the goods seized into money. *Id.*

Held, thirdly, that the second breach was well assigned; inasmuch as, under the circumstances stated, it was a breach of duty to make a return of nulla bona as to any part. *Id.*

A count, alleging that the plaintiff recovered judgment against B., that there were goods and chattels of B. in the sheriff's bailiwick, of which he might have levied, but that he had not the moneys ready, but falsely returned that he had seized the goods of B., which remained with him unsold for want of buyers, is good, as a complaint that the sheriff might have levied, and neglected to do so. *Pitcher v. King*, D. & M. 584; 5 Q. B. 758; 13 L. J., Q. B. 162; 8 Jur. 401.

Defence.—In an action against the sheriff for not levying under a fi. fa., and falsely returning nulla bona, the plea of not guilty admits the judgment, the writ, the delivery of it to the sheriff, that there were goods in his bailiwick, and that he had notice of it. The only matters of defence available under that plea are, that he did not levy within a reasonable time, and that he did not make the return alleged. *Lewis v. Alcock*, 6 D. P. C. 389; 3 M. & W. 188.

The plea of not guilty to a declaration against a sheriff, for a false return of nulla bona to a fi. fa., puts in issue only the fact of the sheriff having the money in his hands, and making the return alleged; and it is not competent to him, under that plea, to set up as a defence the bankruptcy of the debtor, before the execution of the writ. *Wright v. Lainson*, 2 M. & W. 739; 6 D. P. C. 146.

To a count, for a false return to a fi. fa. on a judgment of the King's Bench against B., the sheriff pleaded, that, after the suing out of the writ, and after the return, the plaintiff sued B. in the King's Bench on the judgment, and recovered judgment thereon, which still remained in force, by means of which premises the judgment in the court mentioned became merged and satisfied, the fieri facias abandoned, and the defendant discharged:—Held, that the plea was no answer. *Pitcher v. King*, 1 P. & D. 297; 9 A. & E. 288; 1 W., W. & H. 691.

Evidence—Amount of Goods Seized.—In an

action against a sheriff for a false return of nulla bona, the declaration alleged that he seized and took in execution goods of A., the judgment debtor, of the value of the moneys indorsed on the writ, and levied the same thereout. Plea, that he did not seize or take in execution any goods of A., and levy thereout the moneys so indorsed. The affirmative of the issue is not proved by shewing that A.'s goods were taken in pursuance of a warrant granted by the sheriff upon the plaintiff's writ, such goods being insufficient to satisfy a *fi. fa.* delivered to the sheriff before the plaintiff's writ. *Heenan v. Evans*, 3 M. & G. 398; 4 Scott, N. R. 2; 1 D., N. S. 204.

In an action for a false return of nulla bona to a *fi. fa.*, if the plaintiff shews the debtor to be possessed of certain goods, it is no defence for the sheriff to shew a prior execution to an amount of greater value, if to that execution the sheriff also returned nulla bona; nor if the sheriff has the proceeds of the goods in his hands. *Towne v. Crocker*, 2 C. & P. 355.

If a plaintiff declares for a false return of nulla bona against the goods of R. and S., and alleges that although R. and S. had goods, &c., within his bailiwick, yet the sheriff did not levy, &c.; this allegation is sustained, though the plaintiff does not prove that R. and S. had any goods, for it is severable, that both or either of them had goods. *Jones v. Clayton*, 4 M. & S. 349.

— **That Goods were Seized.**—Where the sheriff returns nulla bona, it is sufficient *prima facie* evidence for the plaintiff, to prove that the sheriff seized the goods. *Stubbs v. Lainsan*, 2 Gale, 122; 1 M. & W. 728; 5 D. P. C. 162.

— **As to Property of Goods Seized.**—A sheriff returned to a *fi. fa.* against W., that before the delivery thereof to him another *fi. fa.* against W. was delivered to him, and that by virtue thereof he seized the goods of W. In an action against the sheriff for a false return:—Held, first, that the sheriff was not estopped by his return from shewing that the goods seized under the first writ were not the goods of W. *Remmett v. Lawrence*, 15 Q. B. 1004; 20 L. J., Q. B. 25; 14 Jur. 1067.

Held, secondly, by Erle, J., that though the judgment on which the first writ issued was fraudulent, the sheriff seized the goods of W. under the first writ, and not under the plaintiff's writ. *Id.*

In an action against a sheriff for a false return of nulla bona to a *fi. fa.*, in which the question is, whether the goods of the debtor had passed to his assignees under his bankruptcy, the defendant need not put in the deposition of the petitioning creditor, to shew what the petitioning creditor's debt was; nor is the defendant limited to the debt only which is stated in the deposition of the petitioning creditor. *Birt v. Stephenson*, 8 C. & P. 741.

— **To Impeach the Judgment.**—The sheriff cannot go into circumstantial evidence to impeach the judgment on the ground of a collateral fraud. *Tyler v. Leeds (Duke)*, 2 Stark. 218. See *Harrod v. Benton*, 8 B. & C. 217.

— **Plea that Goods are Covered by Prior Writs—Evidence to shew that such Writs are Fraudulent.**—Where the sheriff (who was not indemnified) proved that the goods of the debtor

were absorbed by a prior execution:—Held, that the plaintiff might give evidence to shew that the prior execution was concocted in fraud; it appearing that the sheriff had paid over the money, in defiance of notice to retain the proceeds in his hands until the first execution was set aside; and, consequently, that the sheriff was liable for his misconduct in lending himself to the other party. *Warmoll v. Young*, 8 D. & R. 442; 5 B. & C. 660.

In an action against a sheriff for making a false return of nulla bona, to which the defence is, that, at the time of receiving the plaintiff's writ, the sheriff had in his hands other writs of execution, to an amount sufficient to cover the whole of the defendant's property, the plaintiff may give evidence to shew that those other judgments and executions were fraudulent and void against creditors, without proving that the sheriff was party to the fraud. *Imray v. Magnay*, 2 D., N. S. 531; 11 M. & W. 267; 12 L. J., Ex. 188; 7 Jur. 240.

1. Action for Wrongful or Negligent Execution.

(Compare cases ante, d., col. 1127.)

When it Lies—Taking Goods not the Property of the Execution Debtor.—Trespass lies against a sheriff for taking the goods of A. instead of the goods of B. by his bailiff, upon the sheriff's warrant upon a *fi. fa.* *Saunderson v. Baker*, 3 Wils. 309; 2 W. Bl. 832; *S. P., Ackworth v. Kempe*, 1 Dougl. 40. And see *Smith v. Milles*, 1 T. R. 480.

Trespass is maintainable against a sheriff for seizing under a *fi. fa.* goods of A. mortgaged to B., though in A.'s possession. *Watson v. Macquire*, 5 C. B. 836.

The plaintiffs, brewers in Dublin, supplied a customer in Wales with porter in casks, on the terms that the empty casks were to be returned to Dublin, at his expense and risk, within six months from the date of the contract, or paid for at invoice price, at the option of the shippers:—Held, that as soon as the casks were empty, the vendee of the porter was a mere bailee of the casks during pleasure, and that the vendors had such an immediate right of possession as entitled them to maintain trover against a sheriff who wrongfully took them in execution. *Manders v. Williams*, 4 Ex. 339; 18 L. J., Ex. 437.

A. being indebted to B. by a bill of sale, which was found to have been bona fide executed, conveyed to him all his stock in trade, household furniture, &c., absolutely. The bill of sale (which was under seal) contained a covenant by A. to pay the debt on demand; and a proviso for redemption on payment of the debt and interest on demand; and a further proviso that the assignor should continue in possession until default. The goods having been subsequently, and before demand made by B., seized by the sheriff under a *fi. fa.*, upon a judgment entered up against A. on a warrant of attorney:—Held, that B. had not such a right of immediate possession as to entitle him to maintain trover against the sheriff. *Bradley v. Copley*, 1 C. B. 685; 14 L. J., C. P. 222; 9 Jur. 599.

After verdict, but before judgment, W., a plaintiff in ejectment, on the 11th of July, assigned a field of potatoes, with the crop growing on it, which he held under a lease, the subject-matter

of the action, to his attorney, as a security for money advanced by the attorney, and for the amount due for costs incurred in the action. A sheriff's officer, on the 17th of July, seized the crop of potatoes under a *fi. fa.* against W. On the same day, but afterwards, possession was delivered by another sheriff's officer of the field, under a *habere facias possessionem*, to W., who immediately transferred the possession to an agent attending for the attorney. On the 30th of July, the first sheriff's officer sold the potatoes, by auction, as a separate lot, after notice given him of the plaintiff's title, to J., who, after taking an assignment of the lease from the sheriff, entered and took the potatoes:—Held, that the assignment to the attorney was not void by reason of the statute against maintenance and champerty, or as being against public policy, since it was not an absolute sale of the subject-matter of the ejectment, but only a security for past advances; and that an action, *quare clausum fregit*, lay by the attorney against the sheriff and his officers, as his title related back to the time when it accrued. *Anderson v. Radcliffe*, El., Bl. & El. 806; 29 L. J., Q. B. 128; 6 Jur., N. S. 578—Ex. Ch.

An action against the sheriff, for selling the reversionary interest of the plaintiff in goods in the possession of an execution debtor, cannot be supported unless actual damage has been sustained. *Tanner v. Algood*, 4 H. & N. 438; 28 L. J., Ex. 362.

A count alleged that the plaintiff was the owner of goods which had been let to hire to T. for a term, and that the defendant sold the goods and dispersed them so as to prevent them being followed or found, whereby the plaintiff was injured in her reversionary estate. A plea, that the defendant seized, and took and sold the goods not in market overt, but as sheriff under a *fi. fa.* against T. and that the plaintiff had not sustained and would not sustain any damage by reason of the premises:—Held, that as the damages sustained by the plaintiff were the foundation of the action, the plea was an answer to the action. *Ib.*

The mere sale by a sheriff (not in market overt), under a *fi. fa.*, of a chattel let to an execution debtor without notice of the owner's interest in it, is not a conversion or a ground of action against the sheriff, but an absolute sale, and delivery of the chattel under the sale, to a purchaser; and a user by the purchaser, causing damage to the chattel, constitutes a cause of action. *Lancashire Waggon Company v. Fitzhugh*, 6 H. & N. 502; 30 L. J., Ex. 231; 3 L. T. 703.

— **Action against Sheriff for Injunction pending Interpleader—Costs.**—Under a writ of *fi. fa.* against a son, the sheriff seized goods of his father, in whose house the son lived. The son had, in fact, no goods there, except some wearing apparel. The writ was indorsed with a statement that the son lived at a certain address, which was, in fact, the father's house, though the indorsement did not state this. The father gave verbal notice to the bailiff that he claimed the goods, and the next day the sheriff issued an interpleader summons. Meanwhile the father had commenced an action against the sheriff alone, claiming an injunction to restrain him from remaining in possession, and Hall, V.-C., without requiring notice to be given to the execution creditor, granted the injunction. The

sheriff appealed, and meanwhile the execution creditor, on the hearing of the interpleader summons, had admitted that the goods seized were the father's. No misconduct on the part of the sheriff was proved:—Held, that the action was premature; that the father ought to have waited to see the result of the interpleader proceedings; and that he must bear his own costs of the motion for the injunction in both courts. *Hilliard v. Hanson*, 21 Ch. D. 69; 47 L. T. 342; 31 W. R. 151—C. A.

Held, also, that the vice-chancellor ought not to have granted the injunction without hearing the execution creditor, who should have been made a party to the action, or at any rate served with notice of it. *Ib.*

Seizing more Goods than Necessary.—A declaration stated that writs of *fi. fa.* against the plaintiff's goods had been directed to the sheriff; he seized goods of much greater value than was sufficient to pay the sums of money, interest, poundage and expenses indorsed on the writs, although he knew that the money arising from the sale of the goods would be sufficient to satisfy the sums of money, interest and expenses so indorsed and directed to be levied; that he sold more goods than were necessary to pay the sums of money indorsed, and levied thereout a greater sum than was sufficient to pay all the sums of money indorsed; and that he sold the goods for a less sum than the same were really worth, and for which he could and might and ought to have sold them:—Held, that the declaration was good. *Gawler v. Chaplin*, 2 Ex. 503; 18 L. J., Ex. 42.

Where he sells more than sufficient to satisfy the debt and costs, he is liable in trover for the excess. *Batchelor v. Vyse*, 4 M. & Scott, 552. Overruling *S. C.*, 1 M. & Rob. 331.

Continuing in Possession beyond Time allowed by Law.—If a sheriff continues in possession after the return day of the writ, that irregularity makes him a trespasser ab initio, but will not support the allegation of a new trespass committed by him after the acts which he justifies under the execution. *Aitkenhead v. Blades*, 5 Taunt. 198; 1 Marsh. 17.

A sheriff who has entered under a *fi. fa.*, and continues on the premises in possession of the goods for more than a reasonable time, is liable in trespass for so continuing beyond the time allowed by law. *Ash v. Dawnay*, 8 Ex. 237; 22 L. J., Ex. 59.

Where, after seizure and sale by auction of chattels real, under a *fi. fa.*, the sheriff remained in possession an unreasonable time for the further execution of the writ:—Held, that the execution debtor might maintain trespass against him. *Playfair v. Musgrove*, 14 M. & W. 239; 3 D. & L. 72; 15 L. J., Ex. 26; 9 Jur. 733.

Executing Warrant after Payment of Debt.—In an action against a sheriff and S., his bailiff, for breaking into the plaintiff's house and taking his goods there, it appeared that L., the clerk and head officer of J., entered the plaintiff's house and seized his goods under a warrant from the sheriff. The plaintiff paid the amount to L. at J.'s office, and L. withdrew the man in possession, and sent notice to the execution creditor in J.'s name that the money was levied. In the course of the same day J. died, and the exe-

cution creditor, upon application at the office, did not obtain the money. The sheriff then issued the warrant to S., who seized the plaintiff's goods, and remained in possession several days. The jury did not agree as to whether L. paid the money to J. before his death, but they found that L. executed the warrant by the direction of J., and that the money was received by L. in pursuance of an authority from J. The judge directed the jury that they might find that the money had been paid to the sheriff. The jury found for the plaintiff, damages 400*l.*:—Held, first, that there was sufficient evidence of a payment to J. after an execution de facto under the prior warrant; and that no irregularity in the execution could be taken advantage of by the sheriff, or those acting under the sheriff, so as to enable them to set up the validity of the second warrant; and therefore there was no misdirection. *Gregory v. Cotterell*, 1 El. & Bl. 350; 22 L. J., Q. B. 217; 17 Jur. 525.

Held, secondly, that the damages, though not excessive as against the sheriff, were excessive as against S. *Id.*

Not Seizing—Ignorance of Sheriff as to Existence of Goods.—A sheriff is not liable for not seizing goods of the presence of which in his bailiwick he has no notice, though he uses all due diligence. *Yourrell v. Proby*, 2 Ir. R., C. L. 460.

Amount of Diligence to be exercised by Sheriff.—A sheriff, who has exercised reasonable diligence in the execution of a writ, is not liable to an action because he did not use extraordinary exertion or provide against an unexpected and unforeseen contingency. *Hodgson v. Lynch*, 5 Ir. R., C. L. 353.

Immunity from Actions of Trespass on executing Process or Orders of the Court.—B. brought an action for assault and false imprisonment against the sheriff and the attorneys. They pleaded a justification under a judge's order made under the Debtors Act, 1869, ordering the plaintiff as judgment debtor to pay a certain sum of money within two months, and in default of payment to be imprisoned, which order was, after default made, delivered by the attorneys for the judgment creditors to be executed by the sheriff. The plaintiff demurred on the ground that the order was not warranted by the Debtors Act:—Held, that the question of the validity of the order was not arguable, for the order having been made by the judge under the statute, no action of trespass lay against the sheriff or anyone lawfully acting in aid of the sheriff for acts done in pursuance of the order. *Brown v. Watson*, 23 L. T. 745.

So long as a judgment exists, it protects those who seize the property under an execution founded on it; and if the judgment and execution are set aside, no action can be maintained against the sheriff for anything he did under such judgment, while it remained in existence. *Ives v. Lucas*, 1 C. & P. 7.

A sheriff justifying in trespass, under a fi. fa. need not shew its return; the distinction being in this respect, between a justification under mesne process, and under process in execution; at least, where in the latter case no ulterior process is necessary to complete the justification. *Cheasley v. Barnes*, 10 East, 73.

A plea, justifying a trespass under a fi. fa.,

must shew that the outer door was open, and if that allegation is not proved, the justification fails. *Brunswick (Duke) v. Slowman*, 8 C. B. 317; 18 L. J., C. P. 299.

Damages Recoverable.—A. succeeded B. in the occupation of a house, and, on taking possession, agreed with B. for the lease at 80*l.*, and to take the furniture and fixtures at a valuation, as between an outgoing and incoming tenant. The goods were accordingly valued at 109*l.* 15*s.* 10*d.*, and the amount paid by A., and an assignment executed. The plaintiff afterwards commissioned the auctioneer, who had valued the goods, to sell them; and, before he could do so, the sheriff entered and seized them under an execution against B.; and (the same auctioneer being employed by the sheriff) the goods were sold and produced only 73*l.*, the plaintiff himself being a purchaser to the amount of 20*l.* In an action of trespass by A. against the sheriff:—Held, that the jury was justified in giving damages for the full amount of the valuation. *Lockley v. Pye*, 8 M. & W. 133; 9 F. P. C. 744.

If a sheriff wrongfully seizes goods which are afterwards taken from him by another wrongdoer, the owner of the goods may, in an action against the sheriff, recover as special damages the amount necessarily paid to the other wrongdoer, in order to get back the goods. *Keene v. Dilke*, 4 Ex. 388; 18 L. J., Ex. 440.

In an action against a sheriff for negligence in executing a fi. fa., the plaintiff cannot recover more than nominal damages, unless he proves actual damage. *Bales v. Wingfield*, 4 Q. B. 580, n.; 2 N. & M. 831.

An action cannot be maintained against a sheriff for negligence in not levying under a fi. fa. without shewing actual pecuniary damage; and although *prima facie* the measure of damage is the value of the goods which might have been and were not levied, yet it is for the jury to say, looking at the probabilities of the case, whether or not, if the execution had been levied, the creditor would have derived any benefit from it, by reason of the other creditors of the execution debtor being in a position to make him a bankrupt. *Hobson v. Thelluson*, 2 L. R., Q. B. 642; 36 L. J., Q. B. 302; 16 L. T. 837; 15 W. R. 1037; 8 B. & S. 476.

Action by Sheriff against Execution Creditor for Money paid to him under Mistake.—A creditor having issued execution against H., on the 25th April, lodged a fi. fa. against his goods with the sheriff. Prior to the seizure of the goods, which took place on the 27th April, the creditor had notice of an act of bankruptcy committed by H. On the 11th May the sheriff executed an assignment of the goods of H. to the creditor, for 256*l.*, by an instrument which expressed that the creditor had paid that sum, and the sheriff then made a return of fieri fecit. A fiat in bankruptcy having issued against H., in August, his assignees sued the sheriff, and recovered from him the value of the goods with costs. The sheriff thereupon brought an action to recover the 256*l.* from the creditor:—Held, first, that, as between themselves, the sheriff and the creditor were in the same situation as if the sheriff had sold to the creditor and had received the money, the evidence shewing that the money was treated as paid over to the creditor. *Standish v. Ross*, 3 Ex. 527; 19 L. J., Ex. 185.

Held, secondly, that if the money was not the sheriff's money, still he was entitled to recover the money, which he ought to have received as soon as he had been compelled to pay for the goods seized by the real owner. *Ib.*

Held, thirdly, that the sheriff was not estopped in another action, by his return of *feri feci*, from saying, that the then title of the debtor was defeated by matter subsequent. *Ib.*

Held, fourthly, that the money having been paid by the sheriff necessarily in ignorance of the facts, and without any misconduct, he was not prevented from recovering it by the fact, that the creditor had in the meantime paid the money to him, and therefore could not be placed in the same situation. *Ib.*

A *fi. fa.* issued against the goods of A.; the goods were seized by the bailiff. The execution creditor authorized the bailiff to quit possession, the debtor consenting that he might return at any time and sell the goods. The bailiff accordingly gave up possession, and at the end of some months returned, and notice of sale was given. Before the sale another *fi. fa.* issued at the suit of a second creditor. To that writ the sheriff returned *nulla bona*. The second creditor brought an action for a false return, and recovered the value of the debtor's goods against the sheriff. The sheriff, having previously paid the value of such goods to the first creditor under the first *fi. fa.*, brought an action against him to recover from him that money:—Held, that he was entitled to recover the same, unless it was shewn by the debtor, that, at the time when the sheriff made the payment, he was acquainted with the misconduct of his officer, and that, as between the sheriff and the execution creditor, the act of the bailiff was not to be considered an act of the sheriff, so as to fix the latter with the knowledge of the misconduct of his officer. *Crowder v. Long*, 8 B. & C. 598.

— **How far Execution Creditor renders himself Liable by Ratification of Trespass.**]—Where goods are wrongfully seized by a sheriff under a valid writ, the execution creditor does not, by a subsequent ratification only, become liable in trespass for the original seizure. *Wilson v. Tummon*, 6 Scott, N. R. 894; 1 D. & L. 513; 6 M. & G. 236; 12 L. J., C. P. 307.

Pleadings—Sufficiency of.]—Action against a bailiff for breaking and entering the plaintiff's dwelling-house, and there remaining until he paid the bailiff a sum of money; plea, that he entered under a *fi. fa.*, and warrant thereon, directing him to levy; replication, that, before the writ and warrant were fully executed, he exacted more than the sum he was entitled to levy:—Held, that the replication alleged no facts constituting him a trespasser *ab initio*, and was therefore bad. *Sherland v. Govett*, 8 D. & R. 257; 5 B. & C. 485.

A count averred that there were goods of the debtor within the sheriff's bailiwick, of which he had notice, and might have levied the moneys. Breach, that he would not levy or cause to be made the moneys. Proof, that the sheriff seized goods of the debtor and sold them, but that the sale was improperly conducted, so that he did not make so much as ought to have been made; and the plaintiff received less than he otherwise would have done, and not enough to satisfy the debt:—Held, that this evidence supported the

breach, and that it was not necessary that the plaintiff, being the execution creditor, should declare more specially. *Mullett v. Challis*, 16 Q. B. 239; 20 L. J., Q. B. 161; 15 Jur. 243.

— **Effect of.**]—In an action for breaking and entering the plaintiff's ship, and seizing and converting his goods, the defendants justified under a *fi. fa.* sued out on a judgment obtained against the consignor of the goods. The plaintiff replied *de injuriâ suâ propriâ absque residuâ causâ*, and new assigned, that the defendants entered the ship and took the goods for other purposes than those mentioned in the plea:—Held, that on these pleadings it was competent for the plaintiff to shew at the trial, in maintenance of his action, that the acts of the defendants were not really done under or in execution of the writ, but for another purpose and under another claim; and that the writ and proceedings under it were a mere colour and contrivance to get possession of the goods. *Lucas v. Nockells*, 3 M. & Scott, 627; 10 Bing. 157; 2 Y. & J. 304. In Dom. Proc., 1 C. & F. 438.

In an action for breaking and entering the plaintiff's house and taking his goods, the defendants pleaded, as to the house, that the plaintiff was not possessed; and as to the goods, that they were not his property. The defendants also pleaded, as to the breaking and entering, other pleas justifying under a *fi. fa.* and warrant of execution against the goods of B., which warrant was duly delivered to one of the defendants, a bailiff, to be executed, and that goods of B., liable to be taken under the execution, were in the house. On the trial, the plaintiff proved that he was in possession of the house and goods which had been conveyed to him by B., and that the house was entered and the goods taken by defendants, as under the process of execution against B. The case for the defendants was, that the conveyance was fraudulent. The judge, in summing up, told the jury, that on the pleadings it was admitted that the goods were *bonâ fide* taken in execution; on which point, therefore, he did not ask their opinion; and that the main question was, whether or not the property was in the plaintiff, the burden of proving which fact lay on him:—Held, a misdirection; for—1. The replication *de injuriâ suâ absque residuâ causâ* admitted the issuing of the writ and warrant, and the delivery of the warrant to the bailiff, but not that the seizure was under the warrant. 2. The fact that the seizure was under the warrant was traversable. 3. That fact not being admitted on the record, and no evidence of it having gone to the jury, the defendants were in the situation of wrongdoers, against whom possession alone was a sufficient title. 4. That the plaintiff, having proved possession, might recover in respect of the goods as well as the house, though he had, by his pleading, claimed property in the goods. *Carnaby v. Welby*, 8 A. & E. 872; 1 P. & D. 98.

Where a declaration alleged that the sheriff took in execution goods of the judgment debtor of the value indorsed on the writ, and levied the same thereout, to which he pleaded that he did not levy:—Held, that he might under that plea shew that the plaintiff's judgment was obtained by fraud, and that the defendant had paid over the proceeds of the levy to another execution creditor, although the writ of the latter was subsequent in date to that of the plaintiff. *Shat-*

tock v. Carden, 6 Ex. 725; 2 L., M. & P. 466; 21 L. J., Ex. 200.

To trover by assignees for goods the defendant pleaded that the bankrupt being indebted to him before the bankruptcy, he had sued him, and had recovered judgment against him, and issued execution thereon; and that the sheriff had seized the goods under a fi. fa., and had sold them under the writ, which was the conversion complained of:—Held, that the plea amounted to not guilty. *Young v. Cooper*, 6 Ex. 259; 20 L. J., Ex. 136.

Evidence as to.]—A., a sheriff's officer, to whom a fi. fa. was directed, offered for a pecuniary consideration to delay its execution for a few days. B., who exercised the office of bailiff to the sheriff, in partnership with A., afterwards illegally executed the writ, by breaking open an outer door; and A. subsequently withdrew his men from possession on payment of the amount indorsed on the writ, and of a bonus to himself:—Held, sufficient to warrant the jury in finding A. to be a co-trespasser, as having authorized the unlawful act of his partner B. *Brunswick (Duke) v. Slowman*, 8 C. B. 317; 18 L. J., C. P. 299.

In such a case the damages are peculiarly in the discretion of the jury; and they may include the sum paid for the withdrawal of the execution. *Id.*

Of Execution Debtor.]—A. sued out a fi. fa. against the goods of B., and the sheriff executed a bill of sale of certain goods to A. After this, B. remained in possession of the goods, and the sheriff again took them under another execution against B.:—Held, that in an action brought by A. against the sheriff for taking these goods, the declarations of B. were evidence for the sheriff, to shew that A.'s execution was merely colourable. *Willies v. Farley*, 3 C. & P. 395.

Of Execution Creditor.]—If an execution creditor has indemnified the sheriff, what he says is evidence in an action against the sheriff, for taking the plaintiff's goods under an execution against a third person. *Proctor v. Lainsan*, 7 C. & P. 629.

Of Illegal Entry.]—In an action against a sheriff for illegally entering the plaintiff's premises for the purpose of executing a fi. fa., the declaration stated that the defendant on the 6th March, 1853, broke and entered the premises of the plaintiff, and continued and remained therein a long space of time, to wit, eight days:—Held, that evidence was admissible of an entry on the day first named, and also on a subsequent day, although the defendant had, after the first entry, left the premises without intending to return. *Percival v. Stamp*, 9 Ex. 167; 2 C. L. R. 232; 23 L. J., Ex. 25.

As to Person against whom Writ is Issued—Father and Son having same Name.]—If father and son bear the same name, and a fi. fa. issues against the son, but without the addition of "the younger," primâ facie the father is intended. *Jarman v. Hooper*, 7 Scott, N. R. 663; 1 D. & L. 769; 6 M. & G. 827; 13 L. J., C. P. 63; 8 Jur. 127.

This is merely a primâ facie intendment, and, therefore, if a sheriff under such a writ

takes the father's goods, and, to an action of trespass by the father, pleads that the fi. fa. was issued against him, the primâ facie intendment may be rebutted, and the sheriff made liable, by shewing that the judgment was obtained and the writ issued against the son. *Id.*

J. Right to Contribution or Indemnity.

Of Auctioneer against Sheriff.]—Where the owner of goods recovered in trespass against a sheriff, the auctioneer, and others who had taken and sold the goods under a fi. fa., and levied the whole damages on the auctioneer alone, who was only employed by the sheriff's officer:—Held, that the auctioneer had no right of action for contribution against any of his co-defendants, and that there was no implied promise of indemnity on the part of the sheriff. *Farebrother v. Ansley*, 1 Camp. 343.

Of Sheriff against Execution Creditor.]—H. delivered a fi. fa. to a sheriff to be executed against the goods and chattels of D., and pointed out some cattle on the lands of D. as being the property of D., when in reality they were not; and, upon this representation, the sheriff took them in execution. The real owner sued the sheriff and recovered, and the sheriff then sued H. for his damages and costs incurred through the misrepresentation:—Held, that he was entitled to recover them against H. *Humphrys v. Pratt*, 2 Dow & Clark, 288; 5 Bligh, N. S. 154.

(The ground of the decision was, that a sheriff is a public officer, and as such is liable to an action if he refuses to execute the writ—per Tenterden, C. J., Clark's Index, 306.)

A bailiff, having seized goods under a fi. fa. against B., was authorized by A., the creditor, to quit possession, B. consenting that he might return and sell. The bailiff quitted possession, and afterwards returned and sold, and the sheriff paid the proceeds to A. Before the sale, C. issued a fi. fa. against B., to which the sheriff returned nulla bona. C. recovered the value of the goods from the sheriff in an action for a false return:—Held, that A. was liable to the sheriff for the damages and costs recovered by C., unless he could shew that the sheriff was cognizant of the misconduct, or that the action was brought for the benefit of the bailiff. *Crowder v. Long*, 3 M. & R. 17; 8 B. & C. 598.

4. ON WRIT OF VENDITIONI EXPNAS.

What is.]—The legal and proper mode of compelling a sale by the sheriff is by a writ of venditioni expnas. *Cameron v. Reynolds*, Cowp. 406.

A venditioni expnas is a branch of the writ of fi. fa., not a distinct process. *Hughes v. Rees*, 7 D. P. C. 56; 4 M. & W. 468; 1 H. & H. 347.

Liability of Sheriff for not Selling.]—Where the sheriff in Michaelmas term returned to a fi. fa. "goods in hand for want of buyers, value unknown," and no further proceedings were taken by the plaintiff until the Trinity term following, but in the interim the goods were seized under an extent: the court would not compel the sheriff to make good the loss to the plaintiff, and quashed a distringas which had been issued for

that purpose, although it appeared that the sheriff had lain by so long at the request and with concurrence of the sheriff's officer. *Rutson v. Hatfield*, 3 B. & A. 204.

The court refused to grant an attachment against a sheriff for not selling goods under a venditioni exponas, where he had returned he could not sell for want of buyers. *Anon.*, 2 Chit. 390.

And when he had returned that part of the goods levied remained in his hands for want of purchasers. *Leander v. Dancers*, 1 B. & P. 359.

Where several writs of fi. fa. at the suit of different persons against the same defendant, were successively delivered to the sheriff, to the last of which he returned that he had seized goods, which remained in his hands for want of buyers, but stated nothing about the previous writs; the court afterwards relieved the sheriff from an attachment for not returning the venditioni exponas, on his paying over the balance remaining in his hands after satisfying the former writs. *Reg. v. Hertfordshire (Sheriff)*, 9 D. P. C. 916.

— **Return to Fi. fa. of "No Buyers"—Goods Sold by Auctioneer without the Knowledge of Sheriff—Liability of Sheriff.**—A sheriff returned to a fi. fa. the seizure, and that the goods remained in his hands for want of buyers, he being at the time unaware that the goods had been sold by the auctioneer (the plaintiff's brother) by private contract; and the day after this return the plaintiff issued a venditioni exponas. In an action by him against the sheriff for a false return:—Held, that under the circumstances under which the writ was issued, the judge was right in refusing to direct the jury to find some damages for the plaintiff in respect of issuing this writ. *Lery v. Hale*, 29 L. J., C. P. 127; 6 Jur., N. S. 702; 1 L. T. 132; 8 W. R. 125.

A sheriff returned to a venditioni exponas accounting for the disposal of the proceeds of the sale, by stating an application of a part to payment of rent due to the landlord of the premises in which the seizure took place, and the retention of the remainder for charges to which he was entitled, with the exception of a sum charged for possession-money. But the premises where the seizure occurred consisted of two tenements, held of different landlords; and besides the sum accounted for by the sheriff as for rent paid to one of the landlords, there was owing for rent to the other a sum exceeding the value of the proceeds. In an action by an execution creditor against the sheriff for a false return:—Held, that the sheriff might shew that the second rent was due. *Id.*

Return to.—A sheriff having returned a levy under a fi. fa. cannot return to the venditioni that he has sold the goods but detains the money for another party, under a prior writ of execution. *Ruce v. Tapp*, 9 Price, 317.

If, to a venditioni exponas for goods already taken in execution with a clause of fi. fa. for the residue, the sheriff returns that he has made of the goods 20*l.*, but omits, "by mistake," to return nulla bona to the fi. fa., the court will allow the sheriff to amend the return, and will set aside an attachment issued against him for not making the return. *Re v. Monmouth (Sheriff)*, 1 Marsh. 344.

5. DELAYING EXECUTION OF WRIT.

When Action Maintainable for.—If a sheriff unnecessarily delays putting a writ of execution in force, an action lies against him at the suit of the execution creditor, though no actual pecuniary damage has arisen from the default. *Clifton v. Hooper*, 6 Q. B. 468; 14 L. J., Q. B. 1; 8 Jur. 958.

The measure of damages for such default is not necessarily the whole debt, but such a sum as the jury thinks equivalent to the real loss. *Id.*

If there is no actual loss, still, in the case of final process, the plaintiff must have nominal damages. *Id.*

It is sufficient in such action if the jury finds that the sheriff could have executed the process, and omitted doing so; it need not be expressly found that he ought to have executed. *Id.*

An action is maintainable against a sheriff for wilfully, and without any reasonable or probable cause, delaying to sell the goods of the plaintiff which he has seized under a levam facias. *Carville v. Parkins*, 3 Stark. 163.

The lessor of the plaintiff in ejectment, having recovered judgment against the casual ejector, obtained a habere facias possessionem, and delivered the warrant to the sheriff's officer to be executed. The sheriff having received notice that the landlord intended to apply to set aside the proceedings for irregularity, his officer did not execute the writ; and the proceedings were afterwards set aside by a judge's order, but not for irregularity, the landlord being let in to plead on payment of costs. The sheriff had not been ruled to return the writ. The lessor of the plaintiff incurred expense before the judgment was set aside in endeavouring to get the writ executed, which expense the master refused to allow on taxation:—Held, that he was entitled to recover this expense in an action against the sheriff for delaying to execute the writ. *Mason v. Paynter*, 1 Q. B. 974; 1 G. & D. 381; 6 Jur. 214.

A sheriff is not justified in delaying the execution of a ca. sa. or a fi. fa., for the purpose of enabling the judgment debtor to carry on his business (even though the sheriff bona fide believes that by so doing he may the better enable the debtor to raise the money), and his doing so renders him liable to an attachment. *Terrell v. Fisher*, 10 W. R. 796. See also cases ante, col. 1129.

V. TURNING OVER WRITS AND RULING SHERIFF TO RETURN WRITS.

Sending Warrant by Letter—Not received by Sheriff.—Where the plaintiff's attorney obtained from the sheriff's deputy in London a warrant, which he sent to an officer in the country by the post, but did not pay the postage, and the officer having in consequence refused to take in the letter, it was returned to the dead letter office:—Held, that under these circumstances the sheriff could not be called on to return the writ. *Hart v. Weatherley*, 4 D. P. C. 171.

Return to Fi. fa. where a Ca. sa. has been subsequently Issued.—A plaintiff sued out a fi. fa. into Bedfordshire, and lodged it in the office of

the deputy under-sheriff of London. On the receipt of it, the under-sheriff wrote to say the defendant had no effects; the plaintiff thereupon immediately sued out a ca. sa., and lodged it at the same office. Before the return of the fi. fa., finding that the defendant had effects, the plaintiff's attorney wrote to the under-sheriff not to execute the ca. sa.:—Held, that the sheriff was bound to return the fi. fa. *Smith v. Johnson*, 2 C., M. & R. 350; 1 Gale, 357; 5 Tyr. 981; 4 D. P. C. 208.

Return to Fi. fa. previous to issue of Ca. sa.]

—Where the execution of a fi. fa. is intrusted to a special bailiff appointed by the judgment creditor, who seizes goods which, upon a claim being made by a third party, he afterwards relinquishes, the proper course for the judgment creditor to take, if he wishes to issue a ca. sa. (without pledging himself to shew the validity of the claim made), is to request the sheriff to return the fi. fa., such request to be accompanied by a statement of the object for which such a return is required, and by an offer to indemnify. *Hurdin v. Holden or Holder*, 2 M. & G. 914; 3 Scott, N. R. 293. See *Bradley v. Carr*, 3 Scott, N. R. 523; 3 M. & G. 221.

False Return—Scire fieri Inquiry—Costs of.]

—In an action against executors, the plaintiff, having obtained a verdict, sued out a fi. fa. against the goods of the testator, to which the sheriff returned nulla bona. A scire fieri inquiry then issued, to which the sheriff also returned nulla bona. This return was set aside, on the ground that there was evidence of a devastavit, and a new scire fieri inquiry issued. The executors then paid to the sheriff the debt and costs in the original action, and he returned that he had levied them out of the goods of the testator:—Held, that the sheriff should be made a party to a rule, to compel payment to the plaintiff of the costs of the two inquiries. *Palmer v. Waller*, 5 D. P. C. 315; 2 Gale, 103; 1 M. & W. 683.

Sheriff Delaying Return.]—On the 3rd August the sheriff levied. On the 4th September he was ruled to return the writ in eight days. On the day after the expiration of this rule the defendant died. The writ was not returned until the 1st November. The court set aside, on payment of costs, an attachment against the sheriff, it not appearing that the plaintiff could have sustained injury by the officer's neglect. *Reg. v. Essex (Sheriff)*, 8 Scott, 363; 6 Bing. N. C. 150; 8 D. P. C. 5.

Mandates.]—Where a ca. sa. without a non omittas clause has been directed to the sheriff, and he has issued his mandate to the bailiff of a liberty in which the defendant resides, and after obtaining time to return the writ, he has returned capi corpus in due time, the bailiff cannot be compelled to return the mandate, although he has also obtained time to return it. *Jackson v. Taylor*, 5 D. P. C. 140; 2 H. & W. 135. See *Jackson v. Hill*, 2 P. & D. 455; 10 A. & E. 477.

An instrument, in form a sheriff's warrant to levy execution, was addressed by the sheriff to S. and Job Doe. S. was deputy bailiff of a liberty, and having, on consultation with the chief bailiff's agent, acted on this warrant as if a mandate to the bailiff of the liberty:—Held,

that the chief bailiff was bound to make a return, and could not insist that no mandate had been delivered to him. *Platel v. Dowse*, 4 Bing. N. C. 204; 5 Scott, 549; 1 Arn. 38.

A mandate was issued by the sheriff of York, directing the bailiff of a liberty within that county to take the defendant on a ca. sa. The bailiff took the defendant and carried him to the county gaol, which was out of the liberty. The defendant was afterwards discharged under the Insolvent Debtors Act, and the plaintiff appointed assignee of his estate:—Held, that the plaintiff was thereby estopped from ruling the bailiff to return the mandate. *Hepworth v. Sanderson* 1 M. & Scott, 64; 8 Bing. 19.

After Compromise between the Parties.]—The fact of a compromise between the parties, or of a claim for rent by the landlord, does not relieve the sheriff from the necessity of making a return. *Balson v. Meggat*, 3 D. P. C. 557.

Where a ca. sa. has been sued out, and the parties subsequently compromise, the court will not compel the sheriff to return the writ, although he has been ruled to do so by the plaintiff's attorney, without whose consent the compromise has been effected. *Hedges v. Jordan*, 5 D. P. C. 6.

Failure to Return after Rule—Costs.]—Where a sheriff had failed to make any return to a writ of fi. fa., notwithstanding an order of course directing him to make his return forthwith, he was, upon an application ex parte against him for an order nisi, directed, upon the authority of *Evans v. Davies* (7 Beav. 81), to pay both the costs of the order nisi and of the previous order of course. *Heiron's Estate, In re, Hall v. Ley*, 12 Ch. D. 795; 48 L. J., Ch. 688; 27 W. R. 750.

Who Entitled to Rule—Defendant.]—It is irregular that a defendant should, without the plaintiff's authority, rule the sheriff to return a ca. sa., which has not been executed, but such proceeding is not, in itself, a contempt of process of the court. *Daniels v. Gompertz*, 3 Q. B. 322; 2 G. & D. 751.

The court will not assent to an application on the part of the defendant against a sheriff to return a ca. sa. issued against him, unless he shews some special grounds for the application. *Williams v. Webb*, 2 D., N. S. 904; 5 Scott, N. R. 901; 7 Jur. 155.

Where the sheriff seizes goods, and keeps possession at the defendant's desire, to enable him to pay the debt and costs without sale; the defendant, after such payment, may rule the sheriff to return the writ. *Edmunds v. Watson*, 2 Marsh. 330; 7 Taunt. 5.

The defendant as well as the plaintiff may rule the sheriff to return the writ. *France v. Clarkson*, 2 D. P. C. 532.

Where a defendant, against whom a fi. fa. had issued, became a bankrupt after the seizure, and his assignees made an arrangement with the sheriff as to the disposal of the goods:—Held, that the sheriff could not be ruled to return the writ on behalf of the bankrupt. *Gilbert v. Whalley*, 2 C., M. & R. 722.

Where a fi. fa. has been executed, it is competent to the defendant, without shewing special grounds, to call upon the sheriff to return it. *Richardson v. Trundle*, 8 C. B., N. S. 474; 29 L. J., C. P. 310; 7 Jur., N. S. 28; 2 L. T. 568.

Effect of Ruling.]—The act of ruling the sheriff to return a *fi. fa.* does not estop the plaintiff from shewing that the writ was not a good writ; neither does the filing it of record affirm the existence of a void writ. *Jones v. Williams*, 8 M. & W. 349; 9 D. P. C. 302.

Enlarging Time for Return.]—Where a defendant had been arrested on a *ca. sa.*, but was too ill to be removed from his house, without danger to his life, the court enlarged the time for returning the writ, but would not afford the sheriff any relief against the extra costs of keeping up the caption. *Jones v. Robinson*, 11 M. & W. 768; 2 D., N. S. 1044; 12 L. J., Ex. 415; 7 Jur. 657.

Change of Sheriff.]—The same sheriff, by whom any writ directed and delivered to him is executed while in office, ought to make his return to the same, and hand such writ and return over to the new sheriff who comes into office before the return-day; and such new sheriff will return the writ with the old sheriff's return thereon; and if the old sheriff, after arresting the defendant, suffers him to escape and goes out of office before the return-day, he alone is answerable for the escape. *Rex v. Middlesex (Sheriff)*, 4 East, 604; 1 Smith, 286.

Liability of former Sheriff.]—A sheriff is bound, subsequently to the abolition of his office by act of parliament, to account for all writs previously executed by him. *Warner v. Powell*, 2 D., N. S. 531; 12 L. J., Ex. 23.

A *fi. fa.* was put into the sheriff's hands on the 14th December, 1833, returnable on the 30th. The sheriff went out of office on the 14th February following. A rule to return the writ was taken out in June following, which was served in the same month on the under-sheriff of the new sheriff; but it was not served on the under-sheriff of the old sheriff till November following:—Held, that an attachment afterwards obtained against the old sheriff for not returning the writ was irregular, and the court set it aside. *Yaroth, Yuroth, or Yrath v. Hopkins*, 2 C., M. & R. 250; 3 D. P. C. 711; 1 Gale, 141; 5 Tyr. 794.

When not requested to return Writ within Six Months of Expiration of Office.]—A sheriff is not liable to an attachment for not returning a writ, if not called upon by a rule of court within six months after the expiration of his office, notwithstanding that he was requested by the party to return it before the six months expired. *Rex v. Jones*, 2 T. R. 1.

A sheriff is not liable to be called upon to return process unless within six lunar months after the expiration of his office, and the day on which he goes out of office is to be reckoned as part of the six months. *Rex v. Adderley*, 2 Dougl. 463.

A sheriff having been ruled to return a writ more than six months after the expiration of his office, the London agent of his under-sheriff obtained an order for a week's further time to return the writ:—Held, that obtaining the rule after six months was merely an irregularity, and that such irregularity was waived by obtaining the order for further time to return the writ. *Walker v. Davis*, 3 H. & N. 374; 27 L. J., Ex. 387.

Liability of New Sheriff.]—A sheriff is not liable to an attachment for not returning a writ which has not been transferred to him by his predecessor in office, notwithstanding the 3 & 4 Will. 4, c. 99, s. 7. *Thomas v. Newman*, 2 D., N. S. 33.

The new sheriff is not answerable for the escape of a debtor taken in execution, and removed to London by habeas corpus in the time of his predecessor, and not delivered over to him by indenture under 20 Geo. 2, c. 37, s. 1. *Davidson v. Seymour*, M. & M. 34.

VI. ATTACHMENT OF SHERIFF.

1. LIABILITY OF.

Grounds for.]—The court will grant an attachment against a sheriff for returning an escape of an execution debtor, notwithstanding 5 & 6 Vict. c. 98, s. 31. *Reg. v. Leicestershire (Sheriff)*, *In re, Arden v. Bingham*, 1 L., M. & P. 414; 11 C. B. 637; 19 L. J., C. P. 320; 14 Jur. 1026.

Where a sheriff's officer was, as he alleged, in possession of goods under a *fi. fa.* issued out of the Court of Common Pleas, and an officer of the Palace Court levied and took away the goods, under process of that court, using no violence, the court refused to grant an attachment against the officer of the Palace Court, there being reason to believe that the possession of the sheriff's officer was a matter in dispute. *White v. Chapple*, 4 C. B. 428; 16 L. J., C. P. 233; 11 Jur. 543.

An interpleader order directed the sheriff to sell goods seized under a *fi. fa.* Before the sale, the judgment debtor became bankrupt, and the goods were claimed by a messenger of the Court of Bankruptcy, and the sheriff gave up possession to the messenger. The court refused an attachment against the sheriff for contempt of court in not selling the goods. *Collins v. Cliff*, 11 W. R. 786.

A demand of costs, which, by the rule, are payable to a high-sheriff, made under the authority of a power of attorney executed by the under-sheriff, after the high-sheriff has gone out of office, is sufficient to support an attachment. *Reg. v. Matvey*, 6 D. P. C. 515.

If a sheriff's officer is guilty of extortion, the party complaining may call upon the sheriff to shew cause why he should not refund the excess, and upon the officer to shew cause why an attachment should not issue against him under the same rule. *Blake v. Newborn*, 2 B. C. Rep. 263; 5 D. & L. 601; 17 L. J., Q. B. 216; 12 Jur. 882.

Non-Return—Subsequent Directions by Creditor—Waiver of Right to Attachment.]—A plaintiff does not waive his right to an attachment against a sheriff for not duly returning a *fi. fa.*, by directing him, after the expiration of the rule to return the writ, to proceed with the execution, which had been suspended by an adverse claim. *Hovitt v. Rickaby or Rickby*, 9 M. & W. 52; 1 D., N. S. 389.

Application for—When made.]—An attachment against a sheriff may be moved for at the rising of the court on the last day of term (where a rule to return the writ expires on that day), after the period for closing the office has passed, if the motion is made on an affidavit stating that no return was made at the closing of the

office, *Reg. v. Shropshire (Sheriff)*, 9 Jur. 12.

— **For not returning a Writ of Fi. fa.—How made.**—An application, or notice, under Ord. XLIV. r. 2, to attach the sheriff for not returning a writ of fi. fa., should be for an order nisi. *Fowler v. Ashford*, 45 L. T. 46.

An attachment against the sheriff for not returning a writ of fi. fa. is not, as formerly, obtained as of course, but since Ord. XLIV. r. 2, can only be applied for "on notice." *Jupp v. Cooper*, 5 C. P. D. 26; 28 W. R. 324.

Rule for.—A rule for an attachment against a sheriff, for the non-payment of money directed to be paid by an order made a rule of court, and of the costs of the rule, is only in the first instance a rule to shew cause. *Hutfield v. Haverfield* or *Hatherfield*, 6 M. & G. 724; 1 D. & L. 809; 7 Scott, N. R. 430.

In discussing a rule nisi for an attachment against a sheriff for an insufficient return to a writ, the court will not take cognizance of the return, unless an office copy is produced, verified by affidavit by a party as to his belief that no sufficient return has been made. *Wilton v. Chambers*, 5 N. & M. 431; 1 H. & W. 582.

— **Service of.**—To ground an attachment absolute against a sheriff for not returning a writ, the service must be personal upon the under-sheriff at his public office. *Anon.*, Loftt, 301.

Or upon his deputy appointed under 3 & 4 Will. 4, c. 42, s. 20. *Woodland v. Fuller*, 2 P. & D. 570; 11 A. & E. 859.

Issue of Writ.—An attachment for not returning a ca. sa. against a sheriff must issue to elisors in the first instance, if the coroner is the defendant in the action. *Reg. v. Glamorgan-shire (Sheriff)*, 1 D., N. S. 308.

Delivery of an attachment against a sheriff to the managing clerk of the London agent of the coroner, is not sufficient to allow of an attachment issuing against the coroner for not returning the attachment. *Fecer v. Aubin*, 1 H. & W. 332.

— **When Irregular.**—An attachment against a late sheriff for disobedience to a judge's order, calling on the "sheriff" to return a writ, instead of "the late" sheriff, is irregular, and may be set aside, though the sheriff has not applied to set aside the order. *Reg. v. Cornwall (Sheriff)*, 7 D. P. C. 600.

Affidavits—How entitled.—An attachment may be said to be granted when the rule for the attachment is obtained, and after that, the proceedings are on the crown side of the court, and affidavits in the matter are properly entitled "*Reg. v. The Sheriff of Middlesex.*" *Reg. v. Middlesex (Sheriff)*, 2 M. & W. 107.

Affidavits in support of a rule for an attachment against a sheriff or his officer for extortion in the execution of a fi. fa. are properly entitled "in the cause." *Masters v. Lowther*, 11 C. B. 948; 21 L. J., C. P. 130; 16 Jur. 347.

Non-Enforcement of Writ — Discharge of Sheriff.—The plaintiff, at the desire of the sheriff's officer, forbore to enforce an attachment

in the first instance, and ten days afterwards applied to the sheriff for the debt and costs:—Held, that the sheriff was not discharged by the indulgence given to the officer. *Reg. v. London (Sheriffs)*, 1 Taunt. 489.

Where a plaintiff, on account of negotiations between himself and the defendant, delays for a term his proceedings against the sheriff, the latter is discharged by the plaintiff's laches. *Reg. v. Middlesex (Sheriff)*, 1 D. P. C. 53.

VII. FEES AND POUNDAGE.

1. RIGHT OF SHERIFF TO.

a. By Statute and at Common Law.

At Common Law.—At common law, a sheriff has no right to take fees for the execution of process. *Dew v. Parsons*, 2 B. & A. 562; 1 Chit. 295.

By Statute.—28 Eliz. c. 4, does not bind the crown. *Lake v. Turner*, 4 Bur. 1981.

The 50 Geo. 3, c. 50, s. 10, abolishes all fees payable to sheriffs on liberat^e granted to a debtor upon his discharge from prison. *Reg. v. Middlesex (Justices)*, 3 B. & Ad. 101.

The sheriff's right to poundage under 29 Eliz. c. 4, is not affected by 7 Will. 4 & 1 Vict. c. 55, or the table of fees made under it. *Davies v. Griffiths*, 4 M. & W. 377; 7 D. P. C. 204.

b. Fi. fa.

Right to.—A sheriff is not entitled to poundage until the goods are sold. *Anon.*, Loftt, 433.

If he levies he is entitled to poundage, though the parties compromise before he sells any of the goods. *Alchin v. Wells*, 5 T. R. 470.

He has no right to poundage, where the amount of the execution is tendered to him before levy. *Colls v. Coates*, 3 P. & D. 511; 11 A. & E. 826.

He is entitled to poundage on the sum he received under the execution only, and not on the amount claimed or seized. *Reg. v. Robinson*, 2 C., M. & R. 334; 4 D. P. C. 447; 1 Gale, 209; 5 Tyr. 1095.

If a sheriff, who has seized pursuant to a writ of fi. fa. the goods of an execution debtor, is paid out before sale, he is not entitled to poundage, but he is entitled to a discharge fee for the release of the goods. *Roe v. Hammond*, 2 C. P. D. 300; 46 L. J., C. P. 791.

The goods of the defendants were seized by a sheriff under a fi. fa. issued at the suit of the plaintiff, and afterwards a similar writ in an action by I. against one of the defendants was lodged with him. The sheriff remained in possession some days afterwards, but ultimately the amount of the judgment debts was paid on behalf of the defendants, and no part of the goods seized was sold. The sheriff claimed and received payment of a discharge fee in each action, and in the action at the suit of I., poundage and a levy fee. A rule was obtained under 1 Vict. c. 55, s. 3, for a return of these fees and the poundage:—Held, that the sheriff was not entitled to poundage, which must be returned; but that he was entitled to retain the discharge fees and the levy fee. *Id.*

A sheriff, who by compulsion of a fi. fa. recovers the amount of a judgment debt, is entitled to poundage, although after seizure he is paid

out by the execution debtor without a sale of any portion of the goods seized. *Mortimore v. Cragg*, 3 C. P. D. 216; 47 L. J., C. P. 348; 38 L. T. 116; 26 W. R. 363—C. A.

A sheriff's officer went with a warrant for executing a fi. fa. to the execution debtor's shop, told the debtor the particulars of the warrant, and that unless payment was made a man must remain in possession. The debtor thereupon, although he had paid the debt to the creditor, paid the amount demanded, which included poundage and levy fees:—Held, that there was a sufficient seizure and levy to render poundage and levy fees payable. *Bisicks v. Bath Colliery Company*, 3 Ex. D. 174; 47 L. J., Ex. 408; 38 L. T. 163; 26 W. R. 215—C. A. Affirming 2 Ex. D. 459; 46 L. J., Q. B. 611; 36 L. T. 800.

A sheriff's officer went with a warrant to the defendant's premises for the purpose of levying under a fi. fa., and, without saying or doing anything more, produced the warrant and demanded the debt and costs, together with poundage and expenses of levy. The money was paid under protest:—Held, that this did not amount to a levy, so as to entitle the sheriff to poundage or the officer to fees. *Nash v. Dickenson*, 2 L. R., C. P. 252.

— **Subsequent Bankruptcy of Debtor.**—Where the goods of a trader have been taken in execution for a sum exceeding 50l., and, bankruptcy ensuing, the sheriff has been restrained from selling, the sheriff is entitled to be paid by the trustee out of the estate of the bankrupt all expenses properly incurred by him in keeping and taking possession of the goods and preparing for a sale, notwithstanding that no sale has taken place. *Craycroft, In re, Browning, Ex parte*, 8 Ch. D. 596; 47 L. J., Bk. 96; 38 L. T. 364; 26 W. R. 559.

— **Writ Set aside for Irregularity.**—He is entitled to retain his poundage though the execution is set aside for irregularity. *Bullen v. Ansley*, 6 Esp. 111.

But a sheriff is not entitled to poundage, where, after seizure and before sale, the judgment and all subsequent proceedings are set aside for irregularity. *Miles v. Harris*, 12 C. B., N. S. 550; 31 L. J., C. P. 361; 6 L. T. 649.

— **Amount that will be Allowed.**—On foot of a fieri facias marked for 30l. 8s. 11d., the sheriff, by seizure and sale of a term of years, levied 530l., and with the assent of the attorney of the execution debtor retained poundage fees on the whole sum levied:—Held, that he was entitled to poundage fees on the sum marked on the writ, and no more. *Byrne v. Hutchison*, 9 Ir. R., C. L. 75.

It is extortion for a bailiff on a fi. fa. to charge costs of a second man in possession, and of a valuation of the goods. *Hallinwell v. Heywood*, 10 W. R. 780.

By 7 Will. 4 & 1 Vict. c. 55, a sheriff may, under a fi. fa., levy the amount of his fees, authorized by that statute, though not indorsed on the writ, and he need not specify separately the amount of such fees in his return. *Curtis v. Mayne*, 2 D., N. S. 37.

A sheriff, on making a levy under an execution, is only entitled to his poundage under 29 Eliz. c. 4, and to such fees as are allowed by the table of fees framed under 7 Will. 4 & 1 Vict.

c. 35; and, although he is put to extra trouble and expense in making the levy, he cannot claim more. *Slater v. Haines or Hayes*, 7 M. & W. 413; 9 D. P. C. 221.

Where, after the goods of a debtor have been seized, the debt and costs are paid by him, the sheriff's officer is not entitled to charge the fees allowed, "for search for detainers," or "for supersedeas, discharge to any writ or process, or for the release of any goods taken in execution." *Masters v. Louthier*, 11 C. B. 948; 21 L. J., C. P. 130; 16 Jur. 374.

A sheriff is entitled to poundage on the whole amount realized by the sale, although a portion of it is paid over to the landlord for rent; but the sheriff is not entitled to extra expense caused by an adverse claim to the goods. *Davies v. Edmonds*, 1 D. & L. 395; 12 M. & W. 31; 13 L. J., Ex. 1.

Where the sheriff retained, out of the proceeds of a sale under an execution, the expenses occasioned by keeping possession of the goods under an injunction out of chancery:—Held, that this was an indirect taking of more than the poundage allowed by 29 Eliz. c. 4, and that he thereby incurred the penalty of that statute. *Buckle v. Bewes*, 5 D. & R. 495; 3 B. & C. 688.

— **Amount Recovered—Deductions that may be made by Sheriff.**—A sheriff, previously to a sale by public auction of the goods of a debtor, having issued three advertisements of such sale, claimed to deduct from the proceeds of the sale 15s. as the costs of these advertisements, under 24 & 25 Vict. c. 134, ss. 73, 74:—Held, that he was not entitled to do so, and that his charges were regulated by 7 Will. 4 & 1 Vict. c. 55. *Braithwaite v. Marriott*, 1 H. & C. 591; 32 L. J., Ex. 24; 9 Jur., N. S. 26; 11 W. R. 93.

A sheriff who has seized goods under a fi. fa., and disposes of them by bill of sale, has no right to deduct from the amount received the charge of appraising the goods previously to the sale. *Phillips v. Canterbury (Viscount)*, 11 M. & W. 619; 1 D. & L. 283; 12 L. J., Ex. 401.

— **Cost of Keep of Animals.**—The masters will, in a proper case, allow for the keep of animals, by virtue of the general authority given to them by the table of fees, to allow a sum "for any duty not therein provided for." *Gaskell v. Sefton*, 14 M. & W. 802; 3 D. & L. 267; 15 L. J., Ex. 107.

— **What can be Set off against Claim of Sheriff.**—In an action by a sheriff against an execution creditor for poundage, the defendant claimed to set off the expenses which he had paid, of a bill of sale and appraisement, preparatory to an assignment in trust for the creditors of the party whose goods were seized:—Held, that, without further evidence on the defendant's part, the payment in respect of such a sale could not be considered as made for the sheriff, and could not be set off. *Marshall v. Hicks*, 10 Q. B. 15; 16 L. J., Q. B. 135; 11 Jur. 305.

c. Ca. sa.

— **Right to.**—A sheriff has no right to take poundage on the execution of a ca. sa. *Hayley v. Racket*, 5 M. & W. 620.

— **Amount of.**—Where a defendant, against

whom a ca. sa. issued, was confined to his bed, and too ill to be removed; the court could afford the sheriff no relief for the extra costs incurred in keeping the custody, but enlarged the time for him to make his return. *Jones v. Robinson*, 2 D., N. S. 1044; 11 M. & W. 758; 12 L. J., Ex. 415.

A sheriff's officer is entitled to charge one guinea for executing a warrant of ca. sa., and 1s. per mile for travelling expenses, but he is not entitled to charge for an assistant, nor for conducting the party arrested to gaol. *Cooper v. Hill*, 6 C. B., N. S. 703; 28 L. J., C. P. 311; 6 Jur., N. S. 99.

A ca. sa. was indorsed by mistake for a larger sum than the amount really due; and, after the debtor had been taken in execution, the mistake was corrected by a judge's order:—Held, that the sheriff's claim for poundage must be regulated accordingly, and that he was only entitled to poundage upon the debt really due. *Evans v. Manero* or *Maners*, 7 M. & W. 463; 9 D. P. C. 256.

d. Elegit.

Right to.]—A sheriff is not entitled to poundage upon an elegit, unless he has extended the land under the writ. *Carter v. Hughes*, 2 H. & N. 714; 27 L. J., Ex. 225.

Amount of.]—On the execution of an elegit, the sheriff's poundage, under 3 Geo. 1, c. 15, s. 16, and 8 Geo. 1, c. 25, s. 5, is to be calculated on the yearly value of the lands extended, and not on the sum to be levied under the writ. *Nash v. Allen*, D. & M. 16; 4 Q. B. 784; 12 L. J., Q. B. 298.

e. Crown Process.

Right to.]—The 3 Geo. 1, c. 15, which gives the sheriff poundage in cases where the debt is due to the crown, applies only to cases between party and party; but where the sheriff was put to extra trouble and expense, at the request of the prosecutor, in executing a habere facias possessionem under an extent, he is entitled to such expenses on the taxation of costs. *Capp v. Johnson*, 7 Moore, 518; *S. P., Stephens v. Rothwell*, 6 Moore, 338; 3 B. & B. 143.

No poundage is due on money seized in the crown debtor's possession, under an extent against the latter. *Rea v. Villers*, 8 Price, 587; Wightw. 95.

Nor on money paid by the sureties of a crown debtor who has been arrested on crown process, in order to obtain the release of his person. *Id.*

A sheriff has no authority, under an extent, as such sheriff, to collect debts due to the crown debtor; and if he receives such debts, he cannot make them the ground of a charge for poundage on the amount. *Id.*

A sheriff has no right to levy costs or poundage, or any incidental expenses, under an extent on a simple contract debt. *Rea v. Tidmarsh*, 5 Price, 189.

Where two extents issued against A., and an extent in aid into another county against B., for the same sums, and B. paid the whole debt, giving notice to the sheriff to retain the money till the legality of the extent in aid was tried; and afterwards A. paid part of the money to B. in consequence of an arrangement between

themselves:—Held, that the sheriff who took the inquisitions against A. was not entitled to any share of the poundage. *Rea v. Boules*, Wightw. 116.

If, on an extent issuing against the acceptors of bills for the purpose of levying a debt of the crown, the drawers, after the execution of that process, take up and pay the bills, they are not liable to pay poundage on the levy. *Rea v. Freme*, 2 Price, 58.

The sheriff is entitled to levy costs under 42 Geo. 3, c. 99, on an extent against a collector of taxes; and poundage is included in the word "charges," and may be levied. *Rea v. Collingridge*, 3 Price, 280.

— Selling under a Venditioni exponas.]—

If the sheriff sells under a venditioni exponas, he is not entitled to deduct anything, either for extra expenses or poundage, and he must make a return of the whole sum produced by the sale; when the court will order it to be paid over, deducting poundage. *Rea v. Jones*, 1 Price, 205.

Amount of.]—Where the sheriff, besides his poundage, charged 5 per cent. for an auctioneer to sell malt taken under an extent, the court disallowed the charge. *Rea v. Crackenthorp*, 2 Anst. 412.

Where two extents issue into different counties, the sheriff who completes his levy is entitled to full poundage. *Rea v. Caldwell*, 1 Anst. 279.

Though the debt is voluntarily paid to him. *Rea v. Fry*, 2 Anst. 358.

If paid before a venditioni exponas is issued to either. *Rea v. Barber*, 3 Anst. 717.

f. In other Cases.

On Jury Process.]—A sheriff has no right to charge the fees in the table authorized by the judges by virtue of 7 Will. 4 & 1 Vict. c. 55, for jury process, in special jury causes, since the alteration in the mode of summoning special juries by 15 & 16 Vict. c. 76, s. 108. *Bennett v. Thompson*, 2 Jur., N. S. 613.

A sheriff will not be allowed extra expenses of summoning special jurors, on account of their residing at a distance from each other; and the court will grant a rule absolute for the sheriff to refund the money received on this account, though he has actually expended it. *Lane v. Sewell*, 1 Chit. 175.

On Sum Levied upon an Attachment.]—The court directed the sheriff to refund his poundage which he had retained out of money levied upon an attachment for non-payment of money, there being no practice to warrant it. *Rea v. Palmer*, 2 East, 411.

The sheriff cannot be required to pay into court money levied under an attachment, but he is not entitled to his poundage on the sum levied. *Rea v. Devon (Sheriff)*, 3 D. P. C. 10.

Order as to Incidental Expenses—What included in.]—Where proceedings were stayed by a judge's order, on condition of the payment of the debt and costs on a certain day, and in default the plaintiff to be at liberty to sign final judgment and issue execution for the amount of the debt, with costs of the judgment and execution, sheriff's poundage, officers' fees, and all other incidental expenses:—Held, that the sheriff

would not be justified in levying, under the head of "incidental expenses," the costs of a rule to return the writ. *Hutchinson v. Humbert*, 8 M. & W. 638; 1 D., N. S. 78.

On Money Paid into Court in Lieu of Bail.]—Where money deposited with the sheriff in lieu of bail was paid into court by the sheriff under 43 Geo. 3, c. 46, s. 2, neither the sheriff nor the officer of the court was entitled to poundage on the money being taken out of court. *Stewart v. Bracebridge*, 2 B. & A. 770; 1 Chit. 529.

Capias utlagatum.]—Upon a capias utlagatum on mesne process, under which the sheriff seized and took an inquisition, but there had been no venditioni exponas, the sheriff was not entitled to poundage. *Graham v. Grill*, 2 M. & S. 294.

2. RECOVERY OF FEES.

a. By Sheriff.

By Action—On Promise to Pay.]—He may have an action upon a promise to pay his fees due by law; thus, in consideration that the sheriff at the defendant's request would levy an execution, he promised to pay him such fees as the statute of 29 Eliz. c. 4, allows. *Stanton v. Suliard*, Cro. Eliz. 654.

An action will not lie upon an implied promise to repay a sheriff the expenses incurred in seizing and keeping possession under a fi. fa., which was ultimately abandoned on account of the refusal of an indemnity, even after the defendant has recognized the claim by paying money on account. *Bilke v. Harelock*, 3 Camp. 374; *S. P., Lane v. Sewell*, 1 Chit. 175.

On Abortive Execution.]—Where the sheriff levied and received the money, and afterwards, the judgment and execution being set aside for irregularity, and the money ordered to be returned, paid it back with the assent of the plaintiff:—Held, that the 43 Geo. 3, c. 46, s. 5, did not take away his remedy by action, against the plaintiff for his poundage. *Raustorne v. Wilkinson*, 4 M. & S. 256.

Against Solicitor in Cause.]—A sheriff cannot recover his charges for executing a fi. fa. by action against the attorney in the cause, unless there are special circumstances from which a jury may infer an actual undertaking by the attorney to pay. *Maybery v. Mansfield*, 9 Q. B. 754; 16 L. J., Q. B. 102; 11 Jur. 60.

Ca. sa.—Against Plaintiff or Defendant.]—A sheriff may maintain an action for his fees for executing a ca. sa. against either the plaintiff or the defendant in the original action. *Bagot v. Malone*, 5 Ir. L. R. 454.

What can be Set off by Execution Creditor.]—Where an execution creditor paid the expenses of a sale by appraisement of the goods sold under a fi. fa.:—Held, that, in the absence of all proof of the circumstances under which the appraisement took place, he could not set off the amount so paid against the sheriff's demand for poundage. *Marshall v. Hicks*, 10 Q. B. 15; 16 L. J., Q. B. 135; 11 Jur. 305.

Evidence in.]—In an action by a sheriff

for his poundage, proof that he has acted as sheriff is sufficient evidence of his being so, without proof of his appointment. *Bunbury v. Matthews*, 1 C. & K. 380.

In an action for poundage, the sheriff's officer produced the warrant under which he had acted, which concluded, "given under the seal of my office." The only seal to it was a small piece of blue paper wafered to it, and stamped with a wafer-stamp. The officer stated that he did not know this to be the seal of the sheriff, or of his office; but stated that he had received the warrant from Mr. B., who had acted as the sheriff's under-sheriff, and that it was precisely similar to all the other warrants on which he had acted:—Held, sufficient proof of the seal. *Id.*

Sufficiency of Pleading.]—When, in a declaration by a sheriff for his fees for executing a ca. sa., he alleged that the defendant prosecuted a ca. sa., directing him to take A. B., to satisfy the debt of three other persons recovered by them against A. B., and that it was considered by the court that the defendant, assignee of those three persons, should have execution against A. B. for the debt aforesaid, and then averred that the sheriff executed the writ, whereby an action accrued for his fees:—Held, that the declaration was bad, it not being apparent on the face of it who was the plaintiff in the execution. *Bagot v. Malone*, 5 Ir. L. R. 454.

By Sale of Goods Seized.]—When goods have been seized under a fi. fa., and the execution creditor afterwards becomes disentitled to recover the amount of the judgment debt, the sheriff cannot, at least without instructions from the execution creditor, sell any portion of the goods seized in order to realize thereby the amount of his possession-money, fees, and expenses. *Sneary v. Abdy*, 1 Ex. D. 299; 45 L. J., Q. B. 803; 34 L. T. 801.

Goods having been seized under a fi. fa., the execution debtor under the Bankruptcy Act, 1869, s. 126, entered into a composition, to which the execution creditor assented. The sheriff afterwards, without instructions from the execution creditor, sold a portion of the goods seized under the writ in order to realize the amount of his possession-money, fees, and expenses. The execution debtor having sued in a county court the sheriff for an unlawful sale, the judge directed the jury, that in the absence of evidence to shew that the sheriff was required to proceed to the sale by the execution creditor, a cause of action accrued to the execution debtor:—Held, that the direction by the judge of the county court was correct. *Id.*

By Retaking Goods.]—If a sheriff leaves goods taken in execution with a person who parts with the possession of them, he has no right to retake them merely to secure his own poundage, in a case where the execution was fraudulent. *Goode v. Langley*, 7 B. & C. 26.

Against Assignees in Bankruptcy.]—A sheriff having seized under a fi. fa., notice was given of a prior act of bankruptcy by the debtor, and a petition was filed under which he was adjudicated bankrupt, the goods remaining unsold, and the messenger took possession of them:—Held,

that the sheriff was not entitled to a rule calling upon the assignees to pay him the expenses of preparing for a sale of the goods. *Searle v. Blaise*, 14 C. B., N. S. 856.

b. By Officers.

By Action—When Maintainable.]—Where there is an express promise, a sheriff's officer may maintain an action for fees. *Ormerod v. Foshett*, Peake's Add. Cas. 77.

—Against Solicitor of Execution Creditor.]—The solicitors of a judgment creditor, in the course of their duty as such solicitors, lodged a writ of *fi. fa.* at the office of the sheriff, with a request for execution, giving however no instructions as to the selection of any particular bailiff. The sheriff employed one of his officers to execute the writ, which the officer thereupon proceeded to do. On an action being brought by such sheriff's officer against the solicitors of the judgment creditor to recover his fees for executing the writ:—Held, that the solicitors were not liable to pay the fees; that the law, apart from a contract to pay them (express or implied), cast no such liability upon them; and that, from the mere fact that they in the ordinary course of their duty lodged the writ at the sheriff's office for execution, no such contract could be implied. *Maybery v. Mansfield* (ante, col. 1161) followed. *Brewer v. Jones* (infra) dissented from. *Royle v. Bushy*, 6 Q. B. D. 171; 50 L. J., Q. B. 196; 43 L. T. 717; 29 W. R. 315—C. A.

A sheriff's officer may maintain an action against the attorney of the plaintiff in the original action for caption fees and conduct money, on proof of an employment by the attorney, and of its being the usual course of business for the attorney to be charged with and to pay such fees. *Newton v. Chambers*, 1 D. & L. 869; 13 L. J., Q. B. 141; 8 Jur. 244.

Proof of the usage of business is admissible to establish such liability of the attorney. *Id.*

In an action by a sheriff's officer against the attorney of the plaintiff, for levy and caption fees, evidence of usage that the sheriff's officer always looks to the attorney and not to the plaintiff in the action, cannot be admitted. *Seal v. Hudson*, 4 D. & L. 760; 2 B. C. Rep. 55; 11 Jur. 610.

The attorney who engages the services of the bailiff, and not the client, is the party liable to the bailiff for the fees usually allowed on taxation for the execution of process. *Walbank v. Quarterman*, 3 C. B. 94; *S. P., Maile v. Mann*, 6 D. & L. 42; 2 Ex. 608; 17 L. J., Ex. 336.

The attorney in an action, who lodges a *fi. fa.* with a sheriff, is liable to the bailiff by whom it is executed, for the fees due to him, although no directions were given by the attorney to the sheriff as to the person by whom the writ should be executed. *Brewer v. Jones*, 10 Ex. 655; 3 C. L. R. 369; 24 L. J., Ex. 143; 1 Jur., N. S. 240.

A sheriff's officer having made an ineffectual levy upon the goods of a debtor by reason of a claim by an assignee, upon which the officer was obliged to abandon the possession, is not entitled to sue the attorney for the creditor who sent the *fi. fa.* to the sheriff for execution, for his charges. *Cole v. Terry*, 5 L. T. 347.

A sheriff's officer, employed to execute a *fi. fa.*, cannot recover his fees from the attorney at

whose instance the writ was issued if the execution becomes abortive, and does not result in any benefit to the party at whose instance it was issued. *Neuman v. Merriman*, 26 L. T. 397.

The attorney of B., who had recovered judgment against C., issued a *fi. fa.* and delivered it to the sheriff, who made out his warrant to D. to make a levy on the goods of C. D., however, levied on goods which were claimed by E., and having kept possession for eleven days, he went out of possession pursuant to an interpleader order. D. having sued the attorney for his fees:—Held, that as he had done nothing in respect of the levy that was beneficial, he was not entitled to recover them. *Id.*

By Detention.]—An officer cannot detain for fees. *Mason v. Cutterson*, 1 Raym. 4.

By Refusal to Execute Process.]—An undersheriff cannot refuse to execute process till he has his fees; if he does he may be indicted for extortion. *Hecott's case*, 1 Salk. 330.

Amount Recoverable.]—The fees appointed by 23 Hen. 6, c. 9, to be paid to sheriff's officers for an arrest and bail, are the fees allowed by law at the present day; and that statute is not repealed by 32 Geo. 2, c. 28. *Primrose v. Bradley*, 2 C. & M. 687; 4 Tyr. 370; 2 D. P. C. 662.

The constable of Dover Castle is an officer within the contemplation of the 23 Hen. 6, c. 9. *Id.*

3. REMEDY FOR EXTORTION.

By Action—When Maintainable.]—Where a sheriff claimed as of right, upon a warrant issued by him in the execution of his office, a larger fee than he was entitled to by law, and the attorney paid it in ignorance of the law:—Held, that the latter might maintain an action for the excess paid above the legal fee, or might set off the same in an action by the sheriff against him. *Dew v. Parsons*, 2 B. & A. 562; 1 Chit. 295.

Where an application was made against the deputy constable or bodar of Dover Castle, on the ground of his having taken larger fees for executing process than those allowed by 23 Hen. 6, c. 9, but only the usual fees had been allowed by the master, the court refused to interfere, but left the party to his action. *Primrose v. Bradley*, 2 C. & M. 687; 2 D. P. C. 662; 4 Tyr. 995.

An action for money had and received at the suit of a plaintiff who has sued out a *fi. fa.* lies against the sheriff who executed it, if he retains more money in his hands than he is entitled to do, the party injured not being bound to proceed by motion in banc. *Longdill v. Jones*, 1 Stark. 345.

If a sheriff's officer who arrests a defendant, demands and receives from him a larger sum than he is liable to pay, as a caption fee, and for the expense of the bail bond, the court will order it to be referred to the master, to ascertain what the officer is entitled to on that account, and order him to restore the surplus to the defendant, and to pay the costs of the application. *Watson v. Edmonds*, 4 Price, 309.

—Pleadings in.]—A declaration against a sheriff for extortion, on 7 Will. 4 & 1 Vict. c. 55, must aver that a table of fees has been prepared by the taxing officers of the court, under the

sanction of the judges, and specify in respect of what items he took more than is allowed by such table. *Usher v. Walters*, 3 G. & D. 594; 4 Q. B. 553; 12 L. J., Q. B. 246; 7 Jur. 511.

A declaration stated that a fi. fa. was delivered to the sheriff, indorsed to levy debt and costs, and that the sheriff wrongfully took 8*l.* more for the execution than he was entitled to, although he did not levy any sum of money by virtue of the execution:—Held, that the declaration was good, and that it was not requisite to negative all the facts which amount in law to a levy. *Holmes v. Sparks*, 12 C. B. 242; 21 L. J., C. P. 194; 15 Jur. 975.

A misrecital of the statute is immaterial. *Id.*

In a declaration against a sheriff for extortion in the execution of a fi. fa., it was averred that the defendant took the sum of 1*l.* 2*s.* 6*d.* more than is limited and appointed by the statute:—Held, that the averment should state how much he took, so that it might be seen by the court whether more than allowed by law was taken. *Ashby v. Harris*, 5 D. P. C. 742; 2 M. & W. 673.

— **Refusing to Deliver up Goods unless paid Extortionate Sum—Evidence.**—A sheriff seized goods in the possession of S., to satisfy a fi. fa. for 6*l.* S. had previously conveyed all his estate and effects to H. by a deed which, it was contended, was fraudulent and void against creditors; and H. gave notice to the sheriff's officer not to sell, and demanded the goods. The officer refused to deliver them up, except on payment of 9*l.* (the additional 3*l.* being claimed for expenses), which the person sent by H. to demand the goods paid under protest. The sheriff, being ruled to return the writ, returned that he had levied of the goods and chattels of the plaintiff S. the sum of 6*l.* In an action brought by S. against the sheriff to recover back the 3*l.*:—Held, that it was not necessary to prove a tender of the 6*l.* *Scarfe v. Hailifax*, 7 M. & W. 288.

— **When Treble Damages are Claimed.**—Semble, that in an action against a sheriff to recover treble damages for taking greater fees than are allowed by 29 Eliz. c. 4, on several different writs of fi. fa., it is not sufficient to allege, generally, that the defendant took —*l.*, being a larger sum, &c.; but the declaration should state what he ought to have taken, and what was the excess on each writ. *Berton v. Lawrence*, 1 L., M. & P. 668; 5 Ex. 816; 20 L. J., Ex. 46.

The 29 Eliz. c. 4, declares that the defendant "shall lose and forfeit to the party grieved his treble damages;" this means three times the full amount of damages found by the verdict. *Buckle v. Beves*, 6 D. & R. 1; 4 B. & C. 154.

If it appears by the sheriff's return that greater fees have been taken for the levy than are allowed by 29 Eliz. c. 4, the sheriff is liable for treble damages at the suit of the party grieved. *Woodgate v. Knatchbull*, 2 T. R. 148.

Under that statute the sheriff cannot take any other charge except for the poundage. *Id.*

— **Costs.**—Costs are due to the plaintiff who recovers treble damages in an action on 29 Eliz. c. 4, against the sheriff for taking more than the fee allowed by that statute on a levy under an execution against the goods. *Tyte v. Glode*,

7 T. R. 267; *S. C.*, *Deacon v. Morris*, 2 B. & A. 393.

Summarily.—A fi. fa. having been delivered to the sheriff to levy 9*l.* 10*s.*, the defendant, being ignorant of the precise amount, sent a person with a banker's bill for 55*l.* 5*s.*, and 40*l.* in country notes, to the officer to whom the warrant had been delivered. This sum was tendered to the officer; but, upon his stating the amount, the person went away, leaving the bill and notes upon the table, for the purpose of obtaining the difference. Whilst he was gone, the officer seized them under the execution, and upon the return of the person with the balance, demanded poundage. He subsequently seized some sheep for this, when it was paid under protest:—Held, that the money was not liable to seizure, and that the court would interfere summarily against the sheriff, to make him refund the sum extorted as poundage. *Brun or Bell v. Hutchinson*, 2 D. & L. 43; 13 L. J., Q. B. 244; 8 Jur. 895.

A sheriff's officer is liable to an attachment if he takes more than 6*d.* per mile for mileage on executing a fi. fa. where the distance exceeds five miles, the allowances sanctioned by the judges being only 6*d.* per mile, although in the particular county it appears that the custom has been to take 1*s.* per mile. *Gill v. Jose*, 6 El. & Bl. 718; 2 Jur., N. S. 860.

Where a sheriff takes a greater amount of fees than by the scale made under 7 Will. 4 & 1 Vict. c. 55, he is entitled to receive, and on taxation under a judge's order, by consent, the amount of his claim is reduced, the court cannot compel him to pay the cost of taxation under s. 4; that section only applying to cases where the taxation has proceeded in consequence of a complaint to the court under s. 3. *Curlewis v. Bird*, 1 D., N. S. 752; 6 Jur. 669.

A motion to return auction fees on the ground that the goods were transferred by a sheriff by bill of sale to the plaintiff, who employed the auctioneer, and that the auctioneer was employed by the latter, should be made against the sheriff, and not against the plaintiff. *Bushell v. Board*, 4 D. & L. 359; 16 L. J., Q. B. 57; 11 Jur. 268.

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1. NECESSITY OF.

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that statute did not apply, inasmuch as under 8 & 9 Vict. c. 88, ss. 13, 14, the original registration was unnecessary. *Benyon v. Cresswell*, 12 Q. B. 899; 18 L. J., Q. B. 1; 12 Jur. 1036.

It is not a fraud to cause a ship, in fact belonging to foreigners, to be registered in the names of British subjects. *Two Sicilies (King) v. Willcox*, or *Peninsular and Oriental Steam Packet Company*, 1 Sim., N. S. 334; 19 L. J., Ch. 498; 14 Jur. 751.

The name of a vessel was the *City of Bruxelles*, and was so described in a mortgage. It was registered by the owner and by the mortgagee as the *City of Brussels*:—Held, that the misdescription did not vitiate or affect the validity of the registration. *Bell v. Bank of London*, 3 H. & N. 790; 28 L. J., Ex. 116.

The registry is conclusive as to the ship being in a fit state to be registered under 8 & 9 Vict. c. 89, although there may be evidence to shew that the ship was not completed at the time of registry. *Coombes v. Mansfield*, 3 Drew. 193; 24 L. J., Ch. 513.

A foreign-built ship, British owned, was not, under the old statutes, required to be registered. *Long v. Duff*, 2 B. & P. 209.

It is now necessary, since 17 & 18 Vict. c. 104, s. 40.

Condemned Ships.—The purchaser of a ship, which appeared by the sentence of condemnation in the Vice-Admiralty Court abroad to have been taken and condemned for being engaged in the slave trade, was not entitled to register such ship at the Custom-house under 26 Geo. 3, c. 60, as the owner of a ship taken and condemned as lawful prize, although he produced a certificate from the judge of the court abroad, certifying that she was condemned as lawful prize. *Re v. London (Collector of Customs)*, 1 M. & S. 262.

Private Registry—Suspension of Class—Right to notify Non-registry.—Upon a motion for an injunction by subscribers to an association called the Underwriters' Registry, who had had a ship registered by the association in the highest class, to restrain the committee of the association from inserting, after a subsequent survey allowed by the plaintiffs, in their published registry of ships the words, "class suspended" against the plaintiffs' ship:—Held, that the committee was justified in notifying to their subscribers and the public their honest opinion as to the merits of the ship, and had a right to suspend the class until the plaintiffs should have altered the ship according to their requirements. *Clorer v. Royden*, 17 L. R., Eq. 190; 43 L. J., Ch. 665; 29 L. T. 639; 22 W. R. 254.

Of Sales and Mortgage.—*See cases post*, XI. SALE, TRANSFER AND MORTGAGE.

As Proof of Nationality.—*See post*, col. 1176.

2. CERTIFICATE OF.

Lien on.—A master has no lien on the certificate of registry, either for his wages or for moneys disbursed by him for the use of the ship; nor have shipbrokers any lien on the certificate of registry for advances made by them to the owner for the use of the ship. *Gibson v. Ingo*, 6 Harc. 112.

Semble, that a master, whether co-owner or not, can have no lien upon a certificate of registry or ship's papers in case of wrongful dismissal by the managing owners. *The St. Olaf, infra.*

The 8 & 9 Vict. c. 89, s. 30, did not prevent a lien being created on a certificate of an original registry, deposited by an unregistered owner to secure advances for the use of the ship. *Clarke v. Batters*, 1 Kay & J. 242.

Where a factor for the owner of a ship at an English port had, by a request to the master, obtained a certificate of registry for the alleged purpose of paying the tonnage duties at the Custom-house:—Held, that he had no lien on the certificate so obtained for the general balance due to him in respect of the ship. *Burn v. Brown*, 2 Stark. 272.

The former Ship Registry Acts did not prevent a person from having a lien on papers, deposited with him, of a ship which he was commissioned to sell. *Mestaer v. Atkins*, 5 Taunt. 381; 1 Marsh. 76.

So where a certificate of a ship's register had been deposited as a security for advances for the use of the ship:—Held, that this gave the holder a sufficient lien to defeat an action of trover for the certificate. *Bowen v. Fox*, 10 B. & C. 41; 5 M. & R. 5; 4 C. & P. 452.

Order for Delivery up by Master.—The Admiralty Division of the High Court has power, upon the application of the owners of a ship, to order a master who has been dismissed from their employment to deliver up the certificate of registry and other papers and property belonging to the ship, where he refuses to surrender them. *The St. Olaf*, 35 L. T. 428.

Refusal of Master to Deliver.—After a ship had arrived at the port of discharge, but before it was discharged, the owner demanded the certificate of registry from the master, intending to dismiss him, but not communicating that intention to him:—Held, that the master was not liable to be convicted, under 17 & 18 Vict. c. 104, s. 50, for refusing to deliver up the certificate without a reasonable cause. *Huckle v. Henzell*, 8 El. & Bl. 828; 27 L. J., M. C. 110; 4 Jur., N. S. 306.

A conviction under 6 Geo. 4, c. 110, s. 27, and 3 & 4 Will. 4, c. 55, s. 27, for detaining the certificate of a ship's registry, was bad, unless it stated the purpose for which the certificate was wanted, and the person who demanded it was the "proper" officer. *Rex v. Walsh*, 3 N. & M. 632; 1 A. & E. 481.

Pledge of.—A pledge, by the master and sole owner of a ship, of the certificate of registry, though for a good and sufficient consideration, is illegal and void; and therefore an action will lie by the master and sole owner against the person detaining it, after a demand made upon him to return it for the purposes of navigation. *Wiley v. Crauford*, 1 B. & S. 253; 30 L. J., Q. B. 319; 7 Jur., N. S. 943; 4 L. T. 653; 9 W. R. 741—Ex. Ch.

Sale under Order of Court—Conversion of.—An owner of a ship consigned her to persons abroad, who hypothecated her, and directed the captain to sign a bottomry bond: on her arrival in London, he, by their direction, delivered the register to the agent of the consignees, who gave

it to their solicitor to institute proceedings in the Court of Admiralty on the bottomry bond; the ship was sold by order of that court, and the register decreed to be given up to the purchaser. The owner became bankrupt, and his assignees brought an action for the register:—Held, that they could not recover, as they might have appeared in the Admiralty Court and prevented the sale of the vessel, and as the delivery of the register to the purchaser, under the decree of that court, was not a conversion. *Hassack v. Masson*, 4 Moore, 361.

II. NATIONAL CHARACTER AND COLOURS.

Evidence.—A ship's register, containing a statement of British ownership, even if, by 17 & 18 Vict. c. 104, s. 107, made *prima facie* proof of such ownership, may be outweighed by circumstantial evidence to the contrary. *The Princess Charlotte*, B. & L. 75.

The nationality of a British ship is sufficiently proved by statements of the master and crew that she is a British ship sailing under a British flag, without proof of her having been registered; and even if it appears that she has not been registered, a prisoner charged with committing a crime on board might be convicted. *Reg. v. Soberg*, 1 L. R., C. C. 264; 39 L. J., M. C. 133; 22 L. T. 523; 18 W. R. 935; 11 Cox, C. C. 520.

To prove that a ship is a British ship, it is not necessary to produce the registry or a copy thereof; it is sufficient to shew orally that she belongs to British owners, and carries the British flag. *Reg. v. Allen*, 10 Cox, C. C. 405.

A register is not a document required by the law of nations as expressive of a ship's national character. *Le Cheminant v. Pearson*, 4 Taunt. 367.

A native of the Ionian Islands purchased an American ship, and, upon a declaration that he was a British subject, obtained from the British consul at Cuba a provisional registry of the ship as British. The ship was afterwards seized and condemned for a breach of the Slave Trade Acts. Upon an objection taken on appeal to the jurisdiction of the court below, on the ground of the national character of the owner of the ship and cargo:—Held, that the registry, flag, and pass of a ship carry with them the presumption that they are true and correct, and that the owner was estopped from proving that he was not a British subject, and consequently the registry of the ship was void. *The Laura*, 3 Moore, P. C. C., N. S. 181; 13 L. T. 133; 13 W. R. 369.

Illegal Colours.—A British merchant ship was boarded, having an ensign with the St. George's cross, &c., colours other than those legally worn by merchantmen, contrary to 17 & 18 Vict. c. 104, s. 105. A warrant of arrest was directed to issue against the master, upon affidavit of the facts in lieu of declarations in support of them. *Reg. v. Ewen*, 2 Jur., N. S. 454.

Concealment of British Character—Forfeiture.]

—When a British subject, the owner of a British ship, by a representation to the collector of customs at the port of registry that his ship has been sold to foreigners, procures the closing of the registry, and sails her under a foreign certificate of registry and under a foreign flag,

whilst he continues to own her and to receive the profits of working her, doing such acts with the intent to conceal her British character from the officers of customs, and prevent her seizure as unseaworthy, he commits an offence against the provisions of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 103, by reason of which his ship is liable to, and will be condemned to forfeiture to her Majesty. *The Sceptre*, 35 L. T. 429.

— **Forfeiture, as against bonâ fide Purchaser for Value.**—The forfeiture incurred under s. 103 of the Merchant Shipping Act, 1854, accrues at the time of the illegal and fraudulent act, and a subsequent seizure relates back to the date of the act constituting the cause of forfeiture; and this is so even as against a bonâ fide purchaser without notice of such act. *The Annandale*, 2 Adm. D. 179; 46 L. J., Adm. 68; 36 L. T. 259. Affirmed, 2 Adm. D. 218; 47 L. J., Adm. 3; 37 L. T. 139, 364; 26 W. R. 38—C. A.

A ship, with the consent of the British owners, sailed under the Belgian flag in 1874. In 1876 the defendant bought her bonâ fide, and for valuable consideration. The ship was claimed as forfeited to the crown under s. 103 of the Merchant Shipping Act, 1854. The defendant pleaded his bonâ fide purchase for valuable consideration:—Held, that such sale was of no effect as against the prior forfeiture, which accrued at the time of the act of sailing under foreign colours. *Id.*

III. PASSENGER SHIPS.

1. *Qualifications.*
2. *Contracts of Conveyance*, 1178.
3. *Emigrant Ships*, 1183.

1. QUALIFICATIONS.

Number of Passengers—Tonnage.—Under 18 & 19 Vict. c. 119, ss. 3 and 71, a sailing ship is not a passenger ship because she carries more than thirty passengers, or more than one statute adult passenger to every fifty tons, if that number or proportion is not made up without reckoning cabin passengers; and where persons are cabin passengers in all respects except that of having received contract tickets in the form in Schedule K, which in its terms applies to passenger ships only, such persons, for the purpose of estimating the number or proportion, are to be reckoned as cabin passengers; and unless, without including them, the number or proportion is not made up, the ship is not a passenger ship. *Ellis v. Pearce*, El., Bl. & El. 431; 27 L. J., M. C. 257; 4 Jur., N. S. 1275.

Certificate from Board of Trade—Absence of, a Defence to Action on Policy.—In an action on a marine policy, a plea that the ship was sent by the owners with passengers on board on the voyage on which she was lost, without the owners having done what was necessary to enable them to receive, and without having received, a passengers' certificate from the Board of Trade, all which the owner well knew, is good. *Dudgeon v. Pembroke*, 9 L. R., Q. B. 581; 43 L. J., Q. B. 220; 31 L. T. 31; 22 W. R. 914. And see *S. C.* in *H. L.*, *post*, col. 1185.

2. CONTRACTS OF CONVEYANCE.

Time of Sailing.—Where a vessel, bound for the East Indies, is advertised to sail by a certain day, and does not, the shipowner will be entitled to recover half the passage-money of a person who refused to go, after having engaged a passage, unless either the time was of the essence of the contract, or the delay in sailing was unreasonable. *Yates v. Duff*, 5 C. & P. 369.

C., who resided in Ireland, having applied to certain emigration agents in London, respecting a passage for himself and family on board their ships to Australia, received in answer a letter in which they agreed to convey him and his family for a sum of money. This letter was written on the fly-sheet of a printed circular, headed "Emigration to Australia," and which stated that ships "will be dispatched on the appointed days (wind and weather permitting), for which written guarantees will be given." Then followed a list of ships, amongst which the Asiatic was named as to sail from London on the 15th of August, and from Plymouth on the 25th. In another part of the circular it was stated, "Passengers from Ireland can readily join at Plymouth. A deposit of one-half the passage-money to be paid at the time the berths are engaged, the balance to be paid prior to granting the embarkation order." C. engaged a berth on board the Asiatic, and paid the agents a deposit, but no written guarantee was given. The Asiatic did not arrive at Plymouth until the 3rd of September, although not prevented by wind or weather. The berth was kept vacant from London to Plymouth:—Held, that the statement in the circular was not a mere representation, but a warranty that the Asiatic would sail on the days appointed, and that as she did not, C. was justified in taking a passage on board another vessel, and was entitled to recover from the emigration agents the amount of the deposit, and the expenses he had been put to by the delay at Plymouth. *Cranston v. Marshall*, 5 Ex. 395; 19 L. J., Ex. 340.

Accommodation and Provisions.—There was in an agreement under seal for the use of cabins and accommodations for passengers in a ship, a covenant on the part of the captain, to permit and suffer the hirer to stow away the baggage of the passengers in a part of the hold:—Held, that this, in connexion with a covenant to promote the comfort and convenience of the hirer and his passengers, fairly imported that there should be some demand or request made by the hirer for the clearing the space agreed on. *Corbin v. Leader*, 6 C. & P. 32.

A covenant to keep up a supply of the necessary and usual quantity of water, for the use of the passengers, is not broken by a deficiency for a short time, occasioned by the unusual length of the voyage. *Id.*

In an action against a captain for not furnishing good and fresh provisions to a passenger on a voyage, the jury must be satisfied that there was a real grievance sustained by the plaintiff, and there is no right of action unless he has really been a sufferer; for it is not because a man does not get such a good dinner as he might have had that he is therefore to have a right of action against the captain who does not provide all that he ought. *Young v. Fawson*, 8 C. & P. 55.

Rights of Passengers inter se as to Berths.—

In an action, in which one of the questions between the parties was, whether the defendant was justified in expelling the plaintiff from a berth in a steamer, it was proved that the plaintiff placed his coat upon the berth while it was vacant, afterwards applied at the office of the company to which the steamer belonged for the purpose of engaging the berth, and caused the company's clerk or agent, then in attendance at the office, to enter the plaintiff's name on the way-bill opposite the number of the berth, but that the defendant, having also applied for the same berth, another agent or clerk of the company altered the way-bill by inserting the defendant's name opposite the berth, and allotting another one to the plaintiff, and that the plaintiff, upon returning to the berth in dispute, after the steamer had started, found the defendant's servant at the door, who refused to allow him to enter. The plaintiff afterwards entered the berth and was removed by the defendant. Evidence was also given that, according to the usage on board the steamer, the rights of the passengers inter se to berths during the voyage were to be determined by the way-bill as finally settled and sent on board, and that disputes during the voyage with respect to passengers' accommodation should be decided by the captain or steward:—Held, first, that the plaintiff was not entitled to a direction that he was in possession of the berth in dispute. *Dysart v. Montgomery*, 8 Ir. R., Eq. 245.

Held, secondly, that the way-bill, as finally settled and delivered to the officers on board, determined the right to the berth as between the plaintiff and the defendant. *Id.*

Held, thirdly, that the jury having found that the way-bill, as finally settled for the purpose of the voyage, allotted the berth to the defendant, and that he was in possession at the time of the alleged assault, he was justified in removing the plaintiff, without using unnecessary violence, upon his refusal to leave the berth. *Id.*

Putting into Port during Voyage.]—The captain of a ship covenanted to promote the comfort of passengers engaged by the plaintiff; the plaintiff covenanted not to interfere with the navigation of the ship, and to defray the expense of putting into port if it should be necessary for the convenience and at the request of the plaintiff:—Held, that the captain was bound to put into port for the convenience and at the request and expense of the plaintiff, unless he could shew that putting in would be dangerous. *Corbin v. Leader*, 10 Bing. 275; 3 M. & Scott, 751; 6 C. & P. 32.

Authority of Captain over.]—A declaration on an agreement to carry the plaintiff in a ship to a particular place alleged as a breach, that the defendants, by their agent, caused him to be disembarked at an intermediate point, and by their agent, caused the disembarkation to be conducted in a scandalous, disgraceful, and improper manner, whereby, and also by contemptuous usage and insulting language addressed to the plaintiff by the agent in effecting the disembarkation, the plaintiff sustained damage:—Held, a good declaration. *Coppin v. Braithwaite*, 8 Jur. 875.

Held, secondly, that the judge rightly received evidence of the language of the captain in putting the plaintiff on shore, in which he de-

scribed him as being a pickpocket, and belonging to the swell mob. *Id.*

Held, thirdly, that the judge rightly directed the jury, that the defendants were responsible for any injury naturally resulting from the acts of the captain, when acting as their servant; and that the plaintiff was entitled to fair compensation for the injury done to him in being put on shore at the intermediate place, so far as injury arose from the act of the captain in putting him on shore. *Id.*

Conduct unbecoming a gentleman, in the strict sense of the word, will, it seems, justify a captain of a ship in excluding a passenger from the cuddy table, whom he has engaged by contract to provide for there; but it is difficult to say, in what degree want of polish would in point of law warrant such exclusion; but it is clear, that, if a passenger use threats of personal violence towards the captain, the captain may exclude him from the table, and require him to take his meals in his own private apartment. *Prendergast v. Compton*, 8 C. & P. 454.

The captain has absolute control over the passengers in all that is necessary to the safe and proper conduct of the vessel, but the exercise of such power in each instance is defined and limited by the necessity of the case. *King v. Franklin*, 1 F. & F. 360. See also *Noden v. Johnson*, 16 Q. B. 218; 20 L. J., Q. B. 95; 15 Jur. 424.

The captain has authority to exercise so much force as is necessary for the safety of the ship. *Aldworth v. Stewart*, 14 L. T. 862; 4 F. & F. 957.

To imprison a passenger in his cabin for seven days for alleged insolence to the captain personally is an excess of such power, and an action for the false imprisonment will lie. *Id.*

Passage-money—Commencement of Voyage.]

—Where an agreement was made to carry a passenger on board a ship from London to the West Indies, the passage-money to be paid in London before the commencement of the voyage; and the passenger put his baggage on board in the Thames, meaning himself to embark at Portsmouth; and the ship was lost going round to that place; the passage-money could not be recovered back. *Gillan v. Simpin*, 4 Camp. 241.

Aliter, if the agreement had been to carry the passenger from Portsmouth to the West Indies. *Id.*

—Ship's Officers—When entitled to.]—If a captain of an East Indiaman dies at the outward port, after having contracted to bring home certain passengers and laid in a certain quantity of stores for the homeward voyage; and the chief mate succeeding to the command, brings home these and other passengers, and provides further stores for their subsistence during the voyage; the captain's representatives are entitled to the passage-money of the passengers with whom he had contracted, and the mate to that of the others; the representatives being liable to him for the portion of the stores laid in by him consumed by the former class of passengers, and he being liable to the representatives for the portion of the captain's stores consumed by the latter class of passengers. *Siordet v. Brodie*, 3 Camp. 253.

—Lien for.]—The master has a lien on the luggage of a passenger for his passage-money. *Wolf v. Summers*, 2 Camp. 631.

But he has certainly no lien on the passenger himself, or the clothes which he is actually wearing, when he is about to leave the vessel. *Id.* And see cases sub tit. INNKEEPER.

— **Capture—Condemnation as Prize.**—The plaintiff contracted to carry the defendant, his family, and luggage, from Demerara to Flushing; and in the course of the voyage, within four days' sail of Flushing, the ship was captured by an English ship of war and brought into England, and the ship and cargo labelled for prize in the Court of Admiralty, and the cargo condemned, and proceedings still pending against the ship; but the defendant and his family were liberated, and their luggage in fact restored to their possession:—Held, that however the question might be as to the plaintiff's right to recover passage-money upon an implied assumpsit pro ratâ itineris, if the ship was restored, yet pending the proceedings against the ship, as prize in the Admiralty court, no such action could be maintained, for non constat but that the ship might be condemned and the freight decreed to the captors. *Mulry v. Backer*, 5 East, 316; 1 Smith, 447.

— **Mortgage of Ship.**—In an action to recover passage-money brought by mortgagee of a ship against mortgagor, which passage-money had been received, by the mortgagor, as part of the earnings of the ship, before the mortgagee took possession of the ship:—Held, that the mortgagee could not recover. *Willis v. Palmer*, 7 C. B., N. S. 340; 29 L. J., C. P. 194; 6 Jur., N. S. 732; 8 W. R. 295.

— **Insurance of.**—A policy of insurance was effected upon the passage-money of emigrants upon a voyage from Liverpool to Boston against the perils of the sea. At the end of the policy was a memorandum, "On passage-money of emigrants, subject to pay a loss pro ratâ, and subject to the clauses and conditions under ss. 47—51 of the 15 & 16 Vict. c. 44, and against these risks only:—Held, that the policy extended to any expense occasioned by the perils insured against, which were thrown upon the shipowners by any of the enumerated sections; but not to the expense of maintaining the passengers during the detention of the ship at a foreign port for the purpose of repairs, the ship afterwards completing the voyage with the passengers on board, such expense being cast upon the owners by s. 32. *Willis v. Cooke*, 5 El. & Bl. 641; 25 L. J., Q. B. 16; 1 Jur., N. S. 1164.

— **Expenses of forwarding Passengers to Destination.**—By 15 & 16 Vict. c. 44, s. 49, if any passengers of any passenger ship shall, without any neglect or default of their own, find themselves within any foreign or colonial port other than that at which they have contracted to land, and the master of the ship shall decline, or omit within six weeks thereafter, to forward or carry them on to their original destination, it shall be lawful for the governor of the colony to forward such passengers to their intended destination. By s. 50 the expenses incurred under this section shall become a debt due to the crown from the owner, charterer and master:—Held, that a policy of assurance by the owners against all liabilities, to which they might become by perils of the sea liable under these sections, covered a

liability for expenses incurred by the captain in forwarding, without the intervention of the governor, and before the lapse of six weeks, passengers who were in a colony to which they were not ultimately destined, in consequence of the loss of the ship in which they sailed. *Gibson v. Bradford*, 4 El. & Bl. 586; 24 L. J., Q. B. 159; 1 Jur., N. S. 520.

— **Liability of Owners for Loss of Luggage.**—A passenger by steamer from America paid for and received a passenger ticket from the agents of the owners, containing a condition exempting the owners from liability in case of loss or detention of the ship by accidents of navigation or perils of the sea, and from responsibility for luggage, goods, or other description of property, unless bills of lading had been signed therefor:—Held, that the latter condition not having been observed by the passenger, he could not recover for the loss of his luggage, though the loss was caused by the ship having been wrecked owing to the negligence of the captain. *Wilton v. Royal Atlantic Mail Steam Navigation Company*, 10 C. B., N. S. 463; 30 L. J., C. P. 369; 8 Jur., N. S. 232; 4 L. T. 706; 9 W. R. 748.

— **Special Contract—Notice.**—A passenger on paying his fare received a ticket from the clerk of the steam company, on the back of which was printed a notice exonerating the company from liability for loss, injury, or delay to the passenger or his luggage, however caused. There was no evidence that the passenger had been made aware of this condition before or at the time when he took the ticket. During the voyage the steamer was lost by the negligence of the servants of the company, and the passenger lost his luggage and suffered other damage and inconvenience:—Held, that, in the absence of proof that the passenger had assented to be bound by the condition indorsed on the ticket, it was no defence to an action by him to recover the loss he had sustained. *Henderson v. Stearnson*, 2 H. L. (Sc. App.) 470; 32 L. T. 709. See also *Burke v. South-Eastern Railway Company*, and cases sub tit. CARRIERS (Of Passengers).

— **Total Exemption from Liability.**—A contract, entered into between a shipowner and a passenger, contained a provision that the shipowner would not be answerable for loss of baggage "under any circumstances whatsoever:—Held, that such a stipulation covered the case of wilful default and misfeasance by the shipowner's servants. *Tuohman v. Pacific Steam Navigation Company*, 26 L. T. 704.

— **Liability for Injury and Death caused by Collision at Sea.**—The personal representatives of a deceased man cannot maintain an action under Lord Campbell's Act (9 & 10 Vict. c. 93), where the deceased, if he had survived, would not have been entitled to recover. The defendants, a steamship company, issued a passenger's ticket, which contained, amongst others, the following condition: "The company will not be responsible for any loss, damage or detention of luggage under any circumstances. . . . The company will not be responsible for the maintenance of passengers, or for their loss of time or any consequence arising therefrom. . . . nor for any delay arising out of accidents; nor for any loss or damage arising from the perils of the sea, or

from machinery, boilers or steam, or from any act, neglect or default whatsoever of the pilot, master or mariner :”—Held, that the words “loss or damage arising from the perils of the sea,” as contained in the above conditions, exempted the defendants from liability for injury or loss of life to a passenger occasioned on the voyage by the negligence of the defendants’ servants. *Haigh v. Royal Mail Steam Packet Company*, 52 L. J., Q. B. 640—C. A. Affirming 52 L. J., Q. B. 395; 48 L. T. 267; 5 Asp. M. C. 47.

Means of Access to Ship.—A. agreed to carry B. from Milford Haven to Liverpool: the mode of transit provided was that B. should come on to a hulk lying in the harbour at Milford Haven, and wait till a steamer came and took him to Liverpool. On the hulk, close to a ladder down which B. had to pass to reach the steamer, was a large hatchway, which was negligently left unguarded and improperly lighted, and B. fell through it and was injured. The hulk belonged to a third party, and A. had only acquired a right to use it for the purpose of embarking passengers on his steamer. In an action by B. against A. for the injury he sustained :—Held, that he was answerable for all injury occurring through the means of transit being improper, whether it arose from negligence of his own servants or of other parties who helped to provide the means of transit. *John v. Bacon*, 5 L. R., C. P. 437; 39 L. J., C. P. 365; 22 L. T. 477; 18 W. R. 894.

Held, also, that A. having invited B. on to the hulk, was bound to protect him from concealed dangers, and was liable for injury he sustained through the condition of the hatchway, even though it was under the care of others and not his own servants. *Ib.*

3. EMIGRANT SHIPS.

Contracts to Equip.—The defendant, being under contract with the owner to supply and fit an emigrant ship with everything comprised in the commissioners of emigrants’ schedule, to the entire satisfaction of the surveyor to such commissioners, the plaintiff contracted with the defendant to do part of such work, viz., he undertook “to fit up the between-decks of the ship for government emigrants, to provide all materials and labour, viz., all plumbers’ and joiners’ work, for 15s. per statute adult; the whole to be done to the satisfaction of the emigration commissioners.” The plaintiff erected many more berths in the vessel than she was measured to carry according to 18 & 19 Vict. c. 119, and several of the berths had to be taken down, and some of them to be rebuilt and altered, by the plaintiff, by the order of the emigration commissioners. By the like order other work, in the nature of ship’s fittings, was done by the plaintiff, such as making a ventilator, deck lights, and a school-master’s cabin :—Held, that the defendant was only liable to pay the plaintiff at the rate of 15s. per statute adult for the number of berths with which the ship was allowed by the commissioners to go to sea, and that he was not responsible for any further sum in respect of the other work done by the plaintiff under the order of the commissioners. *Dobson v. Hudson*, 1 C. B., N. S. 652; 26 L. J., C. P. 153; 3 Jur., N. S. 216.

Duties of Emigration Officer.—An emigration officer, appointed under 15 & 16 Vict. c. 44, was justified in refusing to certify that the requirements of the statute had been complied with, if he, acting bona fide, deemed that the quantity of cargo on board a passenger ship was such as to endanger the safety of the ship, although none of the articles expressly prohibited by s. 26 were on board, and although his objection was not to any specific articles on board, but solely because the ship was too deep in the water; and if an action was brought against him for refusing his certificate under such circumstances, he was, by s. 81, entitled to have the verdict entered for him. *Steel v. Schomberg*, 3 C. L. R. 302; 4 El. & Bl. 620; 24 L. J., Q. B. 87; 1 Jur., N. S. 679.

The 16th section did not apply to such a case. *Ib.*

IV. STEAMSHIPS.

Meaning of Term “Steamship.”—When a vessel by which goods are forwarded is described as a steamship, simpliciter, in the bill of lading forming the agreement between the freighter and the owner of the vessel, the contract is that the goods shall be transported in a ship whereof the primary and principal propelling power is steam, and the terms will not be satisfied by an auxiliary screw steamship making a sailing voyage with the occasional aid of her steam power. *Fraser v. Telegraph Construction and Maintenance Company*, 7 L. R., Q. B. 566; 41 L. J., Q. B. 249; 27 L. T. 373; 20 W. R. 724.

V. UNSEAWORTHY SHIPS.

Detention and Survey by Board of Trade.—In order to justify the Board of Trade in taking proceedings under the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), s. 12, it was unnecessary that either the complaint as to a vessel or the report from surveyors should state in express terms that she was unable to proceed to sea “without serious danger to human life;” it was sufficient if it appeared from the facts therein respectively mentioned that she was in that condition. *Lewis v. Gray*, 1 C. P. D. 452; 45 L. J., C. P. 720; 34 L. T. 421.

The plaintiff was the owner of a British ship named the *L.*, which was at the British port of S., and was intended to be employed in the foreign cattle trade. Certain surveyors of the Board of Trade reported in doubtful terms that owing to her unusual proportions the *L.* was an unsafe ship. The Board of Trade thereupon ordered the *L.* to be provisionally detained. A court of survey was held as to the condition of the *L.*, and the members thereof reported that the *L.* was not unsafe, and that she ought not to have been detained. The *L.* was accordingly released. The plaintiff then brought an action against the Secretary of the Board of Trade to recover compensation for the loss to him by reason of the provisional detention. At the trial it was admitted that the *L.* was a safe ship. The judge in substance directed the jury to consider whether it was reasonable in the Board of Trade to detain the *L.* for survey without a direct affirmation by their surveyors that in their opinion she was unsafe :—Held, a misdirection; for the proper question to be left to the jury was

whether the facts with regard to the L., as she lay at S., which would have been apparent to a person of ordinary skill on examining her and inquiring about her, would have given him reasonable and probable cause to suspect her safety and to detain her for survey and inquiry. *Thompson v. Farrer*, 8 Q. B. D. 372; 51 L. J., Q. B. 534; 47 L. T. 117; 4 Asp. M. C. 562—C. A.

Indictment for sending Unseaworthy Ships to Sea.—A man was tried and convicted under 34 & 35 Vict. c. 110, s. 11, for sending a ship to sea in an unseaworthy state, upon an indictment which did not aver either that he knew of her being unseaworthy, or that he had not used reasonable means to make her seaworthy:—Held, first, that the indictment need not aver that the accused knew the ship to be in an unseaworthy state. *Reg. v. Freeman*, 9 Ir. R., C. L. 527.

Held, secondly, that the indictment need not contain averments negating the use of reasonable means to make and keep the ship seaworthy. *Id.*

Claim on Insurance Policy.—If a shipowner knowingly and wilfully sends his ship to sea in an unseaworthy condition, the knowledge and wilfulness are essential elements in the consideration of his claim to recover on an insurance policy. But there is no implied warranty of seaworthiness in a time policy. *Dudgeon v. Pembroke*, 2 App. Cas. 284; 64 L. J., Ex. 409; 36 L. T. 382; 25 W. R. 499—H. L.

VI. BUILDING, REPAIRS, AND TONNAGE.

1. *Building and Repairs.*
2. *Lien of Shipwright*, 1188.
3. *Tonnage*, 1189.

1. BUILDING AND REPAIRS.

When Property Passes to Purchaser.—The defendants contracted with a company to make and supply new boilers and certain new machinery for a steamship of the company, and to alter the engines of such steamship into compound surface condensing-engines according to a specification. The engines, boilers, and connexions were, by the contract, to be completed in every way ready for sea so far as specified, and tried under steam by the engineers (the defendants) previously to being handed over to the company; the result of such trial to be to the satisfaction of the company's inspector. The price of the work was to be 5,800*l.*, and was to be paid as the work progressed, in the following manner: viz., 2,000*l.* when the boilers were plated, and 2,000*l.* when the whole of the work was ready for fixing on board, and the balance, 1,800*l.*, when the work was fully completed and tried under steam. These payments were only to be made on the certificate of the company's inspector. The old materials removed from the ship were to become the property of the defendants. The specification contained elaborate provisions as to the fitting and fixing the new boilers and machinery on board the ship, and the adaptation of the old machinery to the new. The boilers and other new machinery contracted for were completed and ready to be fixed

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on board, and one instalment of 2,000*l.* had been paid under the contract, when the ship was lost by perils of the sea. The value of the work actually done by the defendants under the contract amounted to 4,118*l.* The second instalment of 2,000*l.* was subsequently paid, at the time of which payment the company knew of the loss of the ship, but the defendants did not. The company claimed delivery of the boilers and other machinery completed under the contract, and this being refused, brought an action for the detention of the same, or to recover back the 4,000*l.* paid by them to the defendants:—Held, that the contract was an entire and indivisible contract for work to be done upon the company's ship for a certain price, from further performance of which both parties were released by the loss of the ship; that the property in the articles manufactured was not intended to pass until they were fixed on board the ship; and that consequently the company was not entitled to the boilers and machinery, nor could they recover the 4,000*l.* already paid as upon a failure of consideration. *Anglo-Egyptian Navigation Company v. Rennie*, 10 L. R., C. P. 271; 44 L. J., C. P. 130; 32 L. T. 467; 23 W. R. 626. The case was ultimately referred to arbitration. 10 L. R., C. P., 571, n.

A. contracted with B., a shipbuilder in Nova Scotia, for the building a vessel. B. was already largely indebted to A., upon a general consignment account, and A., from time to time, made considerable advances on account of the ship whilst in progress, and also supplied anchors, cables, and other stores for her. On the 20th June, 1848, B., by a bill of sale reciting that A. had made advances to B., and had agreed to make such further advances as he might require to build, launch, rig, and fully equip the vessel for sea, "for the security and repayment of all such sum or sums of money as A. had already advanced, or might thereafter advance, to aid and assist him to finish and complete the vessel, bargained, sold, assigned and transferred to A. 'a certain ship or vessel now in course and progress of building' by him at, &c. (describing it), together with other timber in B.'s possession, to have and to hold the ship or vessel, goods and chattels, to A., to his absolute use and benefit and behoof for ever, when the ship or vessel should be complete and finished, in as full, ample and perfect a manner as if the ship or vessel were ready for sea, and ready to be delivered to A. at the time of executing these presents." On the 30th January, 1849, B. signed a builder's certificate and declaration of ownership, stating A. to be the sole owner of the vessel, and thereupon obtained a certificate of registry in A.'s name, pursuant to 8 & 9 Vict. c. 89, s. 11. This certificate B. retained in his own possession. On the 29th March, 1849, B. induced the comptroller of the customs at Pictou, in Nova Scotia, to cancel the certificate, and to grant him a fresh one in his own name, as owner, and on the same day executed an assignment of the ship, then in an unfinished state, to C., who took possession of her, finished her, and sent her to Liverpool with a cargo on his own account:—Held, that the property in the ship passed to A., by the bill of sale of the 20th June, 1848, and that his right was in no degree limited by the habendum to the time when the vessel should be complete, and consequently that C. was liable in trover. *Reid v. Fairbanks*, 13

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C. B. 692; 1 C. L. R. 787; 22 L. J., C. P. 206; 17 Jur. 918.

Where property passes to employer on failure to complete by shipbuilder, see *Baker v. Gray*, 17 C. B. 462; 25 L. J., C. P. 161; 2 Jur., N. S. 400; *Wood v. Bell*, 6 El. & Bl. 355; 25 L. J., Q. B. 321; 2 Jur., N. S. 664.

Contract for Repairs—Construction—Evidence.—A firm of shipbuilders agreed to lengthen and repair an iron steamship; the object being that she might be classed 100 A 1 at Lloyd's. The specification forming part of the contract contained this stipulation,—"Iron work: The plating of the hull to be carefully overhauled and repaired, *but if any new plating is required the same to be paid for extra* (fourteen words deleted, signed A. and J. I., D. G.). Deck beams, ties, diagonal ties, main and spar deck stringers, and all iron work, to be in accordance with Lloyd's rules for classification:"—Held, that the shipbuilders were bound to supply without extra charge any new plates required to enable the vessel to be classed 100 A 1 at Lloyd's; and that neither the letters of the parties before the contract was signed, nor the initialed deleted words in the contract, could be considered for the purpose of interpreting the intention of the parties. *Ingilis v. Buttery*, 3 App. Cas. 552—H. L. (Sc.).

Held, also, the costs of Lloyd's survey, and the Board of Trade tonnage measurement, should be borne by the shipowner. *Ib.*

Action under, before Completion.—A ship outward-bound with goods, being damaged at sea, put into a harbour to receive some repairs which had become necessary for the continuance of the voyage, and a shipwright was engaged and undertook to put her into thorough repair. Before this was completed, he required payment for the work already done, without which he refused to proceed; and the vessel remained in an unfit state for sailing:—Held, that the shipwright might maintain an action for the work already done, though the repair was incomplete, and the vessel thereby kept from continuing her voyage at the time when the action was brought. *Roberts v. Harelock*, 3 B. & Ad. 404.

Tender of Reasonable Sum—Detention.—A declaration alleged that the defendant agreed to repair a ship for the plaintiff for a reasonable and proper price in that behalf, to be charged by him to the plaintiff, and to re-deliver the ship when repaired upon payment of such price; that the plaintiff was ready and willing to pay such price, but that the defendant did not charge a reasonable price, and refused to re-deliver the ship except upon payment of an exorbitant and unreasonable sum; and claimed damages for the detention of the ship:—Held, that it was not necessary that the plaintiff should aver a tender of a reasonable sum. *Watson v. Pearson*, 9 Jur., N. S. 501; 8 L. T. 395; 11 W. R. 702.

Damages for Breach of Contract.—When a breach of contract with the owner of a ship has been committed, whereby he is prevented from employing her upon an adventure, the damages payable to him cannot be reduced on the ground that he has earned a profit by sending another

ship upon the same adventure in place of the first-mentioned ship. *Jebben v. East and West India Dock Company*, 10 L. R., C. P. 300; 44 L. J., C. P. 181; 32 L. T. 321; 23 W. R. 624.

A company, having contracted to supply a steamship with a propeller shaft and other fittings, supplied useless fittings, whereby the owners, besides being obliged to replace the fittings, lost the use of the ship for nine days:—Held, that the lost earnings of the ship for the nine days ought to be included in the damages recoverable. *Wilson v. General Screw Colliery Company*, 47 L. J., Q. B. 239; 37 L. T. 789.

A shipbuilding company, at the time of being wound up, was under a contract with a steam-packet company to do certain repairs to a ship within a given time, and under orders obtained in the matter of the winding-up, the official liquidator was authorized to complete the repairs, the rights of all parties being reserved. The repairs not having been completed within the stipulated time, leave was given to the steam-packet company to go in under the winding-up order and prove in respect of any damage that might have accrued from the delay:—Held, that the measure of damages was the net profits which the steam-packet company might have made if the contract had been completed in time, but that the company was not entitled to prove for damages arising from imperfect workmanship during the delay. *Trent and Humber Shipbuilding Company, In re*, 4 L. R., Ch. 112; 38 L. J., Ch. 38; 19 L. T. 465; 17 W. R. 181.

2. LIEN OF SHIPWRIGHT.

Nature of.—A shipwright has a lien upon a ship for repairs. *Franklin v. Hozier*, 4 B. & A. 341.

But a shipwright in the River Thames has no lien on a ship taken into his dock to be repaired, without an express agreement for that purpose, because by the usage of the trade the credit is always given to the owner. *Raitt v. Mitchell*, 4 Camp. 146.

It is otherwise where the shipwright deals for ready money. *Ib.*

There is a lien on a ship for repairs done abroad without any hypothecation. *Halkett, Ex parte*, 3 Ves. & B. 135; 2 Rose, 194.

Priority of Rights.—When a shipwright has received a vessel into his yard and repaired her, his rights are subject to all existing obligations then complete and due against the vessel. *The Gustaf*, Lush. 506; 31 L. J., Adm. 207; 6 L. T. 660.

Claims for salvage take precedence of a shipwright's lien in respect of subsequent repairs to the vessel. *Ib.*

A shipwright's lien is postponed to masters' and seamen's wages earned prior, but not to such wages earned subsequently, to the time when the vessel entered the shipwright's yard. *Ib.*

The seamen and master are, in the case of a foreign vessel, entitled to an allowance for return to their own country, and this right takes priority also of such shipwright's claim. *Ib.*

The shipwright's lien takes precedence of all claims in respect of necessities supplied subsequently to the time when the vessel entered the shipwright's yard. *Ib.*

Under Mortgage.—A mortgagor of a ship,

who remains in the ostensible ownership, has an implied authority to confer a right of lien for repairs to keep her seaworthy. *Williams v. Allsup*, 10 C. B., N. S. 417; 30 L. J., C. P. 353; 4 L. T. 550.

Payment for Use of Dock during Detention.]

—A shipowner desired to have his ship repaired. On asking a shipwright for an estimate, he received one, the last item of which was "the cost of use of graving dock for the job will be from 120 to 150 guineas." The ship was repaired. When finished, the account was sent in with this item included. No objection was made to this item, but time was required for payment. The shipwright, who claimed and enforced his lien on the ship for payment, urged the removal of the ship, saying that it was unnecessarily occupying his dock; that he had other ships waiting to go in, and, finally, that from a certain day he should charge 21l. a day for the use of the dock:—Held, that these facts did not constitute an implied contract on the part of the shipowner to pay the additional charge, and that having paid it under protest, he might recover it back. *Somes v. British Empire Shipping Company, Ltd.*, 11 C. B. 220; 5 Jur., N. S. 675—Ex. Ch. Affirmed, 8 H. L. Cas. 338; 30 L. J., Q. B. 229; 6 Jur., N. S. 761; 8 W. R. 707.

Right of Sale.]—A lien upon chattels confers no right of sale upon the person holding such lien, though the retention of the chattels may be attended with expense; and therefore, where shipbuilders having a lien on a ship built by them, according to contract, for the unpaid purchase-money, filed in equity a bill to enforce their lien by a sale, a demurrer was allowed. *Thames Ironworks and Shipbuilding Company v. Patent Derrick Company*, 1 Johns. & H. 93; 29 L. J., Ch. 714; 6 Jur., N. S. 1013; 8 W. R. 408.

3. TONNAGE.

Measurement of.]—A vessel had an upper deck above her main deck, but such upper deck was not continuous from stem to stern of the vessel, and the hatches and other fittings in it were not water-tight:—Held, that such upper deck was not a third deck or spar deck within the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 21, sub-s. 5; and that the space between it and the main deck was not space available for cargo, or for accommodation of passengers or crew, within sub-s. 4, and consequently should not be reckoned in estimating her tonnage. *Lord Advocate v. Clyde Steam Navigation Company*, 2 L. R., H. L. (Sc.) 409; 32 L. T. 287.

See cases sub tit. COLLISION (*Limitation of Liability*), *infra*.

The 17 & 18 Vict. c. 104, s. 23, provides that in every ship propelled by steam or other power requiring engine room, an allowance shall be made for the space occupied by the propelling power, and the amount so allowed shall be deducted from the gross tonnage of the ship, to be estimated as provided by that act. Sect. 29 gives power to the commissioners of customs, with the sanction of the Board of Trade, to make such modifications and alterations as from time to time become necessary in the tonnage rules:—Held, that the commissioners had no power to alter the provisions of the act, as to estimating

the tonnage of ships. *City of Dublin Steam Packet Company v. Thompson*, 19 C. B., N. S. 553; 34 L. J., C. P. 316; 11 Jur., N. S. 829; 12 L. T. 849; 13 W. R. 1019. Affirmed, 1 L. R., C. P. 355; 35 L. J., C. P. 198; 12 Jur., N. S. 726; 15 L. T. 112; 14 W. R. 376; 1 H. & R. 369—Ex. Ch.

VII. OWNERS.

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1. WHO ARE.

a. Evidence of Ownership.

The register is not conclusive evidence of the liability of the person appearing thereon as owner, for the acts of the master done within the scope of his general authority. *Myers v. Willis*, 17 C. B. 77; 25 L. J., C. P. 39; 2 Jur., N. S. 41. Affirmed (*in error*), 18 C. B. 886; 25 L. J., C. P. 255.

In an action against several for stores supplied to a ship by order of the captain, the register obtained on the oath of one is *prima facie* evidence of ownership against all. *Stokes v. Curme*, 2 Camp. 339.

A declaration of ownership in a ship is *prima facie* proof of ownership without the registry, and though the party has ceased to be owner; yet if he has been present when the work was done, giving directions about it, that will be evidence of liability for repairs. *Tibbald v. Wood*, 1 F. & F. 287.

But the bare production of a register containing the names of several owners will not be evidence to support a plea in abatement by one of them of nonjoinder of the others in an action against him alone. *Flower v. Young*, 3 Camp. 240. And see *Ditchburn v. Spracklin*, 5 Esp. 31.

A ship, of which the defendant was the registered owner, was laid up in dock under the charge of a shipkeeper, by whom one of the hatchways was negligently left open, whereby the plaintiff, who was lawfully passing over the deck of the ship, fell through the hatchway, and was injured. At the trial of an action to recover compensation, it did not appear by whom the shipkeeper was appointed, and the only evidence to charge the defendant with liability was the ship's register, in which he was described as owner:—Held, by Blackburn and Lush, JJ. (dissentiente Mellor,

J.), that this was *prima facie* evidence, from which, if un rebutted, they might infer that the shipkeeper was appointed by the defendant. *Hibbs v. Ross*, 1 L. R., Q. B. 534; 35 L. J., Q. B. 193; 12 Jur., N. S. 812; 15 L. T. 67; 14 W. R. 914.

The court cannot look behind a ship's register for the purpose of dispossessing an innocent purchaser for value, whose name is on the register. *The Horlock*, 47 L. J., Adm. 5.

In an action against the owner of a ship for stores supplied to her, the register purporting to be granted on the oath of the defendant, and stating him to be sole owner, is no evidence of ownership. *Smith v. Fuge*, 3 Camp. 456.

In an action against the owners of a ship, it is *prima facie* evidence of ownership to produce an undertaking to appear for them, given before the commencement of the action, by the person who subsequently acted as their attorney in defending it, in which he describes them as owners, without further proof of agency. *Marshall v. Cliff*, 4 Camp. 133.

If there is a bill of sale of a ship, not containing any qualification, and such unqualified bill of sale is entered properly on the register, and there is also a deed of defeasance, making void such bill of sale on the payment of a sum of money, the deed of defeasance may be given in evidence on the part of the defendant, in an action for goods on his liability as the registered owner, in order to shew the qualified nature of his ownership. *Cor v. Reid*, 1 C. & P. 602; R. & M. 199.

Proof of the execution of a bill of sale of a ship to the defendant is not evidence to charge him as an owner with stores furnished to the ship, without shewing his assent to such sale. *Tinkler v. Walpole*, 14 East, 226; *S. P., Cooper v. South*, 4 Taunt. 802.

Property in a ship must be proved by evidence of possession in the plaintiff, his vendors, or bailees, accompanied with a certificate of registry. *Pirie v. Anderson*, 4 Taunt. 652; 3 Camp. 242. And see *Paterson v. Hardacre*, 4 Taunt. 115.

A., whose name has been registered as the part owner of a vessel on the oath of B., and has afterwards conveyed such share by deed to B., covenanting for the goodness of his title, cannot be admitted to prove by the evidence of B. that he has in fact no interest in the vessel. *Nickson v. Thomas*, 1 Stark. 85. And see *Watson v. Shelley*, 1 T. R. 301.

Where A., having contracted for a ship to be built for him in the East Indies, agreed during the time of the building to sell a share to B., and B. paid a part of the price in pursuance of the agreement, and afterwards, on the ship's arrival in England, A. caused her to be registered, and accounted with B. as part owner; but B.'s name was never on the register as part owner:—Held, that B. had no legal interest in the ship. *Stringer v. Murray*, 2 B. & A. 248.

If the names of two partners in trade appear on the certificate of registry as owners of a ship, the Registry Acts do not prevent the shewing how and in what proportions the several owners are respectively entitled; and though the partners may derive title under different conveyances, yet, if their shares were purchased with the partnership funds, and treated by them as partnership property, and the partners become bankrupts, these shares will be considered as the joint property. *Jones, Ex parte*, 4 M. & S. 450.

b. Other Matters.

Contract to Purchase a Share, Effect of.—A person who, though not a registered owner, has entered into a contract enforceable in equity for the purchase of a share of a ship, is an owner within the meaning of s. 147, sub-s. 1, of 17 & 18 Vict. c. 104. *Hughes v. Sutherland*, 7 Q. B. D. 170; 50 L. J., Q. B. 567; 45 L. T. 287; 29 W. R. 867.

Judicial Sale of Interest.—A purchaser under a judicial sale of a beneficial interest in a British ship is not entitled to be registered as owner of it. *Chasteauneuf v. Capeyron*, 7 App. Cas 127; 51 L. J., P. C. 37; 46 L. T. 65; 4 Asp. M. C. 489—P. C.

Foreigners on Register.—Under 8 & 9 Vict. c. 89, s. 12, a corporation within the United Kingdom, some members of which were foreigners and persons residing abroad, might register ships which were the property of such corporation. *Reg. v. Arnaud*, 9 Q. B. 806; 16 L. J., Q. B. 50; 11 Jur. 279.

A murder was committed on board a ship on the high seas, sailing under the British flag, and the accused was brought to England in custody, and put on his trial for the crime. To shew jurisdiction in the courts of this country, it was sought to establish that the ship was a British ship, and the register of the ship at the port of London was put in, wherein the owner's name was stated to be C. A. Rehder, of 14, London-street, city of London, merchant. Rehder was alien born, and it did not appear that he was a denizen of this country or naturalized. The ship was foreign built, and the officers and crew, including the accused, were foreigners:—Held, that although the register might be *prima facie* evidence of the facts stated therein, and that the ship was a British ship, yet the proof that the owner was alien born rebutted the inference from the register that he was a British subject, and he was therefore disqualified by 17 & 18 Vict. c. 104, s. 18, from being the owner of a British ship. *Reg. v. Bjornsen*, 10 Cox, C. C. 74; L. & C. 545; 34 L. J., M. C. 180; 11 Jur., N. S. 589; 12 L. T. 473; 13 W. R. 664.

Held, also, that it would not be presumed that he was denized or naturalized. • *Id.*

Owner of Ships *Prima facie* Owner of Goods on Board.—As against a wrongdoer, the owner of a ship is *prima facie* owner of the goods on board. *Brancker v. Molyneux*, 3 Scott, N. R. 332; 3 M. & G. 84.

Correcting Register.—If a person is by mistake registered as the owner of a ship which is the property of another, the Court of Chancery will correct the error, and direct the person whose name is on the register to transfer the ship to the party declared entitled. *Holderness v. Lamport*, 29 Beav. 129; 30 L. J., Ch. 489.

2. PART OWNERS.

a. Rights and Liabilities inter se.

In General.—Part owners are tenants in common of a ship, but jointly interested in her use and employment; and the law as to the earnings of a ship, whether as freight, cargo or

otherwise, follows the general law of partnership. *Green v. Briggs*, 6 Hare, 395; 17 L. J., Ch. 323; 12 Jur. 326.

A part owner of a ship has a right to require the gross freight to be applied, in the first place, in payment of the expense of the outfit of the ship for the voyage in which the freight was earned, notwithstanding he might sue his co-owners for their proportion of the expenses before the adventure ends. *Id.*

The same rule applies to the expenses of repairs to the hull of the ship, where such repairs were done with a view to the particular adventure in which the earnings were made, and without which that adventure could not have been undertaken. *Id.*

Where Part Mortgaged.—A part owner of a ship, whose share was subject to a mortgage, agreed with the other part owner (whose share was not subject to any mortgage), but without the concurrence of the mortgagee, to purchase guano on the joint account of the two part owners, and bring it in the ship to England. On the completion of the voyage, and when the cargo was about to be discharged, the mortgagee took possession:—Held, that he had no claim against the owner of the mortgaged share for freight, and could, at the utmost, only claim to adopt the mortgagor's contract, and stand in his place as to the profits of the adventure, after deducting all expenses. *Alexander v. Simms*, 5 De G., M. & G. 57; 23 L. J., Ch. 721.

Effect of Register.—If the names of two partners in trade appear on the certificate of registry as owners of a ship, the Registry Acts do not prevent the shewing how and in what proportions the several owners are respectively entitled; and though the partners may derive title under different conveyances, yet if their shares were purchased with the partnership funds and treated by them as partnership property, and the partners become bankrupts, these shares will be considered as their joint property. *Jones, Ex parte*, 4 M. & S. 450.

Mandamus to Register, when.—A mandamus to the officers of customs to register a ship transferred by the survivor of two part owners, merchants, was refused, on the ground that the executors of the deceased part owner ought to have joined in the transfer. *Rea v. Liverpool (Collector of Customs)*, 2 M. & S. 223.

Liabilities in respect of Ship.—A., B. and C., being part owners in a ship, A. directed B. and C. not to order any repairs in their joint names, and informed them that he would no longer consider them as managing owners: repairs were done in their joint names upon the direction of the captain employed by B. and C.:—Held, that A. was jointly liable. *Gleadow v. Tinckler*, Holt, 586.

In order to charge a party, by reason of his name appearing on the ship's register as part owner, for repairs done to the ship, it must distinctly appear that they were done upon his credit, and that the order for them was given with his authority, express or implied. *Curling v. Robertson*, 8 Scott, N. R. 12; 7 M. & G. 536; 13 L. J., C. P. 137.

Where a party takes a share in a ship under a conveyance which is void for want of conformity

with the provisions of the Registry Acts, he is not liable to pay for goods supplied for her use, unless credit is given to him individually, or he has held himself out as owner, or unless he has made an express promise to pay, or has received profits from the ship. *Harrington v. Fry*, 9 Moore, 344; 2 Bing. 179; 1 C. & P. 289; R. & M. 90.

If persons, separately interested in aliquot parts of a ship, employ a joint agent, they are liable in the aggregate. *Pasmore v. Bougfield*, 1 Stark. 296.

One part owner of a ship assigned his share to the defendant in trust to sell, and with the proceeds to repay himself money advanced and expenses, and to pay over any residue to the part owner. In the indorsement on the certificate of registry no statement was made according to 4 Geo. 4, c. 41, s. 43. The defendant never interfered with the ship, and the part owner continued to act as husband:—Held, first, that the defendant was not liable for goods supplied by the part owner's orders, it not appearing he had the defendant's authority, either express or implied, to give those orders. *Briggs v. Wilkinson*, 7 B. & C. 30; 9 D. & R. 871.

A part owner who orders supplies on his own account without mentioning any co-part owners, cannot plead in abatement that they are co-part owners, who ought to have been joined, the plaintiff being ignorant that there were other part owners. *Baldney v. Ritchie*, 1 Stark. 338. And see *Mullett v. Hook*, M. & M. 88.

A. and B., being joint owners of a ship, A. conveyed his moiety to B.; but in the bill of sale the certificate of registry was not truly recited: B. took possession, and afterwards mortgaged the whole ship to A., who did not take possession; then B. ordered C. to repair the ship; afterwards B. conveyed one-half of the ship to A., and the other to D.:—Held, that the first bill of sale was an absolute nullity under 26 Geo. 3, c. 60, s. 17, and that A. was liable to C. for the repairs of the ship in an action for work and labour brought by C.: A. not having pleaded in abatement that B. ought also to have been sued. *Westerdell v. Dale*, 7 T. R. 306.

The defendant, a part owner of a ship jointly with L., contracted to sell his share in the ship to L., but which contract afterwards went off, no price having been agreed on. Between the time of making such contract and its going off, L., without the authority of the owner, sent the ship to the plaintiff's dock to be repaired. The defendant, shortly after the repairs had been begun, and before the contract for sale had gone off, gave express notice to the plaintiff that he would not be responsible:—Held, that, as there was no evidence of the plaintiff having ever before repaired the ship on the joint credit of the defendant and L., or of the defendant having held out L. as his agent for such purpose, the authority to contract for repairs, which the mere fact of being part owner would imply, was rebutted by the circumstances, and the defendant was not liable to the plaintiff for such repairs. *Brodie v. Howard*, 17 C. B. 109; 25 L. J., C. P. 57; 1 Jur., N. S. 1209.

The mere fact of a person being registered as a part owner under an absolute bill of sale, which is shewn aliunde to have been given only as a security for advances, does not give his co-owner or the master (appointed by his co-owner) authority to pledge his credit for necessary repairs.

Hackwood v. Lyall, 17 C. B. 124; 25 L. J., C. P. 44, n.; 2 Jur., N. S. 44, n.

An express authority is necessary from a part owner to the ship's husband to order works not necessary as repairs; but such authority once given cannot be revoked after it has been acted upon, and it is for the part owner, when sued for contribution, to prove that it was revoked before the works were commenced, or a contract for them entered into. *Chappell v. Bray*, 6 H. & N. 145; 30 L. J., Ex. 24; 3 L. T. 278.

Although one of two part owners of a ship has no authority as such to order insurances to be effected on account of the others, yet if they are in partnership together, an order to insure given by one renders all liable. *Hooper v. Lusby*, 4 Camp. 66.

A. and B. were joint owners of a ship; A. working the ship, defraying all the expenses, and taking the uncontrolled management of her, and paying himself by taking two-thirds of the gross earnings; B. taking the remaining one-third as portion:—Held, that A. was a hirer of the share of B., and not the servant or agent of B., so as to render B. liable for damages caused by the negligence of A. *Bernard v. Aaron*, 9 Jur., N. S. 470.

The wages of the captain and seamen of a ship, being the expenses which produce the income thereof, are proper deductions to be made from the gross freight, as between the part owners of the ship and the assignees of the freight belonging to the other co-owners. *Lindsay v. Gibbs*, 3 De G. & J. 690; 28 L. J., Ch. 692; 5 Jur., N. S. 376.

A., who was part owner of a ship, assigned his proportion of the freight payable in respect of a voyage, to C.; B., co-owner with A. of the ship, subsequently, without notice of the assignment to C., concurred with A. in authorizing a broker to pay the insurance of the ship and freight for the voyage:—Held, that the costs of such insurance were proper expenses of the voyage, and that they ought to be deducted from the freight before dividing it between B. and C. *Ib.*

Upon a settlement of accounts at the end of a voyage, one of two shipowners agreed to pay the broker's bill, and, in consideration, was allowed a larger share of the profits. He omitted to pay the broker, who sued both owners for the amount. The other owner having paid it:—Held, that he might sue him for the amount. *Wilson v. Cutting*, 10 Bing. 436; 4 M. & Scott, 826.

Where a ship originally belonged to one of two partners, and had been conveyed to B. for securing a debt, and B. became the sole registered owner of the ship, and afterwards, as agent for both partners, insured the ship and freight, and charged them with the premiums; and, on a loss happening, received the money from the underwriters:—Held, that he was accountable to the assignees of the surviving partner for the surplus, after payment of his own debt, and not to the executors of the deceased partner, to whom the ship originally belonged. *Dixon v. Hamond*, 2 B. & A. 310.

A co-partner in a ship may sue the ship for advances made by him, but not if he is interested in the particular voyage for which the ship is supplied. *The Underwriter*, 25 L. T. 279.

Mode of Payment.—The four defendants and B. were the owners in certain shares between

them, of a ship to which the plaintiffs by order of W., the ship's husband, and with the authority and consent of the defendants, did certain repairs, and upon the account for such repairs being sent in to the owners, it was arranged between W. and the plaintiffs, that it should be paid partly in cash (subject to discount) and partly in good bills, and that the total amount of the contract should be apportioned between the several owners according and in proportion to their interest and the number of their respective shares in the ship. The necessary calculation having been made by W., the account was then paid to the plaintiffs through W., partly by a cheque of the defendant Andrews, payable to W.'s order, and indorsed by him for the amount of Andrews' proportion, partly by cash payments from each of the other three defendants for the amount of their respective proportions, and partly by a bill at six months, drawn by W. on and accepted by B., for the amount of B.'s proportion of the account. B.'s bill being dishonoured at maturity, the plaintiffs brought an action against the defendants to recover from them, as joint owners of the ship, the amount of such dishonoured bill, in answer to which the defendants contended that the plaintiffs, by taking B.'s bill, and giving him time, had placed his co-debtors, the defendants, in a worse position, and necessarily postponed their remedy against B., and had consequently discharged the defendants:—Held, that the defendants were bound by the mode of payment adopted, and that that circumstance distinguished the case from that of principal and surety. *Mould v. Andrews*, 35 L. T. 813.

Receiver—Co-Ownership.—The court will appoint a receiver in a co-ownership suit where the circumstances exist which in the opinion of the court render such a course just and convenient. *The Amphill*, 5 Adm. D. 224.

Sale by Part Owners.—See SALE, TRANSFER AND MORTGAGE, *infra*.

b. Employment of Ship.

Jurisdiction of Admiralty Court.—Where there are several part owners, the owners of the less shares may arrest the ship in the Admiralty Court, and compel a security to be given by the others before they will be permitted to navigate out of port. *Ouston v. Hebdon*, 1 Wils. 101.

The Court of Admiralty is open all the year round to applications by part owners to restrain the sailing of ships without their consent, until security is given to the amount of the respective shares. *Hale v. Goudson*, 2 Mer. 77.

The court has jurisdiction to arrest a vessel in an action of restraint at the suit of a part owner holding a minority of shares, notwithstanding that the vessel is about to proceed on a voyage approved by a majority of the part owners. *The Talca*, 5 Adm. D. 169; 29 W. R. 123.

c. Duty to Account.

In what Cases.—Some of the joint owners of a ship, acting as managers on behalf of the owners generally, furnishing supplies for the voyage, are entitled to sue for an account of the transactions between themselves and the other owners. *Vanner v. Frost*, 39 L. J., Ch. 626.

After Sale of Share.]—A. and B. were co-owners of a ship. A. sold his share to a third person, and afterwards instituted a suit in rem in the Court of Admiralty to have an account taken between himself and B. in relation to the employment and earnings of the ship during the time he and B. were co-owners:—Held, that as the suit related to questions which arose between the parties while they were co-owners, the court had jurisdiction to entertain the suit, notwithstanding A. had ceased to be a co-owner at the time of the institution of the suit. *The Lady of the Lake*, 3 L. R., Adm. 29; 39 L. J., Adm. 40; 21 L. T. 683; 18 W. R. 528.

What should be Included—Account of Ship's Agent.]—In an action for settlement of accounts between co-owners under s. 8 of the Admiralty Court Act, 1861, the plaintiff is entitled only to settlement of such accounts as are or ought to be rendered before the writ. If a co-owner is ship's agent for a coasting steamer at a port of call, the amount due to him as agent cannot be recovered in a co-ownership action. *The Eider*, 40 L. T. 463.

Of Managing Owner.]—See cases post, col. 1200.

3. MANAGING OWNER AND SHIP'S HUSBAND.

Authority of Managing Owner to Bind other Owners for Ship's Necessaries.]—W. was the registered owner of certain shares in a ship, and had been entered on the register as managing owner. The defendant subsequently became the registered owner of other shares in the ship. The defendant was not aware in fact that W. was so registered as managing owner. W. sent the ship on a voyage without the defendant's knowledge, and contrary to the terms of an agreement made between them. The defendant did not participate in the adventure, and had previously informed W. that he did not intend to navigate the ship or take any part in her management. The plaintiffs supplied necessaries for the ship previous to such voyage, upon the order of W. without the knowledge or consent of the defendant. The plaintiffs, before supplying the goods, consulted the register, and found the defendant's name entered therein as part owner of the ship:—Held, that the fact that the defendant had allowed the entry on the register describing W. as managing owner to remain unaltered did not per se amount to a holding out of W. as his agent, so as to render the defendant liable for the necessaries supplied by the plaintiffs, and that inasmuch as W. had not in fact authority to bind the defendant, the plaintiffs could not recover against the defendant for such necessaries. *Frazer v. Cuthbertson*, 6 Q. B. D. 93; 50 L. J., Q. B. 277; 29 W. R. 396.

If a person who supplies stores to a ship, of which there are several owners, takes in payment the bill of the ship's husband (a part owner) only, and settles with him alone, he discharges the other owners, particularly if the bill is renewed. *Reed v. White*, 5 Esp. 122.

Necessaries were furnished to a ship on the order of the ship's husband (himself a part owner), by whom alone the ship was managed:—Held, that the co-owners were liable, although part of the supplies had been paid for by bills drawn by the ship's husband upon the brokers of the ship; and on the bankruptcy of the latter, the plaintiff

had proved against their estate for the balance. *Whitwell v. Ferrin*, 4 C. B., N. S. 412.

Recovery from Part Owners.]—A part owner of a ship is not necessarily a partner; therefore a part owner, who, as a ship's husband, incurs the expense of the outfit, may sue the other part owners separately for their respective shares of the expense. *Helme v. Smith*, 7 Bing. 709; 5 M. & P. 744.

One of several co-owners who acts as ship's husband, is only entitled to charge the cost price of supplies to the ship furnished by him in the course of his business. *Ritchie v. Couper*, 28 Beav. 344.

In an action against one of the owners for work done to a vessel by the order of the ship's husband, such owner will be liable, unless it is shown that the dealing was, that the person who directed the work to be done should be looked to exclusively. *Thompson v. Finden*, 4 C. & P. 158.

Releasing Ship from Arrest.]—A managing owner has power to release a vessel from arrest under an order of the Court of Admiralty, in order that she may prosecute her voyage and earn freight; and he is not bound to do this at his own expense, but may release the ship according to the rules of the court, by procuring bail for damages and costs. *Barker v. Highley*, 15 C. B., N. S. 27; 32 L. J., C. P. 270; 10 Jur., N. S. 391; 9 L. T. 228; 11 W. R. 968.

Master Suing in his own Name.]—Where the master is part owner, but has the entire control and management of the ship, paying to his co-owner a third of the net profits, he is competent to sue in his own name. *Cawthron v. Trickett*, 15 C. B., N. S. 754; 33 L. J., C. P. 182; 9 L. T. 609; 12 W. R. 311.

Acting as Broker—Commission.]—The managing owner of a ship is competent to appoint himself to act as broker to the ship in collecting and distributing the freight, there being no incompatibility between those services (as, semble, there would be between the services of a ship's Chandler or a ship's carpenter) and his fiduciary character as managing owner. *Smith v. Lay*, 3 Kay & J. 105.

But, before allowing him a commission in respect of the services in question, the court directed an inquiry whether, according to the custom of shipowners or otherwise, he, being managing owner, was entitled to any and what commission in respect of duties performed by him, and which duties are ordinarily performed by shipbrokers. *Id.* See *Miller v. Mackay*, 31 Beav. 77.

Cancelling Charterparty.]—A ship's husband, as such, has no authority to bind the shipowner to pay money to the charterer in consideration of the cancellation of the charterparty. *Thomas v. Lewis or Oxley*, 4 Ex. D. 18; 48 L. J., Ex. 7; 39 L. T. 669; 27 W. R. 111.

Mortgage of Warrant for Freight.]—Where A., as the managing owner of a vessel, was permitted by the other owners to have possession of two warrants or orders of the East India Company, to pay to the owners or bearer the sum of money therein mentioned, for freight, and A. deposited those warrants in the hands of his bankers,

and they received the money due on them, and gave him credit for it on account:—Held, in an action brought after A.'s death by the surviving part owners against the bankers, that, on proof of these facts, they could not recover the money, because it was not shewn that the loan was upon their account, for the fact of the warrants being the property of all the part owners when placed in the bankers' hands, was, upon the evidence, consistent with the supposition that the loan of the proceeds to the bankers was A.'s loan. *Sims v. Bond*, 2 N. & M. 608; 5 B. & Ad. 389.

Right to Advances out of Freight.—The right of a ship's husband to be repaid out of the freight for advances made on account of the ship is a right of lien or retainer and not in the nature of a charge on the freight; and therefore if he is removed from his office by the owners before he is in a position to receive the freight, an assignee of his interest in the freight cannot maintain a claim to it as against the owners. *Beynon v. Godden*, 3 Ex. D. 263; 48 L. J., Ex. 80; 39 L. T. 82; 26 W. R. 672—C. A.

Appointment of Agent by.—A. and B., joint part owners of a ship, intrusted the management to C., their co-partowner, as ship's husband; C. employed D. as his agent to raise and pay money in respect of the ship, and also for his general affairs. The ship was chartered by the East India Company, earning freight for them, which D. received, upon giving receipts signed (as required by the rules of the company) by one other part owner, in addition to C., the ship's husband. D., who knew that C. was only part owner, but was never controlled by the others, placed the amount of freights received to the account of C., as ship's owner, and kept a distinct general account with him. C. died insolvent:—Held, that A. and B. could not sue D. for the balance due from him on the ship's account, because there was no privity of contract between them; D.'s responsibility was to the executors. *Sims v. Britten or Brittain*, 1 N. & M. 594; 4 B. & Ad. 375. See *Walshe v. Provan*, post, col. 1443.

Assignment of Freight by.—S. & Co. were owners of seven-eighths of an American vessel and ship's husbands. T. was owner of the remaining eighth, and was captain of the vessel, which was dispatched on a voyage to Liverpool. Before the voyage, S. & Co. spent a large sum in repairs, and for the purpose of taking up bills which they had accepted on account of the repairs, they borrowed a sum of money from the plaintiffs, and assigned the freight to them by way of security. On the arrival of the vessel in Liverpool the plaintiffs obtained an injunction to prevent T. from receiving the freight:—Held, that a part owner, who is ship's husband, has not the right, as against other part owners, of making an assignment of the whole freight to secure moneys advanced to him; that the legal right to receive the freight was in the captain, and that, in the absence of any sufficient allegation and proof that he was about to misapply it, the injunction ought not to have been granted. *Guion v. Trask*, 1 De G., F. & J. 373; 29 L. J., Ch. 337; 6 Jur., N. S. 185; 8 W. R. 266.

Method of Payment of Necessaries.—The

managing owner of a foreign ship was indebted on a general account unconnected with the ship to the plaintiffs, and the freight of the ship was in the hands of certain shipbrokers, and the plaintiffs refused to make a further advance to such managing owner, but agreed to advance money for necessaries for the ship. In accordance with this arrangement the plaintiffs handed a cheque to the managing owner as though for the purchase of necessaries, and he at once returned it to the plaintiffs as payment of his debt to them, and the necessaries were actually purchased out of the freight in the hands of the shipbrokers:—Held, that under the circumstances, the money must be considered as having been advanced for the purchase of necessaries, and that the manner of the advance was no bar to the plaintiffs' right to recover such an amount as was actually spent in necessaries. *The Heinrich Bjorn*, 8 Adm. D. 151; 52 L. J., Adm. 83; 49 L. T. 405; 32 W. R. 279.

Action for not Accounting.—Part owners of a ship having agreed, "each and every of them with the others and each and every of the others," that the ship should proceed on a certain voyage under the exclusive management and control of one of them as ship's husband; and that after her return, "a full account should be made of the ship and her concerns," and the net profits be divided in proportion after deducting all charges; the duty of making out such account is cast upon the ship's husband; and for not doing so, and not dividing the net profits, after deducting all charges, within a reasonable time after the ship's return, an action lies against him upon the agreement by each of the part owners; though it is not averred in terms that the charges were or could have been ascertained before the account brought, for that is matter of defence. *Owston v. Ogle*, 13 East, 538.

When an action is brought in rem against a ship by the owners of certain shares therein, claiming possession and an account against the managing owner, and the latter makes default in appearing, the court will order such managing owner to be joined as a defendant, so that his accounts may be investigated, and will give possession to the plaintiffs if they hold a majority of shares; but will not order, before the reference, a sale of the defendant's shares to satisfy the plaintiffs' costs and any sum found due at the reference. *The Native Pearl*, 37 L. T. 542.

Right to Sell Ship.—See SALE, TRANSFER AND MORTGAGE, *infra*, XI.

4. LIABILITY FOR NECESSARIES, REPAIRS, AND SUPPLIES.

a. What are Necessaries.

Premiums paid by a shipbroker at the owner's request to procure insurance on freight are necessaries. *Mackintosh v. Mitcheson*, 4 Ex. 175; 14 L. J., Ex. 385.

Charges paid by a shipbroker at the owner's request for entering, reporting, and piloting a ship, and for tonnage and light dues, and for noting protest, are within the term. *Ib.*

Advances at the owner's request for travelling expenses of the master and goods supplied for the ship's use are necessaries. *Ib.*

Brokerage charges made by a ship's broker for acting as ship's agent, and for negotiating a charterparty may be necessities within the meaning of the statutes, but must be proved to come within the definition. *Ib.*

Moneys obtained by means of a bill of exchange to procure necessities are necessities within 3 & 4 Vict. c. 65, s. 6. *The Anna*, 45 L. J., Adm. 98. Affirmed on appeal, 1 Adm. D. 253; 46 L. J., Adm. 15; 34 L. T. 895—C. A.

When it is necessary that a wooden ship bound upon a particular voyage should be coppered, the coppering is a necessary for the voyage, which gives the material-man doing the work to a foreign ship, upon the orders of the master, a maritime lien. *The Turliani*, 32 L. T. 341.

The insurance of a ship is not a necessary within the meaning of 3 & 4 Vict. c. 65, s. 6. *The Heinrich Bjorn*, *supra*.

Copper sheathing is a necessary. *The Perla*, Swabey, 353; 4 Jur., N. S. 741.

A foreign ship cannot be sued for money advanced to the master to enable him to come out of gaol, where he was imprisoned for a debt incurred for necessities supplied to the ship. *The N. R. Gogfabrick*, Swabey, 344; 4 Jur., N. S. 742.

Butcher's meat is a necessary. *Ib.*

Coals supplied at intervals to a foreign steamer for several voyages may be recovered as necessities. *The West Friesland*, Swabey, 454; 5 Jur., N. S. 658.

A claim for money advanced to a master to pay averages, dismissed with costs, such advances not being necessities. *The Aaltje Willemina*, 1 L. R., Adm. 107.

The expenses of an agent for coming from Newcastle to London to assist the master in the defence of a vessel prosecuted in a cause of collision, and for attending the trial, are not necessities. *The Bonnie Amélie*, 1 L. R., Adm. 19; 35 L. J., Adm. 115; 14 L. T. 191.

Definition.]—The term "necessaries," where used in the statutes giving the Admiralty Court jurisdiction over such claims, has the same meaning as is given to it by the common law courts, and signifies whatever the owner of a vessel, as a prudent man, if present under circumstances in which his agent in his absence is called upon to act, would have ordered. *The Riga*, 3 L. R., Adm. 516; 41 L. J., Adm. 39; 26 L. T. 202; 20 W. R. 927.

Onus of Proof.]—In an action against a ship-owner for goods supplied and money lent to the master at a foreign port, the onus is on the plaintiff to prove that the goods and money supplied were necessities. *Mackintosh v. Mitcheson*, 4 Ex. 175; 18 L. J., Ex. 385.

Maintenance of Sailors Injured.]—Several sailors on board a merchant vessel having met with a serious accident in weighing the vessel's anchor, were taken on shore by the captain to the plaintiff's, a public-house, the captain telling the plaintiff that the owner of the vessel would pay for what the sailors had. The captain immediately afterwards hired some fresh hands, and proceeded on the voyage. At the time the sailors were intrusted to the care of the plaintiff, there was no probability that they would be able to resume their duties for that voyage, and they remained at his house for several weeks. In an

action against the owner of the vessel for food and medicine supplied to the sailors:—Held, that as the matters supplied were not necessary for the due prosecution of the voyage, the captain had no authority to pledge the owner's credit, and consequently that the latter was not liable. *Organ v. Brodie*, 10 Ex. 449; 24 L. J. Ex. 70.

Payment of Past Services.]—The master has in the absence of the owner, or means of communicating with him, authority to pledge his credit for all things necessary for the purpose of conducting the navigation to a favourable termination, and for that purpose he may borrow money for services which require prompt payment; but he has no authority to borrow money in order to pay for services already rendered. *Beldon v. Campbell*, 6 Ex. 886; 20 L. J., Ex. 342.

Form of Petition.]—When a petition merely alleges that money was advanced for necessary expenses at the owner's request, without stating what those necessary expenses were, such a claim will be struck out on motion to reject or alter the petition. *Mackintosh v. Mitcheson*, *supra*.

b. Authority of Captain to Bind.

Generally.]—Whoever supplies a ship with necessities has a treble security: 1, the person of the master; 2, the specific ship; and 3, the personal security of the owners. *Rich v. Coe*, Cowp. 639; 1 T. R. 108, n.; *S. P.*, *Bland*, *Ex parte*, 2 Rose, 91.

Appointment of.]—The plaintiff proved that he supplied goods, and did work to fit out the ship *Progress* then in London, in dock; that the orders were given by T., who appeared in the register as master, and that the defendant appeared on the register as owner. Some evidence was given, from which it might be inferred that T. was appointed by the defendant. The defendant proved that he had agreed to sell the ship to G.; that T. was appointed master by G., and gave the orders for G., and that the defendant afterwards resumed possession of the vessel. The judge directed the jury, that if T. acted as master with the defendant's privity and consent, and the goods were bona fide supplied on the credit of the owner, the defendant was liable, and that, though the defendant's evidence was believed, he was not conclusively entitled to a verdict:—Held, that the defendant was not liable for the goods ordered by T., unless he had sanctioned his appearing to be his captain, acting for him, and the goods were supplied on the faith of T.'s being so, and, consequently, that the direction was wrong. *Mitcheson v. Oliver*, 5 El. & Bl. 419; 25 L. J., Q. B. 39; 1 Jur., N. S. 900—Ex. Ch.

Agency of.]—The liability of an owner to pay for repairs and equipments ordered by the master depends, not upon the ground of ownership of the vessel, but upon the ground of a contract made with the vendor by a person who was the owner's agent for the purpose of ordering such necessities. *The Great Eastern*, 2 L. R., Adm. 88; 17 L. T. 667.

The master's contracts cannot bind the owner, unless authority to bind the owner has been actually given to him; or unless the owner has, by

word or deed, held out the master as his master, and thereby induced the vendor to supply the necessities upon the credit of the owner. *Ib.*

The master, both at home and abroad, has authority to bind the owners for repairs or stores ordered by him which are necessary for the equipment and navigation of the ship in the voyage or trade in which the owners employ her. *Frost v. Oliver*, 1 El. & Bl. 301; 1 C. L. R. 1003; 22 L. J., Q. B. 353; 18 Jur. 166.

The fact of a person being the registered owner of a ship, is not of itself evidence that the master has authority to bind him by contracts for necessities supplied to the ship, but it must be shewn that the master is his agent for that purpose. *Mackenzie v. Pooley*, 11 Ex. 638; 25 L. J., Ex. 124.

Where a ship sailed for a foreign port, the master having a power of attorney from the owner, and whilst the ship was at the port, the defendant purchased it:—Held, that he did not thereby become liable for necessities supplied to the ship by order of the master. *Ib.*

Evidence of.]—The liability of the owner for acts of the master arises solely from the relation of principal and agent; and in order to make a person liable, such relation must be shewn, either expressly or impliedly, to exist between him and the master. *Myers v. Willis*, 17 C. B. 77; 25 L. J., C. P. 39; 2 Jur., N. S. 41. Affirmed (*in error*), 18 C. B. 886; 25 L. J., C. P. 255.

The owner of a ship, which was then at sea, transferred it to the defendant by absolute bill of sale, and the transfer was duly registered. The bill of sale was in fact intended only as a collateral security for a loan, and the defendant in no way interfered with the ship. While abroad the master entered into contracts (which were within his general authority) with the plaintiff, neither party being aware of the transfer to the defendant:—Held, that he was not liable on these contracts, as there was no evidence of authority from him to the master to act as his agent. *Ib.*

The registered owner of a ship is *prima facie* liable for goods furnished for the use of that ship, but such liability may be rebutted by evidence of the credit having been given to others. *Cox v. Reid*, 1 C. & P. 602; R. & M. 199. See also *cases ante*, col. 1197.

At Home Port.]—The master has authority by law to pledge the credit of his owner, resident in England, for money advanced to the master in an English port where the owner has no agent, if such advance of money was necessary for the prosecution of the voyage; and whether it was so or not is a question for the jury. *Arthur v. Barton*, 6 M. & W. 138.

Where clothes have been supplied to a ship's crew on the orders of the master, in a port within a day's post of the residence of the owners of the vessel, and an undertaking to pay given by the master, the value of the goods cannot be recovered from the owners. *Curran v. Wood*, 15 L. T. 592.

In an action against an owner to recover money advanced to the captain for the use of the ship whilst in a home port:—Held, that the only question for the jury was, whether the captain's position was such as to constitute him the authorized agent of the owner, in order to procure such advances; and that the state of

the accounts between the captain and the owner at the time had nothing to do with the case. *Williamson v. Page*, 1 C. & K. 581.

In a home port, as well as a foreign one, the master has implied authority to borrow money on the owner's credit in case of necessity. *Stonehouse v. Grant*, 2 Q. B. 431, n.

But the master had no implied authority to pledge the owner's credit in respect of necessary supplies and advances for the use of the ship during several weeks while she lay at Newport, Monmouthshire; the owner during all that time having resided at Plymouth, and nothing appearing to have prevented communication, if desired, between the master and owner. *Ib.*

In a home port, the master has the implied authority to borrow money for the necessary use of the ship, if the owner is absent, and no communication with him can be had without great prejudice and delay. *Johns v. Simons*, 2 Q. B. 425.

A vessel having been a fortnight windbound at Newport, her owner residing at Exeter, one day's post from Newport, the master borrowed 5l. from a broker, in order to enable him to purchase provisions necessary for the use of the ship:—Held, that the jury was justified in inferring that there was such a reasonable necessity for borrowing the money as to render the owner liable for it, though there was no proof that the goods might not have been obtained by the master on credit. *Edwards v. Havill*, 14 C. B. 107; 2 C. L. R. 1343; 23 L. J., C. P. 7; 17 Jur. 1103.

A shipowner (in England) is liable for money advanced to the master at his request, for the necessary use of the ship after her arrival in an English port, nor is the consent of the owner necessary to establish his responsibility. *Robinson v. Lyall*, 7 Price, 592.

Abroad.]—An owner of a vessel is liable for money supplied to the captain in a foreign port, provided the supply is absolutely necessary for the use of the vessel. *Rocher v. Busher*, 1 Stark. 27.

The plaintiff must shew that it was necessary to borrow the money, and must prove the actual application of it. *Begle v. Atty*, Gow, 50.

It is not sufficient to prove the advance of a much larger sum than was necessary for the use of the ship, and an application of part of that sum to such uses, and that the residue was placed to the private account of the captain. *Palmer v. Gooch*, 2 Stark. 428.

A shipowner is not only liable for necessary repairs done to a ship by the master's order, but for such as are fit and proper for the vessel on her voyage, and such as a prudent owner, if present himself, would order. *Webster v. Seekamp*, 4 B. & A. 352.

An owner is not liable for money advanced to the master, and expended by him in the necessary use of the ship, unless the money is advanced expressly for that purpose. *Thacker v. Moates*, 1 M. & Rob. 79.

— Where Express Stipulation in Charterparty.]—Where A., charterer of a vessel, by the charterparty, agreed that, on the arrival of the ship at the outward port, he would, through his agent there, supply cash to the master for the disbursement of the vessel, to be repaid by bills to be drawn by the master on the owner; and on the arrival of the vessel there, the agent supplied goods for the use of the crew, and paid certain

money demands made on the master, but did not advance any actual cash:—Held, that although it was not shewn that any bills were drawn by the master for the amount, A. might recover it from the owner in an action for goods sold and delivered and for money paid, the master having authority to obtain supplies of goods and money for the necessary use of the ship on the credit of the owner, independently of the express stipulation of the charterparty. *Weston v. Wright*, 7 M. & W. 396.

A chartered ship at her outward port being in want of money for her necessary disbursements, a merchant there being shewn the charterparty, by which the freighter covenanted to furnish what money might be required for the necessary disbursements of the ship, advanced the requisite sum to the master, and took a bill of exchange drawn by him for the amount upon the freighter:—Held, that, on this bill being dishonoured by the freighter, the owner of the ship was not liable for any part of the money advanced. *Harber v. Brotherton*, 4 Camp. 254. See also cases post, col. 1369.

— Where Solvent Agents Appointed.]—The master of a ship has no power to pledge the owner's credit for requisite supplies to her in a foreign port at which a solvent agent for her has been appointed; and a ship chandler who, in ignorance of there being an agent at the port, furnishes goods or advances money for the ship's use upon an order given by the master without the owner's authority, cannot recover the price of the goods or the amount of the loan from the owner, if at the time of supplying the goods or advancing the money he had the means of knowing that an agent able and willing to furnish what was requisite for the ship had been appointed by the owner to act at the foreign port. *Gunn v. Roberts*, 9 L. R., C. P. 531; 43 L. J., C. P. 233; 30 L. T. 424; 22 W. R. 652.

County Courts Jurisdiction—Liability of Domiciled Owners.]—When a suit is instituted in a county court under 31 & 32 Vict. c. 71, s. 3, for necessities supplied to a ship, the objection that the owner or part owner of the ship is domiciled in England or Wales must be taken before judgment is pronounced. *Michael, Ex parte*, 7 L. R., Q. B. 658; 41 L. J., Q. B. 349; 26 L. T. 871.

When the objection is taken for the first time after judgment has been pronounced, a prohibition will not be granted. *Ib.*

c. Rights of Third Parties.

Advances to Master to Pay for and Release Ship.]—A master and sole owner of a vessel put her into a shipwright's dock for repair. The shipwright repaired the vessel, and refused to allow her to leave his dock until his bill for the repairs was paid for. The master having no funds, the plaintiff lent him money to pay the shipwright's bill, and the master paid the bill with the money lent:—Held, that the plaintiff was entitled to recover the amount of the loan in a suit for necessities. *The Albert Crosby*, 2 L. R., Adm. 37; 18 W. R. 410.

Necessaries—Agents Paying for.]—The agents

of a foreign ship in a British port, who have paid for necessities supplied to her, or who have rendered themselves liable to pay for such necessities, may sue the ship for such advances as were made on her account, but not for the balance of a general account against her owners. *The Underwriter*, 25 L. T. 279.

Necessaries having been supplied to a ship in a foreign port, they were paid for by the agents at that port, the master indorsing the accounts to the agents, when sent to him, with a request to them to pay, and signing them. The master was accredited to the agents by his owners, and the former were to draw bills on the owners for the amounts advanced. No money passed through the master's hands. When the ship arrived in England, the mortgagees took possession of her and the freight:—Held, that as the master became personally liable for the amounts so paid, he had a right to proceed in rem against the ship. *The Marco Polo*, 24 L. T. 804.

— Priority.]—A ship's agent was appointed by the master on his arrival at Bristol. He had no previous knowledge of either master or owner, but made no inquiries as to how he was to be repaid his advances for necessities. He allowed the vessel to be placed in the hands of a shipwright to be repaired, and when her value was by this means increased, caused her to be arrested:—Held, that he was not entitled to be paid his claim in priority to the shipwright. *The Panthea*, 25 L. T. 983.

A claim against a ship for necessities supplied, when made, not by the person who actually supplied them, but by the broker who procured them to be supplied, and paid for them on account of the ship, does not take precedence of a claim under a bottomry bond. *The Flor do Funchal*, 13 W. R. 1000.

Advance of Freight to enable Master to Pay Disbursements—Priority.]—An advance of freight to enable a master to pay his ship's disbursements before sailing does not give the charterer a claim against the ship which will take precedence of the claim of a mortgagee; nor does an advance for a similar purpose made by an insurance company. *The Turliani*, 32 L. T. 841.

Lien on Ship.]—The jurisdiction conferred on the Court of Admiralty by the Admiralty Court Act, 1861 (24 Vict. c. 10), s. 5, "over any claim for necessities supplied to any ship elsewhere than in the port to which the ship belongs," does not create a maritime lien, nor render the ship chargeable for necessities. *Johnson v. Black*, *The Two Ellens*, 4 L. R., P. C. 161; 41 L. J., Adm. 33; 26 L. T. 1; 20 W. R. 592; 8 Moore, P. C. C., N. S. 398.

The material-man has no maritime lien, his right to the res as a security only arises upon his instituting a suit; any security he may thus obtain is subject therefore to any then existing claims; and a registered mortgage takes precedence as an existing incumbrance over a claim for necessities, though supplied previously to the register of the mortgage. *The Pacific*, B. & L. 243; 33 L. J., Adm. 120; 10 Jur., N. S. 1110; 10 L. T. 541.

A tradesman has a lien on a ship which he has

supplied with necessaries. *Rick v. Cve*, Cowp. 639; 1 T. R. 108, n.

— **Agent.**—Although the master has a lien upon the ship for average expenses, the ship's agent, if he has paid them, has no such lien. A claim by ship's agent for disbursements cannot be recognized in the Court of Admiralty, even against the proceeds of ship or cargo. *The Sobolmstein*, 1 L. R., Adm. 293; 36 L. J., Adm. 5.

Remedy after Sale.—A material-man, who supplies stores and materials for the equipment of a British ship, having no maritime lien, cannot enforce his claim against the ship in the hands of a subsequent purchaser, even though such purchaser has notice at the time of purchase that the claim is still unpaid. *The Aneroid*, 2 Adm. D. 189; 47 L. J., Adm. 15; 36 L. T. 448.

A statement of claim in an action of necessities in rem alleged that in November, 1874, the plaintiff had supplied to the owners of the vessel proceeded against stores necessary for her equipment; that in September, 1876, whilst the amount due in respect of the stores was still unpaid, forty-three sixty-fourth shares in the vessel had been transferred to the defendant in the action with knowledge and notice of the claim; that the defendant became owner of the shares subject to such claim; and that the value of the shares was increased by reason of the equipment, and the owners of the vessel had derived benefit therefrom:—Held, that the statement of claim shewed no right of action in respect of the vessel as against the defendant. *Id.*

Effect of Action.—Where one only of several plaintiffs in different causes of necessities has obtained a decree of the court, he is entitled to be paid in priority; the others, being in pari conditione, share rateably. *The William F. Safford*, Lush. 69; 29 L. J., Adm. 109.

The institution of a suit as a cause of necessities does not estop the plaintiff from afterwards pleading, and proving that his claim is in respect of repairs; but the title of the cause must be amended. *The Skipworth*, 10 Jur., N. S. 445; 10 L. T. 48.

Contempt of Court by Master.—Where, on a claim for necessities, the master, in contempt of the warrant, sailed out of the jurisdiction, the court allowed a cause for necessities to be set down, and the plaintiff to file proofs; and, upon such proof of the facts, condemned the ship in the claim and costs. *The Lady Blessington*, 34 L. J., Adm. 72.

Liability of Masters to.—See cases post, col. 1222.

Priority over Master and Seamen.—See *infra*, IX. and X.

— **Over Mortgagees.**—See *infra*.

d. Liability of Mortgagees.

Possession.—The mere fact of ownership, without a privity of contract, is not sufficient to render an owner liable for goods furnished on

the ship's account; nor does it attach any obligation on a mortgagee merely as such, as he derives no profit until the ship comes into his actual possession. *Baker v. Buckle*, 7 Moore, 349.

A mere mortgagee of a ship, who does not take possession, is not liable for necessities supplied for the use of the ship previously to a re-transfer. *Twentyman v. Hart*, 1 Stark. 366.

Where a ship is mortgaged, and the mortgagor continues in possession, the master employed by him cannot maintain an action for wages and disbursements against the mortgagee. *Annett v. Carstairs*, 3 Camp. 354.

A reply in a cause of necessities, leaving it doubtful whether the person in possession of the vessel at the time of the supply was the original mortgagee or the transferee of the mortgage, is bad. *The Troubadour*, 1 L. R., Adm. 302; 16 L. T. 156.

A mortgagee in possession will not be liable for necessities supplied, unless the master in ordering them acted as the agent of the mortgagee. *Id.*

An allegation that a defendant was in possession of the vessel at the date of the supplies, and personally liable for them, will not be a good reply to an answer of a defendant claiming to be a mortgagee prior to the date of the supply. *Id.*

A., the owner of a ship, executed an absolute bill of sale of it to B., and by another deed of the same date assigned other property to B., which deed of assignment (reciting that the bill of sale was for the better securing a sum of money lent by B. to A., and also reciting a bond and warrant of attorney given by A. to B. to secure the same sum) declared that these "several deeds and instruments were made to enable B., by sale of all the things comprised in them, to raise the sum lent without the concurrence of A., at any time before the money should be paid off;" but in the same deed there was a covenant that, upon payment of the money, "B. should reconvey to A., but so as not to prevent B. from selling, &c. at any time before the full payment," &c.:—Held, that under these conveyances B. was not absolute owner of the ship, but only mortgagee; and was not liable for necessities provided for the ship before he took possession. *Jackson v. Vernon*, 1 H. Bl. 114.

Mortgagee and Broker.—If a person, who is mortgagee as well as broker of a ship, gives directions for repairs to be done, the question for the jury will be, in an action by the tradesman against him, whether he gave the directions only in his character of broker, or as a person having an interest in the vessel. *Castle v. Duke*, 5 C. & P. 359.

Lien against.—A mortgagor of a ship, who remains in the ostensible ownership, has an implied authority to confer a right of lien for repairs necessary to keep her seaworthy, notwithstanding s. 70 of the 17 & 18 Vict. c. 104, which enacts, that a mortgagee shall not by reason of his mortgage be deemed to be the owner of a ship, or any share therein, nor shall the mortgagor be deemed to have ceased to be owner of such mortgaged ship or share, except in so far as may be necessary for making such ship or share available as a security for the mortgaged debt. *Williams v. Allsup*, 10 C. B., N. S. 417; 30 L. J., C. P. 353; 8 Jur., N. S. 57; 4 L. T. 550.

Mortgagees are entitled to payment in priority

to material-men who at the time of supplying the materials were not in such actual possession of the ship as to give them a possessory lien over her. *The Scio*, 1 L. R., Adm. 353; 16 L. T. 642.

Where a graving-flat was attached to a vessel, and chisels and other implements were on board at the time of arrest, the property of the material-men:—Held, that these facts were insufficient to prove possession. *Ib.*

Priority over Material Men.—Where a mortgagee brings an action to realize his security, and material-men with a common-law possessory lien on the ship intervene, and the ship, by order of the court, is sold, and the proceeds are only sufficient to satisfy the claim of the material-men, the mortgagee is still entitled to be paid his taxed costs, up to the date of the sale, out of the proceeds of the sale of the ship in priority to the material-men. *The Sherbro*, 52 L. J., Adm. 28; 48 L. T. 767.

A British colonial vessel was mortgaged by her owners. The mortgage was duly registered under the Merchant Shipping Act, 1854. In February, 1868, whilst lying in the port of London, the material-men, on the order of the master, did work and furnished supplies to the ship necessary to put her in a seaworthy condition. In July, 1868, the mortgagee executed an instrument transferring the mortgage to B. This transfer was without any valuable consideration, and was not registered, being made to enable him to take charge of the ship for the mortgagee. In the same month B. took possession of the ship. The material-men having instituted a suit against the ship to recover the amount due to them for the work and supplies, B. intervened. At the time of the institution of the suit, the ship was under the arrest of the court, at the instance of two of her crew who had instituted a cause of wages; the owners of the ship were domiciled in Nova Scotia. The ship having been sold, the proceeds were found insufficient to satisfy the claim of the material-men and the mortgage debt:—Held, that the assignee of the mortgagee was entitled to have his mortgage debt satisfied before the material-men were paid the amount of their claim. *Johnson v. Black, The Two Ellens*, 4 L. R., P. C. 161; 41 L. J., Adm. 33; 26 L. T. 1; 20 W. R. 592; 8 Moore, P. C. C., N. S. 398.

Necessaries were supplied in an English port to a ship belonging to a colonial port. The ship was under mortgage; the mortgagee had taken possession. No owner or part owner being domiciled in England or Wales, a suit in rem against the ship was instituted in the Admiralty Court by the person who had supplied the necessaries. The mortgagee intervened to defend, claiming priority:—Held, that the mortgagee had priority, the claimant for necessaries having no maritime lien, and no equity to precede the mortgagee. *Ib.*

In November, 1861, A. supplied necessaries to a British ship. On the 12th of December, 1861, B. became a registered mortgagee of the ship, and A. subsequently instituted a cause of necessaries against the ship:—Held, that the mortgage of B. had priority over the claim for necessaries. *The Pacific*, B. & L. 243; 33 L. J., Adm. 120; 10 Jur., N. S. 1110; 10 L. T. 541.

A. was quarter owner of a ship; B. was owner of three-fourths. B. mortgaged his share. The mortgagee did not take possession, and the ship was by arrangement between A. and B. left under

the control of A. A. ordered repairs to the vessel, which was afterwards sold by order of the Court of Admiralty:—Held, that in the distribution of the proceeds of the sale the mortgagee of the three-fourths was entitled to his proportion of the proceeds, without contributing towards the payment of the material-men. *The Harriet*, 18 L. T. 804.

Right of Master against Mortgagee.—In his accounts against the mortgagee the master is entitled to security for the amount for which he is personally liable in respect of necessaries. *The Limerick*, 1 Adm. D. 292; 34 L. T. 708—C. A.

e. Devolution of Interest.

Liability of Purchaser.—The purchaser of a ship takes her with the liabilities attached by law—seamen's wages, bottomry bond, demand for salvage; and his remedy must be against the vendor. *The Nymph*, Swabey, 86.

A shipowner assigned fifteen-sixteenths of a ship to his creditor, in trust to sell and retain his debts, and afterwards became bankrupt. The ship was afterwards sold:—Held, that the creditor must bear his proportion of the seamen's wages and other expenses on account of the ship. *Douglas v. Russell*, 4 Sim. 524; 1 Mylne & K. 488.

Where a ship was transferred while at sea to a vendee resident in the port in which she was registered, and money was paid by the vendee's agents under the sentence of a foreign court for salvage and wages of the captain and crew, provisions, and sundry ship disbursements:—Held, that the salvage and mariners' wages were a lien on the ship, but not the sums paid for the captain's wages, nor the disbursements. *Richardson v. Campbell*, 5 B. & A. 203, n.

The lien on a ship for necessaries supplied continues, notwithstanding the sale of the ship, if there have been no laches in enforcing the lien. *The West Friesland*, Swabey, 454; 5 Jur., N. S. 658.

Where A., who had contracted to buy a share of a ship in July (but did not execute a bill of sale till the September), by a memorandum of agreement dated September 30th, transferred his share with all his liabilities as owner to B., and afterwards sued B. for expenses incurred by himself with respect of the ship, after the contract for the purchase of the ship in July, but before the execution of the bill of sale in September:—Held, that, as the memorandum shewed nothing to make B. liable for expenses not incurred by the owner, the action therefore would not lie. *Chapman v. Callis*, 9 C. B., N. S. 769; 30 L. J., C. P. 241; 7 Jur., N. S. 995; 3 L. T. 890; 9 W. R. 375.

Liability while on Register.—Where there were two joint owners of a ship, and one, by private agreement, parted with all his interest in his share to the other, to be paid for by bills at different dates, but kept his name on the register by way of collateral security for the payment of the bills:—Held, that he was liable for repairs done to the ship subsequently to such agreement, although he had never afterwards interfered in the concern or management of the vessel. *Dowson v. Leake*, D. & R., N. P. C. 52.

B., managing owner of a ship, ordered necessary repairs. R. was at that time a registered part owner, but, before the order was given, had entered into a contract, to which B. was privy, for the sale of her share, and had received a bill of exchange in payment, though the contract was not completed until after the repairs had been made. R. never interfered in the concerns of the ship. The bill for repairs sent in was headed, "The captain and owners of the ship F.:"—Held, that R. was not liable for the repairs. *Curling v. Robertson*, 8 Scott, N. R. 12; 7 M. & G. 336; 13 L. J., C. P. 137.

Although legal ownership is *prima facie* evidence of liability, yet it may be rebutted by proof of the beneficial interest having been parted with, and of the legal owners having ceased to interfere with the management of the vessel; and the true question for the jury in cases of this description is, "on whose credit the repairs were done." *Jennings v. Griffiths*, R. & M. 42.

Repairs—Before Registration.—The sole registered owner of a ship gave orders for materials to be furnished and work to be done for the repairs of it; but before all the articles were delivered on board, he conveyed the vessel, with all its furniture, to another, by a bill of sale, which was duly registered:—Held, that the vendee was not liable for any of the goods furnished before the legal title was conveyed to him, and registered in the manner prescribed by the Registry Acts, whatever equitable agreement might have existed before between him and the vendor, for the conveyance of the whole or a share of the ship, which was unknown to the tradesmen; nor was the vendee even liable for any of the goods delivered on board after the sale to him, by virtue of the previous orders of the vendor, to whom the credit was personally given; but the vendee was held liable for articles which were ordered by the captain for the use of the vessel after the legal title was transferred to him. *Trewhella v. Rowe*, 11 East, 435.

Sale—Preliminary Charter.—A., being sole owner of a vessel, contracted to sell one-half share in her to M. & T., and agreed with them that they should have exclusive direction, management, and control of the vessel, to be dealt with and managed by them as managing owners and ship's husbands as they might think best, without let or hindrance from A. There was at the end of the contract a clause that M. and T. were to pay A. 900*l.* as a charter for his half share of the vessel for the first six months from the date of the vessel being ready to receive her cargo. During those six months repairs became necessary to the vessel, and were ordered to be done by T.:—Held, that A. was liable as part owner to pay for such repairs. *Preston v. Tamplin*, 2 H. & N. 363; 26 L. J., Ex. 346. Affirmed, 2 H. & N. 684; 27 L. J., Ex. 192; 3 Jur., N. S. 1247—Ex. Ch.

Abandonment to Underwriters.—The owner is liable for stores and necessaries supplied by the order of the supercargo, after the detention and liberation of the vessel by a foreign power, although the supplies are afforded after an abandonment by the owner to the underwriters. *Mitchell v. Glennie*, 1 Stark, 230.

f. Letting to Master.

Where Covenant by Master to Repair.—Though the master of a vessel is also lessee of it, by agreement with the owners, for a term of years, under a covenant on their part that he shall have the sole management of the ship, and employ her for his own sole benefit, and on his part that he shall repair her at his own sole cost and charge, the owners are still liable for necessaries furnished for the ship by order of the master, though without the knowledge, or without their being known to the person who supplied them. *Rick v. Coe*, Cowp. 636; 1 T. R. 168, n.

The registered owner is not liable for articles furnished without his order for the repair of a vessel, chartered for a year, by a party who has undertaken to repair the ship during that term. *Reece v. Davis*, 3 N. & M. 873; 1 A. & E. 312.

Nor, when there is no charterparty, unless the goods were ordered by the agent of the owner, or were beneficial to him. *Id.*

The registered owners of a steam-boat let it to A., the captain, for one year; the boat to be repaired by A., the engines to be repaired by the owners, who were to appoint an engineer:—Held, that the owners were not liable for repairs ordered by A., unconnected with the engine. *Id.*

The registered owner of a ship having chartered her to the then captain at a rent for a certain number of voyages, is not liable for stores furnished to the ship by order of the charterer, during the charterparty. *Frazer v. Marsh*, 13 East, 238; 2 Camp. 317.

g. Necessaries for Foreign Ships.

Jurisdiction of Admiralty Court.—The Court of Admiralty has no jurisdiction, either under 3 & 4 Vict. c. 65, or under 24 & 25 Vict. c. 10, to entertain a claim for repairs done, and necessaries supplied, to a foreign ship in a foreign port. *The India*, 32 L. J., Adm. 185; 9 Jur., N. S. 417.

Articles supplied for the equipment of a vessel building in a foreign dockyard are not necessaries within the meaning of 3 & 4 Vict. c. 65, s. 6. *The Ocean*, 2 Rob. Adm. Rep. 368; 9 Jur. 381.

The term "domiciled" in 24 & 25 Vict. c. 10, s. 5, is used in its known legal sense; and an action for necessaries will not lie against a ship, the owner of which is temporarily absent from this country. *The Pacific*, B. & L. 243; 33 L. J., Adm. 120; 10 Jur., N. S. 1110; 10 L. T. 541.

Who may Recover.—The agent for a foreign ship, being also part owner, may recover against the ship for necessary supplies. *The West Friesland*, Swabey, 454; 5 Jur., N. S. 658.

"Necessaries," in 3 & 4 Vict. c. 65, s. 6, mean articles immediately necessary for the ship, as contradistinguished from those merely necessary for the voyage. *The Comtesse de Tregeville*, Lush. 329; 4 L. T. 713.

The statute does not apply to ordinary mercantile accounts between shipowner and agent. *Id.*

A firm in England, having accepted and paid a bill of exchange drawn on them by the master of a foreign ship abroad, to procure necessaries,

may sue the ship in the Admiralty Court, as for necessaries. *The Onni*, Lush, 154; 3 L. T. 447.

An advance of money, to pay off a bottomry bond for which a ship is arrested, being made under a contract to pay off claims outstanding on the ship, and outfit her for a new voyage, in consideration of receiving brokerage and the pre-paid freight for the new voyage, is not within 3 & 4 Vict. c. 65, s. 6, and cannot be recovered in the Admiralty Court. *Ib.*

A repayment of a debt due from the ship for the supply of necessaries does not place the person making such repayment in the position of a person supplying the necessaries even though such repayment was required by the law of the country where the supply was made, and the ship could not leave the port, until such repayment had been made. *The Pacific*, *supra*.

Lien.—Necessaries do not ab origine give a lien, but only a statutory remedy against the ship. *The Gustaf*, 31 L. J., Adm. 207; 6 L. T. 660.

Supplied in Colonial Ports.—The court has jurisdiction to entertain a claim against a foreign ship to recover payments made to enable the master of the ship to supply her with necessaries while lying in a British colonial port. *The Anna*, 1 Adm. D. 253; 46 L. J., Adm. 15; 34 L. T. 895—C. A.

The Admiralty Division of the High Court has jurisdiction to entertain an action brought for necessaries supplied to a foreign ship in a British colonial port. *Ib.*

The master of a foreign vessel lying in the port of Quebec, being without funds or credit, by means of a bill of exchange drawn upon a firm of shipbrokers in London, procured the advance of a sum of money for necessaries for the ship. The bill was accepted and paid, but the acceptors, not having received the amount of the bill from the shipowners, instituted an action against the ship for the amount of the bill:—Held, that the Court of Admiralty had jurisdiction to entertain the action. *Ib.*

An American ship, supplied with necessaries at the Cape of Good Hope by an English firm having an establishment there, on her arrival in the port of London, was arrested at the suit of the merchant who supplied the necessaries, and, with the consent of the owner, sold. Payment to him out of the proceeds was opposed by the mortgagees of the vessel; but the court held that it had jurisdiction on a claim for necessaries supplied to a foreign vessel in the colonial as well as in British ports, and decreed payment accordingly. *The Wataga*, Swabey, 165.

Transfer to British Owner.—A claim for necessaries supplied to a foreign ship may be enforced by proceedings in rem under 3 & 4 Vict. c. 65, s. 6, notwithstanding a subsequent and bona fide transfer to a British owner, and this remedy is not taken away by 24 & 25 Vict. c. 10, s. 5, though the British owner is domiciled in England at the time of the institution of the cause. *The Ella A. Clark*, B. & L. 32; 32 L. J., Adm. 211; 9 Jur., N. S. 312; 8 L. T. 119; 11 W. R. 524.

The 24 & 25 Vict. c. 10, s. 5, does not apply to ships foreign owned at the time when the necessaries were furnished. *Ib.*

A vessel foreign owned at the time when

necessaries are supplied to her, cannot by a subsequent sale change her legal position so as to deprive the person supplying the necessaries of the remedies given by 3 & 4 Vict. c. 65, s. 6. *The Princess Charlotte*, 33 L. J., Adm. 188.

5. LIABILITY FOR INJURIES CAUSED BY SHIP.

Injuries to Sea-wall—Delay in Breaking up so as to save Cargo.—A vessel being driven upon a sea-wall became a wreck, and could not be removed otherwise than by breaking her up. Valuable property was on board, which would have been lost if she had been immediately broken up. The owners of the vessel removed the property with reasonable speed, and then broke up the vessel. During the period which elapsed between the time when she could have been first broken up and the time when she was broken up in fact, damage was done by the vessel to the sea-wall on which she lay:—Held (assuming the owners not to have been guilty of any negligence), that they, although remaining in possession, were only bound to use reasonable care and diligence in preventing the ship from damaging the sea-wall, and were entitled to remove the property on board before breaking her up, and that having done so with reasonable speed they were not liable. *Romney Marsh v. Trinity House Corporation*, 5 L. R., Ex. 204; 39 L. J., Ex. 163; 22 L. T. 446; 18 W. R. 869. Affirmed, 7 L. R., Ex. 247; 41 L. J., Ex. 106—Ex. Ch.

The vessel, owing to the negligence of their servants, struck on a sandbank, and becoming from that cause unmanageable, was driven by the wind and tide upon a sea-wall, which it damaged:—Held, that the owners of the vessel were liable for the damages so caused. *Ib.*

Where Vessel Let to Master.—The owner of a ship, who, by a verbal agreement, gives up all control over her to the captain, but retains a right to one-third of the net profits, and is subsequently to the agreement registered as managing owner under the Merchant Shipping Act, 1875, is liable for the negligent management of the vessel by the captain, although occurring during her employment under a charterparty of which the owner knew nothing. *Steel v. Lester*, 3 C. P. D. 121; 47 L. J., C. P. 43; 37 L. T. 642; 26 W. R. 212.

A sloop was navigated under a verbal agreement between Lester, the managing owner, registered according to the Merchant Shipping Act, 1875, and Lilee, the captain, by which, on condition that Lester should have one-third of the net profits, accounts of which were to be rendered to him by the captain from time to time, he was at liberty to go to any port, and take or refuse any cargo he chose, and was also to hire and pay the crew and supply the stores, Lester having no control over the vessel. While discharging cargo under a charter made by the captain, "for and on behalf of the owner," the vessel, through the negligence of the captain, broke loose from her moorings and damaged the wharf of the plaintiff, who brought an action against Lester and Lilee:—Held, that the agreement did not amount to a demise of the vessel, and whatever was the precise relationship thereby created between them inter se, Lester was responsible to the public for the negligence of

Lilee, and, therefore, both were liable to the action. *Ib.*

Vis major—Injury to Pier.]—A vessel was driven ashore by a violent storm, and after having been abandoned was forced by the wind and waves against a pier, whereby serious damage was occasioned :—Held, that the owners of the ship were not liable under s. 74 of the Harbours, Docks and Piers Act, 1847. *Wear Commissioners v. Adamson*, 2 App. Cas. 743 ; 47 L. J., Q. B. 193 ; 37 L. T. 543—H. L.

Injury to Submarine Telegraph Cable by Anchor.]—A ship cast anchor near the South Foreland. Her anchor got foul of a submarine telegraph cable. The crew heaved up the anchor to the water's edge, and the cable came up entangled with it. In order to free the anchor from the cable the mate of the ship, acting under the direction of the master, cut the cable in two with a hatchet. By the exercise of ordinary nautical skill the anchor might have been freed from the cable by the crew without cutting the cable :—Held, that the court had jurisdiction to entertain an action instituted by the owners of the cable against the ship for the damage done to the cable, and that the owners of the telegraph cable were entitled to judgment. *The Clara Killam*, 3 L. R., Adm. 161 ; 23 L. T. 27 ; 19 W. R. 25.

Injury to Diver.]—Where a diver, while employed in diving in a navigable river within the body of a county, was injured by the paddle-wheel of a steamship, and instituted a cause of damage against the steamship in the Court of Admiralty for the recovery of damages in respect of the personal injuries he had sustained :—Held, that the 24 Vict. c. 10, s. 7, gave the Court of Admiralty jurisdiction. *The Sylph*, 2 A. & E. 24.

In Cases of Collision.]—See COLLISION, *infra*.

6. IMPROPER ABANDONMENT.

Consequent Liability of Cargo Owners to Pay Salvage.]—A petition alleged that a master who was also the owner of the vessel had wilfully, improperly, and fraudulently injured and abandoned her on the high seas. She was subsequently taken into port by salvors, and the owners of cargo were compelled to pay salvage to get possession of their cargo, and its delivery was consequently delayed. The master and vessel were both foreign :—Held, that the allegation "fraudulently" might be struck out of the petition ; that the court had jurisdiction over the cause ; and that the owners of the cargo might sue the ship in the Admiralty Court for the constructive damage. *The Princess Royal*, 3 L. R., Adm. 41 ; 39 L. J., Adm. 43 ; 22 L. T. 39.

7. FOREIGN SHIPS.

Damage to Property.]—Sect. 527 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), which gives a remedy in certain cases against the owner of a foreign ship for damage done to a British subject in any part of the world, is confined to damage to *property*, and does not extend to injury to the *person*. *Harris v Owners of the Franconia*, 2 C. P. D. 173 ; 46 L. J., C. P. 363.

VIII. BARGE OWNERS.

Liability of, as Common Carrier.]—A barge owner let out his vessels for the conveyance of goods to any customers who applied to him. Each voyage was made under a separate agreement, and a barge was not let to more than one person for the same voyage. He did not ply between any fixed termini, but the customer fixed, in each particular case, the points of arrival and departure. In an action against the barge owner by a hirer for not safely and securely carrying his goods :—Held, that in exercising this employment he had incurred the liability of a common carrier, and was liable though the goods were lost without negligence on his part. *Liver Alkali Company v. Johnson*, 9 L. R., Ex. 338 ; 43 L. J., Ex. 216 ; 31 L. T. 95—Ex. Ch.

The barge owner was not a common carrier nor liable as such, but was liable as a shipowner carrying goods for hire upon the custom applicable to him as such. *Ib.*

IX. MASTERS AND COMMANDERS.

1. *Position of.*
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1. POSITION OF.

Implied Agreement.]—The law will presume that the terms of a master's engagement for one voyage extend to a succeeding voyage performed without a new agreement, express or clearly implied. *The Gananoque*, Lush. 448.

Wrongful Dismissal—Jurisdiction.]—A claim for damages for wrongful dismissal is within the cognizance of a court having original admiralty jurisdiction, and, semble, of a county court having admiralty jurisdiction by statute. *The Blessing*, 3 Adm. D. 35 ; 38 L. T. 259 ; 26 W. R. 404.

Measure of Damages.]—A master engaged for a voyage out and home, if wrongfully discharged abroad, is entitled to wages until he can obtain other employment. *The Camilla*, Swabey, 312.

Notice of Dismissal.]—The master of a ship, in the absence of express stipulation in the contract of hiring, is entitled to reasonable notice of dismissal from the shipowner. *Green v. Wright*, 1 C. P. D. 591 ; 35 L. T. 339.

Certificate of Master—Suspension.]—The Merchant Shipping Act, 1876 (39 & 40 Vict. c. 80), does not extend the jurisdiction to suspend or cancel the certificate of the master to cases not within the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), ss. 242, 432. There is, therefore, no power to suspend the master's certificate where a ship has merely been stranded without

material damage to the ship or loss of life. *Story, Ex parte*, 3 Q. B. D. 166; 47 L. J., Q. B. 266; 38 L. T. 29; 26 W. R. 329.

See further, XXV., WRECK COMMISSIONERS' INQUIRIES.

Captain not fellow-servant of Sailors.—The captain of a merchant ship is not a fellow-servant of the sailors, but is the agent or representative of the owners of the vessel during the voyage, and the owners of the vessel are responsible for the injury to or death of a sailor resulting from the negligence of the captain during the voyage. *Ramsay v. Quinn*, 8 Ir. R., C. L. 322.

Removal of.—By 17 & 18 Vict. c. 104, s. 240, the Court of Admiralty has power, on an application by the owner or part owner, to remove the master of a ship, if satisfied that the removal is necessary. *The Royalist*, B. & L. 46; 32 L. J., Adm. 105; 9 Jur., N. S. 852.

The removal is necessary if the master has committed a fraudulent breach of trust against the owners, such as making a payment of 5*l.* on ship's account, and fraudulently claiming 25*l.* of the owners, and the court will make the order of removal on the application of one part owner only, notwithstanding another part owner (the ship's husband) is dissentient. *Id.*

2. AUTHORITY TO BIND OWNERS.

To Substitute Voyage.—A captain of a ship has no authority, as such, to agree to a substitution of another voyage in the place of one agreed upon between his owners and the freighters in England, and on which he has sailed to a foreign country. *Burton v. Sharpe*, 2 Camp. 529.

Usual Course of Business.—If the master makes a particular engagement or warranty relating to the conveyance of merchandise according to the usual employment of the ship, the owners will be bound thereby, although made without their consent. *Ringist v. Ditchell*, 3 Esp. 64; 2 Camp. 556, n.

As Servant of Charterer.—Where the owner has let the ship to freight for a specific voyage, the master is the agent of the freighter, and consequently the owner is not liable for the non-delivery of the goods on the contract of the master. *James v. Jones*, 3 Esp. 27.

By Charterparty.—A master has no authority to bind his owners by writing forward to a broker in a foreign port, prior to the ship's arrival therein, authorizing the broker to charter his ship. The authority of a master to bind his owners by charterparty arises when he is in a foreign port, and his owners are not there, and there is difficulty in communicating with them. A master is not the agent for his owners to hold out a person as authorized to charter his ship, so as to bind the owners. *The Fanny, The Matilda*, 5 Asp. M. C. 75; 48 L. T. 771—C. A.

The master of an American vessel arriving in England, authorized by the owners to sell or charter the ship, entered into a charterparty with the plaintiff for a voyage to Ceylon and back. A few days afterwards the defendant purchased the ship from a party acting under a power of attorney from one of the owners to sell her. The greater part of the cargo had been

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put on board under the charterparty. The defendant attempted to stop the sailing of the ship:—Held, that the master having authority to charter the ship, which he had done, and the defendant knowing of the charterparty, an injunction would lie to restrain the purchasers from interfering with the sailing of the ship, in pursuance of the charterparty. *Messageries Impériales Company v. Baines*, 7 L. T. 763; 11 W. R. 322.

By what Law Governed.—The power of a master to bind his owners personally is but a branch of the general law of agency; and where the master contracts as such in a foreign port to carry goods for a foreigner, his authority to bind his owners is that conferred by the law of the country to which the ship belongs; and the flag of the ship is notice to all the world that his implied authority is limited by the law of that flag. *Lloyd v. Guibert*, 6 B. & S. 100; 33 L. J., Q. B. 241; 10 Jur., N. S. 949; 10 L. T. 570; 12 W. R. 953. Affirmed, 6 B. & S. 120; 35 L. J., Q. B. 74—Ex. Ch.

Where a master of a French ship contracted in the West Indies to carry goods of an Englishman thence to Liverpool, and on the voyage was obliged to put into a port of refuge, and there properly borrowed money on bottomry bonds for the use of the ship and crew, and the owner of the goods was obliged to pay money to the holder of the bonds in order to redeem his goods:—Held, that the owner of the goods had no claim against the owners of the ship, if they chose to abandon the ship and freight: inasmuch as by the law of France, it was lawful for them to free themselves from the acts and engagements of the master, in all that concerned the ship and voyage, by the abandonment of the ship and freight. *Id.*

Special Contract with Seamen.—A promise by a captain on behalf of his owners to pay monthly wages to one of the sailors, in order to induce him to become a hostage, is binding on the owners, although they abandon the ship and cargo. *Yeates v. Hall*, 1 T. R. 73. And see *Helly v. Grant*, 1 T. R. 76.

Settling Demurrage.—A., the owner of a ship, entered into a charterparty containing stipulations as to demurrage. The ship was detained in South Africa beyond the time stipulated for. The captain was in possession of the ship: he was to be paid freight and demurrage by bill in South America. After making the charterparty, and before the settlement hereinafter mentioned, the ship with the charter was sold to F. The captain became a part owner of the ship. The captain having settled the account for freight, demurrage, and delay with the charterer by taking a bill in South America:—Held, that F. and A., in whose names he was suing, were bound by such settlement. *Alexander v. Dowie*, 1 H. & N. 152; 25 L. J., Ex. 281.

Collecting Freight.—An order by an owner of a ship to a house abroad to collect freight, takes the freight out of the hands of the master. *The Edmond*, Lush. 58.

Salvage.—Observations of Brett, M. R., as to the implied authority of shipmasters to bind

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owners by salvage agreements. See *The Renpor*, 8 Adm. D. 115; 52 L. J., Adm. 49; 48 L. T. 887; 31 W. R. 640—C. A.

Power to Bind Owners for Necessaries.]—*See cases ante*, col. 1202.

3. PRIMAGE AND PREMIUMS.

Primage.]—Primage belongs of right to the master, and nothing but an express agreement can deprive him of his right to recover it from the freighter. An agreement by the master to receive from the owner a fixed sum, "in full of all cabin and other allowances," does not divest the master of his right. *Best v. Saunders*, M. & M. 208; 3 M. & R. 4. See *Caughey v. Gordon*, 3 C. P. D. 419; 27 W. R. 50.

By a bill of lading freight was to be paid "as per charterparty, with primage and average accustomed."—Held, that the reference to the charterparty applied to the freight only, and that in an action for primage the charterparty need not be produced. *Id.*

Where there is a written agreement between the master and owners, not mentioning primage, and the owners have received payment in respect of primage from the freighters:—Held, that the master, by the usage of trade, is entitled to such payment. *Charleton v. Cotesworth*, R. & M. 175.

As to what amounts to an agreement as between shipowner and master to dispense with primage, see *Scott v. Miller*, 5 Scott, 11; 3 Bing., N. C. 811.

Premiums on Bills.]—If the master in a foreign port, from the state of the exchange, receives a premium for a bill drawn upon England on account of the ship, this belongs to his owner, although there may have been a usage for masters of ships to appropriate such premiums to their own use. *Diplock v. Blackburn*, 3 Camp. 43.

4. ACCOUNTABLE FOR PROFITS.

A master who, having authority to employ the vessel on freight to the best advantage, but not to purchase a cargo on the owner's account, and being unable to procure remunerative freight, loads the ship with a cargo of his own, is liable to account to the owners for all profits made by the sale of the cargo, and not merely for a proper freight. *Shallcross v. Oldham*, 2 Johns. & H. 609; 5 L. T. 824; 10 W. R. 291.

The general principle, that a trustee cannot make a profit for himself by the use of the trust property, applies to an agent intrusted with a ship or other chattel for the purpose of using it for the owner's benefit. *Id.*

5. WAGES AND DISBURSEMENTS.

Actions for.]—A master is entitled to sue the ship for wages as earned on board the ship, within 24 & 25 Vict. c. 10, s. 10, if he performed the duties of master, although during his service he did not sleep on board the ship, and many of his duties were performed on shore. *The Chief-tain*, B. & L. 104; 32 L. J., Adm. 106; 9 Jur., N. S. 388; 8 L. T. 120; 11 W. R. 537.

He may also sue for disbursements made by him during such service on the ship's account, but not for mere liabilities incurred. *Id.*

A master suing for wages and disbursements is bound to furnish accounts before bringing his

suit, otherwise he will not be entitled to his costs. *The Fleur-de-Lis*, 1 L. R., Adm. 49; 12 Jur., N. S. 379.

He is entitled, under 17 & 18 Vict. c. 104, ss. 187, 191, to double pay for the number of days (not exceeding ten), during which the payment of his wages is improperly withheld; but he is not so entitled, if he himself causes the delay, by improperly keeping back the accounts of the ship. *The Princess Helena*, Lush. 190; 30 L. J., Adm. 137; 4 L. T. 869.

The 17 & 18 Vict. c. 104, s. 189, read with s. 191, extends to masters of ships. *The Blake-ney*, Swabey, 428; 5 Jur., N. S. 418.

Being compelled, by pressing necessity of ill health, to leave his ship abroad, he is entitled to sue immediately for his wages. *The Rajah of Cochin*, Swabey, 473.

— Disability to Sue—Habitual Drunkenness of Master.]—A shipmaster who has been habitually drunk during his employment cannot maintain an action for his wages. *The Macleod*, 5 P. D. 254.

— Not Dependent on Freight.]—The rule of marine law, that wages depend on the earning of freight, does not apply to the wages of the master. *Hawkins v. Twizell*, 5 El. & Bl. 883; 25 L. J., Q. B. 160; 2 Jur., N. S. 302.

Therefore, where a ship is lost, the administratrix of the captain is entitled to maintain an action for the period of his service before the loss. *Id.*

When freight has been earned, the master, though also part owner, may sue in the Admiralty Court to recover his wages and disbursements. *The Feronia*, 2 L. R., Adm. 65; 37 L. J., Adm. 60; 17 L. T. 619; 16 W. R. 585.

In an action by the master against his owners to recover wages which accrued during his detention in a foreign port, it is not incumbent on him to prove that freight was earned; it is sufficient for him to shew that he has performed his services; and the owners must adduce evidence to prove that he is not entitled to remuneration. *Brown v. Millener*, 1 Moore, 65; 7 Taunt. 319.

Part Owner—Mortgage of Part.]—F. and S., both residing at Halifax, Nova Scotia, were the owners each of a moiety of a ship and cargo. F. (as it was alleged) mortgaged his moiety to S. The ship sailed in November, 1868, from that port, F. being the master. After so sailing, S. assigned his own moiety and the other moiety, of which he was, as he alleged, mortgagee, to B., of Liverpool, who, on the arrival of the ship at Cork, ordered F. to take her round to Liverpool. F. declined to obey that order, on the ground that he, F., was the owner of a moiety of cargo and ship, and he denied in strong language in a letter to B. that he had mortgaged his moiety to S. The ship and cargo were arrested by order of the Admiralty Court and sold, at a price insufficient to cover the expenses:—Held, that F. was entitled to his wages as master earned on board the ship, even though he was part owner, and that the owner of the other moiety must pay him a moiety of such wages. *The Joseph Dexter*, 20 L. T. 820.

— Claim to Equitable Share.]—[In a suit for wages between an owner and the master,

who is also a part owner, the court can take no cognizance of a claim by the master to an equitable share in the vessel. *The D. Jew*, 13 L. T. 22.

Contract—Independent Condition.]—The captain of a South Sea whaler covenanted with the defendant that he would proceed to the fishery and procure a cargo of sperm oil, or as great a proportion as might be, under all circumstances, within his power to obtain; would return to London, and at his own cost deliver the cargo; would obey instructions, be frugal of provisions, and not dispose of any of them without accounting for the same; and would not smuggle or trade, or permit any one on board to do so. The defendant covenanted, on performance of the before-mentioned terms and conditions on the part of the captain, to pay him a certain proportion of the net proceeds of the cargo:—Held, that the captain's covenants were independent, and that the performance of them was not a condition precedent to an action on the defendant's covenant. *Stokers v. Curling*, 3 Bing. N. C. 355; 3 Scott, 740; 2 Hodges, 237.

Executed.]—A declaration stated, that the defendant was possessed of a ship, and the plaintiff was a master mariner, having interest in the island of N., in the West Indies, for loading a vessel; and it having been proposed by the plaintiff to the defendant that the defendant should give the plaintiff the command of the ship for a voyage to the West Indies and back, thereupon it was agreed, that, in consideration of the plaintiff having interest in N. for loading a vessel, the defendant would give the plaintiff the command of the ship, with the understanding that he would use all possible exertions for the benefit of the ship and the owners thereof, and that for such services the defendant would pay the plaintiff. Averment, that, in pursuance of the agreement, the defendant gave the plaintiff the command of the ship, and that he set out in command of the ship on the voyage, and safely delivered the outward cargo; that, finding that a homeward cargo was not likely to be obtained at N. without disadvantage to the ship and the owners, the plaintiff proceeded to the West Indies, and there procured a homeward cargo, and safely delivered the same, and then resigned the command of the ship into the hands of the defendant; and that, during all the time, the plaintiff used all possible exertions for the benefit of the ship and the owners. Breach, nonpayment by the defendant. Plea, that the plaintiff did not use all possible exertions for the benefit of the ship or of the owners:—Held, first, that a sufficient consideration appeared on the face of the declaration, the contract having been executed by the plaintiff. *Mills v. Blackall*, 11 Q. B. 358; 17 L. J., Q. B. 31; 12 Jur. 93.

Held, secondly, that the plea shewed only a partial failure of the consideration, and was, therefore, insufficient. *Id.*

Counter-claim in Action for Wages.]—In an action of wages by master against shipowner, the defendant, by way of set off and counter-claim, claimed damages for the loss of the ship by the negligence of the plaintiff:—Reply, that the ship was insured against a total loss, and that the underwriters had paid or agreed to pay to the owners the whole amount payable by

them on a total loss:—Held, on demurrer, that the reply was bad, because the plaintiff had not pleaded that the money had been actually paid to the defendant, or that the counter-claim had been brought without the authority of the underwriters. *The Sir Charles Napier*, 5 Adm. D. 73; 28 W. R. 718—C. A. Affirming 49 L. J., Adm. 23.

Jurisdiction of County Court.]—A contract that a master mariner shall take a share of a fishing adventure and bear a share of certain disbursements is a contract of wages by the general maritime law, independently of the Merchant Shipping Amendment Act, 1873 (36 & 37 Vict. c. 85), s. 8; and jurisdiction over such a contract is conferred on county courts having admiralty jurisdiction by the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 3, sub-s. 2. *The Blessing*, 3 Adm. D. 35; 38 L. T. 259; 26 W. R. 404. See *The Dictator*, 38 L. T. 947.

See also PRACTICE, XXIII. 1, b., *infra*.

Liability for Necessaries.]—The captain who gives directions for repairs, is liable to a tradesman in the first instance, if it does not appear that any credit was given to the owners. *Esery v. Cobb*, 5 C. & P. 358.

Where goods were ordered for a ship by the owner, before the appointment of the captain, though some were not delivered till afterwards, yet as no personal credit was given to the captain, he was not answerable for any of them. *Farmer v. Davies*, 1 T. R. 108. See *Nicholson v. Mounsey*, 15 East, 384. And *The Marco Polo*, 24 L. T. 804.

Disbursements—From what Time.]—A master can only claim against his ship for disbursements from the date on which he is placed on the ship's register as master. *The Albion*, 27 L. T. 723.

Counter-claim on Accounts when a Co-owner.]—In a cause of wages and disbursements instituted on behalf of a master, himself a co-owner, against other part owners, they may plead in answer that on a balance of account between the plaintiff as master and co-owner and the defendants nothing is due to the plaintiff, and set up a counter-claim for a balance due to them. *The City of Mobile*, 4 L. R., Adm. 191; 43 L. J., Adm. 41; 29 L. T. 406; 22 W. R. 191.

Defence on Criminal Charge—Forfeit.]—A master, while at a foreign port with a homeward-bound vessel, incurred expenses in defending himself against a charge of murder, maliciously brought by two of the crew, whom he had censured for misconduct. The master was tried and acquitted, and bound over in 10*l.* to prosecute the men for perjury. He forfeited the 10*l.* in order to return with the vessel to England:—Held, first, that he was entitled to the expenses of his defence, on the ground that the charge originated directly from the performance by the master of his duty to his owners in chastising the men. *The James Seddon*, 1 L. R., Adm. 62; 35 L. J., Adm. 117; 12 Jur., N. S. 609; 14 W. R. 973.

Held, secondly, that he was entitled to be allowed the 10*l.* forfeit, as it was for the in-

terest of his owners that the master should not be delayed in returning with the vessel. *Ib.*

— **Bills of Exchange.**—Upon an appeal from the report of the registrar and merchants as to a master's claim for wages and disbursements, the following items were objected to: 1. Sums of money for which the master as well as the ship was liable, but which he had not paid. 2. Slops supplied to seamen, who afterwards deserted. 3. The amount of a dishonoured bill of exchange drawn for ship's purposes by the master upon the managing owner, but it was doubtful whether the master had received notice of the dishonour:—Held, as to the first item that the claim might be allowed upon proof to the satisfaction of the registrar that the sums were actually paid. *The Peronia*, 2 L. R., Adm. 65; 37 L. J., Adm. 60; 17 L. T. 619; 16 W. R. 585.

Held, secondly, that the items for slops were properly allowed. *Ib.*

Held, thirdly, that as to the amount of the bill of exchange, even if notice of dishonour had not been waived, the master had not claimed the benefit of notice, and that therefore, as he was liable for the amount, the item was properly allowed. *Ib.*

There is no implied undertaking on the part of the owner, that a bill of exchange, drawn by the master on a third person, for money advanced for the ship's use, shall be duly honoured. *Harber v. Brotherstone*, 4 Camp. 254.

When the owners of a ship instruct the captain to make purchases in a foreign country, and to draw bills upon them in payment, the promise implied by law is not a promise to accept or pay the bills, but a promise to indemnify the captain against any loss or damage sustained by him from having drawn the bills. *Huntley v. Sanderson*, 1 C. & M. 467.

In April and May, 1880, the master of a steamship obtained at a British colonial port coals for the ship, and paid for them by bills of exchange drawn on the charterers of the ship. The bills were dishonoured by the charterers, and in August, 1880, the master was served with a writ in an action brought to recover the amount of the bills. Judgment in this action was recovered against the master in July, 1881. In October, 1881, the steamship was sold, and the master in November, 1882, instituted an action of disbursements against her and her freight. The purchasers appeared and put in bail. At the hearing of the action the judgment recovered against the plaintiff in August, 1881, remained still in force and unsatisfied, and the plaintiff claimed to recover as a disbursement the amount for which he was liable under it:—Held, that the liability of the plaintiff to satisfy the judgment against him must be considered as a disbursement in respect of which a maritime lien existed under the 10th section of the Admiralty Court Act, 1861. *The Fairport*, 8 Adm. D. 48; 5 Asp. M. C. 62; 52 L. J., Adm. 21; 48 L. T. 536; 31 W. R. 616.

Held, also, that the right to enforce such lien had not been lost by any want of reasonable diligence on the part of the plaintiff, and that his claim must be pronounced for. *Ib.*

Recovery against Owner of Disbursements Paid to Shipwright.—When shipwrights execute repairs to a ship at the order of the master

given under circumstances by which the shipwrights acquire a right to claim against either the owners or the master, and they elect to claim against the master, the latter may, in an action for wages and disbursements, proceed against the ship and recover for the amount of such shipwright's claim as a disbursement made on ship's account. *The Limerick*, 34 L. T. 708—C. A.

Sum Paid under Bond given on Collision.—When a ship through the default of her master has run into and damaged another ship, and the master of the former has in respect of such collision given a bond for the amount of the damage binding himself and his owners and the ship, he, being himself a wrongdoer, cannot, in an action for wages and disbursements, claim the amount of such bond or to be indemnified against any claim to be made against him thereunder in respect of the collision. *Ib.* Reversing 1 Adm. D. 292; 45 L. J., Adm. 97.

6. LIEN.

Certificate.—The master has no lien on the certificate of registry. *Gibson v. Ingo*, 6 Hare, 112.

The master, whether co-owner or not, has no lien upon a certificate of registry or ship's papers in case of wrongful dismissal. *The St. Olaf*, 35 L. T. 428.

For what.—The master has at common law a possessory lien on the cargo, not only for freight, but also for general average. *Cleary v. McAndrew*, *Cargo ex Galam*, 2 Moore, P. C. C., N. S. 216.

A captain who has entered into engagements on account of the ship, thereby acquires a lien on the goods, and on the freight, to the extent of his engagements. *White v. Baring*, 4 Esp. 22; *S. P.*, *The Panthea*, 25 L. T. 389.

But he has no lien on the ship for money expended, or debts incurred by him for repairs done to it on the voyage. *Hussey v. Christie*, 9 East, 426; 13 Ves. 599.

Nor on the freight for his wages, nor for his disbursements on account of the ship during the voyage, nor for the premiums paid by him abroad for the purpose of procuring the cargo. *Smith v. Plummer*, 1 B. & A. 575.

Nor for wages, stores or repairs done in England. *Wilkins v. Carmichael*, 1 Dougl. 101.

A master has no lien on the ship or freight for wages, nor for any expenditure which he may make in the ordinary discharge of his duties as master, however necessary for the performance of the voyage. But the case becomes one of ordinary principal and agent, where he makes a special contract, in itself ultra vires, in order to fulfil which he incurs special expenses; if the owner adopts the benefit of that contract, he must, in equity, also bear its burthens. *Bristow v. Whitmore*, 9 H. L. Cas. 391; 31 L. J., Ch. 467; 8 Jur., N. S. 291; 4 L. T. 622; 9 W. R. 621.

The master has no lien upon freight for his wages or other demands, unless it is a matter of express stipulation between himself and his owner. *Atkinson v. Cotesworth*, 5 D. & R. 552; 3 B. & C. 647; 1 C. & P. 339.

Where Unsatisfied Judgment against Master for Necessaries.—See *The Fairport*, *supra*.

Lien not lost by taking Mortgage of Ship.]—

A master is not deprived of his lien for wages and disbursements by the fact that he has taken a mortgage on the ship for the balance of his wages and disbursements, more especially if the shipowner has concealed from him the fact that there was a prior mortgage. *The Albion*, 27 L. T. 273.

— **Delay.]—**See *The Chieftain*, *infra*.

Under Tortious Hirer—Release.]—

The release by the master of his personal claim against the shipowner for wages does not operate as a release of the ship from his lien for such wages. The fact that the master was hired by one who had fraudulently obtained possession of the ship, will not prevent the master having a lien upon the ship for his wages and disbursements, if he has discharged his duties in ignorance of the fraud. *The Edwin*, B. & L. 211; 33 L. J., Adm. 197; 10 L. T. 658; 12 W. R. 992.

Colonial Law.]—By 17 & 18 Vict. c. 104, s. 191, a master has a lien for his wages in the Vice-Admiralty Court, whatever may be the municipal law of the colony. *The Rajah of Cochin*, Swabey, 473.

7. PRIORITIES.

Extent of.]—The master has a maritime lien on the ship for his wages and disbursements, and his claim takes priority over all other claims, save claims for salvage and damage by collision. *The Panthea*, 25 L. T. 389.

Maritime liens, being in the nature of rewards for services rendered, rank against the fund out of which they are to be paid in the inverse order of their attachment on the res, and the last in time should be the earliest in payment. *The Hope*, 28 L. T. 287.

Over Bottomry Bond.]—The claim of a master for his wages earned and disbursements made subsequently to a voyage, during which a bottomry bond has been given on his ship, takes priority over the claim of the bondholder. *Ib.*

A bottomry bondholder is entitled to priority over the claim of a master for wages earned on voyages previously to that during which the bond is given. *Ib.*

Against the balance of proceeds of sale of a vessel sold in a bottomry suit, the master has in respect of his claims, both for wages and disbursements, priority over the rights of the mortgagee. *The Mary Ann*, 1 L. R., Adm. 8; 35 L. J., Adm. 6; 12 Jur., N. S. 31; 13 L. T. 384; 14 W. R. 136.

A master, being sole owner, having given a bottomry bond, binding himself, ship and freight, cannot claim his wages to the prejudice of the bondholders. *The William*, Swabey, 346.

When a master, being also part owner of a vessel, had bound himself by a bottomry bond on ship, freight, and cargo:—Held, that the owners of part of the cargo could not oppose his right to be paid his wages and disbursements in priority to the bondholder. *The Daring*, 2 L. R., Adm. 260.

In such a suit by the master, the court will not, under the Merchant Shipping Act, 1855, s. 191, entertain a counter-claim by the owner of the cargo. *Ib.*

The master cannot compete with the bondholder for his wages against the ship's freight where he binds himself by the bond. Where, however, he has incurred no such personal obligation, he is not barred. *The Salacia*, 32 L. J., Adm. 41; 9 Jur., N. S. 27; 8 L. T. 91; 11 W. R. 189.

Over Seamen.]—The 17 & 18 Vict. c. 104, s. 191, does not alter the relation of the master to the seamen, and he cannot compete with them to their detriment for a share in a fund. *Ib.*

Over Mortgagees with Notice.]—A master does not lose his lien upon a ship for wages due by delaying to enforce such lien for ten months after his discharge, notwithstanding he has had an opportunity to do so; but he may enforce it even against persons who, as mortgagees, have in the interim become interested in the ship with notice of the lien. *The Chieftain*, B. & L. 212.

— **Or otherwise.]—**A master's claim for wages and disbursements, whenever earned or made, takes priority over the claims of mortgagees. *The Hope*, 28 L. T. 287.

Where, therefore, the master of an ordinary seeking ship entered into a charterparty, under seal, to carry troops from the Mauritius to England, and stipulated, on his own responsibility, in the charterparty, that he would make certain alterations in the ship, in order to enable him to carry the troops, and at the Cape of Good Hope entered into another charterparty, not under seal, to a similar effect, and made the specified alterations, and paid money, and drew bills to meet the expenses necessary to the making of these alterations, and the voyage was performed:—Held, that, in equity, the master was first entitled out of the freight earned under these charterparties to be repaid the sums advanced, and to be indemnified against the bills, and that the owner (or his mortgagee) was only entitled to the net freight after deducting these charges. *Bristowe v. Whitmore*, *ante*, col. 1224.

Enforcing Claim against Ship.]—The master of a ship belonging to a company drew a bill on the company for necessities supplied to the ship, which was accepted, but was dishonoured at maturity. He paid the bill, and claimed repayment from mortgagees who had taken possession of the ship. On the following day an order was made for winding up the company. The master then applied in the winding-up for leave to take proceedings in the Admiralty Court, and obtained an order giving him leave. The liquidator applied to discharge this order, and an order was made for the liquidator to pay into court to a separate account to meet the claim 150*l.*, which exceeded the principal and interest, the master undertaking not to proceed in the Admiralty Court; the payment to be without prejudice to any application by him to increase the amount. The 150*l.* was paid in, and he applied to increase the amount so as to cover the costs of defending an action brought against him by the holder of the bill, and his costs of the application in the winding-up. Bacon, V.-C., ordered the principal and interest on the bill to be paid to the master out of the 150*l.*, and the residue to be paid to the liquidator:—Held, that though if there had not been mortgagees in possession of the ship

the proper mode of enforcing the master's lien on the ship would have been by application in the winding-up, the order giving leave to proceed in the Admiralty Court was a proper order, the mortgagees not being parties to the winding-up; and that the master was entitled to all his costs before the vice-chancellor as costs properly incurred by a mortgagee in enforcing his security. *Rio Grande Do Sul Steamship Company, In re*, 5 Ch. D. 282; 46 L. J., Ch. 277; 36 L. T. 603; 25 W. R. 328—C. A.

Priority of Claim of Material-Men.]—A master being part owner of a foreign ship ordered necessities for the ship. The necessities were supplied, and the master became liable for payment:—Held, that the material-men were entitled to be paid for the necessities out of the proceeds of the ship and freight in priority to a claim of the master for wages and disbursements. *The Jenny Lind*, 3 L. R., Adm. 529; 41 L. J., Adm. 63; 26 L. T. 591; 20 W. R. 895.

A shipwright's lien is postponed to a master's claim for wages earned prior to the repairs. *The Gustaf*, Lush. 506; 31 L. J., Adm. 207; 6 L. T. 660.

Interference of Court of Bankruptcy with Arrest under Warrant.]—A master mariner claiming a lien for wages and disbursements upon a vessel, the property of the arranging debtor, who had declared himself insolvent, caused the vessel to be arrested under the warrant of the Court of Admiralty. The Court of Bankruptcy, upon an application to restrain the further action of the Court of Admiralty in respect of the vessel, declined to do so, except upon the terms of lodging in court a sum sufficient to answer the claim and costs, and an undertaking to abide any further order in respect of any further sum which might be declared due for costs or otherwise. *T. C., In re*, 11 Ir. R., Eq. 151.

8. FORFEITURE.

Drunkenness.]—Constant drunkenness, or non-performance of duty ascribed to it, on the part of the master, does, but occasional intoxication does not, work a forfeiture of wages. *The Atlantio*, 9 Jur., N. S. 183; 7 L. T. 647; 11 W. R. 188; *S. P., The Macleod*, 5 Adm. D. 254.

Occasional drunkenness in port on the part of the master of a vessel will not, if unaccompanied with neglect of duty, work a forfeiture of wages. *The Roebuck*, 31 L. T. 274.

Seemingly, that constant drunkenness on the part of a master, whether there is proof of neglect of duty or not, will work a forfeiture of either the whole or part of his wages, according to circumstances. *Id.*

Error in Judgment—Neglect.]—An error in judgment on the part of the master will not work a forfeiture of his wages. *Id.*

Neither error of seamanship in a master, nor neglect to communicate to a Lloyd's agent, stranding of the vessel, nor neglect to sign a bottomry bond, works a forfeiture of wages. *The Camilla*, Swabey, 312.

—Taking Bill instead of Cash for Freight.]

—When a master receives instructions to take the balance of freight due at the end of a voyage in cash, or by bank bill upon London, and without

sufficient enquiry, but without mala fides and rather through error of judgment, he takes a bill which he believes to be (but which is not) a bank bill, and which is afterwards dishonoured, causing loss to his owners, this negligence or disobedience, not being wilful, does not work a forfeiture of his wages, nor can the owners claim to deduct the amount of their loss from his wages. *The Dunmore*, 32 L. T. 340.

Insubordination.]—The owners of a vessel have a right to dismiss an officer who directly or indirectly promotes insubordination, and such officer has no right to wages otherwise due to him by agreement after such dismissal. *The Marina*, 50 L. J., Adm. 33; 29 W. R. 508.

F., part owner of a vessel, mortgaged (as it was alleged) his share to the other part owner S., who assigned his own share and the other mortgaged share to B. F. refused to obey B.'s orders, and denied in strong language to him that he had mortgaged to S.:—Held, that even if B. was owner of the entire ship and cargo, F.'s conduct and language were not such as to raise a forfeiture of his wages. *The Joseph Dexter*, 20 L. T. 820.

Employing Ship contrary to orders.]—When a master receives express orders from his owners as to the voyages which he is to make and the ports to which he is to take the ship, and such orders are given under and with a view to a state of circumstances out of which danger might arise to the ship, and which are known to and discussed by the master and owner at the time when they are given, the master is not justified, out of an alleged apprehension of that danger, in taking the ship on other voyages and to other ports; and if he does so take the ship, he will not be entitled to recover his wages for the time during which she is engaged against the owners' orders, even if the voyages are for the owners' benefit. *The Roebuck*, 31 L. T. 274.

Desertion.]—A master's wages may be forfeited by desertion, but there can be no absolute desertion of his ship working a forfeiture of the whole of his wages if there is an animus reverendi upon the part of the master. *Id.*

When a master quits his ship and remains away for such a time and under such circumstances as lead his owner reasonably to suppose that he has no intention of returning, the owner will be justified in removing the vessel from the place where it is left, and appointing another master; and the original master will not be entitled to recover his wages for any period after the time when he so quitted the ship. *Id.*

9. BARRATRY.

Cotton Stowed on Deck.]—Ninety bales of cotton, insured against barratry of the master and mariners, were stowed upon deck, and were jettisoned in a storm. Before the ship sailed, one of her agents discovered that the captain was stowing cotton on deck, and opposed it, and desired him to send the cotton by another vessel. The captain notwithstanding the remonstrance, continued to stow the cotton upon deck. This it was contended amounted to barratry, as "an act of wrong done by the master against the ship and goods:—Held, that it did not amount to

barratry. *Atkinson v. Great Western Insurance Company*, 27 L. T. 103.

Kidnapping.—When a master ships and carries Polynesian native labourers without a licence, against the provisions of the Kidnapping Act, 1872 (35 & 36 Vict. c. 19), proof that the master, although he may never have seen the act itself or the proclamation thereof in the Australasian Colonies, was informed before shipping the labourers that such an act existed, and that it was illegal to carry them, is sufficient evidence to justify a jury in finding that he shipped and carried the labourers wilfully and with knowledge of the prohibition, so as to make his act barratrous. *Australian Insurance Company v. Jackson*, 33 L. T. 286.

Scuttling Ship.—Scuttling a ship with the knowledge of the shipowner, but without the knowledge of the freighter, is barratry, in respect of which the freighter may recover against the underwriters. *Ionides v. Pender*, 27 L. T. 244. See also *Grill v. General Iron Screw Collier Company*, *post*, col. 1287.

10. OTHER MATTERS.

Detention Money as Witness.—In calculating the amount due to a master for detention money and board whilst detained ashore as a witness, in a cause for the recovery of his wages, the fact that he through his wife carries on a business will not deprive him of his right to be allowed detention money; but if he lives at his place of business during his detention, the fact that he can live more cheaply at home than elsewhere is to be taken into consideration in fixing the amount to be allowed for subsistence money. *The Royal Family*, 31 L. T. 704.

Infringement of Patent by.—An action was brought against the master of a ship to restrain him from using pumps which were an infringement of the plaintiff's letters patent. He denied having used any pumps which were an infringement of the patent, and did not suggest that the owners ought to be parties. It was shewn that the ship was fitted up exclusively with pumps which were an infringement of the letters patent, but had been so fitted up before the defendant, who was not a part owner, had taken command of her; he had nothing to do with putting them on board, and they had never been worked in British waters:—Held, by Brett and Cotton, L. J. (dissentiente, James, L. J.), that the injunction was rightly granted on the ground that the defendant, being in command of a ship exclusively fitted up with pumps which were an infringement of the letters patent, was intending to use the patented invention. *Adair v. Young*, 12 Ch. D. 13; 40 L. T. 598—C. A.

Assaults by.—A captain is not justified in throwing a stone at a person in a boat, who has fastened it to the ship, and thereby impeded and endangered it, for the purpose of making him let go, unless it was not possible either at the time or before the immediate pinch of the danger to adopt any other mode for the purpose. *Eyre v. Norworthy*, 4 C. & P. 502.

An action lies against the master for purposely firing a cannon at negroes, and thereby preventing them trading with the plaintiff; and

it is no answer, that the plaintiff had not conformed to the law of the country, in paying the duty due to the king for his licence to trade. *Tarleton v. M'Gawley*, Peake, 205.

11. FOREIGN MASTERS.

Remedy for Wages.—In a suit by a foreign master against the freight for his wages, the question whether the freight is liable is a question of remedy, and not of contract, and is, therefore, to be determined by the *lex fori*. *The Milford*, Swabey, 362; 4 Jur., N. S. 417.

The 17 & 18 Vict. c. 104, s. 191 (notwithstanding s. 107), extends to the masters of foreign ships, and gives them a remedy against ship and freight for wages. *Id.*

A master of a foreign ship instituted a cause against the ship for his wages, and no notice of the institution of the cause was given by him to the consul of the foreign state. The owners appeared under protest; and the consul protested, as consul, against the cause being allowed to proceed. The cause was dismissed on the ground that the jurisdiction of the Court of Admiralty over causes of wages of foreign masters is discretionary only; that notice of the institution of any such cause ought to be given to the consul of the state to which the ship belongs; and that the protest of the consul was a bar to the cause proceeding. *The Herzogin Marie*, Lush. 292; 5 L. T. 88.

Protest by Consul.—The protest by a foreign consul against the continuance of a wages cause against a foreign vessel does not deprive the court of jurisdiction; but the court will use its discretion whether or not to exercise its jurisdiction. *The Octavia*, B. & L. 215; 9 L. T. 695. And see *The Leon XIII.*, 8 Adm. D. 121; 52 L. J., Adm. 58; 48 L. T. 770.

In a suit for wages by foreign seamen, if their consul intervenes and asks that payment of the wages due to them be made to him on their behalf, the court usually grants the application. *The Timor*, 9 L. T. 397; 12 W. R. 219.

Lien—Bottomry Bond.—A master of a foreign ship having, in the terms of a bottomry bond, bound as well himself as the ship and freight, cannot enforce his lien for wages against the claim of the bondholder. *The Jonathan Goodhue*, Swabey, 524.

12. MATE.

On Death of Captain.—Where, in consequence of the death of the captain during the voyage, the chief mate becomes captain, the latter has authority to appoint a seaman to the post of second mate with the wages of such; and a contract to that effect is binding on the owners, notwithstanding no alteration is made in the articles under which the seaman shipped. *Hanson v. Royden*, 3 L. R., C. P. 47; 37 L. J., C. P. 66; 17 L. T. 214; 16 W. R. 205.

Semble, if the master dies on the voyage, and the chief mate succeeds him in the command, the crew is bound by the ship's articles, though such chief mate is a foreigner. *Renno v. Bennett*, 3 G. & D. 54; 3 Q. B. 768; 12 L. J., Q. B. 17.

Wages and Disbursements.—A subject of the United States was mate on board a vessel of that

country during a voyage from California to Great Britain. By the death of the master, the mate assumed that position. He proceeded in the British Court of Admiralty against the freight for wages due to him. The owners appeared under protest, objecting that the *lex fori* ought to prevail, and not the *lex loci*:—Held, that the *lex fori* must govern the case, and the protest be overruled, and that the mate had a lien on the freight, whatever might be the law of the United States, and notwithstanding the provisions of the 17 & 18 Vict. c. 104, ss. 109, 191. *The Milford*, Swabey, 362; 4 Jur., N. S. 417.

The Court of Admiralty has no jurisdiction to adjudicate upon a mate's claim for wages paid to the crew, and necessary disbursements in foreign ports. *The Victoria*, 37 L. J., Adm. 12.

X. SEAMEN AND APPRENTICES.

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1. CONTRACT OF SERVICE.

a. Stamp Duty.

Under 55 Geo. 3, c. 184.—The plaintiff and the defendant being resident in England, and P. at Havana, and the defendant being a foreign agent, a written agreement was entered into by the plaintiff with the defendant in behalf and representation of P. of Havana (so stated in the agreement), that the plaintiff would proceed as fireman and stoker on board a steamer, about to leave London for Havana, calling at intermediate ports, to be placed in the service of P., and would faithfully do the work of fireman or stoker on board the steamer, and obey the orders of the engineer. In consideration of the service, the plaintiff was to receive wages of 5*l.* per month, payable monthly, and 2*l.* per month for providing himself in provisions. During the outward voyage, rations were to be served out to the plaintiff on account of P., the contract to be understood to be in force for one year; and should the plaintiff be discharged before that time, three months' wages were to be paid in advance, besides finding him a homeward passage, P. being at liberty to confirm and continue the engagement

on the terms stated, or to discharge the plaintiff and to find him his passage back to England, the wages to be payable up to the day of the plaintiff's arrival in England; and unless he should be discharged for misconduct, one month's pay to be advanced for his outfit for the voyage:—Held, that the agreement did not require a stamp, being within the exemption stated in Part I., Sched. tit. Agreement, as a memorandum or an agreement for the hire of a labourer. *Wilson v. Zulucta*, 14 Q. B. 405; 19 L. J., Q. B. 49; 14 Jur. 366.

An agreement by a master of a ship to take out a mariner to a foreign port, he working on board, is within the above exemption, as being an agreement for the hire of a labourer. *Cornforth v. Danube and Black Sea Railway Company*, 2 F. & F. 197. And see now Merchant Shipping Act, 1854, s. 9; and 33 & 34 Vict. c. 97, s. 3, and Sched. Agreement.

b. Form of Contract.

Statutory.—The 5 & 6 Will. 4, c. 19, s. 2, enacted that it shall not be lawful for any master of a ship to carry to sea any seamen, without first entering into an agreement, in writing, specifying the wages, &c. The defendant pleaded, to an action on a policy of insurance, that the master had not entered into any such agreement with the seamen, or any one of them, wherefore the voyage was illegal:—Held, that the non-compliance with the statute was no answer to an action on a policy of insurance effected on the ship, as it did not make the voyage itself illegal, or the vessel unseaworthy. *Redmond v. Smith*, 7 M. & G. 457; 8 Scott, N. R. 250; 13 L. J., C. P. 159; 8 Jur. 711.

Contract to Serve "in same Employ"—Transfer to another Ship.—A seaman, in March, 1854, shipped on board a vessel called the *Custos*, to serve as steward, and signed articles, as required by 13 & 14 Vict. c. 93, which professed to be an agreement between the master and the several persons whose names were thereto subscribed, at 3*l.* per month wages, for a voyage "from Liverpool to the west coast of Africa, to trade in any ports, bays, or rivers therein, and back to a final port of discharge in the United Kingdom, or for a term not to exceed three years." The articles contained the following provision: "The crew, if required, to be transferred to any other ship in the same employ." After the *Custos* remained some time on the African coast, the seaman, at the request of the captain, was transferred to another and a larger vessel, engaged in the same trade, called the *Dauntless*, entering into fresh articles with the master, under which he was to receive wages at the rate of 4*l.* per month. The *Dauntless* arrived in Liverpool on her return voyage in June, 1856, when he claimed wages at 4*l.* per month for the period during which he had served on board the *Dauntless*. The defendant refused to pay him at the increased rate, insisting that he was bound by the original articles to serve on board any ship "in the same employ;" and he declined to accept the sum mentioned in the original articles:—Held, first, that the articles were not invalid for being, in the alternative "from Liverpool to the west coast of Africa and back, or for a term not to exceed three years." *Frazer v. Hatton*, 2 C. B., N. S. 512; 26 L. J., C. P. 226; 3 Jur., N. S. 694.

Held, secondly, that the provision for the transfer of the crew to another vessel in the same employ, was not in contravention of the 13 & 14 Vict. c. 93. *Ib.*

Held, thirdly, that the provision for transfer was not limited to a transfer of the whole crew collectively, but that the articles constituted an agreement between the owners and each of the crew for himself, and, consequently, that he was bound to serve under the original articles, and there was therefore no consideration for the master's promise to pay the increased wages. *Ib.*

Execution before Consular Agent.—Held, lastly, that the circumstances of the fresh articles not having been executed in the presence of a consular agent, was not an objection to their validity, provided they could have been set up. *Ib.*

c. Duty of Master or Owner.

Who may Engage—Persons Contracting to Purchase one Share of Ship.—By s. 147, sub-s. 1, of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), if any person not licensed by the Board of Trade other than "the owner or master or mate of a ship, or some person who is bonâ fide the servant and in the constant employ of the owner, or a shipping master duly appointed as aforesaid, engages or supplies any seaman or apprentice to be entered on board any ship in the United Kingdom," he incurs a penalty. The respondent having bonâ fide contracted to purchase one sixty-fourth share in a British ship from P., who, though not registered as the owner, had the full possession and control of the ship under a contract to purchase the sixty-four shares, supplied an apprentice to P., who engaged the apprentice for the ship:—Held, that the respondent was an "owner" within the meaning of the exemption, since though not a registered owner he had a contract enforceable in equity for the purchase of a share in the ship. *Hughes v. Sutherland*, 7 Q. B. D. 160; 50 L. J., Q. B. 567; 45 L. T. 287; 29 W. R. 867; 46 J. P. 6; 4 Asp. M. C. 459.

Implied Warranty.—There is no implied warranty of seaworthiness in a contract between an owner of a ship and a seaman to serve on board it for a particular voyage. Therefore an action by a seaman against an owner of a ship for so negligently fitting out the ship, that by reason thereof it was unseaworthy, and the seaman was unable to sleep in his hammock, and obliged to undergo excessive labour, and was thereby injured in his health, not alleging any knowledge of the unseaworthiness, or any personal blame on the part of the owner, cannot be supported. *Couch v. Steel*, 3 El. & Bl. 402; 2 C. L. R. 940; 23 L. J., Q. B. 121; 18 Jur. 515.

To Supply Medicines.—A count alleged that the defendant neglected to supply and keep on board the vessel a proper supply of medicines, whereby the plaintiff's health suffered:—Held, that 7 & 8 Vict. c. 112, s. 18 (similar in enactment to s. 224 of 17 & 18 Vict. c. 104), made it the duty of the shipowner to have on board such medicines, and that though the act imposed a penalty recoverable as the specific punishment for the breach of that duty as to the public, sailors sustaining a private injury from a breach of that

statutable duty were entitled to maintain an action to recover damages; and that the count was good. *Ib.*

Increase of Risk.—The plaintiff agreed with the defendant to serve as one of the crew of a ship, whereof the defendant was master, for twelve months, from London to Rio, or any other of the ports specified in the agreement, amongst which were ports in the Pacific Ocean, and back to a final port of discharge, and to obey during that period all the defendant's lawful commands. He subsequently sailed for Rio with the ship. She was destined, as it appeared from her charterparty, for the service of the Peruvian government, and had on board a cargo of coal and ammunition. In the course of her voyage to Rio she joined company with two Peruvian war steamers, to which from time to time she supplied coal and ammunition. At Rio it became known to the plaintiff and the defendant that hostilities had commenced between Spain and Peru, two powers at peace with England. The defendant, notwithstanding this circumstance, announced to the plaintiff that he intended to go on to Callao, in the Pacific, another Peruvian port. He was at that time acting under the direction of a Peruvian agent on board the ship, who received his instructions from the commanders of the two war steamers. The plaintiff objected to serve any further on the voyage on the ground that it had become illegal, and involved greater danger than he had anticipated when he entered into his agreement with the defendant. He accordingly left the ship. In an action for breach of contract brought by him against the defendant:—Held, that he must be taken to have engaged the plaintiff for an ordinary voyage, and that the plaintiff was entitled to treat as a breach of contract the defendant's employment of him on a voyage which would expose him to greater danger than he originally had reason to anticipate. *Burton v. Pinkerton*, 2 L. R., Ex. 340; 36 L. J., Ex. 137; 17 L. T. 15; 15 W. R. 1139.

Damages for Breach of Contract.—The plaintiff, after leaving the ship, was imprisoned at Rio for some days as a Peruvian deserter. When he came out of prison the ship had gone, carrying some of his clothes on board of her. The jury awarded damages both for the imprisonment and the loss of clothes:—Held, that these damages were too remote to be recoverable. *Ib.*

Leaving Seamen Abroad.—In an indictment against a master of a merchant ship, under 5 & 6 Will. 4, c. 19, for wilfully and wrongfully leaving a seaman behind before the termination of the voyage for which he was shipped, the allegation of ownership is material; and the only defence which the master can set up is, the production of a certificate of the consul or other party mentioned in the statute, or proof that it was impossible to obtain such certificate. *Reg. v. Dunnett*, 1 C. & K. 425.

Liability for Expenses.—Where seamen are injured by an accident, and put on shore while the ship proceeds on her voyage, the captain has no implied authority to make the shipowner liable for expenses incurred for their maintenance and care. *Organ v. Brodie*, 10 Ex. 449; 24 L. J., Ex. 70.

Passage Money.—Foreign seamen engaged for a voyage out and home, are entitled, upon being discharged in this country against their own consent, to receive, out of the proceeds of the ship, passage money for their return home; but not so seamen engaged during the course of a voyage. *The San Jose Primeiro*, 3 L. T. 513.

Seamen forced to provide themselves, the ship's provisions being exhausted, are entitled to board wages out of the proceeds of the ship. *Ib.*

Seamen of a disabled foreign vessel are entitled to an allowance for return to their own country. *The Gustaf*, Lush. 506; 31 L. J., Adm. 207; 6 L. T. 660. See also *The Raffaelluccia*, post, col. 1244.

2. WAGES GENERALLY.

a. Apprentices.

An apprentice is entitled to sue the proceeds of the ship in which he has served for wages due, under a general apprenticeship to the owner, but not for the penalty contained in the indenture for breach of the agreement. *The Albert Crosby*, Lush. 44.

b. Seamen.

i. When Due.

Termination of Contract.—On the wreck of a ship the seamen are bound to do their utmost to save ship and cargo; but the seamen's contract of service may be terminated either by final abandonment of the ship or by a discharge given by the master. *The Warrior*, Lush. 476; 6 L. T. 133.

Ships Lost or Captured.—The wages of a sailor are not payable if the ship is lost or taken before the end of the voyage. *Hernaman v. Bowden*, 3 Burr. 1844.

An officer or a sailor, who has engaged to serve on board a 'letter-of-marque for wages during the voyage, and a share of all prizes, is not entitled to any part of the wages if the ship is taken before she completes her voyage, although he shall have been sent from the ship before the capture, as prize-master on board a prize taken in the course of the voyage. *Abernethy v. Landale*, 2 Dougl. 539.

— **On Home Voyage.**—A ship was hired by government to take out convicts to Van Diemen's Land. From that place it sailed to Batavia, and on several other trading voyages. It sailed on the homeward voyage to England, and arrived safe at St. Helena, but was lost before arrival at the port of discharge, and all on board perished:—Held, that proof of these facts, and of a seaman having gone on board the ship in England, and having been seen working on board at Van Diemen's Land, at Batavia, and afterwards at St. Helena, was sufficient to entitle the seaman to wages pro rata for the voyage out. *Harris v. Ice*, 1 H. & W. 238.

Though a ship when she sails on a voyage is not seaworthy, and after part of the voyage is performed she is forced into port, and compelled to abandon the voyage, that does not entitle the sailors to recover wages for any part of the voyage. *Eaken v. Thom*, 5 Esp. 6.

Seamen entered into articles to serve for monthly wages on board a ship "bound for the

ports of Madeira, any of the West India Islands, and Jamaica, and to return to London;" and it was agreed that they should not demand or be entitled to their wages, or any part, until the arrival of the ship at the port of discharge (meaning London):—Held, that though the ship earned freight upon the delivery of an outward-bound cargo at Madeira, and of another cargo taken in at Madeira, and delivered in the West Indies; yet, that, being lost in her passage home by a storm, the seamen could not recover wages pro rata upon the outward voyage by reason of the express terms of the stipulation respecting wages. *Appleby v. Dods*, 8 East, 300.

— **Where Recaptured.**—If a ship is captured in the course of her voyage, and is afterwards recaptured, and arrives at her port of destination, the sailors are entitled to their wages. *Bergstrom v. Mills*, 3 Esp. 36.

Detention by Foreign Powers.—A seaman may recover for wages during a hostile embargo in a foreign port, while he was imprisoned on shore, on proof that the crew was restored to the ship, and that she completed her voyage and earned freight, without producing the order by which the embargo was taken off. *Delamainer v. Winteringham*, 4 Camp. 186; *S. P.*, *Pratt v. Cuff*, 4 East, 43, n.

The Russian government laid an embargo on British ships in Russian ports, until an alleged convention between the Russian and British government should be fulfilled by the latter. The crews were taken out of the ships, marched up the country, and there detained for six months, and treated as prisoners of war; and at the end of that time they were marched back to their ships, and the vessels with their cargoes restored:—Held, that this was an embargo, and not a hostile capture, and that the seamen were entitled to wages during the time of the detention. *Thompson v. Beale*, 1 Dow, 299; 4 East, 546; 1 Smith, 144; 3 B. & P. 405.

So it was held, where the plaintiff was a foreign seaman. *Johnson v. Broderick*, 4 East, 566; 1 Smith, 153.

Seaman unable to do Duty.—A seaman is entitled to his whole wages though he has been unable to render his service, if his inability has proceeded either from a hurt received in the performance of his duty, or from natural sickness happening to him in the course of the voyage. *Chandler v. Grieves*, 2 H. Bl. 606, n.; 6 T. R. 325, n.

Captain causing Men to Refuse to Work.—If a seaman's claim for wages is resisted on the ground that he would not do his work, which by the ship's articles is to cause forfeiture of wages, it is a good answer to shew that the refusal to work was caused by the misconduct of the captain, which went to induce the men to incur such forfeitures. *Train v. Bennett*, 3 C. & P. 3; M. & M. 82.

Sent Home by Authority of Consul.—The plaintiff was hired as a mariner on board a ship for a specific voyage. In the course of the voyage he was obliged to leave the ship, and was sent to England by authority of a British consul, under 7 & 8 Vict. c. 112, ss. 59, 60, and 13 & 14 Vict. c. 93, as a witness on a trial of a person for

an offence committed on the high seas:—Held, that this operated as a dissolution of the contract, and that he could not recover any wages subsequently to the period when he was sent to England. *Melville v. De Wolfe*, 4 El. & Bl. 844; 3 C. L. R. 960; 24 L. J., Q. B. 200; 1 Jur., N. S. 758.

Action brought before Proper Time—Admitted Sum due.—Where a seaman is restricted by the ship's articles from demanding his wages until the expiration of twenty days after the ship's arrival at her destined port and the delivery of her cargo:—Held, that, although the seaman had commenced his action before the expiration of the twenty days, he might still recover a sum which the captain had admitted to be due to him for wages, and which he had offered to pay him. *White v. Mattison*, 2 Stark. 325.

Dismissal.—Where seamen were not to be entitled to their wages until the voyage was ended, and that voyage was to a foreign port, and the master, for no good or legal cause, dismissed a seaman before the ship's arrival at such port:—Held, that such seaman might immediately maintain an action for his wages. *Sigard v. Roberts*, 3 Esp. 72.

A seaman having contracted to go a voyage from A. to B. and back again, with a stipulation that he should not be entitled to his wages till the end of the voyage, cannot recover his wages pro rata as far as B., though he was there wrongfully dismissed by the captain; but his remedy is either for the breach of the special contract, or for such tortious act of the captain's, whereby he was prevented from earning his wages. *Hulle v. Heightman*, 2 East, 145; 4 Esp. 75.

When Left Behind by Own Negligence.—A seaman shipped under articles, by which he agreed that he would serve on voyages to certain named places and home to the final port of discharge of the ship, in consideration of which services to be duly performed the master agreed to pay as wages a certain sum per calendar month. He was left behind at one of the places at which the ship stopped; and the jury found that there was no desertion, but that he had been guilty of drunkenness and abusive language, to the subversion of discipline, and was left behind through his own negligence:—Held, that he was entitled to his wages up to the time of his being left behind. *Button v. Thompson*, 4 L. R., C. P. 330; 38 L. J., C. P. 225.

Death before Termination of Voyage.—A seaman entered into articles to serve on board the ship R., "bound from the port of L. to the S. S., to procure a cargo of sperm oil, and to return therewith to the port of L., where the voyage was to end;" instead of wages he was to receive a share of the net proceeds of the cargo; and it was stipulated that no one of the crew should "demand or be entitled to his share of the net proceeds of the cargo until the arrival of the ship at L., and her cargo should be there sold and delivered, and the money for the same actually received by the owners." A cargo was procured, the ship was afterwards condemned in a foreign port, and the mariner accompanied part of the cargo on its homeward voyage (it having been transhipped into another vessel, the A.), but died at sea:—Held, that "until" in the articles was

a word of limitation of the mariner's right to wages, and not of postponement of payment of them merely; and, consequently, that as the ship did not return to L., the administrator of the mariner was not entitled to recover his share of the net proceeds of the R.'s cargo, but only to recover on a quantum meruit for his services on board the A. *Jesse v. Roy*, 1 C., M. & R. 316; 4 Tyr. 626.

If a sailor hired for a voyage takes a promissory note from his employer for a certain sum, provided he proceeds, continues, and does his duty on board for the voyage, and before the arrival of the ship he dies, no wages can be claimed, either on the contract or on a quantum meruit. *Cutter v. Powell*, 6 T. R. 320.

ii. Division of Profits.

Consideration for.—Where an agreement was entered into between the captain and the mariners, whereby, in consideration of their faithfully serving in a fishing voyage to the South Seas and back, they were each to receive a certain share of the net proceeds of the cargo brought home, and the owner was appointed agent to dispose of the cargo for the benefit of all concerned:—Held, that an action would not lie against him by one of the mariners to recover his share of the net proceeds, on proof that the defendant had sold the cargo, and that the price of it had come to his hands, unless an admission of faithful services could be proved. *Evans v. Bennett*, 1 Camp. 300.

Sailor not a Partner.—If a sailor engages on a whaling voyage, and is to receive a certain proportion of the profits of the voyage in lieu of wages, when the cargo is sold he may maintain an action for his wages against the captain, and he will not be considered as a partner. *Wilkinson v. Fraser*, 4 Esp. 182.

iii. Contract for Further Remuneration.

What is sufficient consideration.—No action will lie at the suit of a sailor on a promise of the captain to pay him extra wages in consideration of his doing more than his ordinary share of navigating the ship. *Harris v. Watson, Peake*, 72.

Where a seaman signed articles containing the following provision: "The crew, if required, to be transferred to any other ship in the same employ"; and after serving for a certain period on one vessel was shipped by the captain's desire on another vessel engaged in the same trade, under which he was to receive further remuneration:—Held, on the refusal of the defendant to pay him at the higher rate, that there was no consideration for the master's promise to pay increased wages, and that there was no neglect or refusal on the part of the defendant, so as to render him liable to the penalty imposed by 17 & 18 Vict. c. 104, s. 187. *Fraser v. Hatton*, 12 C. B., N. S. 512; 26 L. J., C. P. 226; 3 Jur., N. S. 694.

Where Ship Undermanned.—A ship, being on a voyage from L. to P. and back, when in port at P. became so short-handed that it was dangerous to life to proceed with only the reduced crew; the captain, being unable to procure additional hands, voluntarily promised the remain-

ing seamen, who were under articles for the whole voyage, an additional sum if they would assist in taking the ship to her next port:—Held, that the seamen were not bound to proceed on the voyage, as it involved risk of life, and that the promise was therefore binding on the captain. *Hartley v. Ponsonby*, 7 El. & Bl. 872; 26 L. J., Q. B. 322; 8 Jur., N. S. 746.

If in the course of a voyage some of the seamen desert, and the captain, not being able to find others to supply their places, promises to divide the wages which would have become due to them among the remainder of the crew; this promise is void for want of consideration. *Stilk v. Myrick*, 2 Camp. 317.

The plaintiff and other seamen had entered into articles of agreement to serve for a voyage from Liverpool to Melbourne and home. At Melbourne several of the crew deserted, and one of the crew was discharged by the captain. Whilst the desertion was going on, the captain entered into a fresh agreement with the plaintiff and the other remaining seamen, to raise their wages for the remainder of the voyage:—Held, that he never was, under the circumstances, released from the obligation of the original articles, and could not, therefore, maintain an action to recover the increased rate of wages for the voyage home. *Harris v. Carter*, 3 El. & Bl. 559; 2 C. L. R. 1582; 23 L. J., Q. B. 295; 18 Jur. 1014.

— **Unseaworthy.**—When a seaman signs articles at a foreign port there is an implied warranty of seamanship, and if the ship is unseaworthy, there is consideration for a new contract for extra reward to induce him to sail in her. *Turner v. Owen*, 3 F. & F. 176.

In other Cases.—The plaintiff, at the request of a captain in the royal navy, agreed to enter on board his ship as captain's cook, he undertaking to pay the plaintiff over and above the government pay to which his rating would entitle him. The plaintiff having performed the service:—Held, that there was a sufficient consideration to enable the plaintiff to maintain an action for such wages. *Clutterbuck v. Coffin*, 4 Scott, N. R. 509; 1 D., N. S. 479; Car. & M. 273; 3 M. & G. 842; 11 L. J., C. P. 65; 6 Jur. 131.

A mariner, who has signed articles for a voyage at a certain pay per month, cannot claim any further wages or gratuity by usage or custom. *Elsworth v. Woolmore*, 5 Esp. 84.

Where a sailor sued for wages due under the ship's articles, and also for the average price of a negro slave, for which there was only a parol agreement with the captain, and which was not mentioned in the articles:—Held, that the contract for the slave was void, as being in fact a promise to pay further wages. *White v. Wilson*, 2 B. & P. 116.

iv. Allowance for Short Provisions.

When Granted.—Owing to the unexpected length of a voyage, the crew of a vessel had been put on short allowance. They were allowed compensation, under 17 & 18 Vict. c. 104, s. 223. *The Josephine*, Swabey, 152.

v. Advance Notes.

What are.—A captain, on the eve of sailing,

gave one of the seamen an advance note in the following form: "Ten days after the ship *Athlone* sails from the port of Liverpool, the undersigned does promise and agree to pay to any person who shall advance to Reuben Hill on this agreement, the sum of 6*l.*, provided Reuben Hill shall sail in the ship from the port of Liverpool." An outfitter gave the seaman in exchange for the note 3*l.* 15*s.* in cash, and 2*l.* 15*s.* worth of wearing apparel; but he stated, in answer to a question from the court, that if he had advanced the whole amount in cash, he would have charged a discount of 7½ per cent. The seaman having sailed with the vessel:—Held, that the condition upon which the holder of the document was entitled to sue the maker was substantially fulfilled by giving the seaman the amount in money and money's worth. *McKune v. Joynton*, 5 C. B., N. S. 218; 28 L. J., C. P. 133; 4 Jur., N. S. 760.

3. RECOVERY OF WAGES.

a. Currency.

Construction in Favour of Seaman.—When, in a seaman's articles, it is covenanted to pay wages in dollars, sterling and not currency value is to be assumed as intended, and the wages are to be paid at the rate of 4*s.* 2*d.* per dollar. *The Annie Sherwood*, 12 L. T. 582; 13 W. R. 641, 965.

Where it was alleged that there was a specific covenant in seamen's articles, duly read over and explained to the crew, that the wages when due should be payable in United States currency or its equivalent:—Held, that the court would not enforce such a condition against the seamen, from the fact of its being contrary to equity and justice, and an imposition on them. *Id.*

Where the amount of wages due to a seaman under his contract was greatly lessened by a depreciation of the currency at the date of his claim, and it did not appear at what rate such wages were to be calculated, the court construed the uncertain contract most strongly in favour of the seaman, and allowed him wages at the fullest rate. *The Nonpareil*, 33 L. J., Adm. 201.

b. Against whom.

Charterer or Owner—Allotment Note of Seamen.—By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 169, the wife of any seaman in whose favour an allotment note of part of his wages is made, may recover by summary procedure the sum allotted, with costs, from the owner or any agent who has authorized the drawing of the note. The registered owner of a ship entered into a charterparty, by which he demised the ship to the charterer for a stipulated period, and parted with all control over it. He took possession of the ship, and appointed a master, who engaged W. as one of the crew, and gave his wife an allotment note, allotting and requiring the charterer to pay her 6*l.* monthly out of her husband's wages. The charterer having become insolvent:—Held, that the section did not, under the circumstances, make the registered owner liable to pay the arrears due under the note. *Meiklerid v. West*, 1 Q. B. D. 428; 45 L. J., M. C. 91; 34 L. T. 353; 24 W. R. 703.

On Change of Ownership.—Where a change of ownership in a British vessel takes place by sale in this country whilst she is in a foreign port, the contract under which the crew shipped is (quoad the new owner) at an end; but if one of the crew continues to serve on board the vessel at the request of an agent of the new owner without entering into any fresh articles, and afterwards, and before the termination of the contemplated voyage, quits with the consent of the captain appointed by the new owner, he may recover wages pro rata against such new owner. *Robins v. Power*, 4 C. B., N. S. 778; 27 L. J., C. P. 257; 4 Jur., N. S. 810.

Against Master.—It is an established rule, so ancient that its origin is unknown, that the seamen may recover their wages against the master. *The Salacia*, 32 L. J., Adm. 41; 9 Jur., N. S. 27; 7 L. T. 440; 11 W. R. 189.

During a voyage the ship was wrecked, and the captain gave the mariners an order upon the owners for the amount of their wages to the date of the wreck, acknowledging, at the same time, that he had hired them by the month:—Held, that, under these circumstances, no action for wages could be maintained by the mariners against the captain, at least without proving that they had first made a demand upon the owners. *Forsboom v. Krugor*, 3 Camp. 197.

Purser.—A purser's steward on board a king's ship cannot recover wages from the purser upon an implied contract for his services as such steward on board the ship. *Carter v. Hall*, 2 Stark. 361.

c. Right to Sue Barred by Agreement.

Made Abroad.—If foreign sailors stipulate, in their own country, before the commencement of a voyage, that they will not sue the captain for any money abroad, but be satisfied with what he may advance them in deduction of their wages till they return home, they cannot maintain an action against him for wages in the courts of this country. *Johnson v. Machielsen*, 3 Camp. 44.

Even though the ship and cargo are confiscated in an English port, and the voyage thereby ended. *Gienar v. Meyer*, 2 H. Bl. 603.

Made with Part Owner.—Where a seaman, about to proceed on a trading voyage, entered into and signed articles, whereby he agreed not to sue for wages any of the owners, except one, who was the captain, and who alone was a party to the articles:—Held, that he could not sue the other owners, although they sold and received the proceeds of the cargo, and one of them, the managing owner, adjusted the wages, and settled with the seamen. *M'Auliff v. Bicknell*, 2 C., M. & R. 263; 1 Gale, 232; 5 Tyr. 1035.

d. Payment and Priority.

Payment.—Payment to seamen by ship-owners before a shipping master is no satisfaction of wages pronounced for in a suit in the Court of Admiralty. *The Araminta*, Swabey, 81; 2 Jur., N. S. 810.

Priority.—Where there are several claims on

a ship, and the proceeds are insufficient to pay all, a wages claim is preferred to a bottomry bond previously pronounced for, the bond having been given before the wages were earned. *The William F. Safford*, Lush. 69.

A claim by a person having paid wages to a ship's crew, at the request of the master, on account of the ship, is in the nature of a wages claim, and entitled to the same priority. *Id.*

There is no distinction in their right of precedence to a bottomry bond between seamen's wages earned antecedently, and those earned subsequently to the execution of the bond. *The Union*, Lush. 128; 30 L. J., Adm. 17; 3 L. T. 280.

A vessel had been pronounced liable for damage resulting from a collision; wages were due to the crew of the damaged ship. The proceeds of the sale of the ship doing the damage were not sufficient to satisfy both claims:—Held, that the wages were not entitled to priority. *The Linda Flor*, 4 Jur., N. S. 172.

Seamen are entitled to be paid their wages in priority to the master's claim, either for his own wages or for advances made by him in payment of the seamen's wages. *The Salacia*, 32 L. J., Adm. 41; 9 Jur., N. S. 27; 8 L. T. 91; 11 W. R. 189.

The master and seamen next after the salvor take precedence of the shipwright for wages earned before their ship comes into the shipwright's hands. If foreigners, they are also entitled, in addition to such wages, to a sufficient sum to take them back to their own country. *The Gustaf*, Lush. 506; 31 L. J., Adm. 207; 6 L. T. 660.

Damages or Wages.—The owners of a vessel who have recovered judgment against another ship in an action for damage by collision have a prior right against the proceeds of such ship to seamen who have recovered judgment against the same ship for wages earned before and after the collision. *The Elin*, 8 Adm. D. 39; 51 L. J., Adm. 77. Affirmed, 8 Adm. D. 129; 52 L. J., Adm. 55; 49 L. T. 87; 31 W. R. 736—C. A.

Foreign Ship.—The master and crew of a foreign ship arrested in this country are entitled to priority over a bottomry bondholder in respect of their expenses home. *The Constancia*, 15 W. R. 183.

When a foreign ship is under arrest, and no appearance is entered for her, the court will allow the payment of wages and viaticum out of freight in the hands of a plaintiff in a bottomry suit, and order the discharge of the crew, although there is no suit instituted for their wages. *The Bridgewater*, 37 L. T. 366.

e. Practice.

Before Justices.—The 7 & 8 Vict. c. 112, s. 15 (similar to s. 188 of 17 & 18 Vict. c. 104, Part III., s. 188), did not give any jurisdiction to a justice of the peace to adjudicate upon a claim for wages, by the administrator of a deceased seaman, and such administrator was not deprived of his right of action. *Hollingsworth v. Palmer*, 4 Ex. 267; 18 L. J., Ex. 409.

In Superior Court—Place of Business.—A place of occasional business is not a residence

within the meaning of the latter part of the s. 189 of 17 & 18 Vict. c. 102. *The Blakeney*, Swabey, 428; 5 Jur., N. S. 418.

—**Pleading.**—To an action by a seaman for wages a defence that 17 & 18 Vict. c. 104, s. 189 prohibits any suit in a superior court for the recovery of wages under 50*l.* is not open under the plea of never indebted, but must be pleaded specially. *Johnston v. Hilberry*, 3 H. & C. 328.

A seaman having brought an action for wages to an amount less than 50*l.*, together with a claim for damages for an assault, the court allowed the defendant (upon terms) to plead a plea founded upon the 188th and 189th sections of the 17 & 18 Vict. c. 104. *Rossi v. Grant*, 5 C. B., N. S. 699; 5 Jur., N. S. 895.

—**Jurisdiction.**—The 17 & 18 Vict. c. 104, s. 189, bars a seaman from recovering wages less than 50*l.* in the Court of Admiralty, except in the contingencies therein specified. *The Harriet*, Lush. 285; 5 L. T. 210.

The Court of Admiralty has no authority to restrain seamen from proceeding against the ship for their wages, however well satisfied it may be that the owner is solvent. *The Arab*, 5 Jur., N. S. 417.

The court has jurisdiction to entertain a claim by seamen for wrongful dismissal and the consequential damages. *The Great Eastern*, 1 L. R., Adm. 384; 36 L. J., Adm. 15; 17 L. T. 228.

The object of the 24 & 25 Vict. c. 10, s. 10, is to extend the jurisdiction which the Court of Admiralty had in the ordinary case of wages to the case of wages under a special contract, and of disbursements on account of the ship. *The Nina*, 2 L. R., P. C. 38; 87 L. J., Adm. 17; 17 L. T. 585; 5 Moore, P. C., N. S. 60.

Foreign Ship.—The Court of Admiralty has jurisdiction to entertain a suit for wages against a foreign ship, the words of the 24 & 25 Vict. c. 10, s. 10, being "any" ship; but the court ought not to exercise jurisdiction without first giving notice to the consul of the nation to which such ship belongs. *Ib.*

The protest of a foreign consul does not ipso facto operate as a bar to the prosecution of the suit: but the court ought to determine according to its discretion, judicially exercised, whether, having regard to the reasons advanced by the consul, and the answers offered on behalf of a claimant, it is fit and proper that the suit should proceed or be stayed. *Ib.*

A British subject having shipped on board a Portuguese ship as mate, and having signed an agreement to be bound by the law of Portugal, which required him to submit all differences between the master and seamen to the Portuguese consul, arrested the ship, and instituted a suit against the owners in the Court of Admiralty in England for wages, whereupon the Portuguese consul entered a protest against the proceedings:—Held, that the suit ought to be dismissed and the ship released, but without costs. *Ib.*

Quere, whether 17 & 18 Vict. c. 104, s. 189, applies to a claim for wages earned on board an American ship. *Burns v. Chapman*, 5 C. B., N. S. 481.

In an action for wages and wrongful dismissal brought by persons domiciled in England against a foreign ship, in which they had served under articles signed in a port of the country to which

the ship belonged, in which action imprisonment, hardship, and ill-treatment were alleged, the court refused to interfere with the discretion of the judge below in declining to exercise jurisdiction against the protest of the consul, which alleged that, by the law of the country to which the ship belonged, all disputes relating to the ship, or claims against the owner or master, were to be referred to and decided by the tribunals or consuls of that country. *The Leon XIII.*, *Wardrop v. Leon XIII. (Owners)*, 8 Adm. D. 121; 5 Asp. M. C. 73; 52 L. J., Adm. 58; 48 L. T. 770; 31 W. R. 882—C. A.

When a ship has been sold in a cause in which no appearance has been entered, and the proceeds remain in the registry, all preliminary proceedings in a cause of wages may be waived, and the money due paid out of court. *The Julina*, 35 L. T. 410.

The court will not pay the money to a foreign consul at his request, but will require the solicitor of the parties to satisfy any claims the consul may have before receiving the money. *Ib.*

Subsistence Money.—A seaman who brings a suit in rem for the recovery of his wages cannot have a decree for wages or subsistence money after the date of the commencement of his suit, although he is retained in the service of the ship by the master; but he will be entitled to an allowance in the way of costs for detention and subsistence money from the date of the institution of the suit to the date of the decree. *The Carolina*, 34 L. T. 399.

Foreign Seamen's Passage Money after Recovery of Wages.—Foreign seamen, discharged in Great Britain, and who recover wages in a suit against a foreign ship in which they served, are not entitled as of course to their passage money home, but will obtain it when their consul certifies that they have gone or are about to go home. *The Raffaelluccia*, 37 L. T. 365.

Foreign Seamen—Security for Costs.—When a cause of wages was instituted against a foreign ship by her master and crew, who were also foreigners, and although they were at the time in this country, their only place of residence was on board the ship, and the master had stated that he had no means and intended to leave England, the court ordered them to give a security for costs in 130*l.* *The Zufall*, 44 L. J., Adm. 16; 32 L. T. 571; 23 W. R. 328.

See also PRACTICE, XXIII, *infra*.

2. Evidence.

If, in an action for sailors' wages on articles under seal, the words are, "to which the parties have set their hands," without saying "seals," the plaintiffs will not be nonsuited, if it appears that they did not mean to contract by deed. *Clement v. Gunhouse*, 5 Esp. 83.

In an action for seamen's wages, the plaintiffs might, under 2 Geo. 2, c. 36, give evidence of the contents of the ship's articles, without having served a notice to produce them. *Bowman v. Manzelman*, 2 Camp. 315.

The 2 Geo. 2, c. 36, requiring articles to be entered into between the masters of ships and the mariners, and providing that the mariners shall not fail on any suit for wages from not produc-

ing the articles, did not apply in the case of a British seaman entering on board a foreign ship in a fault port. *Dickman v. Benson*, 3 Camp. 290.

4. DESERTION, MISCONDUCT, AND FORFEITURE.

What is.]—The sections coming under the head of "Discipline," in 17 & 18 Vict. c. 104, have reference to British ships alone; and s. 257 renders liable to a penalty every person who wilfully harbours or secretes any seaman or apprentice who has deserted from his ship, and in order to convict an offender under this section, it must be shewn that the ship deserted from is a British ship; and inasmuch as by s. 19 every British ship must be registered, and no ship thereby required to be registered shall, unless registered, be recognized as a British ship, proof that the ship is registered must also be given, either by the production of the original register, or by an examined or certified copy of it, as required by s. 107. *Leary v. Lloyd*, 3 El. & El. 178; 29 L. J., M. C. 194; 6 Jur., N. S. 1246.

If seamen go on shore on the ship's duty, and when the boat is about to return request to be permitted to remain on shore to get some victuals, which is refused, and the boat goes without them, if they afterwards go and offer to return to their duty on board the ship it is not a desertion. *Sigard v. Roberts*, 3 Esp. 71.

A sailor, under articles providing for a forfeiture of wages in case of breach of any of his engagements, among which is that of serving faithfully during the voyage, can recover nothing if he is left ashore in the course of it owing to his own fault in being absent, though he had no intention of deserting. *Sherman v. Bennett*, M. & M. 489.

Desertion before Sailing.]—If a seaman, who had signed the articles of agreement required by 5 & 6 Will. 4, c. 19, previously to sailing on a voyage, absolutely deserted the ship (i. e., left her without any intention of returning) after she had been moored at the port of delivery, and before her cargo had been discharged, he did not thereby incur a total forfeiture of his wages under s. 9, and was only liable under s. 7 to forfeit one month's wages. But if such desertion took place during the twenty-four hours immediately preceding her sailing, or at any time afterwards before she was moored at her port of delivery, he forfeited all his wages under s. 9. *M'Donald v. Jepling*, 4 M. & W. 285.

After Arrival of Ship.]—If there is a clause in the ship's articles, that the seamen may leave at the end of three months if the ship is in port or in perfect safety, of which the captain is to be the sole judge, and the ship is in port in safety after three months, the seamen may leave the ship without the permission of the captain. *Neave v. Pratt*, 2 N. R. 408.

Detention of Property.]—Where the second mate was ordered, with three other seamen, to take the ship's boat and convey the captain on board, who had gone on shore at the Mauritius, and, on their getting on shore, they refused to return with him, but remained there all night, and he was obliged to get back to his ship in another boat, and redeem his on the following morning, when such mate was taken before a magistrate

at the Mauritius, and committed to prison for a month:—Held, that this was such an act of disobedience as to warrant the captain to detain his property on board the vessel by way of forfeiture; and, consequently, that trover could not be maintained against the captain for such detention. *Weatherpen v. Laidler*, 8 Moore, 37.

Endangering Safety of Ship.]—To sustain an indictment for a misdemeanor under 17 & 18 Vict. c. 104, s. 239, it is not necessary that the act done or omitted should be followed by actual loss, destruction, or damage of such ship. *Reg. v. Gardner*, 1 F. & F. 669.

Owing to Misconduct of Officers.]—If a master by inhuman treatment compels a sailor to quit a ship, it is not such a desertion as will amount to a forfeiture of his wages for the voyage performed. *Limland v. Stephens*, 3 Esp. 269.

To a declaration by a seaman for wages, the defendant pleaded that the plaintiff had been engaged as a seaman on board the Candace, a British registered ship, for a voyage from Liverpool to San Francisco and back, and had during the voyage, and while he belonged to the ship at San Francisco, deserted from the ship, within the meaning of the 7 & 8 Vict. c. 112, s. 9; and that the plaintiff afterwards, and while he was such deserter, engaged himself as a seaman for the voyage back to England from San Francisco with the defendant, as the master of another ship, for wages for which this action was brought. Replication, that while the plaintiff was serving as seaman on board, the captain and officers flogged and punished him with great and unreasonable cruelty and severity, and that such flogging and punishment were not rendered necessary by mutinous or improper conduct, but were unnecessary and unreasonable; that the plaintiff requested the captain and officers to desist, which they refused to do, whereupon the plaintiff, having reasonable grounds to believe that they would continue to flog and punish him with great and unreasonable cruelty and severity, in order to escape therefrom deserted from the ship:—Held, a good answer to the plea. *Eduard v. Trevellick*, 4 El. & Bl. 59; 2 C. L. R. 1605; 24 L. J., Q. B. 9; 1 Jur., N. S. 110.

The plaintiff also replied that he was a negro, and that negroes are bought and sold as slaves in divers states of the United States; that he was serving on board the Candace, and before he deserted, the captain of the ship threatened to sell him, the plaintiff, as a slave to citizens of the United States; that San Francisco is situated in one of the United States, to wit, in California, and that the plaintiff had just and reasonable grounds for believing and did believe that, on the arrival of the ship at San Francisco, the captain was about and meant to carry his threat into execution; and that, in order to prevent the captain from selling him as a slave, the plaintiff deserted:—Held, no answer to the plea. *Ib.*

Vessel Plundered.]—If a sailor executed the articles prescribed by 37 Geo. 3, c. 73, and served accordingly, and during the voyage part of the cargo was plundered, but by whom could not be ascertained, he did not, in consequence of such plunderage, forfeit his wages. *Thompson v. Collins*, 1 N. R. 347.

Compensation.]—By a clause in the ship's

articles of a South Sea whaler, the seamen serving on board were to lose their wages if they did not return with the ship to the port of London. After serving twenty-seven months, some of the seamen were, with the consent of the captain, exchanged into another ship for others belonging to that ship:—Held, that, if these seamen had lost their wages under the articles, they could at any rate receive a reasonable compensation for their services. *Hillyard v. Mount*, 3 C. & P. 93.

Waiver.—If seamen have incurred a forfeiture of their wages, and in a time of distress, when the ship is aground, the captain calls on those seamen to assist in getting her off, this is no waiver of the forfeiture; but if the captain continues them in their work after the peril is over it is otherwise. *Train v. Bennett*, 3 C. & P. 3; M. & M. 82.

Where it is provided by a ship's articles that any of the crew who shall absent themselves from the ship without leave shall forfeit their wages; if, after one of the crew has so absented himself, the master receives him back again, and allows him to work like the others, the forfeiture is waived and the wages are recoverable. *Miller v. Brant*, 2 Camp. 590.

Time for Proceeding.—The Merchant Shipping Act, 1854, s. 257, makes it an offence to persuade or attempt to persuade any seaman to neglect or refuse to join, or to desert from his ship; by s. 525 no conviction for any offence shall be made in any summary proceeding, unless such proceeding is commenced within six months after the commission of the offence; or if both or either of the parties to such proceeding happen during such time to be out of the United Kingdom, unless the same is commenced within two months after they both first happen to arrive or to be at one time within the same:—Held, that "parties to the proceeding" meant the seaman and the person persuading or attempting to persuade; and that if either of them leaves the kingdom during the six months after the commission of the offence, an information may be laid within two months of his return. *Austin v. Olsen*, 3 L. R., Q. B. 208; 37 L. J., M. C. 34; 18 L. T. 537; 9 B. & S. 46.

Informal Engagement.—Held, also, that the offence might be committed, although the formalities required by s. 150 in the engagement of the seaman had not been complied with. *Ib.*

A seaman engaged by the master, and taken to sea without any such written agreement having been entered into between them as was rendered necessary by 7 & 8 Vict. c. 112, s. 2, was not a seaman or a mariner within 11 & 12 Will. 3, c. 7, s. 9, and therefore was not liable under that section for making a revolt by deserting his vessel in port, and inducing the rest of the crew to do the same. *Reg. v. Smith*, 3 Cox, C. C. 443.

Summary Proceeding excludes Civil Remedy.]

—The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 243—which enables a seaman who neglects without reasonable cause to join his ship to be punished upon proceedings before a court of summary jurisdiction with imprisonment and forfeiture of part of his wages—by implication takes away any other remedy against

the seaman for the breach of contract, and the shipowner cannot, where the amount which he claims does not exceed 10*l.*, take proceedings for the recovery of damages under the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 4. *Great Northern Steamship Fishing Company v. Edgehill*, 11 Q. B. D. 225.

Evidence of.]—A seaman having remained ashore all night at a foreign port, the master went to the consul without any notice to the seaman, and obtained his certificate, with an indorsement thereon that the seaman had deserted. In a summary proceeding before justices in this country by the seaman to recover his wages, the consul's certificate is not conclusive evidence of the fact of desertion. *Lewis v. Jewhurst*, 15 L. T. 275.

5. CAPTAIN'S AUTHORITY TO PUNISH.

In what Cases.]—The captain of a merchant ship, lying in a foreign port, sent a seaman, who had committed mutiny, on shore, into the custody of the local authorities, and procured him to be flogged and imprisoned:—Held, that the captain was answerable, having taken an active part in the proceedings, and not merely lodged his complaint. *Aitkin v. Bedwell*, M. & M. 68.

Where C., a mariner on board an East India-man at anchor in the bay of Canton, within two miles of Macao, and within hail of several other vessels, having been guilty of disorderly conduct in the absence of the captain, was, upon the captain's return to the ship four days afterwards, ordered to be flogged, upon which L., a mariner on board the same ship, resisted the execution of the captain's orders, and was guilty of riotous and mutinous conduct, for which, by command of the captain, he was flogged:—Held, that the captain was justified in flogging L.; and that the authority of the captain to inflict moderate punishment is not confined to a case where the vessel is at sea beyond the reach of assistance; and that such punishment need not be inflicted immediately upon the act being done for which the punishment is inflicted. *Lamb v. Burnett*, 1 C. & J. 291; 1 Tyr. 265. See also *Broughton v. Jackson*, 18 Q. B. 378; 21 L. J., Q. B. 265; 16 Jur. 886.

It is the duty of the captain of a merchant vessel, in case of misconduct of one of the crew, previously to the infliction of punishment, to institute inquiry, with the assistance of others, and to have the result entered in the log. *Murray v. Moutrie*, 6 C. & P. 471.

A seaman employed in cutting blubber on board a whaler, in consequence of a quarrel with the captain followed by a blow from the mate, threw down his knife, and refused to do any more work in the ship:—Held, that such conduct was an act justifying moderate punishment; and that, although the punishment was excessive, yet, if the seaman, by some concession, might have put an end to it, and refused, he could not recover damages for the continuation of the punishment after such refusal. *Ib.*

Evidence in Action against Captain.]—In an action against the captain of an East Indianman, for flogging the plaintiff (a gunner's mate) on board the ship, the latter cannot give evidence

as to his being of a respectable family and connexions, unless these circumstances could be proved to have been known to the captain at the time. *Rhodes v. Leach*, 2 Stark. 516.

6. FORGING CERTIFICATE OF CHARACTER.

A master having made and signed a report of a seaman's character, upon his discharge, in the form sanctioned by the Board of Trade, the shipping master gave the seaman a copy of such report. A. knowingly and fraudulently made a fac-simile of this report, but instead of writing the letter M., which stood in the original to indicate that the seaman's character for ability and conduct was middling, wrote "G.," indicating that it was good:—Held, that A. was guilty of an offence within 17 & 18 Vict. c. 104, s. 176. *Reg. v. Wilson*, Dears. & B. C. C. 558; 27 L. J., M. C. 230; 4 Jur., N. S. 670.

7. PROTECTION FROM IMPOSITION.

Persons going on Board before final Arrival of Ship.—A. was charged under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 237, with boarding, without the permission of the master, a ship "about to arrive at her place of destination before her actual arrival in dock or at the place of her discharge." The ship, at the time he boarded her, had just entered the Cumberland Basin, in the port of Bristol, at 7 P.M. The basin is divided from the River Avon by dock gates, and is a complete dock, forming part of, but divided by other dock gates from, the rest of the docks. There are quays in the basin, but the ship was not intended to discharge in the basin; she remained in the basin all night, and the next morning she was moored further in the floating harbour, and discharged her cargo at the quay there. The justices dismissed the complaint:—Held, that the ship had not arrived "at her place of destination" by merely arriving in the port of Bristol, and that she had not "actually arrived at her place of discharge," which was the quay where she ultimately did discharge; but that she had actually arrived in dock, within the meaning of the section, although the dock was not the dock in which she ultimately discharged; and that the justices' decision was therefore right. *Attwood v. Case*, 1 Q. B. D. 134; 45 L. J., M. C. 20; 33 L. T. 507; 24 W. R. 94.

XI. SALE, TRANSFER, AND MORTGAGE.

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1. CONTRACT FOR SALE.

Written Agreement for—Necessity of Registration.—An agreement in writing to transfer a ship does not require to be registered under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 55, nor need the special description of the ship sold required by that section to be inserted in a bill of sale transferring the ship be contained in such agreement. The plaintiff agreed in writing with the defendant to sell, and the defendant agreed to purchase, a yacht belonging to the plaintiff for the sum of 2,600*l.*, whereof the plaintiff was the registered owner, on condition that the defendant should be at liberty to rescind the said agreement should the yacht prove unsound. The defendant refused to carry out his part of the agreement, and the plaintiff brought an action against the defendant for specific performance, or, in the alternative, 2,600*l.*, and for damages for breach of contract. The defendant pleaded that the agreement, if any was made, was not a bill of sale, nor was it registered, nor did it contain a sufficient description of the yacht, as required by the Merchant Shipping Act, 1854. The plaintiff demurred:—Held, that s. 55 of the Merchant Shipping Act, 1854, applies to the actual instrument by which the ship is to be transferred, and not to an agreement to transfer. *Bathhyang v. Bouch*, 50 L. J., Q. B. 421; 44 L. T. 177; 29 W. R. 665.

An unregistered contract for the sale of shares in a British vessel could not be enforced in equity before the passing of the 25 & 26 Vict. c. 63, s. 3. *Hughes v. Morris*, 2 De G., M. & G. 349; 21 L. J., Ch. 761; 16 Jur. 603; *S. P.*, *M'Calmont v. Rankin*, 2 De G., M. & G. 403; 22 L. J., Ch. 554; *Liverpool Borough Bank v. Turner*, 2 De G., F. & J. 502; 30 L. J., Ch. 379; *Boyson v. Gibson*, 4 C. B. 121; 16 L. J., C. P. 147.

Executory Contract—Recital of Registry.—An action would not lie for the breach of an executory contract for the sale or transfer of a ship, unless the contract contained a recital of the certificate of registry pursuant to the previous statute, 8 & 9 Vict. c. 89, s. 34. *Duncan v. Tindall*, 13 C. B. 258; 22 L. J., C. P. 137; 17 Jur. 347.

Payment of Earnest.—Trover was held to lie for a ship, where, upon a bargain of exchange, the contract and delivery were fully completed by the payment of earnest. *James v. Price, Lofft*, 219.

Illegal Stipulation in.—A stipulation, in a contract for the purchase of a ship made with a shipbuilder, that a certificate shall be delivered to the purchaser by the builder, for the purpose of enabling the former to obtain a register as owner, under 3 & 4 Will. 4, c. 55, ss. 15, 25, before the masts were on board, and before the ship was in a sufficiently forward state for the measurement required to be made by that act, did not render such contract illegal. *Goss v. Quinton*, 3 M. & G. 825; 4 Scott, N. R. 471; 12 L. J., C. P. 178; 7 Jur. 901.

Irregular—Effect of, against Wrongdoer.]—The plaintiff bought and paid for a ship stranded on the English coast, but the transfer was not regular; he tried to save her, but she went to pieces; the defendant possessed himself of parts of the wreck which drifted on his farm:—Held, that the plaintiff's possession enabled him to recover them in trover. *Sutton v. Buck*, 2 Taunt. 302.

Parol Evidence to shew Alteration.]—E., as agent to H., agreed to sell a ship to S., and a written contract was signed by S. The contract was forwarded to H., who made an alteration therein, and returned it to E., who thereupon produced the written contract, as altered by H., to S., who assented, without resigning the contract:—Held, that parol evidence was admissible to shew that S. assented, without re-signing, to the alteration made by H. in the contract after S. had affixed his signature. *Stewart v. Eddowes*, and *Hudson v. Stewart*, 9 L. R., C. P. 311; 43 L. J., C. P. 204; 30 L. T. 333; 22 W. R. 534.

Varying by Evidence of prior Contract.]—An agreement for the sale of a ship and kintlage will not be varied or controlled by a prior contract for the purchase of the latter only. *Lano v. Neale*, 2 Stark. 105.

Warranty by subsequent Bill of Sale.]—A contract by parol, or by letter, having been entered into for the sale of a ship, with a warranty, a subsequent bill of sale, not containing any contract of warranty, does not necessarily destroy the previous warranty, supposing there is no evidence that the parties did not intend that it should continue. *Stuckey v. Bailey*, 3 F. & F. 1.

Existence of Subject-Matter—Implied Warranty.]—By a deed-poll, A. sold to B. a ship, with its masts, tackle and appurtenances, and covenanted that he had good right, full power, and lawful authority to grant, bargain, sell, assign and set over the premises:—Held, that this was a covenant that the subject-matter of the transfer existed in the character of a ship, at the date of the deed; and if it was physically destroyed, or had ceased to answer the designation of a ship, the covenant was broken. *Barr v. Gibson*, 3 M. & W. 390.

Condition precedent—"Ship now at Rangoon."]—In an action by the vendors against their vendees for refusal to accept, evidence was given to shew the circumstances under which the contract was made, and that it was of vital importance that the vessel should be in the port named at the time of making the contract. The jury found that the condition, "ship now at Rangoon," had not been fulfilled, and that it was a condition absolutely vital:—Held, that it was rightly left to the jury to say under what circumstances the contract was made, and that the words "ship now at Rangoon" amounted to a warranty justifying the defendants in saying that there had been a failure of performance of a condition precedent, and in refusing to carry out the contract. *Oppenheim v. Fraser*, 34 L. T. 524.

Held, also, that the finding of the jury was rightly taken as an element in enabling the court to say that the words amounted to a condition precedent. *Id.*

Removing Ship after Contract for Sale.]—A shipowner of Hamburg made, at Hamburg, an agreement with a domiciled Englishman for the sale to the Englishman of a Hamburg ship whenever she might return from the voyage on which she then was. The ship returned, and was by the owner ordered to proceed to Sunderland. The master of the ship, who was authorized by the shipowner to act as his agent in the sale, refused to deliver the ship except on certain terms. The purchaser filed a bill against the owner and the master for specific performances. He obtained leave to substitute service on the master for the owner, and moved for an injunction to restrain the defendants from removing the ship out of the jurisdiction:—Held, that the court had jurisdiction to restrain the defendants from removing the ship, and injunction granted. *Hart v. Herwig*, 8 L. R., Ch. 860; 29 L. T. 47; 21 W. R. 663.

2. TITLE.

a. By Bill of Sale.

Mode of Transfer by.]—Under the 17 & 18 Vict. c. 104, sales of ships can only be made in the manner prescribed by the statute. *Liverpool Borough Bank v. Turner*, 1 Johns. & H. 169; 29 L. J., Ch. 872; 6 Jur., N. S. 935; 8 W. R. 730. Affirmed, 2 De G., F. & J. 502; 30 L. J., Ch. 379; 3 L. T. 494.

A mere literal deviation from the form of conveyance of a ship prescribed will not render it void. *Taylor v. Kinloch*, 1 Stark. 175.

Notwithstanding the 26 Geo. 3, c. 60, s. 17, enacted that a bill of sale of a ship should be absolutely void, unless the certificate of the registry was truly and accurately inserted therein, a mere clerical mistake would not vitiate it. *Rolleston v. Smith*, 4 T. R. 161.

A bill of sale of a ship is not void, although it omits to set forth the true consideration, and is not stamped with an ad valorem stamp; but the parties thereto are liable to a penalty. *Robinson v. Macdonnell*, 5 M. & S. 228.

A bill of sale made to a trustee for the benefit of underwriters, whose names are not stated, is not *prima facie* void, because contrary to the Register Acts. *Heath v. Hubbard*, 4 East, 110; 4 Esp. 205.

Where a bill of sale, though executed by the person named for that purpose by the plaintiff, the then owner of the ship, and purporting in all other respects to be made in conformity with the certificate of sale, was, in fact, made for less than the minimum price specified in the certificate, and the ship was registered in the name of the purchaser as sole owner:—Held, that the registry was void; and the ship having been sold by arrangement pending a suit that the plaintiff was entitled to the net proceeds of the sale. *Orr v. Dickinson*, *infra*.

When Necessary.]—A vessel which had been registered, was by the owners used for the space of four years as a mere coaling hulk and workshop, moored at one of their coaling stations; she was then transferred by them, under an agreement in writing, to a company to which the owners transferred their business. She was described in the agreement, and also in an invoice delivered, as a coal hulk:—Held, as a matter of fact, that under the circumstances of

the case she was not a ship, at any rate as between the parties, so as to be by 17 & 18 Vict. c. 104, s. 53, transferable only by bill of sale, and therefore that the property in her passed to the company. *European and Australian Royal Mail Company v. Peninsular and Oriental Steam Navigation Company*, 12 Jur., N. S. 909; 14 L. T. 704; 14 W. R. 843.

Vesting of the Property.—The property of a ship vests in the purchaser, instantly upon the execution of the bill of sale. *Hubbard v. Johnstone*, 3 Taunt. 177.

The non-registration of a ship, required by 8 & 9 Vict. c. 89, ss. 37, 38, by the first purchaser, did not affect the title of a subsequent bona fide purchaser. *The Australia*, 13 Moore, P. C. C. 132; Swabey, 486.

Under 17 & 18 Vict. c. 104, s. 79, the registry of a bill of sale, which, though purporting to be valid, so that the registrar has no alternative but to register it, is in fact invalid, gives no title, even at law, to the person thereby registered as sole owner of the ship. *Orr v. Dickinson*, Johnson, 1; 28 L. J., Ch. 516; 5 Jur., N. S. 672.

The property in a ship passes, as between the vendor and his assignees and the vendee, by a bill of sale, although the transfer is not registered pursuant to the Merchant Shipping Act, 1854. *Stapleton v. Haymen*, 2 H. & C. 918; 33 L. J., Ex. 170; 10 Jur., N. S. 497; 9 L. T. 655; 12 W. R. 317.

The duty to register a transfer of ownership rests with the vendee; the bill of sale entirely divests the title of the vendor; immediately on the execution of the bill of sale the vendor becomes entitled to all the benefits of ownership, and he takes with them all the concurrent liabilities. *The Spirit of the Ocean*, 34 L. J., Adm. 74; 12 L. T. 239.

What passes by.—A bill of sale of a whaler absent on a fishing adventure, together with all masts, &c., boats, oars, and appurtenances, does not pass the cargo of oil, &c., acquired during the adventure. *Langton v. Horton*, 5 Beav. 9.

Purchase by an Infant.—A transfer of a vessel by a bill of sale, under 17 & 18 Vict. c. 104, s. 55, to a bona fide purchaser for value, vests the property in such vessel in the transferee from the moment of its execution, and gives him a good title against the assignees of his vendor for seizing and selling the vessel under the bankruptcy of the latter, although, until registration of the transfer, the transferee could not have transferred the vessel to a purchaser from himself. *Stapleton v. Haymen*, 2 H. & C. 918; 33 L. J., Ex. 170; 10 Jur., N. S. 497; 9 L. T. 655; 12 W. R. 317.

On a purchase of a vessel by a person under twenty-one, the vendor becomes a trustee in equity for the purchaser, until the latter, on coming of age, is enabled to make the declaration of ownership required by 17 & 18 Vict. c. 104, s. 38, previously to registering the vessel in his own name; and s. 3 of the 25 & 26 Vict. c. 63, expressly recognizes and gives effect to such an equitable right, and enables it to be enforced. *Id.*

Whether Absolute or Conditional.—A bill of sale of some shares in a ship was executed to T., and with it a declaration of ownership, as re-

quired for registration. T. did not register the instrument for more than four years, although he knew that this proceeding would be necessary to complete his title as part owner. He sought to have the vessel sold, and accounts taken between him and the defendant. The defendant alleged that the bill of sale had been given by him only as security for a loan which had since been fully paid. On several occasions T. accepted portions of the ship's earnings, without requiring to see vouchers or any regular accounts:—Held, that his conduct was that of a creditor, and not of a part owner, and that the setting up of the bill of sale as an absolute conveyance was an afterthought, and a course of conduct which would not be sanctioned by the court. *The Jane*, 23 L. T. 791.

When a bill of sale of a ship has been executed in the form prescribed by 17 & 18 Vict. c. 104, s. 55, the provisions of s. 66 do not prevent the owners from shewing that the transfer, though absolute in its terms, was intended as a security only. *Ward v. Berk*, 13 C. B., N. S. 668; 32 L. J., C. P. 113; 9 Jur., N. S. 912.

The 25 & 26 Vict. c. 63, s. 3, is a declaratory enactment that this is the true interpretation. *Id.*

In July, 1853, A., being owner of a ship, sold it to D., of the firm of D., Y. & Co., for 4,725*l.*, and received in payment their draft on B., at twelve months' date. In September, 1853, the ship sailed from London on a voyage to San Francisco, and thence on a seeking voyage home. In June, 1854, the captain, who was sent out by D. to take charge of the vessel, chartered it to load a cargo of flour for Sydney. Some days after the bill of exchange became due, D., Y. & Co. requested A. to renew it, and he consented to do so on having the vessel transferred to him as a security. The vessel was accordingly transferred to him by deed of assignment, which was in the form of an absolute sale. In October, 1854, the captain, who had no knowledge of the assignment, received 1,000*l.* on account of freight, and remitted it to D., Y. & Co. by a bill of exchange. In November, 1854, D., Y. & Co., who had acted as ship's husband, became bankrupt:—Held, that though the assignment was in form absolute, yet the court might look to the real nature of the transaction, and see that it was by way of mortgage only. *Gardner v. Cazenove*, 1 H. & N. 423; 26 L. J., Ex. 17.

b. In other Cases.

Ship Sold to Foreigner.—A ship built in order to be sold to a foreigner, and to be delivered to him at a foreign port, was assigned by her builder to a bank for a valuable consideration, under an agreement which was not in the form of a bill of sale given by the Merchant Shipping Act, 1854. The assignment was not registered, either under that act or under the Bills of Sale Act, 1854. At the time of the assignment the vessel had been completely built and had been tried:—Held, that the ship was not a British ship within the meaning of the Merchant Shipping Act, 1854, and that an assignment of her need not be by bill of sale, nor registered under that statute. *Union Bank of London v. Lenanton*, 3 C. P. D. 243; 47 L. J., C. P. 409; 38 L. T. 698—C. A.

Held, also, that an assignment of her fell within the proviso in the Bills of Sale Act, 1854,

s. 7, which exempts assignments of a ship from the operation of that statute. *Ib.*

A transfer of a ship, which has not been registered as a British ship under s. 19 of the Merchant Shipping Act, 1854, is good, although not made by bill of sale under s. 55. *Ib.*

Shares in Ship.]—An original owner of shares in a ship cannot enforce his title to those shares against a registered owner who has purchased them *bonâ fide* for value from a person whose name was on the register as owner, even though such person had been registered through fraud in the original owner. *The Horlock*, 2 Adm. D. 243; 47 L. J., Adm. 5; 36 L. T. 622.

A statement of defence alleging a fraudulent registration of the plaintiff's predecessor in title was demurred to, and the demurrer sustained, on the ground that a fraudulent registration on the part of an intermediate transferee is no defence to an action for possession by a *bonâ fide* purchaser for value, without notice of the fraud. *Ib.*

An injunction granted *ex parte*, on application of the plaintiff to prevent the defendant dealing, and to restrain the registrar of shipping from registering any dealings, in shares of a ship the subject of a co-ownership action *pendente lite*. *Ib.*

The sale of a share in a ship is good without actual delivery. *Addis v. Baker*, 1 Anst. 222.

— As against Registered Mortgagee.]—A shipowner sold certain shares in a ship, and the purchaser, having neglected to register the sale, subsequently mortgaged the whole ship to a third person, who had no knowledge of the previous sale, to secure a balance exceeding the value of the ship. The purchaser subsequently registered his shares, and then finding the mortgage registered, instituted a suit against the ship, claiming as against his co-owner an account and the sale of the ship. The mortgagee intervened and claimed the release of the ship and damages and costs for its detention:—Held, that he was entitled to the release of the ship and to costs from the time the plaintiff became aware of his claim. *The Eastern Belle*, 33 L. T. 214.

Sale by Licitation.]—The transfer of a British ship is governed by the express provisions of the Merchant Shipping Acts, which make a clear distinction between the legal estate and mere beneficial interests therein:—Held, that a sale by licitation of a British ship (or of a share therein) without a conveyance by bill of sale did not create such an interest in the purchasers as rendered it compulsory on the registrar, under the Merchant Shipping Act, 1854, to register them as owners, and that the registrar was right in refusing so to do, and to erase from his books the inscriptions contained in the register against the ship in the names of the mortgagees. *Chasteauneuf v. Caperyon*, 7 App. Cas. 127; 51 L. J., P. C. 37; 46 L. T. 65—P. C.

Foreign Judgment in rem.]—A ship was, whilst in a port of an English colony, repaired and furnished with necessaries for the voyage. The captain drew on his owner for the amount due. The bill was never accepted. The ship sailed on its prescribed voyage, and before reaching England entered a French port. The bill was indorsed to a French subject, who sued the

captain on it, and obtained in the Tribunal de Commerce a judgment against him, but the judgment freed him from personal arrest, and declared the debt "privileged on the ship" (having priority over others). The ship was taken possession of by the French authorities under this judgment. While the ship was on its voyage, and before its arrival in the French port, the owner had executed a mortgage of the ship to a creditor. Neither the original owner nor the mortgagee was in any way personally cited in the action. The ship could not be actually sold till the Civil Tribunal of the district had confirmed the original judgment. It was confirmed, after the original owner and his assignee (for he had in the meantime become bankrupt) had been cited before the Civil Tribunal, and that court disregarded the opinion of an English lawyer as to what would be the relative rights of the holder of a bill of exchange and the holder of a bill of sale of the ship. The assignee of the mortgage afterwards instituted before the Civil Tribunal a process in the nature of a *replevy* of the ship, but failed in the process, and the ship was sold:—Held, that there had been a judgment in rem in the French court, and that the title of the vendee of the ship (an Englishman) could not afterwards be disturbed in this country. *Castrique v. Imrie*, 4 L. R., H. L. 414; 39 L. J., C. P. 350; 23 L. T. 48; 19 W. R. 1.

Purchase by Surveyor.]—A person surveying a ship, with a view to a sale by the master, may be justified in becoming the purchaser. *The Australia*, Swabey, 145; 13 Moore, P. C. C. 132.

Sale by Court when Person absolutely Entitled.]—Under the Merchant Shipping Act, 1854, ss. 62—64, the court will order a particular sale to be carried out, instead of making an order for sale generally, if that course is shewn to be preferable. *Santon, In re*, 26 W. R. 810.

Where a petitioner under those sections claims as sole executor and general legatee of the registered owner, and makes the application within a year, though more than four weeks after the occurrence of the event on which the transmission took place, it is not necessary to serve the crown or any other person. *Ib.*

Where jurisdiction was given in respect of a particular kind of proceeding, by an act passed before the passing of the Judicature Acts, to the Court of Chancery alone, but, by a later act, still before the passing of the Judicature Acts, the jurisdiction was extended to the Court of Admiralty, the Chancery Division now has jurisdiction under the Judicature Acts. *Ib.*

Pirate Ship.]—A ship which had been engaged in acts of alleged piracy, and which, before any proceedings had been taken by the crown, had been sold by her owners at a public auction to a *bonâ fide* purchaser, was afterwards arrested by the crown:—Held, that although the ships and goods of pirates are upon conviction forfeited to the crown, yet the ship of a pirate which has not been piratically taken, and which before conviction has been transferred to an innocent purchaser, is not liable to seizure by the crown. *Reg. v. M'Clervy, The Telegrafo or Restauracion*, 3 L. R., P. C. 673; 40 L. J., Adm. 18; 24 L. T. 748; 20 W. R. 242; 8 Moore, P. C. C., N. S. 43.

3. WHO CAN SELL.

a. Managing Owners.

Authority of.]—D., the managing owner of a ship, through the plaintiffs, his agents at Constantinople, sold her to the Turkish government, and received a bill upon the Oriental Bank in London for the purchase-money, which bill was duly paid. D. had no express authority at the time from the defendants (who were the owners of $\frac{2}{3}$ ths of the ship) to sell her, but the latter knew that a sale was contemplated; and, after the sale, they executed a power of attorney, reciting that they had agreed to sell the vessel to the Turkish government, and had actually received the purchase-money, and empowering the plaintiffs to transfer their respective shares and to hand over the vessel to the purchasers. The defendants afterwards received from D. (or settled in account with him) the value of the then respective shares:—Held, that the jury was warranted in finding that the defendants had authorized the sale of the ship to D., or had by their subsequent ratification so adopted his act as to render them jointly liable to the plaintiffs for the commission due to the latter on the sale. *Keay v. Frowick*, 1 C. P. D. 745—C. A.

Held, also, that the position of the defendants was not so altered by the fact of the plaintiffs having drawn upon D. a bill at three months' date for the amount of the commission, as to release the former from liability upon the dishonour of the bill. *Ib.*

b. Part Owners.

Rights of.]—A broker was employed to sell a ship belonging to three part owners, two of whom communicated with him on the subject; to them he paid their shares of the proceeds of the sale, but, after admitting the amount of the third part owner's share to be in his hands, refused to pay it to him without the consent of the other two; an action having been brought by the third part owner for the share:—Held, that he was not entitled to recover. *Hatsell v. Griffith*, 2 C. & M. 679; 4 Tyr. 487.

A. & B. being in partnership and joint owners of a ship, A. requested C. & D. to accept two bills amounting together to 2,600*l.* on the security of the ship, which they agreed to do, and A. accordingly executed a bill of sale to them, and the ship was registered in their names, A. agreeing that they might sell the ship, and indemnify themselves out of the proceeds, if he neglected to provide for the bills when due. A. became bankrupt, and the bills were paid by C. & D., who thereupon assumed the ownership of the ship:—Held, that the ship, being the partnership property of A. & B., and registered in the name of the partnership firm, was within 3 & 4 Will. 4, c. 55, s. 32, and that A. had therefore a right to deal with her as with any other partnership property, and consequently could sell or mortgage her without a power of attorney from his partner B. *Howden, Ex parte*, 2 Mont., D. & D. 574.

A mandamus to the officers of customs to register a ship transferred by the survivor of two part owners, merchants, was refused on the ground that the executors of the deceased part owner ought to have joined in the transfer. *Ree v. Liverpool (Collector of Customs)*, 2 M. & S. 223.

Sale by Order of Court.]—The Admiralty Division of the High Court of Justice has power, under the Admiralty Court Act, 1861, s. 8, in a co-ownership action, to order the sale of a ship on the application of a minority of owners, but such power will always be exercised with great caution. *The Nelly Schneider*, 3 Adm. D. 152; 39 L. T. 360.

Part owners of a vessel, in a suit for sale brought against them by their co-owners, set up in their answer a claim for damages alleged to have been occasioned by the negligence or other wrongful act of such co-owners. The plaintiffs in their reply denied the jurisdiction of the court:—Held, that the court had jurisdiction to entertain such a claim. *The Ceylon*, 18 L. T. 417.

c. Attorney.

Ordinarily a power of attorney authorizing the sale of a vessel is revoked by the death of the owner. *Watson v. King*, 1 Stark. 121; 4 Camp. 272.

But a power of attorney to execute the indorsement of sale upon the register of a ship when she returns home is not revoked by the bankruptcy of the party giving the power. *Dixon v. Ewart*, Buck, 94; 3 Mer. 327.

A power of attorney to sell a ship may be substantially revoked by parol, and the attorney selling thereafter is guilty of a breach of trust. *The Margaret Mitchell*, Swabey, 382.

If the grantee of a power of attorney to sell a ship sells fraudulently, or so as to commit a breach of trust, the fraud of the attorney vitiates the title of the purchaser, if the fraud was known to him, or could have been known by reasonable inquiry. *Ib.*

d. Guardian of Infant.

The guardian of an infant shipowner has no power under 17 & 18 Vict. c. 104, s. 99, to mortgage or sell a ship of which such infant is the owner. *Michael v. Fripp*, 7 L. R., Eq. 95; 38 L. J., Ch. 29; 19 L. T. 257; 17 W. R. 23.

e. Sheriff.

An execution debtor, being a registered proprietor of shares in a ship, a *fi. fa.* was delivered to the sheriff; and the solicitor for the creditor, by the direction of the sheriff, procured the certificate of registry from the ship, and delivered it to the sheriff, who retained it. The sheriff was registered at the Custom-house, under the Merchant Shipping Act, as the owner of the shares, which were afterwards sold by him and transferred to a purchaser by a bill of sale, which was also registered:—Held, that the seizure was effectual, although the sheriff did not go on board the ship, and that the property in the shares was regularly transferred by the bill of sale. *Harley v. Harley*, 11 Ir. Ch. Rep. 451.

f. Master.

Authority and Necessity.]—The master of a vessel has no power to sell her so as to affect the insurers, except under circumstances of stringent necessity; such circumstances as, after sufficient examination of her condition, after every exertion in his power, within the means at his disposal, to extricate her from peril or to raise funds

for the repair, leave him no alternative but to sell her as she is. *Cubequid Marine Insurance Company v. Barteaux*, 6 L. R., P. C. 319; 32 L. T. 510; 23 W. R. 892.

By the law of England, and the general maritime law, the master has no power to sell either cargo or ship, except in cases of absolute and utter necessity. *Cammell v. Sewell*, 5 H. & N. 728; 29 L. J., Ex. 350; 6 Jur., N. S. 918; 8 W. R. 639.

A ship reached Savannah in March, 1855, laden a cargo of timber, and in April, before she cleared the mouth of the river, drove ashore in a hurricane; she was got off, discharged her cargo, and was surveyed; extensive repairs were found necessary; neither the owner, who lived at Gloucester, in England, nor the master had any credit, the ship was uninsured, and money could not be raised on bottomry; under these circumstances the master sold her without any express authority from the owner; she was repaired by the purchasers, sailed to Liverpool, and was arrested there at the suit of the former owner:—Held, that the sale was valid, and the ship was decreed to be restored with costs and demurrage; but in such cases the burden of proof lies upon the purchaser, unless the sale took place under the decree of a competent court. *The Glasgow*, Swabey, 145; 12 Moore, P. C. C. 355, n.; S. P., *The Victor*, 13 L. T. 21.

If a ship, being in a foreign port, cannot be sent upon her voyage without repairs, and the repairs cannot be done except at so great and so certain a loss that no prudent man would venture to encounter it, this constitutes a case of necessity, justifying a sale of the ship by the master. *The Australia*, Swabey, 480; 13 Moore, P. C. C. 132.

The sale of a ship abroad, by the master, without the consent of the owner, can only be justified by proof of urgent necessity. *The Margaret Mitchell*, Swabey, 382; 4 Jur., N. S. 1193.

Where, in consequence of damage to a ship during the voyage, it becomes impossible to prosecute the adventure, the master has authority to sell her for the benefit of all parties interested, and a person employed by him to superintend the sale may lawfully pay over the proceeds to him or to his order. *Ireland v. Thomson*, 4 C. B. 149; 17 L. J., C. P. 241.

To constitute a valid sale at a port of distress, there must be the consent of the master (except under most peculiar circumstances), and impossibility of repairs except at a ruinous cost, or an equally ruinous delay and an inexpediency arising from imminent risk of awaiting communication with the owners. *The Uniao Vencedora*, otherwise *The Gipsy*, 33 L. J., Adm. 195; 11 L. T. 351.

Duty of Captain.—A master, before selling the ship, is bound, if practicable, to communicate with his owner. *The Bomba v. The Charlotte*, *infra*.

It is the duty of the master of a British ship, before selling her in a foreign port, to consult the British consular officer there resident, the opinion of the consul being much considered by the court in determining the validity of the sale. *Id.*

Where an English-owned vessel came into collision in a foreign port, within telegraphic communication of England, at which port a British consul and agent of Lloyd's resided, and the

master, believing the vessel would not again be fit for sea, sold her against the advice of the agent of Lloyd's, and without first fully communicating with the owner and waiting for his reply, and it subsequently turned out that the vessel was but slightly injured, and was at a small expense fitted for sea, the court set aside the sale. *The Bonita*, 30 L. J., Adm. 145; 5 L. T. 141.

Onus of Proof.—The master of a British ship, except under urgent necessity, is not entitled to sell without the authority of the owner; and the proof of such necessity lies upon the purchaser. *The Bomba v. The Charlotte*, Lush. 252; 30 L. J., Adm. 141.

The first purchaser of the master is bound to prove such necessity; but whether such onus probandi attaches to a second purchaser depends on all the circumstances of the case. *The Australia*, Swabey, 145; 13 Moore, P. C. C. 132.

By Fraud and Forgery.—A sole owner and at first master, after some intermediate appointments, made his son master, who, in Australia, without authority, sold the vessel, asserting himself to be the sole owner and master, the certificate of registry and indorsement bearing out, on the face of it, such assertion. The son received the purchase-money, but never transmitted it to the father:—Held, that the sale was effected by the fraud and forgery of the son; that the misleading description of him on the certificate of registry, which enabled him to practise such deceit, was not proved to arise from any culpable neglect in the instructions given by the father to the custom-house, and that the sale was null and void. *The Empress*, Swabey, 160; 3 Jur., N. S. 119.

According to Law of Foreign Country.—The validity of the sale of a British ship in a foreign port is determined by the law usually enforced in the Court of Admiralty, unless the foreign law is specially pleaded. *The Bomba v. The Charlotte*, Lush. 252; 30 L. J., Adm. 141.

A British ship was sent home under the command of a master in the navy, who was placed in charge by the naval officer commanding on the station. On her voyage she met with bad weather and put into a port at Fayal, where she was, after survey, sold at public auction to a Portuguese merchant by the master:—Held, that no necessity being shewn, and the proof of the validity of the sale by the law of the country not being made out, the sale was invalid by the general maritime law, and by the law of England. *The Eliza Cornish*, otherwise *The Segreda*, 1 Spinks, 36; 17 Jur. 738.

C., a British subject, owner of a ship, transferred her whilst on her voyage, by bill of sale, to H. The master had meanwhile drawn a bill for necessaries at Melbourne, on C. in England, which C. refused to accept, and the bill was dishonoured. The ship having touched at Havre, the holder of the dishonoured bill indorsed it to T. & Co., French subjects residing at Havre, who thereupon commenced proceedings in the court of the civil tribunal there, against the master and against the ship. The master allowed judgment to go against him by consent, and was condemned to pay the amount of the bill, with interest, and the vessel was sold, H.'s claim as holder of the bill of sale of the ship being negatived:—Held,

that the proceedings in the French court were proceedings in rem; and, consequently, the sale under its decree passed the property in the ship, and that H. was not entitled to recover. *Custrigue v. Imrie*, 8 C. B., N. S. 405; 30 L. J., C. P. 177; 7 Jur., N. S. 1076; 4 L. T. 143; 9 W. R. 455—Ex. Ch. In Dom. Proc., 4 L. R., H. L. 414; 39 L. J., C. P. 350; 23 L. T. 48; 19 W. R. 1.

See further cases, sub tit. INSURANCE.

g. Ratification by Owner.

What is.]—Semble, that the master has authority, when, in consequence of injury to the ship during the voyage, there is no prospect of bringing her to the termination of the voyage, to sell her for the benefit of all parties interested. At all events, where the proceeds of such sale have been received by the owner, that is a sufficient ratification by him of the act of the master in selling her, so as to prevent him from afterwards recovering back the ship from the purchaser or one claiming under him. *Hunter v. Parker*, 7 M. & W. 322.

So, it is equally a ratification of a sale by an auctioneer acting under a parol authority for the master. *Ib.*

If there has been acquiescence by the owner, however unauthorized the sale may have been at the commencement, it amounts to a ratification by the owner. *The Australia*, 13 Moore, P. C. C. 132; Swabey, 486.

Confirmation of a sale by an owner will not be inferred from vague expressions of approval, if the owner at the time was not aware of the true state of the facts relating to the sale. *Ths. Bomba v. The Charlotte*, Lush. 252; 30 L. J., Adm. 141.

Acceptance of purchase-money generally operates as a ratification of the sale; but not so if the money was received without the intention of appropriating it; or if received in ignorance of the facts relating to the sale. *Ib.*

Receipt of the purchase-money by a vendor and absent principal, acts only as a ratification of a sale when received by him with an intention to appropriate it to his own use, and with full knowledge of the facts of the case. *The Bonita*, 30 L. J., Adm. 145; 5 L. T. 141. See also *Keay v. Fenwick*, ante, col. 1257.

4. MORTGAGE.

a. Legal.

Effect of Registration—Bankruptcy.]—On the 10th of June, 1830, R. mortgaged, by bill of sale to W. & Co., the ships Lady East, Pyramus, and Sprightly, then being at sea. The bill of sale contained an assignment of the freight and policies. On the 12th of June the bill of sale was entered in the book of registry. On the 18th of October the Sprightly returned to port, and sailed again on the 16th November. On the 7th January, 1831, R. mortgaged the same ships, freights and policies to the petitioners by bill of sale, containing a recital of and subject to the first mortgage; on the 11th May, 1831, the second bill of sale was entered in the book of registry; on the 14th June R. became bankrupt; on the same day the Pyramus arrived from sea; and on the 15th of July the Lady East arrived from sea; on the 21st June both mortgages were indorsed on the certificate of the Pyramus; and

on the 16th of July both mortgages were indorsed on the certificate of the Lady East. The Pyramus was lost at sea:—Held, that the second mortgage was valid as to the interest in the ships, freights, and policies. *Jones, Ex parte*, 2 C. & J. 513.

—Priorities.]—A. mortgaged a ship for 1,200*l.* to B., who transferred the mortgage to C. A. afterwards executed a second mortgage for 400*l.* B. afterwards paid off C., and C. signed a statutory receipt, instead of a re-transfer. This receipt was produced to the registrar, who made an entry in the register-book, under the Merchant Shipping Act, 1854, s. 68, to the effect that the mortgage had been discharged. C. afterwards executed a deed purporting to be a re-transfer of the 1,200*l.* mortgage to B., which was registered, and at the same time a note was made by the registrar against the entry of the receipt, stating that the receipt was signed in error, and the mortgage was afterwards again transferred to C., to secure a balance on account current, and this deed remained in C.'s hands, after satisfaction of all that was due on the account. B. then took a fresh mortgage from A. for 2,500*l.*, which included the 1,200*l.* and 400*l.*, and had since been transferred to the plaintiff. After the new mortgage, B. agreed with C. that the mortgage for 1,200*l.* should be a security for advances on a current account. The transfer of the mortgage to the plaintiff was not registered until after this agreement. Upon a question of priority between C. and the plaintiff:—Held, that the receipt with the entry on the register operated as a discharge of the first mortgage, and the same could not afterwards be revived by the note made by the registrar. *Bell v. Blyth*, 4 L. R., Ch. 136; 38 L. J., Ch. 178; 19 L. T. 662; 17 W. R. 194.

Indorsement on Certificate—Postponement of Power of Sale.]—A claimant, upon an interpleader in a county court, as to his title to a ship seized in execution upon a judgment against the registered owner, proved a previous mortgage of the ship to him by such owner for a loan, with a proviso in the mortgage postponing until a date subsequent to the seizure of the ship the power of sale vested in the mortgagee by 17 & 18 Vict. c. 104, s. 71, and that such mortgage was recorded in the register-book of the port of the ship's registration in the form prescribed by s. 66, but there was no indorsement on the certificate of registry, according to 4 Geo. 4, c. 41, ss. 35, 43, and 3 & 4 Will. 4, c. 55, ss. 34, 42:—Held, that the mortgage was not invalid, either as a fraud against creditors, or as not being according to 17 & 18 Vict. c. 104, on the ground of the postponement of the power of sale. *Dickinson v. Kitchen*, 8 El. & Bl. 789.

Held, also, that, even if the registration of the mortgage was imperfect, by reason of the want of the indorsement on the certificate, yet a judgment given by the county court upon the interpleader summons against the claimant in favour of the execution creditor was erroneous; for the claimant became and was the owner of the ship, by reason of the mortgage, and such common-law incident to a mortgage is not abrogated by 17 & 18 Vict. c. 104, s. 70, which was intended to protect a mortgagee, taking possession of a mortgaged ship in order to make it available as a security, from liabilities that might otherwise attach upon him as owner of a ship in possession. *Ib.*

Where Fraudulent Concealment.]—The legal title of a mortgagee of a ship who, for the purpose of facilitating a sale by the mortgagor, conceals his mortgage, cannot prevail in equity against a purchaser for valuable consideration without notice. *Hooper v. Gumm*, 2 L. R., Ch. 282; 36 L. J., Ch. 282; 16 L. T. 107; 15 W. R. 464.

Of unfinished Ship.]—A., being owner of a ship which was unfinished, on the 5th of July mortgaged it to B. A., on the 5th of August, registered the ship as owner, pursuant to 17 & 18 Vict. c. 104, s. 42. On the following day, B. caused the mortgage to himself to be inserted on the registry. A. having become bankrupt:—Held, that A.'s assignees could not maintain trover against B. for the ship. *Bell v. Bank of London*, 3 H. & N. 730; 28 L. J., Ex. 116.

Erasing Entries of.]—There is no provision in the Merchant Shipping Acts which authorizes the registrar to erase entries of mortgages. In case of their having been duly discharged, an entry to that effect may be made under s. 68 of the Act of 1854. *Chasteauneuf v. Caperyon*, 7 App. Cas. 127; 51 L. J., P. C. 37; 46 L. T. 65—P. C.

b. Equitable.

Notice—Effect of.]—A mortgagee of a ship, with notice of a prior unregistered equitable mortgage, registers; the prior equitable mortgage is postponed to him. *Coombes v. Mansfield*, 3 Drew. 193; 24 L. J., Ch. 513; 1 Jur., N. S. 270. See also *Hooper v. Gumm*, *supra*.

Validity of.]—In August, 1874, a shipbuilder, having overdrawn his account with his bankers, offered to give them a security over a ship which he was then building. This offer was declined in the first instance, with the intimation, however, that circumstances might arise which might render it desirable for the bank to have the security offered, whereupon he promised that whenever he was required to give it he would do so. Two months later, his account being still largely overdrawn, the bankers requested him to give them the promised security. Accordingly he deposited with them the builder's certificate of the ship, which was still unfinished, and the following day they put a man in possession. At the same time he, in consideration of 770*l.*, then advanced to him, assigned to the bankers a trade debt of 2,384*l.* 2*s.* 8*d.*, as a further security for the general balance of his account. Two days afterwards he filed a petition for liquidation:—Held, that the transaction between him and his bankers was neither a fraudulent preference nor an act of bankruptcy. *Winter, Ex parte, Softley, In re*, 20 L. R., Eq. 746; 44 L. J., Bk. 107; 33 L. T. 62; 24 W. R. 68.

By Deposit of Builder's Certificate.]—Held, also, that the deposit of the builder's certificate was a good equitable mortgage of all his property and interest in the ship, and that, although unfinished, it did not require registration under the Bills of Sale Act, 1854. *Id.*

Of unfinished Ship—Incapable of Registration.]—Whether a ship not yet finished, and therefore incapable of registration under the

Merchant Shipping Acts, is properly called a ship or not, it is a thing capable of assignment by certificate in the usual way. *Id.*

Under 17 & 18 Vict. c. 104.]—Although the 17 & 18 Vict. c. 104, contains no provision negating the validity of a mortgage made otherwise than according to the terms of the act, the whole scope of the act is to that effect, and an equitable mortgage is invalid. *Liverpool Borough Bank v. Turner*, 2 De G., F. & J. 502. *But see* 25 & 26 Vict. c. 63, s. 3.

In Bankruptcy.]—A registered mortgagee of a ship having deposited with a creditor the instrument of mortgage thereof, and subsequently become bankrupt:—Held, that such deposit took the ship out of the order and disposition of the bankrupt, and constituted the creditor equitable mortgagee of the ship. *Lacon v. Liffen*, 1 N. R. 44; 4 Giff. 75; 32 L. J., Ch. 25; 9 Jur., N. S. 13; 7 L. T. 411; 11 W. R. 135. Affirmed on appeal, 32 L. J., Ch. 315; 9 Jur., N. S. 477; 7 L. T. 774; 11 W. R. 474.

By Parol as a Lien.]—An owner of a ship may verbally authorize a creditor to take possession of it as a lien, and the creditor so taking possession may enforce such lien without any alteration in the registry. *Cazenove v. Clayton*, 2 M. & Rob. 552.

c. Mortgagor in Possession.

Effect of Charterparty.]—Where a beneficial charterparty has been entered into by a mortgagor in possession of a ship the mortgagee cannot object to the charterparty being carried out simply upon the ground that the effect of carrying out the charterparty will be to remove the ship out of the jurisdiction of the court, and to render it difficult for him to enforce his mortgage security. *The Fanchon*, 5 Adm. D. 173; 50 L. J., Adm. 4; 42 L. T. 483; 29 W. R. 339.

When shares in a ship are mortgaged, possession being retained by the mortgagors, and the managing owner, duly appointed by all the co-owners, including the mortgagors, charters the ship for a foreign voyage, and she loads and is about to proceed on the voyage, the mortgagee, even though he takes possession of his shares before the sailing of the ship but after the making of the charterparty, cannot arrest the ship or demand bail in an action brought by him to compel payment of his mortgage debt, provided the performance of the charterparty is not prejudicial to the security; and the court will, upon the application of the co-owners, release a ship so arrested, and will condemn the mortgagee arresting in costs. *The Maxima*, 39 L. T. 112.

Where a mortgagor of a ship does some act which prejudices or injures the security of the mortgagee, the declaration in 17 & 18 Vict. c. 104, ss. 70, 71, that the mortgagor is to be deemed the owner, ceases to have any binding effect against the mortgagee, and he may exercise the powers given to him by the mortgage, subject to this qualification: every contract entered into by the mortgagor in possession is a contract which derives validity from the declaration contained in the statute of his continuing to be the owner. Such contract would, however, enure for the benefit of the mortgagee, on his giving notice to the party who is to pay the mortgagor under that

contract. *Collins v. Lamport*, 34 L. J., Ch. 196; 11 Jur., N. S. 1; 11 L. T. 497; 13 W. R. 283.

Therefore where, pending a mortgage, the mortgagor had contracted for the sale of the ship, and before the contract was completed the purchaser had entered into a charterparty with the plaintiff, the mortgagees, on the bankruptcy of the mortgagor, were restrained from selling or otherwise dealing with the ship in any manner inconsistent with the terms of the charterparty. *Ib.*

Where a mortgagee took, with notice of a charterparty entered into by the mortgagor, an interlocutory injunction was granted restraining the mortgagee from exercising his power of sale in such a manner as to interfere with the rights of the charterer. *De Mattos v. Gibson*, 4 De G. & J. 276.

Right to Possession under.]—A., being the owner of a steamship, mortgaged it to B., and subsequently, under circumstances held to shew acquiescence by B., entered into an agreement in contemplation of a partnership with C., by the terms of which C. was to work the ship for A. till further notice, paying all the expenses and receiving all the profits, A. agreeing to indemnify him against loss, if any, upon a periodical statement of accounts. Subsequently to this agreement B. gave notice to C. of the mortgage, and required possession of the ship. The ship was being employed in voyages at a distance from England, between S. and T., and was at that time at S., under engagements which had been entered into by C. with third parties, with respect to its next voyage to T. The ship was given up to B.'s agent at T. at the termination of its next voyage thither. At the time of such delivery C. owed to the crew of the ship a large sum for wages, which entitled them to proceed against the ship in the Admiralty Court; and shortly after the delivery of the ship the crew took such proceedings, and the ship was seized by the officers of the court. B., after suffering much delay and loss, paid the wages and obtained possession of the ship. In an action of trover for the ship, brought by B. against C. :—Held, that C. was entitled to retain possession of the ship till its arrival at T., in order to fulfil the engagements incurred before notice. *Johnson v. Royal Mail Steam Packet Company*, 3 L. R., C. P. 38; 37 L. J., C. P. 33; 17 L. T. 445.

Held, also, that as there had been a delivery of the ship at T., notwithstanding it was subject to a maritime lien for wages, A. was not entitled to recover on a count for trover. *Ib.*

d. Rights of Mortgagees.

To Sell and Use.]—Where a ship has been mortgaged for a debt, a creditor who has got judgment against the registered owner of the ship cannot take and sell the ship in execution, for to do so would be to defeat the rights of the mortgagee to make the ship available as a security for his debt, given him by 17 & 18 Vict. c. 104, s. 70. *Kitchen v. Irvine*, 28 L. J., Q. B. 46; 5 Jur., N. S. 118.

Seem, that a mortgagee of a ship has power, under 17 & 18 Vict. c. 104, s. 70, to use as well as to sell the ship. *European and Australian Royal Mail Company v. Royal Mail Steam Packet Company*, 4 Kay & J. 676; 5 Jur., N. S. 810.

— Under what Conditions.]—Where a mortgagee of a steamship took possession of her, and used her for the purposes of a speculation which resulted in a loss, and subsequently sold her disadvantageously :—Held, that he must himself bear such loss, and be charged with the value of the vessel at the time he took possession of her. *Marriott v. Anchor Reversionary Company*, 2 Giff. 457; 7 Jur., N. S. 155; 3 L. T. 538. Affirmed, 3 De G., F. & J. 177; 13 L. J., Ch. 571; 7 Jur., N. S. 713; 4 L. T. 590; 9 W. R. 726.

A vessel was mortgaged for a nominal sum, to secure an unascertained balance due to the mortgagee, with power to sell by public auction, and, in case a vessel could not be sold, the mortgagee was to hold, enjoy and possess the free use, control and possession thereof as sole owner, until the full amount of his claims should be satisfied. Default was made in payment of the sum named before the real balance was ascertained, and pending an investigation thereof before arbitrators, the mortgagee caused the vessel to be sold by private contract :—Held, that such sale was wrongful, and not warranted by the conditions of the mortgage. *Brouard v. Dumaresque*, 3 Moore, P. C. C. 457.

As to Sale of Vessel at the Suit of a Mortgagee of Part.]—See post, col. 1270.

To defend Actions against Ship.]—The mortgagee may come in and defend his interest in the ship sued, but can only rely on defences open to the owner of the ship. *The Chieftain*, B. & L. 104.

To receive Freight—Extent of Right.]—A mortgagee of a ship does not, ordinarily speaking, obtain, by the mortgage alone, a transfer, by way of contract or assignment, of the right to freight; the mortgagor remains the dominus of the ship, with regard to everything relating to its employment, or non-employment, or to any rate of freight to be earned by its employment, until the mortgagee takes possession. The mortgagee on taking possession becomes the owner, and it is by virtue of that ownership, and not by virtue of any antecedent contract or right, that he is entitled to receive the freight, which, by contract or otherwise, is lawfully payable. *Keith v. Burrows*, 2 App. Cas. 636; 46 L. J., C. P. 801; 37 L. T. 291; 25 W. R. 831.

M. mortgaged his ship, then in California, to K. & Co., but the mortgage was not registered. A cargo was afterwards put on board in California on account of the ship, and bills of lading were drawn for a nominal freight of 1s. per ton. Before the ship arrived in England, B. & Co., without notice of the mortgage, advanced money to M. on the security of the cargo, and then sold the cargo to J. by a contract containing the following clause: "As cargo is coming on ship's account, freight is to be computed at 55s. per ton, and invoice to be rendered accordingly." M. paid for the cargo and received the bills of lading, and handed them to B. & Co. with an assignment indorsed of his interest in "the within freight" expressed to be "at the rate of 55s. per ton, and not the nominal amount of 1s. per ton." K. & Co. registered their mortgage, and on the arrival of the ship took possession, and claimed freight at the rate of 55s. per ton :—Held, that the sum of 55s. per ton was not really freight, but was part of the price of the

cargo kept back till the arrival of the ship, and that the mortgagees were not entitled to more than 1s. per ton, the freight specified in the bills of lading. *Ib.*

The first registered mortgagee of a ship, by taking possession of her before the freight is completely earned, obtains a legal right to receive the freight, and to retain thereout not only what is due on his first mortgage, but also the amount of any subsequent charge which he may have acquired on the freight, in priority to every equitable charge of which he had no notice; and it makes no difference that a subsequent incumbrancer was the first to give notice to the charterers of his charge on the freight. *Liverpool Marine Credit Company v. Wilson*, 7 L. R., Ch. 507; 41 L. J., Ch. 798; 26 L. T. 717; 20 W. R. 665.

The mortgage of a ship carries with it a right to receive the freight earned by the ship; and although the mortgagee cannot recover back from the mortgagor freight which he has allowed the mortgagor to receive, yet he may at any time intercept the freight by giving notice to the mortgagor, consignee, or charterer that he intends to exercise his right of property, and to require the freight to be paid to him. *Wilson v. Wilson*, 14 L. R., Eq. 32; 41 L. J., Ch. 423; 26 L. T. 346; 20 W. R. 436.

The owner of a ship assigned the freight not yet earned, and three days afterwards, with the knowledge of the assignee, mortgaged the ship to persons, and the mortgagees registered their mortgage. The assignee neglected to give notice of his claim upon the freight to the mortgagees:—Held, that the assignee was not entitled to set up any right to such freight in opposition to the rights of the mortgagees. *Ib.*

When an entire ship is in mortgage, in order to defeat the right of the mortgagor to receive the freight, the mortgagee must take possession of her before the completion of her voyage; but where the mortgagor of certain shares is ship's husband, if the mortgagees join with the owners of the other shares in the ship in the appointment of a new ship's husband before the completion of the voyage, the mortgagor loses all right as ship's husband to receive the freight. *Beynon v. Godden*, 3 Ex. D. 263; 39 L. T. 82; 26 W. R. 672—C. A.

In August, 1876, R. was mortgagor of certain shares in a vessel, and also was acting as ship's husband, and the defendant was charterer of the vessel for the voyage upon which she was then employed. R. obtained from the plaintiff a loan of 200L., and by a letter dated the 30th of August requested the defendant to pay to the plaintiff the freight due on the charter. On the 20th of September the mortgagees of R.'s shares and the owners of the other shares appointed E. ship's husband in place of R. Upon the 11th of October the vessel completed her voyage, and upon the 14th began to discharge her cargo; upon the 16th the defendant sent to the plaintiff a cheque for 200L., which he afterwards dishonoured, E. having claimed the amount of the freight:—Held, that the plaintiff could not maintain an action to recover the amount of the cheque. *Ib.*

Payment of Wages by—Recovery from Mortgagor's Agent.]—The owner of a vessel mortgaged it and subsequently entered into an agreement in contemplation of a partnership

with C., under which the latter was to work the vessel, the owner paying all expenses. The vessel was employed on several voyages and finally given up to the mortgagee. At the time of such delivery C. owed large sums for wages, in respect of which proceedings were taken in the Admiralty Court by the master and seamen. The vessel was seized, and the mortgagee, after much delay and loss, paid the wages:—Held, that he was entitled to recover such payments from C., as money paid to his use. *Johnson v. Royal Mail Steam Packet Company*, 3 L. R., C. P. 38; 37 L. J., C. P. 33; 17 L. T. 445.

Deduction of Advances by Charterers.]—By the terms of a charterparty it was provided that the charterers should advance necessary funds for the ship's disbursements, not exceeding a specified amount at the port of lading. Previously to entering into the charterparty the owner had mortgaged the ship and freight. The charterers made advances for the ship's disbursements, considerably in excess of the amount specified in the charterparty. Before the freight became due the mortgagee took possession of the ship, and stopped the cargo for freight:—Held, that the charterers were not entitled to deduct from the amount due for freight the advances made by them in excess of the sum provided by the charterparty. *Tanner v. Phillips*, 42 L. J., Ch. 125; 27 L. T. 717; 21 W. R. 68.

Sale—"Just Allowances."]—A ship was mortgaged to the defendant to secure a sum exceeding 1,400L.; the mortgage was duly registered, and the defendant took possession of the ship and advertised her for sale. Before the sale the plaintiff, who held a mortgage on the ship, made and registered after the date of the registration of the mortgage to the defendant, instituted a suit against the ship to enforce his mortgage, and caused the ship to be arrested. The defendant, to obtain the release of the ship, paid 500L. into court in lieu of bail. The ship was sold by the defendant, and the proceeds were insufficient to satisfy the defendant's mortgage. The plaintiff, when the cause was ripe for hearing, abandoned the suit. The court condemned the plaintiff in costs, and ordered him to pay to the defendant interest on the 500L. paid into court. *The Western Ocean*, 3 L. R., Adm. 38.

The mortgagees of a ship having seized it and advertised it for sale, the mortgagors brought an action against them for redemption, and moved for an injunction to restrain the sale, when, upon the mortgagees undertaking not to proceed with the sale, a decree was taken by consent in the action, directing an account of what was due on the mortgage for "principal and interest," and redemption on payment by the mortgagors of the amount certified:—Held, that the mortgagees were justified in seizing the ship, and that, in taking the account directed, they were entitled to be allowed expenses incurred by them in taking and holding possession of the ship, advertising it for sale and effecting insurances, under the head of "just allowances." *Wilkes v. Sannon*, 7 Ch. D. 188; 47 L. J., Ch. 150.

e. Recovery of Money Advanced.

Where the plaintiff assigned his ship to the defendant as a security for the repayment of money; but it appeared on the register to be an

absolute assignment, and the defendant sold her, and told the plaintiff that he had received the purchase-money, and would account with him for the balance of the proceeds of the sale:—Held, that the plaintiff was entitled to recover this balance on the common money counts, the acknowledgment being sufficient to support the action. *Prouting v. Hammond*, 8 Taunt. 688; Gow, 41.

Though a bill of sale for transferring the property in a ship by way of mortgage might be void as such, for want of reciting the certificate of registry therein, as required by 26 Geo. 3, c. 60, s. 17, yet the mortgagor might be sued upon his personal covenant contained in the same instrument for the repayment of the money lent. *Kerriou v. Cole*, 8 East, 231.

f. Jurisdiction of Court of Admiralty.

Extent of.]—The enabling power conferred upon the Court of Admiralty by 3 & 4 Vict. c. 65, s. 3, did not extend to all questions arising out of a deed of mortgage, but was confined to the ship itself being mortgaged. *The Fortitude*, 2 Rob. Adm. Rep. 217.

Therefore by 24 & 25 Vict. c. 10, s. 11, the jurisdiction was enlarged to claims in respect of mortgages duly registered, whether the ship or the proceeds thereof were under arrest or not. *Ib.*

In Action of Restraint.]—Under 17 & 18 Vict. c. 104, s. 66, and 25 & 26 Vict. c. 63, s. 3, the court will look behind the register to the real character of transactions between co-owners, and treat as a mortgage that which is on the face of it an absolute transfer, if it should appear that such was the intention of the parties. *The Innisfallen*, 1 L. R., Adm. 72; 35 L. J., Adm. 110; 12 Jur., N. S. 653.

Under 17 & 18 Vict. c. 104, s. 70, a mortgagee not in possession of the vessel cannot maintain an action of restraint. *Ib.*

A vessel having been arrested in a cause of restraint between co-owners, the court, on a motion by the charterer, to whom the vessel had been let for a voyage, ordered her release, it appearing that the alleged co-owner was only a mortgagee. *Ib.*

To appoint Receiver on Application of Second Mortgagee.]—Although a second mortgagee has no rights as against a prior incumbrancer, yet as against all other persons he has a right to possession of the ship, and the court will, at his instance, appoint a receiver. *Liverpool Marine Credit Company v. Wilson*, 7 L. R., Ch. 511.

To decide Equities.]—Where an action has been brought by the registered transferee of a mortgage and the ship arrested, the court will, in conformity with 25 & 26 Vict. c. 63, s. 3, enforce equities between the owner and the mortgagee; and will, in estimating the right of the mortgagee, consider not only the registered documents, but all the transactions between the parties relative to the mortgaged loan. *The Cathcart*, 1 L. R., Adm. 314; 16 L. T. 211.

To declare Title.]—A British ship was mortgaged by an instrument that was in the form prescribed by the Merchant Shipping Act, 1854, and was duly registered. The mortgagor died intestate, and the mortgagees sold the ship under

their power of sale, and executed a bill of sale to the purchaser. By mistake, a receipt for the payment of the mortgage-money was indorsed on the mortgage and signed by the mortgagee, and produced to the registrar of shipping, who recorded the same. Afterwards the bill of sale was produced to the registrar, who refused to register it, upon the ground that the property in the ship had vested in the representatives of the mortgagor. In order to complete the title of the purchaser a suit in rem was instituted on behalf of the mortgagee and purchaser:—Held, that the court had jurisdiction to grant a decree declaring that the purchaser was entitled to possession of the ship. *The Rose*, 4 L. R., Adm. 6; 42 L. J., Adm. 11; 28 L. T. 291; 21 W. R. 511.

To Order Sale.]—Sale of vessel at the suit of a mortgagee of three-fourths of the shares, decreed. *The Fairlie*, 37 L. J., Adm. 66.

Mortgages of Foreign Vessels—Jurisdiction.]

—The arrest necessary to found the jurisdiction of the Admiralty Division of the High Court over claims by mortgagees of foreign ships under 3 & 4 Vict. c. 65, must be in a cause over which the court has jurisdiction; a mere de facto arrest is not sufficient. *The Evangelistria*, 46 L. J., Adm. 1; 35 L. T. 410; 25 W. R. 255.

The Admiralty Division of the High Court has jurisdiction, independently of the Judicature Acts, to and will entertain, on the intervention of the representative of a foreign state, or by the consent of parties, a cause of possession or mortgage of a foreign ship belonging to such state, so far as to ascertain the true position of the claimants and the nature of their title, and will, where it is for the advantage of all parties, order a sale of the ship. *Ib.*

To restrain Removal of Ship out of Jurisdiction to enforce Mortgage.]

—The defendant, a Spaniard, executed at Santander, in Spain, a mortgage to A. B. of a Spanish vessel, of which he was the master, to secure the repayment by the defendant to A. B., or whoever in future might represent his right, a sum of money and interest; and the mortgage deed contained a proviso that A. B., or whoever might represent him, might exact payment of the loan and interest at any time and in any manner. The plaintiff was the transferee of the mortgage, and the defendant and the vessel being at the port of Q., within the jurisdiction, the plaintiff commenced an action against the defendant to enforce the mortgage, and for an injunction to restrain the defendant from removing the vessel out of the jurisdiction, and duly served the defendant with a copy of the writ. He now moved for an interlocutory injunction to restrain the defendant from removing the vessel out of the jurisdiction until the hearing:—Held, that the court had jurisdiction to grant such an injunction, and it was granted accordingly. *Clavering v. Aguire*, 5 L. R., Ir. 97.

When Sales by Order of Foreign Court.]

—A British ship was attached in Louisiana by creditors of the registered owner, a British subject, for the purpose of making her available for their demands. Proceedings were taken by these creditors, in which certain persons, British subjects, claiming under a bill of sale by way of

mortgage, from the owner, duly registered in England, intervened for the purpose of asserting their title and protecting their rights. Their title was wholly disregarded by the court of Louisiana, the law of that State not allowing a mortgage of chattels; and the ship was sold. The ship arrived at an English port, and the mortgagees filed a bill to establish their charge:—Held, first, that the judgment of the foreign court was not upon a proceeding in rem, but in personam. *Simpson v. Fogo*, 1 Johns. & H. 18; 29 L. J., Ch. 657; 6 Jur., N. S. 949; 8 W. R. 407.

Held, secondly, that the mortgagees had not originated the proceedings in the foreign court so as to estop themselves from asserting their rights in this country. *Ib.*

Held, thirdly, that the judgment of the foreign court as averred, proceeding, as it did, in total disregard of the *lex loci contractus*, was not a decision which the court here would of necessity uphold, or such as from its mere averment would destroy the plain and clear title previously averred in the mortgagees. *Ib.*

The owners of a British ship mortgaged her in England, and she afterwards was taken by the mortgagors to New Orleans, where she was attached by creditors, who took proceedings in the courts there for the purpose of making her available for their demands. The English mortgagees intervened in these proceedings for the purpose of asserting their rights, but their claim was wholly disregarded, the law of New Orleans not recognizing a mortgage of chattels; and, under an order of the court, the ship was sold to a British subject. The ship having afterwards returned to England with a cargo, the mortgagees filed a bill to enforce their claim:—Held, that the judgment of a foreign court of competent jurisdiction is conclusive inter partes on the merits of the matter in dispute, but may be reviewed by the courts in England, if any error appears on the face of the record. *Simpson v. Fogo*, 1 Hem. & M. 195; 32 L. J., Ch. 249; 9 Jur., N. S. 403; 8 L. T. 61; 11 W. R. 418.

A British ship, mortgaged in England by a British subject to British subjects, was arrested at New Orleans by creditors of the mortgagor, also British subjects resident in England, and as the courts of New Orleans do not recognize such mortgages of ships, the mortgagees, in order to protect the ship from sale, gave bonds for the amounts claimed by the creditors. The mortgagees afterwards filed a bill in equity to restrain the creditors from suing on these bonds:—Held, that though the decisions of the courts of New Orleans might be open to the reproach of injustice, yet as the creditors owed no duty to the mortgagees, and had a right to proceed against the property of their debtor wherever they found it, the bill could not be maintained. *Liverpool Marine Credit Company v. Hunter*, 3 L. R., Ch. 479; 37 L. J., Ch. 386; 18 L. T. 749; 16 W. R. 1090.

g. Costs in Actions.

Taxation of.]—Mortgagees' costs will be taxed as between party and party, in accordance with the practice of the Court of Chancery, and not as between solicitors and clients, where a decree has been made by consent that the mortgagees are to receive their "costs, charges, and expenses properly incurred." *The Kestrel*, 1 L. R., Adm. 78; 12 Jur., N. S. 713.

Mortgagees are entitled to charges by their solicitors for attending to take particulars of other suits against the vessel to which they were not parties; to costs of negotiation between rival incumbrancers which led to nothing, and to which the owners were not parties; and costs of conference with counsel at a stage of the suit when it is not usual for a conference to be held. *Ib.*

Order to Pay.]—Mortgagee of four sixty-fourth shares of a vessel condemned in the costs, but not damages, occasioned by a wrongful arrest of the vessel. *The Egerateia*, 38 L. J., Adm. 40.

Priority over Material-men.]—*See ante*, col. 1209.

XII. BILLS OF LADING.

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1. STAMPING.

(*See* 33 & 34 Vict. c. 97, *per Sched.*, and s. 56.)

The indorsement and deposit of a bill of lading, as a security, did not require a stamp within 55 Geo. 3, c. 184, Sched. tit. "Mortgage." *Harris v. Birch*, 1 D., N. S. 899; 9 M. & W. 591.

2. FORM AND NATURE OF.

a. Form of.

North German Code does not exclude Special Form.]—By the laws of England and of the North German Confederation, a bill of lading is decisive as between shipowner and consignee, and the North German code, although providing a form of bill of lading, does not prevent a special form of contract. *The Patria*, 3 L. R., Adm. 436; 41 L. J., Adm. 32; 24 L. T. 849.

Payment of Freight—Omission of usual Words.—A bill of lading, in mentioning the freight payable for a cargo, did not use the ordinary words "he or they paying freight for the same," but, after giving the names of the consignees to whose order the cargo was to be delivered, employed the words "freight for the goods 4l. 5s. per ton of 20 cwt. net, delivered, with prime and average accustomed :"—Held, that the two forms of expression were in effect the same, and constituted the ordinary condition that the goods were to be deliverable only on paying freight. *Weguelin v. Cellier*, 6 L. R., H. L. 286; 42 L. J., Ch. 758; 22 W. R. 26.

"Or Order or Assigns."—Semble, that a bill of lading, in which the words "or order or assigns" are omitted, is not a negotiable instrument. *Henderson v. Comptoir d'Escompte de Paris*, 5 L. R., P. C. 253; 42 L. J., P. C. 60; 29 L. T. 192; 21 W. R. 873.

When goods have been delivered to the person to whom the bill of lading was made out, and they have then been delivered to indorsees of the bill of lading, so that the indorsees unite in themselves a legal and an equitable title to the goods, the omission of the words "or order or assigns" in the bill of lading is not sufficient to give the indorsees constructive notice of some equitable arrangement between the person to whom the bill of lading was made out and the consignors. *Ib.*

Letters of Advice.—Letters to a party who has accepted bills of exchange on the faith of a consignment, which gave him advice of the fact, are not equivalent to bills of lading indorsed. *Nichols v. Clent*, 3 Price, 547.

b. Duration and Currency.

Commencement.—The liability of a shipowner for goods, the receipt of which is acknowledged by the master's signature to a bill of lading, commences from the time of delivery to the servants of the owner, although the goods are not put on board the ship. *British Columbia and Vancouver Island Spar, Lumber and Saw Mill Company v. Nettleship*, 3 L. R., Ex. 330; 37 L. J., C. P. 236; 18 L. T. 291; 16 W. R. 1046.

Termination.—A bill of lading remains in force until there has been a complete delivery of the goods thereunder to a person having a right to receive them. *Meyerstein v. Barber*, 4 L. R., H. L. 317; 39 L. J., C. P. 187; 22 L. T. 808; 18 W. R. 1041. Affirming 2 L. R., C. P. 661; 36 L. J., C. P. 289; 16 L. T. 569; 15 W. R. 998.

A. was indorsee of a bill of lading for cotton, drawn in a set of three, making the cotton deliverable in London on payment of freight. The cotton had been recently landed under an entry made by A., and carried to a sufterance wharf in the port of London, where it remained with a stop thereon for freight. On the 4th of March, 1865, A. obtained from B. an advance of 2,500l. on the deposit of two copies of the bill of lading; A. fraudulently retaining the third copy, which B. supposed to be in the hands of the captain. On the 6th and 7th of March (the stop for freight being then removed), A., who had in February instructed cotton brokers to take samples of the cotton and to offer it for sale, obtained from them advances to the amount of 2,000l. on the deposit

of the third copy of the bill of lading; and on the 11th, being then informed of the prior advance by B., they sent such third copy of the bill of lading to the wharfinger, and procured the cotton to be transferred into their names, and afterwards sold it and received the proceeds :—Held, that the bill of lading, when deposited with B., retained its full force and effect, and consequently that there was a valid pledge of the cotton to B. before the advances made to A. by the brokers. *Ib.*

c. Revocability.

In what Cases.—A bill of lading, by which goods are made deliverable to A., is revocable until the goods are or the bill of lading is delivered to A. The shipper of the goods, therefore, may change his purpose, and make the goods deliverable to any one else. *Mitchel v. Ede*, 3 P. & D. 513; 11 A. & E. 888.

Where a freighter of a ship to such ports as the master should be directed by himself or his agents, first ordered the master to proceed to one of them, in consequence of which he had taken in goods, and signed bills of lading for that port, he could not afterwards countermand that order, and order him to proceed to another port, without first recalling the bills of lading, or at least tendering a sufficient indemnity to the master, against the consequences of his liability thereon. *Davidson v. Gwynne*, 12 East, 381.

When goods have been put on board a ship to be conveyed on freight, and bills of lading have been signed by the master, the owner of the goods cannot, before the sailing of the ship, insist on their being redelivered to him without paying the freight that would become due for their carriage, and indemnifying the master against the consequences of his signing the bills of lading. *Tindall v. Taylor*, 4 El. & Bl. 219; 3 C. L. R. 199; 24 L. J., Q. B. 12; 1 Jur., N. S. 112.

d. Construction.

Intention.—In construing bills of lading the intention of the parties as expressed in the contract is to be looked at, for no exception, of a private nature at least, which is not contained in the contract itself, or arising therefrom by implication of law, can be engrafted upon it. *Atkinson v. Ritchie*, 10 East, 533; *S. P., Spence v. Chadwick*, 10 Q. B. 517.

Contract created by—As to Goods to be Carried.—When a bill of lading described the goods shipped as "Thirteen packages books, woodwork, whalebones, Dutch clocks, shoes, and linen goods," and was also stamped by the master with the words, "value, weight, and contents unknown :"—Held, that the proper construction of the contract was, that the shipowners contracted to carry whatever goods were contained in the packages, and that they were therefore bound to carry silk stuffs contained in one of the packages, there being no evidence of wilful or fraudulent misstatement on the part of the shippers. *Lebeau v. General Steam Navigation Company*, 8 L. R., C. P. 88; 42 L. J., C. P. 1; 27 L. T. 447; 21 W. R. 146.

Held, also, that, although the freight charged for linen goods was lower than that for silk stuffs, the shippers were not estopped from

proving the delivery of silk stuffs to the ship-owners. *Ib.*

As to Ships.]—Goods were shipped on board a vessel, under a bill of lading, "Shipped on board the steamship *Hibernia* . . . from Singapore to London . . . with liberty to call at any ports, in or out of the route, to receive and discharge coals . . . &c., and to tranship the goods by any other steamer:"—Held, that the contract of the shipowner was that the goods should be carried on board a ship in which the principal motive power during the voyage should be steam. *Fraser v. Telegraph Construction and Maintenance Company*, 7 L. R., Q. B. 566; 41 L. J., Q. B. 249; 27 L. T. 373; 20 W. R. 724.

Construction according to Foreign or English Law.]—A German master of a German ship, chartered by German charterers, signed bills of lading which were in the English language, and stipulated for payment of freight in English money by English consignees of goods to be carried to a German port:—Held, that the contract must be construed by reference to the following rules: First—that the rights and obligations of the parties are to be determined by the law which they have declared themselves to intend; secondly—that where there is no express declaration of intention, the presumption as to the law contemplated must be gathered from the circumstances of the case; thirdly—that where the contract is plain in its language, that language must receive the ordinary and natural construction, and does not admit the introduction of a law dehors the contract; fourthly—that the contract must be executed according to its terms, or abandoned, with due compensation to the party injured, unless supervening unforeseen circumstances have rendered the execution legally impossible; and fifthly—that the happening of such circumstance may justify a reasonable delay in the execution of the contract, though not an abandonment of it. *The Patria*, 3 L. R., Adm. 436; 41 L. J., Adm. 23; 24 L. T. 849.

The ship arrived at Falmouth on the 23rd of August, during the war between France and Germany. Hamburg was blockaded till the 18th of September. The consignees offered to take their cargo at Falmouth, and pay full freight, but were refused. The suit was commenced on the 1st of November:—Held, that whether the contract should be construed according to the general maritime law, or English or German law, the master was bound to have delivered the cargo at Hamburg or at Falmouth. *Ib.*

A bill of lading made in England is a contract to be governed and interpreted by English law, and therefore no substantive defence arising from delay in making the claim can be made apart from the express condition contained therein. *Moore v. Harris*, 1 App. Cas. 318; 45 L. J., P. C. 54; 34 L. T. 519; 24 W. R. 887—P. C.

Parol Evidence—Usage—Rate of Freight.]—By a bill of lading of wool from Odessa, freight was to be paid in London, on delivery, "at the rate of 80s. per cwt., gross weight, tallow, and other goods, grain, or seed, in proportion, as per London Baltic printed rates:"—Held, that extrinsic evidence was admissible to shew, that, by usage of the trade, the meaning of the bill of lading was, that 80s. per cwt. of tallow was to be

taken as the standard by which the rate of freight on all other goods was to be measured. *Russian Steam Navigation Company v. Silva*, 13 C. B., N. S. 610.

Discount.]—A bill of lading provided that the goods specified therein should be deliverable to the order of the consignee or his assigns at Liverpool, he or they paying freight for the goods, five-eighths of a penny sterling per pound, with primage and average accustomed:—Held, in an action by the shipowner against an indorsee of the bill of lading who had accepted the goods to recover the freight and primage, that the latter might give evidence of a mercantile custom existing at Liverpool, by which he was entitled to a deduction of three months' discount from the freight, inasmuch as the custom was binding, and was not inconsistent with the terms of the bill of lading. *Brown v. Byrne*, 3 El. & Bl. 703; 2 C. L. R. 1599; 23 L. J., Q. B. 313; 18 Jur. 700. See *Hall v. Janson*, 4 El. & Bl. 500.

The custom existing in Liverpool of allowing discount upon freights payable on bills of lading of ships from ports in North America, is applicable to freights from ports in California since its annexation to the United States. *Falkner v. Earle*, 3 B. & S. 360; 32 L. J., Q. B. 124; 9 Jur., N. S. 847; 7 L. T. 672; 11 W. R. 307.

Commission.]—The holder of a bill of lading comprising the whole cargo, has by custom a right to deduct "address commission" from the freight. *The Norway*, 3 Moore, P. C. C., N. S. 246.

e. Presentation.

A bill of lading should be delivered as soon after its arrival as possible, without reference to the arrival or unloading of the cargo. *Barber v. Taylor*, 5 M. & W. 527.

The master after waiting a reasonable time at a foreign port, and no person having produced the bill of lading, may deliver the goods to some person to keep till the bill of lading is produced. *Howard v. Shepherd*, 9 C. B. 297; 19 L. J., C. P. 249.

A. sold goods to B., to be delivered free on board at Liverpool, for Trieste. The goods were placed by A. on board a steamer to be delivered to the order of B. By the custom of the trade, where goods are sold, to be delivered free on board, the price is not payable until production of a bill of lading, or some other document, giving evidence of their being on board. The owners of the steamer refusing to give out the bill of lading until a greatly-increased amount of freight was paid, and B., when informed of that fact, declining to have anything to do with the matter, A. (who had not contracted to pay the freight) was unable to comply with the custom by producing the bill of lading:—Held, that B., by his conduct, dispensed with the strict compliance with the custom, and that consequently A. was entitled to maintain an action for the price of the iron, without producing a bill of lading. *Green v. Sichel*, 7 C. B., N. S. 747; 29 L. J., C. P. 213; 6 Jur., N. S. 827; 8 W. R. 663.

3. EFFECT OF.

a. Authority of Master to Sign.

For what Goods.]—The master has no power

to charge his owner by signing bills of lading for a greater quantity of goods than is on board.

Hubbersty v. Ward, 8 Ex. 330; 22 L. J., Ex. 113. He has no general authority from the owner to sign bills of lading for goods not received on board, and all persons taking a bill of lading by indorsement or otherwise have notice that his authority is limited to signing bills of lading for goods actually received on board. *Grant v. Norway*, 10 C. B. 665; 20 L. J., C. P. 93; 15 Jur. 296.

The captain of a merchant ship borrowed, in a foreign port, a certain sum for the ship's use, in consideration of which he took home goods for the lenders, and signed bills of lading, making the freight payable to them or their assigns at the port of discharge:—Held, that he exceeded his authority as improperly interfering with the shipowner's lien on the unpaid freight. *Reynolds v. Jex*, 7 B. & S. 86; 34 L. J., Q. B. 251; 13 W. R. 968.

Rate of Freight.—A master has no authority to sign bills of lading for a lower rate of freight than that for which the owner has contracted. *Pickernell v. Jauberry*, 3 F. & F. 217.

Binding on whom.—When a master puts up a ship as a general ship, and the shippers have no knowledge of the existence of a charterparty, the contract in the bill of lading is between the shippers and the owner, and not the shippers and the charterer. *The Figlia Maggiore*, 2 L. R., Adm. 105; 37 L. J., Adm. 52; 18 L. T. 532.

F. & Co. requested the defendants to purchase, through their branch house in Calcutta, a quantity of cotton on their behalf, and to ship it for Liverpool on board two of F. & Co.'s ships. By arrangement goods shipped on account of F. & Co. by the house at Calcutta were to be shipped at a nominal rate of freight. One of the ships was addressed to the defendants' Calcutta house, as agents for F. & Co., and having arrived at Calcutta a quantity of cotton, in pursuance of the order of F. & Co., was shipped in her, for which the captain signed bills of lading making the cotton deliverable to order of the Calcutta house, and stating it to be "freight free on owners' account." The ship, while on her voyage to Calcutta, was sold by F. & Co., and became the property of the plaintiffs. No notice of this had reached the captain or the defendants when the shipment was effected. When the ship arrived at Liverpool, F. & Co. having become bankrupt, the defendants, to whom the house at Calcutta had indorsed the bill of lading, claimed to receive the cotton without paying any freight to the plaintiffs, in accordance with the terms of the bill of lading:—Held, that the terms of the bill of lading, under which the goods were shipped, were binding on the plaintiffs, and that no freight was payable by the defendants. *Mercantile and Exchange Bank v. Gladstone*, 3 L. R., Ex. 233; 37 L. J., Ex. 130; 18 L. T. 641; 17 W. R. 11.

A master signed bills of lading to deliver at Hamburg, "dangers of the seas only excepted:—Held, that though the charterparty contained other exceptions, the master was the agent of the owner as well as the charterer, and that, therefore, the terms of the bill of lading were binding. *The Patria*, 3 L. R., Adm. 436; 41 L. J., Adm. 23; 24 L. T. 849.

Without Production of Receipt for Goods.—Where the master gives a receipt for goods put on board, it behoves him not to sign a bill of lading till that receipt is given up. *Thompson v. Trail*, 2 C. & P. 334; 6 B. & C. 36; 6 D. & R. 31.

Where the master receives goods on board, and gives a receipt for them, he is bound not to deliver the bill of lading, except to the person who can produce the receipt in exchange for it. *Craven v. Ryder*, 2 Marsh. 127; 6 Taunt. 433; Holt, 100. And see *Mitchell v. Scaife*, 4 Camp. 298.

When Goods on Board.—The master of a vessel may properly sign bills of lading in favour of the shipper of goods, without production of the mate's receipts for the goods, if he is satisfied otherwise that the goods are on board the vessel and has no notice that anyone but the shipper claims any interest in them. *Hathesing v. Laing*, *Laing v. Zeden*, 17 L. R., Eq. 92; 43 L. J., Ch. 233; 29 L. T. 734.

The holder for value of bills of lading so given has a better title than an indorsee of the mate's receipts. *Id.*

When Signature Fraudulently Obtained—Property in Goods.—The plaintiffs, merchants in London, purchased for C., but on their own credit, goods abroad, debiting C. with the price and a commission. The goods were warehoused in London in the plaintiffs' name. C., in his own name, engaged room for the goods in the ship E., which had been put up as a general ship for Calcutta. The plaintiffs, at C.'s request, delivered the goods to a lighterman, but with a view to preserve their lien, took the lighterman's engagement to give them the mate's receipt. The goods were shipped in the E.; the mate's receipt in blank was handed to the lighterman, who gave it to the plaintiffs. C. promised the plaintiffs to redeem the mate's receipt, but never did so, and fraudulently induced the ship brokers to get bills of lading to C.'s order, to be signed by the master, though the mate's receipt was not produced. C. fraudulently indorsed these bills of lading for value to a bona fide indorsee. The plaintiffs had no communication with the ship brokers or captain till after the ship had sailed, when, the facts being discovered, they demanded the goods, both in this country and on the arrival of the ship at Calcutta. The goods were delivered by the captain at Calcutta to the holders of the bills of lading. An action was brought for this conversion against the shipowner and the captain. The captain and crew were appointed by the shipowner, but the ship was chartered for a lump sum to third parties, who put up the ship as a general ship. The refusal of the captain to deliver the goods at Calcutta was by the orders of the shipowners. The only question left to the jury was, whether the master was justified in signing the bills of lading without the production of the mate's receipt. The jury finding in the negative, the plaintiffs had the verdict against both defendants, on the pleas of not guilty and not possessed:—Held, that the property in the goods remained the property of the plaintiffs, there never having been any delivery animo transferendi to C.; and that the misdelivery at Calcutta was a conversion, and that the question, whether the plaintiffs were precluded from relying on their pro-

party or complaining of this conversion, was in effect properly left to the jury, and properly found by them. *Schuster v. McKellar*, 7 El. & Bl. 704; 26 L. J., Q. B. 281; 3 Jur., N. S. 1320.

Held, also, that the shipowner having authorized the detention at Calcutta, the verdict was proper. *Id.*

b. Mate's Receipt.

Effect of.]—M. chartered a vessel with a cargo of salt, therewith to proceed to Calcutta; the freight to be paid on unloading, one-third by freighter's acceptance at four months from the final sailing of the vessel, remainder on the right delivery of the cargo, agreeably to bills of lading. The captain to apply to F. for cargo and custom-house business. F. proceeded to load the vessel, but before the whole cargo was on board M. stopped payment, and thereupon F. stopped the loading. F. presented bills of lading made out in his own name, which the owners of the ship refused to sign. M. presented none, and the ship sailed. On her arrival, F.'s agents tendered to the owners' agents the mate's receipt, and offered to pay freight, but they declined to deliver the salt. In an action for the conversion of the salt, the jury found that F. did not part with the control over the goods in putting them on board, and that the property did not pass to M. :—Held, that the sailing away with the goods was ample evidence of conversion, and that the conversion commenced from the time of sailing. *Falk v. Fletcher*, 18 C. B., N. S. 403; 34 L. J., C. P. 146; 11 Jur., N. S. 176; 13 W. R. 346.

A manufacturer at Newcastle consigned goods to E. & Co., his factors in London, specifically, to meet a bill of exchange drawn upon them, transmitting to them a receipt, signed by the mate of the vessel, acknowledging the goods to have been received on board to be delivered to E. & Co. :—Held, that E. & Co. had a sufficient property in the goods and right to the possession to entitle them to maintain trover against a wrongdoer, the consignee not having repudiated the contract upon which they were sent. *Erans v. Nichol*, 4 Scott, N. R. 43; 3 M. & G. 614.

— Meaning of "Connaissements."]—The plaintiffs wrote to their agents, the defendants, regarding goods which S. had proposed to purchase : "Les informations sur S. sont telles que nous ne pouvons lui livrer les 2,500 caisses que contre connaissance. Si vous voulez, nous vous enverrons les connaissements, et vous ne les lui livrerez que contre paiement." The plaintiffs, who carried on business in Holland, consigned the goods to the defendants, with the bill of lading of a Dutch ship, and the defendants put them on board of a ship named by S., and they received and kept the mate's receipt, but no bills of lading of export ship were made up, nor was the price paid by S. when the ship sailed. In an action for delivering the goods without obtaining the price :—Held, that the instructions to the defendants were not carried out by obtaining the mate's receipt; that "connaissement" meant a bill of lading; and that, as the control over the goods had been lost without payment of the price, the defendants were liable. *Stearns Company v. Heintzmann*, 17 C. B., N. S. 56; 10 Jur., N. S. 881; 11 L. T. 272.

Evidence—Short Delivery.]—The plaintiff having verbally chartered a ship to carry iron from Glasgow to Swansea, the ship was loaded with iron bought by the plaintiff from W. & Co. The iron was weighed by the agents of W. & Co., to whom the mate gave a receipt signed by him for 330 tons, but there was no bill of lading. On delivery at Swansea, the quantity of iron was discovered to be 326½ tons only, but the mate deposed, and was not contradicted, to the delivery of all that had been shipped. The plaintiff having paid on the full amount of 300 tons to W. & Co., who refused to repay them the difference, sued the shipowner for short delivery :—Held, that there was no evidence of negligence in the shipowner, and that if there had been, it would not be negligence causing loss to the plaintiff. *Biddulph v. Bingham*, 30 L. T. 30.

Custom as to.]—A local custom of trade was alleged to exist at Bombay by virtue of which the mate's receipts for goods shipped on board a vessel are negotiable instruments, and pass the property in the goods in the same manner as bills of lading, and that masters of ships are bound to have the mate's receipt returned to them before signing any bill of lading for the goods mentioned in that receipt; and that if a captain signed a bill of lading without production and delivery to him of the mate's receipt for the goods, he would be bound, on the production of that receipt, to sign a fresh bill of lading, and to deliver the same to the person producing the mate's receipt, and that the goods mentioned in the receipt ought to be delivered to the person who produced the second bill of lading :—Held, that such a custom, if proved to exist, would be inoperative as against the captain and the shipowners. *Hathering v. Laing*, *Laing v. Zeden*, 17 L. R., Eq. 92; 43 L. J., Ch. 233; 29 L. T. 734.

c. As to Quality and Quantity of Shipment.

Under 18 & 19 Vict. c. 111, s. 3.]—This provision only applies to persons who have actually signed bills of lading; therefore, the owners of a ship are not estopped from shewing that a statement of weight contained in a bill of lading of goods shipped, signed by the ship's agent, is incorrect. *Jessel v. Bath*, 2 L. R., Ex. 267; 36 L. J., Ex. 149; 15 W. R. 1041.

The above section does not make a bill of lading conclusive evidence against the owner that the goods were put on board. *Meyer v. Dresser*, 16 C. B., N. S. 646; 33 L. J., C. P. 289; 10 L. T. 612; 12 W. R. 983.

The statute operates where a bill of lading is signed by the master, who is part owner, and who sues on behalf of himself and his co-owners. *Id.*

Liability of Master.]—A flour company abroad shipped on board a vessel 1,676 bags of rye-meal, some of which weighed twelve stone each, and some eight stone each. They were shipped from lighters, all mixed together, and the master knew nothing of their relative capacity. The master signed two bills of lading, one for 1,200 bags and the other for 467 bags, deliverable to order. The latter bill of lading was for 467 bags rye-meal, gross 35 tons 9 cwt., and at the foot of it was "contents unknown and not responsible for

weight." The bags were all marked alike, and no means were taken to identify by marks in the bills of lading any particular bags, and there was nothing on the face of the bills of lading from which the master could see that they were intended for different consignees. When the ship arrived, the master, by mistake, delivered to the consignee of the 467 bags of twelve stone each, several bags which weighed only eight stone:—Held, that the master was responsible for the non-delivery of 467 bags of the proper weight. *Bradley v. Dunipace*, 7 H. & N. 200; 31 L. J., Ex. 210; 5 L. T. 356. Affirmed, 1 H. & C. 521; 32 L. J., Ex. 22—Ex. Ch.

The master having been sued to judgment on a bill of lading, the owner cannot be sued, although the judgment is unsatisfied. *Priestly v. Fernie*, 3 H. & C. 977; 34 L. J., Ex. 173; 11 Jur., N. S. 813; 13 L. T. 208; 13 W. R. 1089.

— **Of Joint Owner—Custom to Weigh.**—

Bark was shipped (green) at Penang, under a bill of lading describing it to be of a certain weight, and making it deliverable to the consignees in London on payment of freight at a certain rate per ton of 20 cwt. nett weight delivered. On arrival in London, the agent appointed by the managing owner demanded freight on the weight mentioned in the bill of lading, and refused to deliver the bark unless the consignees would pay according to that weight, or (under an alleged custom) incur the expense of weighing over the ship's side or at a legal quay. The consignees paid the money under protest, and brought an action against one of the joint owners to recover back the excess. The jury having negatived the alleged custom:—Held, that he was liable, notwithstanding that he had not interfered or in any way assented to the appointment of the agent by the managing owner, and that no part of the money had come to his hands. *Coulthurst v. Sweet*, 1 L. R., C. P. 649.

Where Fraud.—A bill of lading is not conclusive between the shippers of the goods and the owners of the ship, but the owners may shew that less goods than specified in the bill of lading were shipped, the master who signed the bill of lading having been misled by the fraud of the agent of the shippers. *Bates v. Todd*, 1 M. & Rob. 106.

A bill of lading represented a larger number of bales to have been shipped on board a vessel than was really shipped. This arose from the mistake of the mate, which, there was some evidence to shew, was caused by the fraud of the person who put the bales on board. The latter was either agent of the person named as shipper in the bill of lading, or of his vendor:—Held, that there was evidence that the misrepresentation was caused wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claimed. *Valeri v. Boyland*, 1 L. R., C. P. 382; 35 L. J., C. P. 215; 12 Jur., N. S. 566; 14 L. T. 362; 14 W. R. 637.

Weights—Mistake and Misdescription as to.

—In an action for freight, the master is at liberty, notwithstanding the terms of the 18 & 19 Vict. c. 111, s. 3, the Bills of Lading Act, to shew that the cargo actually received by him differs in weight from that signed for in the bill of lading; at all events where the weight mentioned in the bill of lading is a mere matter of

measurement. *Blanchet v. Powell's Llantwit Collieries Company*, 9 L. R., Ex. 74; 43 L. J., Ex. 50; 30 L. T. 28; 22 W. R. 490.

— **Signature of Master not conclusive.**—

Bills of lading signed by the master are *prima facie* evidence that the quantities named therein were received on board by him; the onus of rebutting this presumption, and of shewing that a less quantity than that specified was received, lies on the shipowner. *McLean v. Fleming*, 2 H. L. Sc. App. 128; 25 L. T. 317.

A shipowner is not estopped by the signature of the bill of lading by the master from shewing that the goods or some of them were never actually put on board. *Brown v. Powell Duffryn Steam Coal Company*, 10 L. R., C. P. 562; 44 L. J., C. P. 289; 32 L. T. 621; 23 W. R. 549.

By a charterparty for the conveyance of a cargo of coal from Cardiff to Buenos Ayres, it was stipulated that the master should "sign bills of lading for the cargo put on board as presented to him by the charterers, without prejudice to the terms of the charterparty." On arrival at the port of discharge, it was found that the coal delivered to the consignees was less by thirty-two tons than the quantity mentioned in the bills of lading, and the owners were called upon to pay, and paid, the difference of value to the consignees. In an action by the owners against the charterers to recover the amount so paid:—Held, that, inasmuch as the owners were under no legal liability, either at common law or under the Bills of Lading Act, to pay for such deficiency, the action was not maintainable. *Id.*

In an action by consignees against a shipowner for the loss of one out of several boxes of machinery, which had been delivered on the quay to the people of the ship, and the receipt of which had been acknowledged by the signatures of the mate and captain on the bill of lading:—Held, that the owner was responsible, although there was no proof that the missing box was ever on board the ship. *British Columbia and Vancouver Island Company v. Nettleship*, 3 L. R., Ex. 330; 37 L. J., C. P. 236; 18 L. T. 291; 16 W. R. 1046.

Effect of signing "Weight, Value and Contents unknown."—When, on a closed package being shipped for carriage, a bill of lading, containing an innocent misdescription of its contents, is presented to the master of the ship, and he, without asking questions or examination, stamps thereon "weight, value and contents unknown," there is a contract to carry the package whatever its contents may be. *Lebeau v. General Steam Navigation Company*, 8 L. R., C. P. 88; 42 L. J., C. P. 1; 27 L. T. 447; 21 W. R. 146.

The plaintiffs delivered to the defendants, for carriage on board their ship, a closed case containing silk goods. The bill of lading, as tendered by the plaintiffs for signature, described the contents of the case as linen goods; but before signing it the captain impressed upon it with a stamp the words "weight, value and contents unknown." The freight charged for silk was higher than that for linen goods, and the freight paid for the goods so delivered was that for linen goods; but the plaintiffs represented the goods to be linen inadvertently, and without fraudulent intention. On the ship's arrival at her destination it was found that two

pieces of silk had been abstracted from the case. In an action by the plaintiffs against the defendants as common carriers for non-delivery of the silk goods so lost:—Held, that the addition of the words "weight, value and contents unknown" to the bill of lading completely did away with the effect of the description of the goods as linen, and that consequently the contract was to carry the case and its contents, whatever they might be; and the plaintiffs were entitled to maintain the action. *Ib.*

The master of a Russian ship received on board his vessel, at St. Petersburg, certain goods under a bill of lading in the ordinary form:—"Shipped in good order and condition, to be delivered in the like good order and condition at the port of London." Certain excepted perils were enumerated in the bill of lading, and in the margin were the words, "Weight, contents and value unknown." The ship arrived in London, and the goods were delivered to the consignees, but a great number of them were found to be in a damaged state. At the hearing of a cause under the Admiralty Court Act, 1861, s. 6, instituted on behalf of the consignees against the ship, it was proved that the goods were damaged both externally and internally, and that the damage was recent, and not traceable to any inherent vice in the goods:—Held, that, in the absence of any satisfactory proof on the part of the shipowners that the goods were in a bad condition when shipped, it was not incumbent on the consignees, in order to establish their case, to prove where or how the goods became damaged. *The Peter der Grosse*, 1 Adm. D. 414; 34 L. T. 749.

Held, also, that the bill of lading afforded evidence that externally, and so far as met the eye, the goods had been shipped in good order and condition. *Ib.*

A bill of lading for manganese shipped on board stated the weight in writing, but contained a printed clause, "weights, contents and value unknown":—Sembles, that the person signing the bill of lading would not be concluded from shewing that the written statement of weight was erroneous. *Jessel v. Bath*, 2 L. R., Ex. 267; 36 L. J., Ex. 149; 15 W. R. 1041.

A bill of lading, signed by a master since deceased, for goods to be delivered to a consignee or his assigns, he paying freight, is admissible as evidence of the consignee having an insurable interest in the goods; but if the master guards his acknowledgment by saying, "contents unknown," so that he does not charge himself with the receipt of any goods in particular, the bill of lading alone is not evidence either of the quantity of the goods or of property in the consignee. *Haddow v. Parry*, 3 Taunt. 303.

Effect of signing "Quantity and Quality unknown."—A bill of lading stating that goods were shipped in good order and condition, but also containing an indorsement by the master, "quantity and quality unknown," does not admit, as against the shipowners, that the goods were shipped in good order and condition. *The Prosperino Palazzo*, 29 L. T. 622.

Evidence of the condition of goods on delivery tending to shew that the damage sustained could not be accounted for by any damage existing at the time of shipment, and that such damage, had it existed, must have been noticed by the master or officer in charge of the ship at the

time of shipment, will not, where goods are shipped under a bill of lading indorsed "quantity and quality unknown," satisfy the onus cast upon the plaintiff seeking to recover against shipowners for damage to the goods. Positive evidence of the condition of the goods when shipped must be given. *Ib.* See next case.

A bill of lading, stating goods to have been shipped in good order and condition, but indorsed by the master with the words "quantity and quality unknown," does not admit as against the shipowner that the goods were shipped in good order and condition. *The Ida*, 32 L. T. 541—P. C. See preceding case.

There is no rule of law by which the consignee of goods under a bill of lading, stating goods to have been shipped in good order and condition, but containing the words "quantity and quality unknown," is bound to shew that the goods were shipped in good order and condition, or fail in his suit against the shipowner for damage done to the cargo; but failing proof of the condition of the cargo when shipped, the consignee is bound to shew that the damage which it sustained is traceable to causes for which the shipowner is responsible. *Ib.*

Amount of Freight Payable.—A charter-party under which a ship was chartered for a grain cargo from the Danube to the United Kingdom, for freight "per imperial quarter delivered," contained a provision that, in the event of the cargo or any part being delivered in a damaged or heated condition, the freight should be payable on the invoice quantity taken on board as per bill of lading, or half freight upon the damaged or heated portion at the captain's option. The bill of lading stated that 1,021 kilos were shipped on board; but the master added at the end of the bill of lading, before signing it, the words "quantity and quality unknown." The cargo having become heated on the voyage, the master claimed to exercise his option, and to be paid freight upon the invoice quantity, as per bill of lading:—Held, that the addition of the words "quantity and quality unknown" to the bill of lading by the master, did not take away his right to be paid freight upon the invoice quantity in the bill of lading, and that the object and effect of that memorandum were merely to protect the captain against any mistake which might occur in the invoice quantity in the bill of lading, in case of alleged short delivery or deterioration not caused by his default. *Tully v. Terry*, 8 L. R., C. P. 679; 42 L. J., C. P. 240; 29 L. T. 36.

Upon a purchase and sale of corn afloat, made before the arrival in England of the shipping documents, the written contract was in form, "for the purchase of the cargo per Prima Donna, from Ibraila, now at Queenstown, as it stands, consisting of about 1,800 quarters Ibraila Indian corn, at the price of 30s. per imperial quarter, free on board, including freight and insurance to a safe port in the United Kingdom; the quantity to be taken from the bill of lading, and measure calculated at 220 quarters = 100 kilos. Payment, cash on handing shipping documents." Upon the arrival of the bill of lading, it was found to be expressed as for a shipment at Ibraila of "1,667 quarters; quantity and quality unknown to the master." Whereupon the vendee paid to the vendor as for 1,667 quarters, deducting freight on that number of quarters; but on

delivery it was found that the cargo really contained only 1,614 quarters:—Held, that the construction of the contract was, that it was a sale of the cargo, whatever it might be, at a price which was to depend upon the amount which should be found stated in the bill of lading when it should come to hand, and not upon the real amount of corn; that the purchaser took the chance of the cargo really turning out more or less than mentioned in the bill of lading; and that he could not recover for a short delivery. *Covas v. Bingham*, 2 El. & Bl. 836; 2 C. L. R. 212; 23 L. J., Q. B. 26; 18 Jur. 596.

4. EXEMPTIONS FROM LIABILITY.

a. Seaworthiness, Implied Warranty of.

Not excluded.—When special clauses in a bill of lading exonerate the shipowner from the liability of even the perils induced by the negligence of his servants, it is necessary that the jury should find whether the vessel was or was not seaworthy when starting on the voyage. *Steel v. State Line Steamship Company*, 3 App. Cas. 72; 37 L. T. 333.

A cargo of wheat was shipped at the port of New York for conveyance to Glasgow, and a specially-worded bill of lading contained clauses excepting "peril of the seas of whatever nature or kind soever and howsoever caused," including negligence of the crew. On the voyage the sea burst through an insufficiently-fastened port-hole, damaging the cargo. A jury found by special verdict that this port-hole had been insufficiently fastened, but did not find whether this happened before starting on the voyage:—Held, that there was an implied engagement to supply a seaworthy ship. *Ib.*

Held, also, that the jury not having found whether the vessel started on her voyage in a seaworthy condition, there was no finding upon which judgment could be entered; therefore the case must be reheard. *Ib.*

There is in the bill of lading an engagement that the ship shall be seaworthy. *Ib.*

b. Liability to General Average.

Injury to Goods by Water employed to extinguish Fire.—When a bill of lading contained an exception of "fire on board," and the goods carried under it were injured in consequence of the water used to extinguish a fire occurring during the voyage:—Held, that the exception did not exempt the shipowners from liability to contribution in general average towards the loss sustained by the owner of the goods so injured. Nor were they exempted by virtue of the Merchant Shipping Act, 1854, s. 503. *Schmidt v. Royal Mail Steamship Company*, 45 L. J., Q. B. 646.

The exception in the bill of lading and the above section of the act had reference only to the obligation on the contract to deliver the goods, and did not take away the ordinary liability of the shipowner to contribute in general average, as owner, when a fire had occurred and a sacrifice had been properly made to save the whole adventure. *Ib.*

A bill of lading, by which the shipowner undertook to deliver the goods at a port to a railway company, to be by them carried inland and delivered to the consignees, contained an

exception, "that the shipowner or railway company are not to be liable for any damage to any goods which is capable of being covered by insurance, or for any claim, notice of which is not given before the removal of the goods." On the voyage a fire broke out, and the cargo was damaged by the admission of water to extinguish the fire. The ship put back, and the shipowners delivered the cargo up, without taking security from any of the cargo owners, or taking any step for procuring an adjustment of general average:—Held, following *Schmidt v. Royal Mail Steamship Company* (45 L. J., Q. B. 646), that the shipowners were not exempted from contribution to general average by the clauses in the bill of lading. *Crookes v. Allan*, 5 Q. B. D. 38; 49 L. J., Q. B. 201; 41 L. T. 800; 28 W. R. 304.

Introduction of Novel Clause.—If a shipowner wishes to introduce into his bill of lading so novel a clause as one exempting him from general average contribution, he ought not only to make it clear in words, but also to make it conspicuous by inserting it in such type and in such a part of the document as that a person of ordinary capacity and care could not fail to see it. *Ib.*—Per Lush, J., 5 Q. B. D. at p. 40.

c. Statutory Limitations.

Robbery.—The owner of a ship was not liable beyond the value of the ship and freight, under 7 Geo. 2, c. 15, s. 1, in case of a robbery, in which one of the mariners was concerned, by giving intelligence and afterwards sharing the spoil. *Sutton v. Mitchell*, 1 T. R. 18. See 26 Geo. 3, c. 86, s. 1, and 17 & 18 Vict. c. 104, s. 503.

Fire.—The 26 Geo. 3, c. 86, s. 2, did not apply to goods on board a lighter employed in carrying goods from the shore to be loaded on board ship. *Morewood v. Pollok*, 1 El. & Bl. 743; 1 C. L. R. 78; 22 L. J., Q. B. 250; 17 Jur. 881.

A gabbert (Anglice, a lighter) was not a ship, or vessel, within 26 Geo. 3, c. 86, s. 2, and if goods on freight were shipped on board such vessel, and destroyed by fire accidentally or through the negligence of the master, the owners were not protected by that statute, but were responsible as at common law. *Hunter v. Gower*, 1 Bligh, 573.

Declaration of Value.—A bill of lading, describing goods as "one box, containing about 248 ounces of gold dust," is not a declaration of the "true nature and value of such articles," within the Merchant Shipping Act, 1854, s. 503. *Williams v. African Steamship Company*, 1 H. & N. 300; 26 L. J., Ex. 69; 2 Jur., N. S. 693.

On a shipment of a cargo from Valparaiso to England, a bill of lading described the property as "1,338 hard dollars," which was a coin current at Valparaiso at the time:—Held, that this was a sufficient compliance with 26 Geo. 3, c. 86, s. 3, it being the current coin of the place where the shipment was made. *Gibbs v. Potter*, 10 M. & W. 70; 6 Jur. 586. And see 17 & 18 Vict. c. 104, s. 503.

d. Perils of the Sea.

Collision caused by Negligence.—An exception of "accidents or damage of the seas, rivers,

and steam navigation of whatever nature or kind soever," does not exempt a shipowner from responsibility for loss of goods by reason of a collision caused by the gross negligence of the master or crew. *Lloyd v. General Iron Screw Collier Company*, 3 H. & C. 284; 33 L. J., Ex. 269; 10 Jur., N. S. 661; 10 L. T. 586; 12 W. R. 882.

A collision between two vessels brought about by the negligence of either of them, without the waves or wind or difficulty of navigation contributing to the accident, is not "peril of the sea" within the terms of that exception in a bill of lading. *Woodley v. Mitchell*, 11 Q. B. D. 47; 5 Asp. M. C. 71; 52 L. J., Q. B. 325; 48 L. T. 599; 31 W. R. 651—C. A.

Goods were shipped on board a vessel, which was called the *Black Prince*, under a bill of lading which contained an exception of barratry of the master and mariners, and accidents or damage of the seas. In the course of the voyage the *Black Prince*, meeting a vessel called the *Araxes* under circumstances which rendered it the duty of the *Black Prince* to port her helm, neglected to do so, and the result was that the *Black Prince*, with the goods on board, was run down and totally lost.—Held, that the conduct of the master, though a wilful default by the Merchant Shipping Act, 1854, s. 299, did not amount to barratry, nor was the loss a loss by accidents or damage of the seas within the exception. *Grill v. General Iron Screw Collier Company*, 1 L. R., C. P. 600; 35 L. J., C. P. 321; 12 Jur., N. S. 727; 14 W. R. 893. Affirmed, 3 L. R., C. P. 476; 37 L. J., C. P. 205; 18 L. T. 485; 16 W. R. 796—Ex. Ch.

—**Question for Jury.**—The judge left it to the jury to say whether the collision was caused by the negligence of the crew, and whether there was any want of ordinary care on the part of the *Araxes* by the exercise of which the collision might have been avoided.—Held, a proper direction, and that he was not bound to leave it to them to say whether the persons in charge of the *Araxes* might not have mitigated the calamity by stopping or backing when they found a collision inevitable. *Ib.*

—**Where no Fault of either Ship.**—Goods were laden on board a ship, the bill of lading containing an exception of the perils of the sea; the ship ran foul of another ship without any fault in the master of either.—Held, to be an injury by the perils of the sea within the exception. *Buller v. Fisher*, Peake's Add. Cas. 183.

—**Amount of Care necessary—Discharging.**—A vessel laden with goods arrived in the port of London, and was taken into the Commercial Dock to discharge her cargo. For this purpose she was fastened by tackle, on the one side to a loaded lighter lying outside her, and on the other to a barge lying between her and the wharf. The crew was discharged, except the mate, and lumps were being employed in unloading her, when the tackle broke whereby she was fastened to the lighter, and in consequence she canted over, water got in through her ports, and the goods still on board were damaged.—Held, that this was a loss within the exception in the bill of lading of "all and every the dangers and accidents of the seas and navigation." *Laurie v. Douglas*, 15 M. & W. 746.

Held, also (in an action by the freighters against the shipowners to recover damages for this loss), that the jury was properly directed, that the owners were only bound to take the same care of the goods as a person would of his own goods, that is, an ordinary and a reasonable care. *Ib.*

—**Barratry of Crew.**—A shipowner carrying goods under a bill of lading, by which he contracts to deliver in good order and condition, certain perils excepted, is bound to deliver in that condition, unless prevented by those perils, and is responsible for any damage to goods occasioned otherwise than by those perils. *The Chasca*, 4 L. R., Adm. 446; 44 L. J., Adm. 17; 23 L. T. 838.

Injury to cargo damaged by sea water during a voyage, in consequence of the barratrous act of the crew in boring holes through the sides of the ship for the purpose of scuttling her, is not a loss by perils of the seas, within the meaning of the exception in a bill of lading, such as will exempt the shipowner from his liability for the damage under his contract to deliver in good order and condition. *Ib.*

Even if such a loss would come within the meaning of the words, "perils of the seas," in a policy of insurance, it is not included in those words as used in a bill of lading. *Ib.*

—**Stowage—Due Ventilation.**—A cause of damage to cargo, instituted under 24 Vict. c. 10, s. 6, by the consignees, who were also assignees of the bills of lading, to recover damages on account of breaches of contract and duty with respect to certain parcels of oil-cake, which in the bills of lading were agreed to be delivered in the like good order and condition as when shipped, the dangers of the seas only excepted. The oil-cake, when delivered, was in a greatly damaged and deteriorated condition, occasioned by the packing and stowage.—Held, that as the proximate cause of damage arose from the nature and collocation of the cargo, consisting of animal, vegetable, and to some extent putrescible matter, and the want of due ventilation, it was not brought within the legal exception of "dangers of the seas." *The Freedom*, 3 L. R., P. C. 594; 24 L. T. 452.

Held, also, that it was enough for the consignees to have established that the shipowners had not performed their contract, since they had failed to produce sufficient evidence of due provision for ventilation of the ship's hold, so as to throw the onus on the consignees of proving that the damage might have been prevented by reasonable care and skill on the part of the shipowners. *Ib.*

—**Insufficient Fastening of Port.**—A ship sailed from America for Scotland with a cargo of wheat, and in the bill of lading "perils of the sea, however caused," were excepted. During the voyage the wheat was damaged by sea water. In an action by the indorses of the bill of lading against the owners, the jury found that the water obtained access to the cargo in consequence of one of the ports being insufficiently fastened, and on this finding the Court of Session entered a verdict for the shipowners, on the ground that the loss was covered by the exception in the bill of lading.—Held, that, as in order to bring the loss within the exception it

must be found that the ship sailed from the port in a seaworthy state, and the jury had not done so, a new trial must be had. *Steel v. State Line Steamship Company*, 3 App. Cas. 72 ; 37 L. T. 333.

Danger of War—Foreign Contract.]—The master of a North German vessel, under a North German charterparty, gave a bill of lading for goods shipped on board his vessel, in South America, as part of a general cargo to be delivered in North Germany to English consignees. The English language, money and weight were used in the bill of lading, which contained the proviso, "the dangers of the sea only excepted." The master of the vessel, on her arrival at Falmouth, refused to proceed on account of the outbreak of war between France and Germany :—Held, that, whether the contract was governed by English, general maritime, or North German law, the master was bound to proceed, as the bill of lading was precise in its terms, and, contemplating the happening of certain events, exempted him in only one event. *The Patria*, 3 L. R., Adm. 436 ; 41 L. J., Adm. 43 ; 24 L. T. 849.

Confiscation.]—To an action by a shipper of goods under a bill of lading for carrying goods to be shipped on board a ship lying at Gibraltar, and bound for London, calling at Cadiz, from Gibraltar to London, "the act of God, all and every other dangers and accidents of the seas, rivers and navigation, of what nature and kind soever excepted," a plea, that the ship, in the course of her voyage to London, called at Cadiz, and that the goods were within the jurisdiction of the officers of customs of Cadiz, and within the jurisdiction of a court held at Cadiz, and that the goods were, by the authorities having jurisdiction in that behalf, and according to the law of Spain, lawfully taken out of the ship and detained, without the default of the shipowner, on a charge which was duly preferred in the court ; and, by a decree of the court, made according to the law of Spain, were confiscated :—Held, that the loss was not within any of the exceptions in the bill of lading, but was occasioned by inevitable necessity, against which the shipowner ought to have provided by his contract ; and that the plea afforded no answer, inasmuch as it did not allege any wrongful act or default by the shipper, or knowledge by him that the goods were contraband at Cadiz, nor that they were taken to Cadiz by his desire. *Spence v. Chadwick*, 10 Q. B. 517 ; 16 L. J., Q. B. 313 ; 11 Jur. 872.

Risk of Boats.]—Goods were shipped in London, to be conveyed to Jamaica. The goods were there sent on shore, according to the custom of the West India trade, in a shallop belonging to the ship, and lost by perils of the sea. The clause of exception in the bill of lading was in the following terms : "The act of God, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, save risk of boats, so far as ships are liable thereto, excepted :"—Held, that the shipowner was not liable for such loss under the bill of lading, as the saving clause only extended to the same risk as if the goods had been on board the ship. *Johnston v. Benson*, 4 Moore, 90 ; 1 B. & B. 454.

Detention by Bottomry Suit.]—The non-

delivery of goods occasioned by a suit instituted in the Admiralty Court on a bottomry bond, was not an exception, within the meaning of "perils of the seas," in the bill of lading. *Benson v. Duncan*, 3 Ex. 644 ; 18 L. J., Ex. 169 ; 14 Jur. 218.

Held, also, that to a count upon a bill of lading for non-delivery, a plea, alleging that the injury and damage could not be repaired, so as to enable the ship to proceed to its destination, except at a cost exceeding what would be the value of the ship, after her repair, on her arrival ; and that no prudent owner would have incurred the expense ; and that the master acted imprudently, and without authority from the defendant ; and that the defendant never had the control of the goods after the arrival of the vessel at the port of its destination, was bad after verdict. *Id.*

e. Negligence of Master and Crew.

Generally.]—When a bill of lading exempted a shipowner from liability for the negligence of his master and crew, and a suit was instituted for damages to the cargo sustained in consequence of their negligence :—Held, that the shipowner was not liable for the damage. *The Duero*, 2 L. R., Adm. 393 ; 38 L. J., Adm. 69 ; 22 L. T. 37.

Collision between two Ships belonging to same Owner.]—The plaintiffs shipped goods on board the defendants' vessel, the Crown Prince, under a bill of lading, which contained exceptions of, among other things, "collision," and "accidents, loss, or damage, from any act, neglect, or default whatsoever of the pilots, master, or mariners, or other servants of the company in navigating the ship." In the course of the voyage the Crown Prince came into collision with another vessel of the defendants', the Atjeh. The plaintiffs' goods were in consequence lost. The collision was due to negligence, for which the Atjeh was mainly in fault ; but the Crown Prince also was in some degree to blame :—Held, that the defendants had not committed a breach of the contract created by the bill of lading, and that no action could be maintained against them on the ground of failure to perform the undertaking therein contained to carry the goods safely upon the voyage. Per Brett, L. J. : No stipulation on the part of the defendants could be implied as to the conduct of those on board the Atjeh, and although the negligence of the Atjeh was not within the exceptions, nevertheless it was not within the contract created by the bill of lading. Per Bag-gallay and Lindley, L. JJ. : The exception "collision," although it did not cover the negligence of the Crown Prince, covered the negligence of the Atjeh, and the defendants were expressly relieved from liability for the negligence of the Crown Prince by the other exceptions in the bill of lading. *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Company*, 10 Q. B. D. 521 ; 5 Asp. M. C. 65 ; 52 L. J., Q. B. 220 ; 48 L. T. 546 ; 31 W. R. 445 ; 47 J. P. 260—C. A.

Held, further, that the defendants were liable in tort for the negligence of those engaged in navigating the Atjeh, but that the amount payable by the defendants must be limited to one-half of the loss sustained by the plaintiffs, pursuant to the Supreme Court of Judicature Act, 1873, s. 25, sub-s. 9. *Id.*

Negligent Stowage.]—Bags of sugar shipped

by the plaintiffs were carried in the defendants' steamship from H. to L. at an agreed freight. The vessel was chartered for the voyage by P. & K., who signed the bill of lading as agents. It contained a clause that the owners of the ship should not be liable for the default of the pilot, master, or mariners in navigating the ship, and a further clause that the captain, officers, and crew in the transmission of the goods should be considered the servants of the shipper, owner, or consignee. The sugar was negligently stowed under oxide of zinc and was consequently damaged. It did not appear how the sugar came to be shipped, nor with whom the plaintiffs made the contract of carriage:—Held, that the defendants were liable to compensate the plaintiffs for the damage done to the sugar; for either the defendants had contracted to carry the sugar upon the terms set out in the bill of lading, which did not relieve them from responsibility for negligent stowage; or if they had not contracted with the plaintiffs, they were liable for misfeasance, that is, for stowing the goods in such a manner as to come into contact with a mischievous substance. *Hayn v. Culliford*, 4 C. P. D. 182; 48 L. J., C. P. 372; 40 L. T. 536; 27 W. R. 541—C. A.

Oil-cake, which the master had agreed to deliver in good order and condition, was stowed with hogsheads of tobacco, oaken staves being placed between them, and the oil-cake was damaged on the voyage:—Held, that the damage, however caused, was occasioned by the negligence or misconduct, as well as by the breach of contract, of the shipowner and his servants. *The Figlia Maggiore*, 2 L. R., Adm. 106; 37 L. J., Adm. 52; 18 L. T. 532.

f. Other Cases.

King's Enemies.]—A bill of lading for goods shipped in a Russian port, on board a Mecklenburgh ship, for a port in this country, contained an exception of the king's enemies:—Held, that "the king's enemies" meant, or at all events included, the enemies of the sovereign of the person who made the bill of lading, viz., the Duke of Mecklenburgh; and, consequently, that the exception protected the captain against the consequences of a hostile seizure by the Danes, then at war with Mecklenburgh. *Russell v. Niemann*, 17 C. B., N. S. 163; 34 L. J., C. P. 10; 10 L. T. 786; 13 W. R. 93.

By a bill of lading the goods were made deliverable to order or assigns, "paying freight for the goods, and all other conditions as per charterparty":—Held, that this did not incorporate an exception in the charterparty as to "acts of enemies" and "restraints of princes." *Id.*

Acts of Princes.]—The acts or restraints of princes and rulers provided against in a bill of lading refer to the forcible interference of a state, or the government of a country taking possession of the goods manu forti, and do not extend to legal proceedings in foreign courts, nor, in an action founded on contract, can the act of any court of law, or judicial tribunal, deciding that the shipowners should hold possession of the goods to the order of the true owner, relieve them from performing their contract, such act or decision not having been expressly excepted against in the bill of lading. *Finlay v. Liver-*

pool and Great Western Steamship Company, 23 L. T. 251.

Rust, Leakage, or Breakage.]—The clause in a bill of lading by which the shipowner is "not accountable for rust, leakage or breakage," is limited to the rust, leakage or breakage of the goods themselves, and does not protect the shipowner from liability for damage done to other goods in consequence of such rust, leakage or breakage. *Thriff v. Youle*, 2 C. P. D. 432; 46 L. J., C. P. 402; 36 L. T. 114.

The defendants caused to be shipped on board a vessel bales of palm-baskets and barrels of oil, under a bill of lading containing the clause, "Not accountable for rust, leakage or breakage." During the voyage some of the oil escaped from the barrels, and damaged the palm-baskets:—Held, that the clause in the bill of lading, exempting the plaintiff from responsibility for leakage, did not extend to damage caused by the oil which had escaped from the barrels, and that the plaintiff was liable to compensate the defendants for the injury done to the palm-baskets. *Id.*

Where Gross Negligence.]—A stipulation in a bill of lading, that the shipowner is "not to be accountable for leakage or breakage," does not exempt him from responsibility for a loss by these means, arising from the gross negligence of himself and his servants. *Phillips v. Clark*, 2 C. B., N. S. 156; 26 L. J., C. P. 168; 3 Jur., N. S. 467; S. C. 5 Jur., N. S. 1081.

A bill of lading containing the following memorandum—"Weights, measurement, and contents unknown, and not accountable for leakage," protects the shipowner as to all leakage, whether ordinary or extraordinary, except that caused by negligence. *Ohrloff v. Briscall*, 4 Moore, P. C. C., N. S. 70; 35 L. J., P. C. 63; 12 Jur., N. S. 676; 14 L. T. 873; 15 W. R. 202; S. C., nom. *The Helene*, B. & L. 429.

A bill of lading of forty-seven casks of oil contained a memorandum in the margin, "not accountable for leakage." The casks of oil were, at the desire of the charterers, stowed in the same hold with rags and wool (being part of the cargo), whereby the casks became heated and leaked:—Held, that the condition that the shipowners should not be accountable for leakage was not limited to the quantity of leakage, and that such memorandum protected the shipowner as to all leakage, unless caused by the negligence of the shipowner, and that ignorance that casks so packed would become heated and leak did not amount to negligence. *Id.*

A bill of lading for a quantity of sugar contained a memorandum in the margin that the shipowner was "not liable for leakage." The sugar, in consequence of improper stowage, was damaged during the voyage by the drainage from other sugar stowed above, which caused it to heat:—Held, that this was not damage by leakage within the meaning of the memorandum. *The Nepoter*, 2 L. R., Adm. 375; 38 L. J., Adm. 63; 18 W. R. 49; 22 L. T. 177.

Onus of Proof.]—Goods were shipped on board a steamer under a bill of lading which contained an exception from liability for breakage, leakage, or damage. The goods were found at the end of the voyage to be injured by oil. It was proved that there was no oil in the cargo,

but that there were two donkey engines on deck, near the place where the goods were stowed, in lubricating which oil was used; there was no direct evidence of how the injury to the goods occurred:—Held, that the exception did not protect the shipowners from liability for damage accruing through the negligence of their servants, but that it did shift the onus of proof, and that it was incumbent upon the shipper to prove affirmatively the negligence of the shipowners' servants. *Czech v. General Steam Navigation Company*, 3 L. R., C. P. 14; 37 L. J., C. P. 3; 17 L. T. 246; 16 W. R. 130.

Held, also, that the above facts were evidence upon which a jury was justified in finding the existence of negligence. *Ib.*

In an action upon such a bill of lading to recover damages for loss by leakage of any kind, the burthen of proof is on the plaintiff to shew that the leakage was caused by negligence. *Ohrloff v. Briscall*, *supra*.

Damage by Rats.—Under a bill of lading, whereby the shipowner undertakes to deliver goods "in good order and well conditioned (the act of God, the Queen's enemies, fire, all and every other dangers and accidents of the seas, rivers, and navigation, of whatsoever nature or kind soever excepted)," he is liable for damage done to the goods on board his ship by rats, though he has taken every precaution against them. *Kay v. Wheeler*, 2 L. R., C. P. 302; 36 L. J., C. P. 180; 16 L. T. 66; 15 W. R. 495—*Ex. Ch.*; *S. P.*, *Laceroni v. Drury*, 8 *Ex.* 166; 22 L. J., *Ex.* 2; 16 *Jur.* 1024.

By Stranding.—In an action upon a bill of lading against the shipowner for loss of part of cargo alleged to have been jettisoned and sold in consequence of the ship stranding, the plaintiff is not entitled to recover, unless he proves affirmatively that the stranding was occasioned by the negligent navigation of the ship. *The Norway*, B. & L. 404; 3 Moore, P. C. C., N. S. 245.

"Thieves."—A box of diamonds was shipped at Liverpool, on board a ship for New York, under a bill of lading by which were excepted "pirates, robbers, thieves, vermin, barratry of master, and mariners . . ." The box was stolen during the voyage or on the ship's arrival in port, before the time for delivery; but there was no evidence to shew whether it was stolen by one of the crew or by a passenger, or, after her arrival, by some person from the shore:—Held, first, that "thieves" must be interpreted as in a policy of insurance, and only applied to thieves external to the ship. *Taylor v. Liverpool and Great Western Steamship Company*, 9 L. R., Q. B. 546; 43 L. J., Q. B. 205; 30 L. T. 714; 22 W. R. 752.

Held, secondly, assuming theft by one of the crew to be barratry, that it lay on the shipowners, to bring the loss within one of the exceptions, by shewing by whom the theft had been committed; and that the shippers of the diamonds were therefore entitled to recover for the loss. *Ib.*

A company received at Panama goods to be delivered in London, "the act of God, the Queen's enemies, pirates, robbers, fire, accidents from machinery, boilers and steam, the dangers of the seas, roads and rivers, of what nature or kind soever excepted." The goods were carried by the company across the Isthmus of Panama to Chagres,

where they were shipped to Southampton, and there placed in a railway truck, whence they were secretly stolen in the course of their transit to London:—Held, that this was not within the exception a loss by robbers, or by dangers of the roads, since the word "robbers" meant, not "thieves," but robbers by violence; and "dangers of the roads" meant dangers of marine roads; or if of land roads, such dangers as are immediately caused by roads, as the overturning of carriages in rough and precipitous places. *De Rothschild v. Royal Mail Steam Packet Company*, 7 *Ex.* 734; 21 L. J., *Ex.* 273.

Suffocation of Animals—Loss arising from Want of Ballast.—A bill of lading of cattle to be carried from Rotterdam to London contained an exemption in the following terms: "Ship free in case of mortality, and from all damages arising from act of God, the Queen's enemies, fire, accidents from machinery, or boiler, steam, or other dangers of the seas, rivers, roadsteads, or steam navigation whatsoever. The owners of the vessel will not be liable for the loss of or injury done to any horses, cattle, or other animals, except as to 50*l.* for horses, and 15*l.* per head of neat cattle, and 2*l.* per head as to sheep, pigs and dogs. The owners will not be liable for any loss arising from suffocation or other causes occurring to horses, dogs, cattle, or other animals; or from kicking, plunging, or viciousness of the same in transit, nor for any damage arising from shipping or landing, or while in the possession of the owners or their agents before or after the voyage, from whatever cause they may remain in such possession." Several of the cattle were suffocated and killed from the vessel overturning, it having been sent to sea without proper ballast. The injury having been occasioned by the negligence of the owners of the vessel:—Held, that the owner of the cattle was entitled to recover notwithstanding the exception in the bill of lading. *Lewo v. Dudgeon*, 3 L. R., C. P. 17, n.; 37 L. J., C. P. 5, n.; 17 L. T. 145; 16 W. R. 80.

Construction of Word "Damage" in exemptive Clauses.—A bill of lading contained a clause: "The shipowner is not to be liable for any damage to any goods which is capable of being covered by insurance:—Held, that "damage" would include damage to the goods amounting to a total loss or destruction of them, but did not apply to the case of the abstraction of the goods. *Taylor v. Liverpool and Great Western Steamship Company*, *supra*.

Liability of Shipowner on, to cease on Delivery from Deck.—Goods were shipped under a bill of lading which contained these words, "to be delivered from the ship's deck, where the ship's responsibility is to cease." The usage at the port required that the unloading should be done by the dock company, at the expense of the shipowner, on to a quay, and then that the consignee should send lighters into which the goods were delivered also by the dock company, and also, if within a specific time, at the expense of the shipowner. The usage was followed, but one bale of goods was lost after delivery on to the quay, and before delivery into the lighters:—Held, that the shipowner was not responsible for the loss to the consignee. *Petrocchino v. Bott*, 9 L. R., C. P. 355; 43 L. J., C. P. 214; 30 L. T. 840.

— **Fire after Landing.**—A carrier by sea, under a bill of lading of goods, "to be delivered in the like good order, &c., at the port of &c., unto A. or his assigns, on paying for the goods, freight and charges, as per margin, with primage and average accustomed," is not entitled, immediately on the arrival of the vessel, and without notice to the owner, to land the goods; and if he should land them, and they should be destroyed by fire, he will be answerable to the owner for the loss. *Bourne v. Gatliff*, 11 C. & F. 45; 8 Scott, N. R. 604; 7 M. & G. 850.

5. SPECIAL CONDITIONS.

Giving Liberty to Tow.—The plaintiffs shipped goods at Liverpool on board the *Liberia*, a steam vessel belonging to a steamship company, to be carried for freight, payable by the plaintiffs to the company, to Benin, on the coast of Africa, which goods, on the arrival of the *Liberia* at Bonny, were, in the usual course of the business of the company, and according to the terms of the bill of lading, transhipped on board the *Kwara*, a small branch steamer belonging to the company, to be forwarded thereby to their destination at Benin. The *Kwara*, with the plaintiffs' goods on board, left Bonny, and proceeded on her voyage to Benin, calling on her way at Brass, where she had both to discharge and take in cargo. Whilst lying in the harbour at Brass, and after having discharged and taken in cargo, and within two or three hours of being ready to proceed on her onward voyage to Benin, the *Kwara* was taken by her captain, at the request of the captain and owners of another vessel, to the mouth of the Brass river, some three miles from the harbour, for the purpose of towing off such other vessel which had got stranded on the breakers in attempting to cross the bar at the entrance of the river, and in her efforts to tow that vessel off, the *Kwara* herself, in consequence of her screw getting fouled with a rope, was wrecked, and the plaintiffs' goods were lost. It did not appear that human life was in any imminent danger, or that the assistance of the *Kwara* was sought for, except to save property. The bill of lading, given by the company on receiving the goods at Liverpool, contained a clause giving to their vessels "liberty to tow and assist vessels in all situations;" and also a memorandum in the margin as follows: "The within goods to be transhipped at Bonny, and forwarded to destination by branch steamer at ship's expense but shipper's risk." In an action by the plaintiffs to recover the value of their goods:—Held, first, that, under the express words of the clause in the bill of lading giving liberty "to tow and assist vessels," &c., the *Kwara* was justified and protected in going to the assistance of the other vessel in the manner and under the circumstances stated. *Stuart v. British and African Steam Navigation Company*, 32 L. T. 257.

Transshipment "at Shipper's Risk"—Ship's Expense.—Held, secondly, that the words in the margin of the bill of lading "at shipper's risk," applied, as did also the words "at ship's expense," to the transshipment only of the goods from the one vessel to the other at Bonny, and not to the "forwarding of them from Bonny to Benin." *Ib.*

No Claim unless before Removal of Goods.—

By a bill of lading made in England by the master of an English ship certain packages of tea were "to be delivered from the ship's deck, where the ship's responsibility shall cease, at the port of Montreal . . . unto the Grand Trunk Railway Company, and 'by them to be forwarded thence per railway to the station nearest to Toronto, and at the aforesaid station delivered to the consignees or to their assigns." The instrument contained, in addition to a long list of excepted special risks, whether arising from negligence or otherwise, the following condition:—"No damage that can be insured against will be paid for, nor will any claim whatever be admitted unless made before the goods are removed." In an action in Lower Canada against the shipowner for the value of damage done to the packages during the voyage, it appeared that they were landed, placed in shipping sheds, removed therefrom to railway freight-sheds in Montreal, and finally delivered to the consignees in Toronto. No notice of damages was given until thirteen days after the delivery was completed:—Held, that the condition, though in its first clause limited to insurable damage, clearly applied as regards its second clause to all damage, whether apparent or latent, which could by examination of the packages conducted with reasonable care and skill at the place of removal have been discovered. *Moore v. Harris*, 1 App. Cas. 318; 45 L. J., P. C. 65; 34 L. T. 519; 24 W. R. 887—P. C.

Excluding Merchant Shipping Act.—A condition in a bill of lading provided, in effect, that, on the arrival of the vessel in dock, the consignee of a portion of the cargo should be ready to receive the goods, and that, in default, the master or agent of the ship should be at liberty to land the goods and warehouse them at the consignee's risk and expense. The vessel arrived, and the agent of the consignee made an immediate application for the goods, but was told that it was not known in what part of the ship they were. On receiving the same answer on the following day, the agent withdrew, handing to the mate a notice desiring him to give twenty-four hours' notice of his readiness to deliver the goods, in accordance, as the notice alleged, with 25 & 26 Vict. c. 63, ss. 66, 67. No such notice of readiness was given, and there being no one to receive the goods, they were placed in a warehouse by the master of the ship, a charge of 5*l.* 17*s.* 3*d.* being thereby incurred. The consignee having threatened to charge his agent with the value of the goods unless he obtained delivery of the same, the agent paid the said sum under protest, and brought this action against the shipowner to recover such sum:—Held, that the special contract in the bill of lading excluded the operation of the Merchant Shipping Act Amendment Act; and that the act did not apply to a case where the shipowner was in bona fide ignorance of the position of the goods, regard being had to the premature demand of the agent of the consignee. *Oliver v. Colten*, 27 W. R. 822.

Introduction of Novel Clause.—If a shipowner wishes to introduce into his bill of lading so novel a clause as one exempting him from general average contribution, he ought not only to make it clear in words, but also to make it conspicuous by inserting it in such type and in such a part of the document as that a person of

ordinary capacity and care could not fail to see it.—*Per Lush, J., Crookes v. Allen*, 5 Q. B. D. p. 40.

6. EFFECT OF INDORSEMENT, ASSIGNMENT, AND TRANSFER.

a. Generally.

Delivery or Indorsement.—A bill of lading is the usual document entered into upon a contract for the carriage and delivery of goods by sea for freight. *Lickbarrow v. Mason (in error)*, 4 Bro. P. C. 57; 1 H. Bl. 360; 5 T. R. 683; 2 T. R. 63.

There is no distinction between a bill of lading indorsed in blank and an indorsement to a particular person. *Ib.*

A bill of lading is not a necessary instrument in the transfer of property of goods consigned to the owner. *Meyer v. Sharp*, 5 Taunt. 74.

The property in a cargo, for which the master has signed bills of lading, may be transferred by delivery, without indorsement of the bill of lading. And the transfer will be good against all the world, except subsequent indorsees of the bill of lading for a valuable consideration. *Nathan v. Giles*, 5 Taunt. 558; 1 Marsh. 226.

By Shipper.—Bills of lading, made out to the order of the shipper or his assigns, are negotiated and transferred by the shipper's indorsement. *Haille v. Smith*, 1 B. & P. 564.

Liability after Indorsement.—Merchants in London received from a mere stranger residing abroad a bill of lading of goods, in a letter requesting them to effect insurance; they declining to do the business for the consignor, but acting bona fide with a view to his interest, indorsed the bill of lading to a friend of his, who received the goods, and afterwards failed with the proceeds in his hands:—Held, that the merchants, by indorsing the bill of lading, were liable to the consignor for the amount. *Corlett v. Gordon*, 3 Camp. 472.

Effect of 18 & 19 Vict. c. 111, s. 1.—Before this enactment, a bill of lading was not negotiable like a bill of exchange, so as to enable an indorsee to maintain an action upon it in his own name; the effect of the indorsement being only to transfer the right of property in the goods, but not the contract itself. *Thompson v. Dominy*, 14 M. & W. 403; 15 L. J., Ex. 320; *S. P., Howard v. Shepherd*, 9 C. B. 297; 19 L. J., C. P. 249.

Under the above statute the rights and liabilities of the consignee or indorsee of a bill of lading pass from him by indorsement over to a third person. *Smurthwaite v. Wilkins*, 11 C. B., N. S. 842; 31 L. J., C. P. 214; 5 L. T. 842; 10 W. R. 386.

A bare assignee to whom the property in the goods has not passed, and who cannot therefore sue at common law, is not entitled to sue in the Admiralty Court. *The St. Cloud*, B. & L. 4.

By 18 & 19 Vict. c. 111, s. 1, the consignee or indorsee of goods named in a bill of lading, and the indorsee of a bill of lading, to whom the property in the goods mentioned shall have passed by such indorsement, has transferred to and vested in him all rights of suit, and he is subject to the same liabilities, in respect of such goods, as if the contract in the bill of lading had been

made with himself. *The Freedom*, 3 L. R., P. C. 594; 24 L. T. 452; 38 L. J., Adm. 25.

The right of suing upon a contract, under a bill of lading, follows the property in the goods therein specified; that is, the legal title to the goods as against the indorsee. *Ib.*

In a suit for damage to cargo and for improper delivery by the consignees, who were also assignees of the bills of lading:—Held, that they had a locus standi both as to negligence and breach of contract. *Ib.*

To entitle the indorsee of a bill of lading to have transferred to and vested in him a right of suit under 18 & 19 Vict. c. 111, the circumstances under which a bill of lading shall have been indorsed must be such that the property in the goods shall have passed to the indorsee by reason of the indorsement. *For v. Nott*, 6 H. & N. 637; 30 L. J., Ex. 259.

The plaintiff, who was the charterer, had taken an assignment of the bill of lading upon the terms that the freight should be paid:—Held, that he had not lost his right against the shipper for the freight. *Ib.*

The consignees named in a bill of lading are entitled to sue in the Admiralty Court, for negligence in the carriage of the goods, or for a breach of the contract contained in the bill of lading, although the property in the goods has not passed to the consignees. *The Nepoter*, 2 L. R., Adm. 375; 38 L. J., Ex. 63; 22 L. T. 177; 18 W. R. 49.

C., M. & Co. were in the habit of consigning goods to the plaintiffs for sale, and the plaintiffs from time to time accepted their bills and accredited them with the proceeds of sale of the goods. C., M. & Co. being at the time indebted to the plaintiffs upon the account current between them, consigned a cargo of sugar to the plaintiffs which was delivered in a damaged state:—Held, that as consignees of the cargo and creditors of C., M. & Co., they were entitled to sue in the Admiralty Court for damage by reason of negligence or breach of duty. *Ib.*

The indorsees of a bill of lading of a cargo agreed to sell the cargo to B. & Co., but the purchase-money had not been paid, nor had the bill of lading been indorsed to B. & Co. In a suit in the Court of Admiralty for breach of contract for non-delivery of the cargo:—Held, that they were entitled to sue in the court under 24 & 25 Vict. c. 10, s. 6, when construed with the Bills of Lading Act (18 & 19 Vict. c. 111). *The Felix*, 2 L. R., Adm. 273.

The plaintiffs were assignees for valuable consideration of bills of lading for 1,000 barrels of oilcake shipped on board the *Figlia Maggiore*, at New York, and which the master had agreed "to deliver in like good order and condition at the port of London." The vessel was at the time under a charterparty, of which the shippers were ignorant, the master having put up the ship as a general ship. The oilcake was stowed with hogheads of tobacco, oaken staves being placed between them. A suit having been brought by the assignees of the bills of lading against the shipowner for damage suffered by the oilcake on the voyage:—Held, that as the vessel had been put up as a general ship, and as they had no knowledge of the charterparty, the owner was the proper person to be sued. *The Figlia Maggiore*, 2 L. R., Adm. 106; 37 L. J., Adm. 52; 18 L. T. 532.

Held, also, that the property in the oilcake had

so vested in them as to entitle them to sue for breach of contract under 24 & 25 Vict. c. 10, s. 10, construed with s. 1 of 18 & 19 Vict. c. 111, and that, in any case, they were entitled to sue under the former section on the ground of negligence, and that the onus of proving negligence lay on them. *Ib.*

The rights and liabilities which the assignee of a bill of lading under 18 & 19 Vict. c. 111, s. 1, has transferred to him, are the same rights and liabilities in respect of such goods as if the contract contained in the bill of lading had been made with him. In these are not included the right and liabilities as between the shipper and the master dehors that contract in respect of other goods or of the charterparty. *The Helene*, B. & L. 415; 4 Moore, P. C. C., N. S. 70; *S. C.*, sub nom. *Ohrloff v. Briscall*, 35 L. J., P. C. 63; 12 Jur., N. S. 675; 14 L. T. 873; 15 W. R. 202.

Danger of War—Refusal of Master to Deliver.]

—The master of a North German vessel under a North German charterparty, gave a bill of lading for goods shipped on board his vessel in South America as part of a general cargo to be delivered in North Germany to English consignees. The master of the vessel, on her arrival at Falmouth, refused to proceed on account of the outbreak of war between France and Germany. The goods were stowed at the bottom of the hold under those of the other shippers, and as the charterers refused to consent to the unloading of the cargo at Falmouth, the master would not deliver to the consignees there, even on the offer of full freight:—Held, that the master was bound to deliver at Falmouth. *The Patria*, 3 L. R., Adm. 436; 41 L. J., Adm. 43; 24 L. T. 849.

Consideration.]—The property of goods passes by the indorsement and delivery of the bill of lading by the consignee to another, if bonâ fide for a valuable consideration, and without collusion, although the indorsee knew at the time that the consignor had not received money payment for his goods, but had taken the consignee's acceptances payable at a future day not then arrived; and after such assignment of the bill of lading the consignor cannot stop the goods in transitu upon the insolvency of the original consignee. *Cuming v. Brown*, 9 East, 506; 1 Camp. 104.

The forbearance or release of a pre-existing claim is not a sufficient consideration for the indorsement of a bill of lading so as to defeat an unpaid vendor's right of stoppage in transitu. *Rodger v. Comptoir d'Escompte de Paris*, 3 L. R., P. C. 465; 38 L. J., P. C. 30; 21 L. T. 33; 17 W. R. 468.

L. & Co., merchants, carrying on business at Hong Kong, purchased goods of a merchant in Manchester, to be shipped to their firm at Hong Kong, to be paid for at certain credit. The goods were shipped deliverable to the order of L. & Co., and bills of lading signed. Before the goods arrived at Hong Kong, L. & Co. being insolvent, and being indebted to R. & Co., the agent of L. & Co., at Hong Kong, agreed to assign to R. & Co. all the estate of L. & Co., including the bills of lading in respect of the goods, and such bills of lading were in pursuance of the agreement indorsed to R. & Co. At the time the bills of lading were so transferred, no money was advanced or benefit conferred on L. & Co. by R. & Co.:—Held, that there was no sufficient

transfer of the bills of lading for a valuable consideration so as to defeat the right of an unpaid vendor to stop the goods in transitu. *Ib.*

A., a merchant in London and in Hong Kong, purchased goods for shipment from B., and paid for them by his acceptance of B.'s draft against the shipment, on the terms that A. should send them to his firm at Hong Kong, and that the proceeds should be remitted to A. in bills specially to meet such acceptance. A.'s firm at Hong Kong owed a large sum to C., and were under engagement to secure the debt by depositing shipping documents with him. Being threatened by C. with immediate legal proceedings, they promised him that if he would forbear to take such proceedings, and would release them from their obligation to deposit shipping documents, they would deposit with him a bill of lading for goods of a certain value, upon the understanding that the bill of lading, or the goods represented therein, should be returned to them upon payment of a sum equivalent to the value thereof. The bill of lading of the goods purchased from B. was accordingly indorsed to C., who had no knowledge of the terms made with B., and it was returned by C. according to agreement, on receipt of an equivalent sum:—Held, that C., by such forbearance and release, gave valuable consideration; that the legal interest in the goods passed by the indorsement of the bill of lading, and that B. could not enforce his claim against the proceeds of sale received by C. in respect thereof. *Chartered Bank of India, Australia and China v. Henderson*, 5 L. R., P. C. 501; 30 L. T. 578.

Past Consideration.]—The vendee of goods may, by assignment of the bills of lading to a bonâ fide transferee, defeat the vendor's right to stop them in transitu in case of the vendee's insolvency, although the consideration for which the assignment is made is a past one, and has not been got by means of the bills of lading. *Leask v. Scott*, 2 Q. B. D. 376; 46 L. J., Q. B. 576; 36 L. T. 784; 25 W. R. 654—C. A. Reversing 2 Q. B. D. 376; 46 L. J., Q. B. 329; 35 L. T. 903.

G. & Co., the consignees of certain goods from the defendant from abroad, for which they had accepted a bill of exchange at three months, being already indebted to the plaintiff, obtained a further loan on the condition of giving security. They delivered to him the bill of lading of the goods, together with other securities to the amount required. After this and before the arrival of the goods G. & Co. became insolvent:—Held, that the defendant was not entitled to stop the goods in transitu, for that it was not necessary that the consideration for the assignment of the bill of lading should be obtained by means of the bill of lading, and that there is in such case no difference between a past and present consideration. *Ib.*

A bill of lading assigned in part payment of a debt already due from the assignor to the assignee, is assigned for valuable consideration. *The Emilien Marie*, 44 L. J., Adm. 9; 32 L. T. 435.

Restriction on Right of Indorsement.]—If a consignee under a bill of lading, while the goods are yet in transitu, indorses the bill and gives notice thereof to the party entitled to the freight, and upon the indorsement he states in express

terms that the owner of the freight, the party who may be ultimately entitled thereto, is to look to other persons for payment of it, and that indorsement is accepted and acted upon without objection or qualification on the part of the owner of the freight, that of itself, in point of law, constitutes a transfer of the liability, and a defence to any subsequent action. *Lewis v. McKee*, 2 L. R., Ex. 37; 36 L. J., Ex. 6; 15 L. T. 388; 4 H. & C. 674. Affirmed, 4 L. R., Ex. 58; 38 L. J., Ex. 62; 19 L. T. 522; 17 W. R. 325—Ex. Ch.

Re-Indorsement.—Goods were shipped for Bombay under a bill of lading, making them deliverable to order or assigns. The consignor indorsed the bill of lading in blank, and deposited it with a banker as security for an advance of money, and on his repaying the sum advanced, the bill of lading was re-indorsed and redelivered to him:—Held, that such re-indorsement of the bill of lading to him remitted the consignor to all his rights as against the shipowners under the original contract; and consequently that he was entitled to sue them for a breach, whether occurring before or after such re-indorsement. *Short v. Simpson*, 1 L. R., C. P. 248; 35 L. J., C. P. 147; 12 Jur., N. S. 258; 13 L. T. 674; 14 W. R. 307; 1 H. & R. 181.

Proof of Indorsement.—In an action upon a bill of lading by an indorsee against the shipowners, for not delivering the goods, he put in a bill of lading, and proved that the consignors indorsed and delivered it to A., and that A. indorsed and delivered it to him for value:—Held, evidence of such an indorsement and delivery of the bill of lading as to vest the property in the goods in him, and so to transfer to him the right of action under 18 & 19 Vict. c. 111, s. 1. *Dracachi v. Anglo-Egyptian Navigation Company*, 3 L. R., C. P. 190; 37 L. J., C. P. 71; 17 L. T. 472; 16 W. R. 277.

Right to Goods on Payment of Freight, though Nominal.—Goods which, by the terms of the bill of lading, have been carried upon a nominal amount of freight, can be lawfully demanded, by the holder of the bill of lading, on payment of that amount. *Keith v. Burrows*, 2 App. Cas. 636; 46 L. J., C. P. 801; 37 L. T. 291; 25 W. R. 831—H. L.

The owner of a ship cannot, by his subsequent acts, give to his mortgagees, as against the holder of a bill of lading, rights different from those possessed by himself under it. *Id.*

Shipper and Consignee—Evidence of Insurable Interest.—The fact of a person being named both shipper and consignee in a bill of lading is *prima facie*, but not conclusive, evidence of an insurable interest in him. If he is a mere agent, without lien on the goods, or possession of them as a bailee, or liability to account for their loss by the perils insured against, he has no insurable interest. *Seagrave v. Union Marine Insurance Company*, 1 H. & R. 302; 1 L. R., C. P. 305; 35 L. J., C. P. 172; 12 Jur., N. S. 358; 14 L. T. 479; 14 W. R. 690.

Right where no Indorsement.—Where, from all the facts, it may fairly be inferred that it was the intention of a seller to pass the property in goods shipped to order, the mere circumstance

of the bill of lading being taken in the name of the seller, and remaining unindorsed, will not prevent its passing. *Joyce v. Swann*, 17 C. B., N. S. 84.

Indorsement to Agent.—But the mere indorsement of a bill of lading by the consignor to an agent, to authorize him to stop the goods in transitu on account of his principal, will not enable such agent to maintain an action for the goods in his own name. *Waring v. Cox*, 1 Camp. 369.

Right of Equitable Assignee to Sue for Detention of Bill of Lading.—The plaintiff was in the habit of receiving goods consigned to him by L. for sale upon commission, and in order to place L. in funds for the purchase of the goods, agreed to allow him to draw upon him. The documents of title of the goods were hypothecated to the plaintiff to enable him to provide funds to meet the bills so drawn by L. The plaintiff accordingly, and at the request of L., arranged for the sale of a parcel of goods, to be shipped by a vessel chartered by the buyers, and L. having drawn upon the plaintiff for that purpose, purchased and shipped the goods. The bill of lading was handed to L., but never forwarded to the plaintiff, and L.'s affairs being put in liquidation, the liquidator placed the bill of lading in the hands of the defendants with instructions not to part with it until they were paid the value of the goods, and they accordingly refused to give it up to the plaintiff:—Held, that the plaintiff had an equitable right to the bill of lading, and was entitled to sue the defendants for the wrongful detention of it. *Lutscher v. Comptoir d'Escompte de Paris*, 1 Q. B. D. 709; 34 L. T. 798.

Extent of Right of Assignees to Cargo.—An assignee of a bill of lading may have a better right against the shipowner to recover for breach of the contract of carriage than the assignor. *The Emilien Mario*, 44 L. J., Adm. 9; 32 L. T. 435.

An assignee of a bill of lading, who has given valuable consideration, without notice of any arrangement between the shipper and the various consignees giving priority to the holders of the other bills of lading in the case of short shipment, may claim from the shipowner full delivery of the cargo specified in his bill of lading, even though the arrangement has been made without the privity of the shipowner, and the master has indorsed the bill of lading with the words "weight unknown." *Id.*

A letter written by an assignor of a bill of lading to his assignee, informing the latter that the bankruptcy of the shipper and consignor (who has indorsed to the assignor) may possibly interfere with the proceeds of the shipment, so far as the assignor is concerned, and that he thinks it best to prevent the possibility of a hitch to send the bill of lading for the assignee to deal with, the latter having advanced money thereon, is not such a notice as will oblige the assignee to make inquiries as to the quantity of and the various rights to the cargo, so as to bind the assignee with constructive notice of any arrangement between the shipper and different consignees, giving priority to the holders of other bills of lading in the case of short shipment. *Id.*

The rights of an innocent holder of a bill of lading are not affected by the fact that the

master signed as agent for the charterers, unless the holder has notice of the charterparty, or that the master signed in that capacity. *Ib.*

An assignee of a bill of lading is entitled to the goods therein named, if he is a *bona fide* assignee for value, without notice of fraud or of insolvency on the part of the person to whom the goods were consigned. *The Argentina*, 1 L. R., Adm. 370; 16 L. T. 743.

Set-off by Holders against Assignees of Freight.—The holders of a bill of lading cannot, as against the assignees of the freight, set off a debt due to them from the original owner of the goods, who was also the assignor of the freight. *Weguelin v. Cellier*, 6 L. R., H. L. 286; 42 L. J., Adm. 758; 22 W. R. 26.

Liability of Consignee to take Delivery of Cargo.—When there is no express stipulation in a bill of lading it is an implied term of the contract contained in it, that the consignee named in the bill of lading, or his assigns, will take delivery of the goods within a reasonable time; and the person to whom the property in the goods has passed, by reason of such consignment, is by virtue of the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), s. 1, subject to the liability so to take them. *Fowler v. Knoop*, 47 L. J., Q. B. 473. Affirmed, 4 Q. B. D. 299; 48 L. J., Q. B. 333; 40 L. T. 180; 27 W. R. 299.

Where the charterers and the shippers are the same persons, such contract will still be implied in the bill of lading, notwithstanding the existence of an express stipulation in the charterparty, between the charterers and the shipowner, in reference to the same matter. *Ib.*

b. In Passing Property.

Absolutely.—Though the consignee named in the bill of lading should become insolvent, without having paid for the goods, yet his assignment made for a valuable consideration, and without notice to the assignee that the goods were not paid for, or that they were paid for by bills sure to be dishonoured:—Held, to pass them absolutely to his assignee, and to deprive the consignor of his right to stop in transitu, which as against the original consignee he might have exercised. *Lickbarrow v. Mason*, 2 T. R. 63; 4 Bro. P. C. 57; 1 H. Bl. 360; 5 T. R. 683; 6 T. R. 63; 2 H. Bl. 211.

When goods are at sea, the parting with the bill of lading, which is the symbol of the goods, is parting with the ownership of the goods themselves. *Barber v. Meyerstein*, 4 L. R., H. L. 317; 39 L. J., C. P. 187; 22 L. T. 808; 18 W. R. 1041.

The same principle applies to goods which, for the convenience of parties, have been landed at a sufferance wharf. *Ib.*

As long as the engagement of the shipowner has not been completely fulfilled, the bill of lading is a living instrument, and the transfer of it for value passes the absolute property in the goods. *Ib.*

It has not been fulfilled when the goods, though actually landed at a wharf, are subject to a stop order. *Ib.*

The person who first gets the bill of lading (though only one of a set of three) gets the property which it represents; he need not do any act to assert his title which the transfer of the bill of lading of itself renders complete, and any

subsequent dealings with the others of the set are subordinate to the rights passed by that one. *Ib.*

Though the shipowner or wharfinger, having no notice of the transfer of one bill of lading, may be excused for delivering the goods to a person who produces to him another bill of lading, which has in reality been subsequently taken, that does not affect the legal ownership of the goods as between the holders of the two bills of lading. *Ib.*

As Security.—The shipper of goods by simply indorsing the bill of lading and delivering it to the indorsee by way of security for money advanced by him, "passes the property" in the goods to such indorsee so as to make him directly liable to the shipowner for freight under 18 & 19 Vict. c. 111, s. 1. *Burdick v. Sewell*, 13 Q. B. D. 159—C. A. Reversing 10 Q. B. D. 363; 5 Asp. M. C. 79; 52 L. J., Q. B. 428; 48 L. T. 705; 31 W. R. 696.

The shipper of goods indorsed the bill of lading in blank, and delivered it to the defendants' bankers by way of security for money advanced by them. The goods upon their arrival at the port of destination were sold for an amount insufficient to pay the freight:—Held, that the property in the goods had passed to the defendants within the meaning of the Bills of Lading Act, 18 & 19 Vict. c. 111, s. 1, so as to make them liable in an action by the shipowner for the freight. *Ib.*

Liability of Warehouseman.—Goods shipped to C., as owner, were before arrival pledged by him to the plaintiffs as security for an advance. The bill of lading was, as is customary, in three sets, "the one being accomplished the rest to stand void," and made the goods deliverable to "C. or assigns," freight payable in London. C. indorsed one copy of the bill of lading marked "first," to the plaintiffs, and also gave them a letter of charge, making the bill of lading a collateral security for the advance, and empowering them to sell the goods represented by the bill of lading should default be made in the repayment of the advance. The vessel went on arrival into the dock of the defendants. C. duly entered the goods at the custom house, and they were afterwards, at the request of C., landed and deposited with the defendants, the freight being unpaid. The manifest, a copy of which the captain lodged with the defendants, authorized the defendants to deliver the goods to the holders of the bill of lading. On the following day the captain lodged with the defendants a stop order for freight, pursuant to the Merchant Shipping Act, 1862. C. then produced and gave to the defendants, unindorsed, the second part of the bill of lading; the defendants then entered C. as the proprietor of the goods. C. paid the freight, the stop was taken off, and the defendants delivered the goods to W., on the production by him of a delivery order from C. C. shortly after went into liquidation, when the plaintiffs, producing the indorsed bill of lading, in vain demanded the goods of the defendants. In an action for conversion,—Held, by the Court of Appeal (Bramwell, L. J., and Bagallay, L. J.; dissentiente Brett, L. J.), that the defendants were not liable. By Bramwell, L. J., that the property in the goods did not pass, but that there was a pledge of them with a right of redemption

in C.; that the duty of the defendants was the same as that of the shipowner would have been had the goods remained on board; that the plaintiffs assented to C.'s retaining the other parts of the bill of lading, and to the receipt by the defendants of the goods to hold, after freight paid, to the order of C., so that there was no conversion. By *Baggallay, L. J.*, that the property in the goods passed by delivery of the indorsed bill of lading; that the landing of the goods was the result of an arrangement between the shipowner, C., and the defendants; that the Merchant Shipping Act did not effect that the defendants thereafter held the goods for the plaintiffs, but that they received them to hold to an order of C., and that in the absence of any notice of title in anyone else, the defendants were bound to deal with them as directed by the ostensible owner. By *Brett, L. J.*, that the defendants were liable; that C. by indorsing the bill of lading to the plaintiffs, passed the legal property to the plaintiffs, only reserving to himself an equity of redemption; that the shipowner was therefore bound to deliver to the plaintiffs, subject to the provisions of the Merchant Shipping Act as to warehousing the goods; that the defendants were, as such warehousemen, bound to hold the goods till freight was paid, and then to deliver to the plaintiffs as holders of the bill of lading. On appeal to the House of Lords:—Held, that the dock company had not been guilty of conversion, and that the bank could not maintain an action against them. *Fearon v. Bowers* (1 H. Bl. 364), commented on. *Glyn, Mills & Company v. East and West India Dock Company*, 6 Q. B. D. 475; 50 L. J., Q. B. 62; 43 L. T. 584; 29 W. R. 316—C. A. Affirmed in H. L., 7 App. Cas. 591; 52 L. J., Q. B. 146; 47 L. T. 309; 31 W. R. 206; 4 Asp. M. C. 580.

— **Of Master.**]—One part of a set of three bills of lading was indorsed to the partner of the vendor, and another to the vendee. The vendee made default in payment, and the vendor obtained delivery of the goods. In an action of detainee against the master, brought by an indorsee from the vendee, it appearing that by usage of trade the captain was not concerned to examine into the rights of different holders, the jury were directed to find a verdict for the defendant. *Fearon v. Bowers*, 1 H. Bl. 364.

Priorities between different Holders.]—K., a miller in England, agreed with F. & Co., a firm in California, that they should send him cargoes of wheat, he accepting bills of exchange against the bills of lading. A cargo was sent, and a bill of lading, with a bill of exchange annexed, was sent to the agents in England of F. & Co., and by them the acceptance of K. to the bill of exchange was obtained. The bill of exchange was subsequently negotiated, and a bill of lading deposited by F. & Co. Six bills of lading were drawn, and one of them was inadvertently, as F. & Co. alleged, sent to K., who deposited it with a bank at Exeter by way of security. K. failed, and a bill was filed by the bank, claiming the cargo as against the holders of the other bill of lading:—Held, that F. & Co. had full right to negotiate the bill of exchange with the bill of lading annexed, and that the bank must at the time when they made an advance on the bill of lading have known that there would be

several bills of lading, and that one could not be negotiated without the other. The English bank had, therefore, no priority. *Gilbert v. Guignon*, 8 L. R., Ch. 16; 27 L. T. 733; 21 W. R. 281.

Where several bills of lading have been signed of different imports, no reference is to be had to the time when they were signed by the captain, but the person who first gets one of them, by a legal title from the owner or shipper, has a right to the consignment. *Caldwell v. Ball*, 1 T. R. 205.

And where such bills of lading, though different upon the face of them, are constructively the same, and the captain has acted *bonâ fide*, a delivery according to such legal title will discharge him from them all. *Ib.*

A master is justified in delivering goods to the holder of the first bill of lading presented. *The Tigress*, B. & L. 38; 32 L. J., Adm. 97; 9 Jur., N. S. 361; 8 L. T. 117; 11 W. R. 538.

The indorsement or delivery of one of a triplicate set of bills of lading does not necessarily operate as an indorsement or a delivery of all. *Ib.*

The mere indorsement and delivery of one of a triplicate set of bills of lading is not necessarily such a negotiation as to preclude a vendor from exercising his right of stoppage in transitu. *Ib.*

A. bought coal of B., to be shipped in a ship chartered by A., payment in cash against bill of lading in the hands of B.'s agent. Before shipment A. sold to C., and at the time of both sales the coal was unascertained. The coal was shipped, and three bills of lading signed for delivery to A. or order; one only was stamped and retained by B., another was sent to A. Not being paid, B. sent the stamped bill of lading to D., and the captain delivered the coal to him:—Held, that C. had no right of action against D. *Moakes v. Nicholson*, 19 C. B., N. S. 290; 34 L. J., C. P. 273; 12 L. T. 573.

Where the consignor of goods abroad advised the consignee by letter that he had chartered a ship on his account, and inclosed him an invoice of the goods laden on board, which were therein expressed to be for account and risk of the consignee, and also a bill of lading, expressing the delivery to be made to order, &c., he paying freight for the goods according to charterparty; and the letter of advice also informed the consignee that the consignor had drawn bills on him at three months for the value of the cargo:—Held, that the invoice and bill of lading sent to the consignee, and the delivery of the goods to the captain, vested the property in the consignee, subject only to be divested by the consignor's right to stop the goods in transitu in case of the insolvency of the other. *Walley v. Montgomery*, 3 East, 585.

The consignor's agent having obtained possession of the cargo under another bill of lading, and having refused to deliver it up unless the consignee would make immediate payment, which he declined doing, but offered his acceptances at three months in the manner before stipulated:—Held, that the consignee might maintain trover against such agent without having tendered payment of the freight either to him or the captain, the agent having possessed himself of the goods wrongfully. *Ib.*

When Jus disponendi Reserved.]—B. sold to

A. wheat, the price to be paid by bankers' draft on London at two months, to be remitted on receipt of invoice and bill of lading, which B. shipped by order of A., to be carried to M., for the account and at the risk of A., there to be delivered to A.; B. delivered the wheat to the master of the vessel, who took possession of it; the master signed a bill of lading to deliver the wheat to the order of B., who indorsed such bill of lading to A., and made an invoice, and sent the invoice and bill of lading to A., in a letter, requiring A. to remit in course; which letter, with the invoice and bill of lading, was received by A. A. having received the bill of lading and invoice, and having failed to remit the bankers' draft, B. assumed to revoke and rescind the sale, and caused the wheat to be stopped in its passage to A.:—Held, that, by the delivery of the wheat to the master of the vessel, for the account and at the risk of A., and the transmission of the indorsed bill of lading, B. had so parted with the property and right of possession as not to be entitled to intercept the delivery. *Wilmshurst v. Bouker*, 7 M. & G. 882; 8 Scott, N. R. 571; 12 L. J., C. P. 475—Ex. Ch.

The plaintiff, a merchant at Leeds, contracted with the London partner of a firm, carrying on business as merchants at London and Odessa, for the purchase of linseed, to be paid for half by drafts on the buyer, at three months from the time of advice of the sale reaching Odessa, and the remainder at three months from the date of shipment. The London partner forwarded the contract to the Odessa partner, and the latter drew upon the plaintiff two bills of exchange on account of the linseed, which were accepted and paid when due. In order to fetch the linseed, the plaintiff chartered a vessel, which was to proceed with an outward cargo to Odessa, and there take on board, from the agents of the freighter, the linseed, and being loaded, proceed to Hull, and deliver the same to the order of the freighter, on being paid freight. The vessel having arrived at Odessa, the master applied for the linseed, and produced a copy of the charter-party, when he was informed that the cargo should be shipped in time. A letter was also sent by the Odessa partner to the London partner, informing him of the arrival of the vessel, and stating that a portion of the linseed was ready for her. The Odessa house commenced loading the vessel; but not being able to procure the entire quantity of linseed the master consented to receive wheat in substitution, which was accordingly shipped. When the loading of the linseed was completed, the Odessa partner wrote to the London partner, stating that he should have the bill of lading by the next post. The Odessa partner afterwards procured the master to sign bills, making the goods deliverable "unto order or to assigns," and indorsed the bills of lading for value to a third person, who transferred them to the defendant:—Held, that there was no such delivery of the goods as to vest the right of property or possession in the plaintiff. *Ellershaw v. Magniac*, 6 Ex. 570.

B. & Co., merchants at Liverpool, sent orders to M. & Co., merchants of Charleston, to ship on account of B. & Co. cotton for the homeward voyage of their ship, the Charlotte. M. & Co. accordingly made considerable purchases of cotton, and shipped it on board the vessel of B. & Co. The master signed the bill of lading of the cotton

to be delivered at Liverpool, "to order, or to our assigns, paying for freight for the cotton nothing, being owners' property;" and M. & Co. indorsed the bill of lading, "Deliver the within to the Bank of Liverpool, or order." M. & Co. informed B. & Co. that they had drawn bills upon them for the cargo on their account, by the Charlotte, and desired them to insure the cotton. M. & Co. also sent to B. & Co. an abstract invoice, which stated that the cotton was shipped by M. & Co., on board the Charlotte, for Liverpool, "by order and for account of B. & Co. there, and addressed to order." M. & Co. afterwards sent a full invoice, stating that the cotton was shipped for Liverpool "by order and for account of B. & Co. there, and to them consigned." M. & Co. not having sufficient funds of B. & Co. to pay for the cotton, sold the bills to a bank at Charleston, and delivered to the bank the bill of lading so indorsed, as a security for payment of the bills, which were dishonoured and taken up by M. & Co. B. & Co. became bankrupts before the arrival of the vessel, and on its arrival M. & Co. by their agent claimed to stop the cargo in transitu, and it was afterwards stowed in the warehouse of the defendants:—Held, first, that the property in the cotton did not vest absolutely in B. & Co., notwithstanding the delivery on board their ship, for by the terms of the bill of lading M. & Co. reserved to themselves a *ius disponendi* of the goods which the master acknowledged by signing the bill of lading, making the cotton deliverable to their order or assigns, although by so doing the master might have exceeded his authority. *Turner v. Liverpool Dock Trustees*, 6 Ex. 543; 20 L. J., Ex. 393—Ex. Ch.

Held, secondly, that M. & Co. did not by their indorsement and delivery of the bill of lading to the bank divest themselves of their property in or possession of the goods. *Id.*

When by a bill of lading goods are made deliverable to the shipper, or his order, and not to the consignee, the *ius disponendi*, or control over the property in the goods shipped, remains with the shippers, although the invoice states that the goods were shipped "on account of and at the risk of" the consignee; such statement being not conclusive, of itself, that the right to the possession of, as well as the property in, the goods was intended to be unconditionally passed to the consignee. *Shepherd v. Harrison*, 5 L. R., H. L. 116; 40 L. J., Q. B. 148; 24 L. T. 857; 20 W. R. 1.

The burthen of shewing the existence of a different state of things lies on the person who contradicts what would be the ordinary legal conclusion from the transaction. *Id.*

When a vendor for his own protection takes and keeps a bill of lading making the goods sold deliverable to his own order, and the goods are deliverable by the contract of sale on certain conditions, the vendor thereby preserves a hold over the goods until the conditions are fulfilled and the bill of lading handed over, or until the vendee offers to fulfil the conditions; and such a hold confers, not only a right to the possession of the goods, but also a power to dispose of them, at least so long as the vendee continues in default. *Ogg v. Skuter*, 1 C. P. D. 47; 45 L. J., C. P. 44; 33 L. T. 492; 24 W. R. 100—C. A. Reversing 10 L. R., C. P. 159; 44 L. J., C. P. 161; 32 L. T. 114; 23 W. R. 319.

Imperfect Assignment by Indorsee.]—The

delivery of a bill of lading indorsed puts it in the power of the indorsee to transfer the property to a bona fide purchaser for a valuable consideration, and deprives the original owner of any right of stoppage in transitu; but, as between the original parties, the consignor and consignee, the question, whether the property passed, will depend upon what the real contract was. *Jenkyne v. Ussborne*, 8 Scott, N. R. 506; 7 M. & G. 678; 13 L. J., C. P. 196.

A., of London, had ordered beans of B. & C., of Leghorn, through D., their agent. B. & C. shipped more than the quantity ordered, and drew two bills on A.—one for the quantity ordered and the other for the residue; and they transmitted those bills to A. through D., with a letter of advice and an indorsed bill of lading for the whole cargo. A. accepted the bill for the beans ordered, but declined to take the residue or to accept the bill drawn against them. D. consented to take the residue, and A. thereupon wrote a letter to him acknowledging such residue to be his, and inclosed an order to the captain to deliver them to D. D. thereupon handed over the bill of lading to A. D. accepted the bill drawn against the residue of the cargo, and paid it at maturity. Before the arrival of the ship, D. sold the residue to E., who accepted a bill for the amount drawn by B., who happened to be in London, and handed to E. A.'s letter and delivery order. E. afterwards applied to F. for an advance of cash, and handed over to him such letter and delivery order; and F. gave his acceptance to E. for the amount of cash required. Before E.'s acceptance became due, and before the arrival of the ship, E. stopped payment:—Held, that D. might stop the residue not taken by A. in transitu, and that the delivery order given by A. was not equivalent to a bill of lading. *Ib.*

Where no Property in Indorser.]—Unless the indorser of a bill of lading really and bona fide has property in the goods at the time of indorsing it, the Bills of Lading Act (18 & 19 Vict. c. 111) passes no property to the indorsee, and upon the intervention of the true owner the latter is entitled to receive the goods from the shipowner, who is thereupon relieved from the liability of delivering them according to the bill of lading. *Finlay v. Liverpool and Great Western Steamship Company*, 23 L. T. 251.

Knowledge of Assignee of previous Transfer.]—If A. has an equitable title to goods on board a ship, and B., knowing of such a title, gets an indorsement of the bill of lading, he cannot recover such goods in an action of trover but the captain will be justified in delivering the goods to A. *Dick v. Lumden*, Peake, 189.

Wrongful Delivery under, by Captain.]—The consignor of goods abroad, upon a receipt of orders from a correspondent here, shipped goods on account and at the risk of the consignee, and took bills of lading from the captain, making the goods deliverable to the consignor's own order, and transmitted one of such bills undorsed with the invoice to the consignee, inclosed in a letter, informing him that he had drawn upon him for the amount, which he doubted not would meet due honour, and close the account; and the consignor, by way of precaution, also sent another bill of lading indorsed to his own agent:—Held,

that upon the shipment, on account and at the risk of the consignee, the property in the goods vested in him, subject only to be divested by the consignor's stopping them while in transitu, and that upon the arrival of the goods, the consignee having obtained possession of them from the captain by the production of his indorsed bill of lading, the property became absolute in the consignee, however wrongfully parted with by the captain without authority from the shipper, and however liable the captain might be to him on that account. *Cox v. Harden*, 4 East, 211; 1 Smith, 20.

c. Conditionally—Drawn against Bills of Exchange.

Effect of.]—P. shipped 600 tons ofumber upon a vessel chartered for the plaintiff. The bill of lading made the umber deliverable to the order of P. or assigns. The plaintiff insured the umber. A bill of exchange drawn by P. on the plaintiff, which had been discounted by the defendants, to whom the bills of lading had been transferred, having been refused acceptance, a second bill was drawn by P. to the order of C. on the plaintiff, and was given to the defendants in exchange for the first bill, upon the terms that the plaintiff should accept and pay the second bill against the delivery of the bill of lading. The umber and the bill of exchange reached their destination at the same time, but the plaintiff declined to accept the bill. The umber was, therefore, entered at the custom house in the defendants' name. Subsequently the plaintiff tendered the amount of the bill of exchange and demanded the bill of lading, but the defendants refused to give up the bill of lading; the plaintiff offered a guarantee for the freight, which offer was not accepted by the defendants, and they sold the cargo:—Held, in an action by the plaintiff for the value of the umber so sold by the defendants, that the property in the umber passed to the plaintiff, and therefore that the plaintiff was entitled to recover. *Mirabita v. Imperial Ottoman Bank*, 3 Ex. D. 164; 47 L. J., Ex. 418; 38 L. T. 597.

K. & Co., merchants in New Orleans, purchased with their own money corn, as agents for the plaintiff in England, for the price of which they drew bills of exchange upon the plaintiff, which he accepted. The corn was shipped under bills of lading, making it deliverable to K. & Co. or their order, and invoices and a letter of advice were forwarded to the plaintiff, stating that the corn was shipped on his account. The bills of exchange drawn upon the plaintiff were purchased for their full amount by the defendant, of K. & Co., who indorsed and delivered to them the bills of lading as a security for the due payment of the bills of exchange, with a power of sale in case of nonpayment. On the day when the bills of exchange fell due, the plaintiff offered payment to the holder of them, but the bills being accidentally mislaid, the money was not then received, but he was desired to pay the following morning, which he was unable to do: and the bills had never, in fact, been paid. The defendant having sold the corn under the power, the plaintiff brought trover:—Held, that he could not recover, as by the indorsement of the bills of lading to the defendant a special property passed to him in the corn, subject to which the plaintiff had a general property by the invoice and letter of advice, and

that the offer of payment by the plaintiff did not discharge the plaintiff from his duty to pay the bills before the right to the possession of the corn attached. *Jenkyns v. Brown*, 14 Q. B. 496; 19 L. J., Q. B. 286; 14 Jur. 505.

The plaintiffs, merchants at New York, by direction and on account of B., forwarded to the defendant, a commission agent at Hull, employed by B., the invoices and bills of lading of two cargoes, against which they drew upon the defendant bills which he accepted and paid. The defendant sold the cargoes, which did not realize enough to cover his acceptances. The plaintiffs afterwards, and by direction of B., forwarded to the defendant the invoice and bill of lading of another cargo which had been purchased by B. with money supplied by the plaintiffs, and the bills of lading of which had been specially indorsed to them as a security, and were by them specially indorsed to the defendant; the plaintiffs at the same time stating that they had, by direction of B., drawn upon the defendant for part of the price. The defendant, without knowing that the plaintiffs had made advances to B., took the bill of lading, disposed of the cargo, and placed the proceeds to the credit of B.:—Held, that the defendant was not bound as between himself and the plaintiffs to accept the bills drawn against the last cargo, because no privity could arise between the plaintiffs and the defendant except by express contract, and the indorsement of the bill of lading by the plaintiffs to the defendant, and his receiving it and disposing of the cargo did not, under the circumstances, create such a contract. *Depperman v. Hubbersty*, 17 Q. B. 767.

A. consigned goods to B. abroad, and ordered a cargo in return, for which he sent his own ship. The return cargo was delivered to A.'s captain, B. stating it to be "on A.'s account, as A.'s own goods, and to be delivered to A." The return cargo consisting of more goods than the proceeds of those consigned to B., B. drew bills on A. for the difference, which he sent to his agent with a bill of lading drawn in blank, and desiring the agent, in case of A.'s refusal to accept the bills, to indorse the bill of lading to C.; A. refused to accept the bills, and the bill of lading was accordingly indorsed to C. The ship arrived, and C. demanded the cargo, as indorsee of the bill of lading; the captain, however, refused, and delivered them to A., who deposited them with D. as his warehouseman; D. then received notice from B. to hold the goods for B. as his property; in consequence of which D. refused to redeliver them to A. In an action of trover by A. against D.:—Held, that D. was not estopped by having received the goods as warehouseman of A. from setting up the claim of a third person as a defence, supposing that claim to be a good one, and that though the goods might have been delivered to the captain, on condition of A.'s accepting the bills, yet, as no such condition was imposed at the time of the delivery, that the delivery was complete, and vested the property absolutely in A. *Ogle v. Atkinson*, 1 Marsh. 323; 5 Taunt. 759.

A continental bank, having contracted to sell and ship 1,400 quarters of rye, to be paid for by an acceptance at three months, put the rye on board the Agatha. The vessel proved to be capable of containing from 200 to 300 quarters more grain than the quantity shipped, and therefore the bank filled up the vacant space with

maize. One bill of lading only was given for the cargo, and the bank wrote on the 24th April to the purchasers, with the invoices and drafts: "The maize is on the same bill of lading as the rye . . . as there would, no doubt, be a loss on the maize, we presume you will wish to leave it for account of shippers; but if you will accept the bill we will get an undertaking from the bank to hold you harmless for so doing." The purchasers, who had made a sub-sale of the cargo, replied: "The drafts and invoices of this cargo are to hand, and we observe that the bills of lading are in the hands of the . . . bank. We think . . . we are entitled to ask a guarantee from the bank that the Agatha shall deliver the weight specified in the invoice. Would you have the kindness to ask the bank for this, and telegraph to us . . . their acquiescence, or the contrary. We would be obliged also by a copy, or the original, of the charterparty, and copy of the bill of lading for our government. We leave, as you suggest, the maize to the shippers; the transaction in rye is a very bad one. We return you inclosed draft invoices of maize." On the 8th May the purchasers refused to accept the bill of exchange for the rye, upon the ground that the bank had not given them a proper bill of lading. In an action for such non-acceptance:—Held, that the purchasers had, by a new agreement, waived any objection to the bill of lading in respect of the maize being included therein, and were therefore liable. *Imperial Ottoman Bank v. Cowan*, 31 L. T. 336—Ex. Ch.

In 1845, the defendants, commission agents in London, wrote to the plaintiffs, merchants at Madras, as follows: "At the request of K. & L. of Glasgow, we beg to open a credit in your favour to the extent of 1,500*l.*, to be applied to the execution of an order they have given you for Madras handkerchiefs, and for costs of which, as produced, you draw on us at the customary date, on forwarding bills of lading to our order." In consequence of this letter, two orders given by K. & L. were executed by the plaintiffs, who forwarded the goods and bills of lading to the defendants, and they accepted and paid bills drawn on them in accordance with the letter. In February, 1847, K. & L. wrote to the plaintiffs, inclosing patterns for a third order, and saying, "You will draw for cost, and consign goods as before." The plaintiffs executed this order, and on the 21st of August shipped the goods on account of K. & L., and sent to the defendants the invoice and bill of lading inclosed in a letter, saying, "We have, as usual, drawn upon you at six months for the equivalent of the amount of invoice." The bill of lading stated the goods to have been "shipped by the plaintiffs, and to be deliverable to the defendants or their assigns, on payment of freight." The invoice stated that the goods were consigned to the defendants on account and risk of K. & L. The letter containing the bill of lading and invoice was received by the defendants on the 26th of August, and the goods arrived in London on the 21st of October. On the same day the plaintiffs' agent received a bill drawn against the goods, and presented it to the defendants for acceptance, but they refused to accept it. On the 27th of October, K. & L. stopped payment. The goods were received by the defendants under the bill of lading, and sold, and the proceeds retained by them. On the 4th of March, 1848, the plaintiffs gave the defendants notice

that they claimed to stop the goods in transitu, the defendants having refused to accept the bills; and the plaintiffs subsequently brought an action to recover the proceeds of the sale:—Held, first, that it was a question for the judge, and not for the jury, to decide whether, under the circumstances, the property in the goods vested absolutely in K. & L., or merely conditionally on the acceptance of the bill by the defendants. *Key v. Cotesworth*, 7 Ex. 595; 22 L. J., Ex. 4.

Held, secondly, that the contract was not subject to the condition, either precedent or subsequent, that the defendants should accept the bill, but that the property in the goods vested absolutely in K. & L. upon the delivery on board the ship, and transmission of the bill of lading to the defendants. *Id.*

Held, also, that if the plaintiffs had intended to preserve their right of property in the goods until the bill was accepted, they should have transmitted the bill of lading indorsed in blank to an agent, to be delivered over only in case the bill was accepted. *Id.*

Equitable Title—Effect of Subsequent Conduct.]—N., a timber dealer in Sweden, had transactions with D., a factor in London, who sold timber on his account on a *del credere* commission. D. had sold for him three cargoes of timber. N., on the 29th of September, 1853, wrote to D. a letter, in which he expressed a hope to be able, in a few days, to send the shipping documents of all the cargoes. Two only of those cargoes arrived. On the 6th of October, 1853, N. wrote to D., inclosing invoices of timber shipped on board three vessels, and made out an account in which N. appeared to be a creditor for 1,312*l.*, and he drew a bill to that amount on D. On the same day N. wrote to H. & Co., stating the value of the cargoes, and asking for three acceptances to the amount of 1,300*l.* He inclosed his letter to D., and the bill and the shipping documents, with directions to H. & Co. to deliver these last to D., on condition that D. accepted the bill for 1,312*l.*, acknowledged the correctness of the account current, and admitted that the cargoes agreed for had been forwarded. These conditions were communicated by H. & Co. to D., who called the whole affair a regular swindle. D., after hesitation, accepted the bill, but he obtained possession of the shipping documents by a statement that he wanted them to compare with the invoices, and would return them if from any cause he did not accept the bill. On this H. & Co. accepted N.'s three bills for 1,300*l.* D. did accept the bill for 1,312*l.*, but refused to return the shipping documents, and utterly disregarded the other conditions on which they were to be delivered to him:—Held, that though he might have a prior equitable claim to these shipping documents, he had not properly insisted on it, and that he had thereby misled H. & Co., who had a legal right to recover them from him. *Hoare v. Dresser*, 7 H. L. Cas. 290; 28 L. J., Ch. 611; 5 Jur., N. S. 371; 7 W. R. 374.

Carrier Setting up Jus tertii.]—A., who resided at Manchester, contracted to buy of B., at Dumfries, a quantity of oak-bark, to be shipped for delivery at Liverpool. B. accordingly shipped the bark, to be delivered at Liverpool to the defendants, who were wharfingers and carriers there, to be by them forwarded to A., at

Manchester. The bark was to be paid for in cash, and B. sent a bill of lading, making it deliverable to A. or his assigns, together with a bill of exchange payable on demand, through his bankers, to the Manchester and Salford Bank, with instructions to present the bill for acceptance. The bank at Manchester was unable to find A., and accordingly they returned the bill of lading and draft to B. Before the bill of lading had been so returned, B., who was at Liverpool when the bark arrived there, believing, from the representations of an agent of the plaintiff (who had bought the bark of A.), that the bill of lading had been duly handed over to A., assented to the bark being delivered to the defendants for the purpose of its being carried to Manchester for the plaintiff; but, upon subsequently discovering that A. had not got the bill of lading or paid for the bark, B. claimed and received it from the defendants:—Held, that, under the circumstances, the property in the bark never passed to A., and consequently that B. had a right to countermand the delivery; and that it was competent to the defendants, notwithstanding that they had received the bark, to be carried for the plaintiff, to set up the title of B. in an action brought against them by the plaintiff. *Sheridan v. New Quay Company*, 4 C. B., N. S. 618; 28 L. J., C. P. 58; 5 Jur., N. S. 248.

Accompanying Bills of Exchange.]—When a bill of lading, and a bill of exchange to cover the goods included in the bill of lading, are sent in a letter to a vendee of the goods, it is a well-understood rule that the bill of exchange must be accepted, or the bill of lading cannot be retained. *Shepherd v. Harrison*, 5 L. R., H. L. 116; 40 L. J., Q. B. 148; 24 L. T. 857; 20 W. R. 1. Affirming 4 L. R., Q. B. 493; 38 L. J., Q. B. 177—Ex. Ch.; and 4 L. R., Q. B. 196; 38 L. J., Q. B. 105.

When the bill of exchange is not accepted, but the bill of lading is retained, the bill of lading, acquired in that manner, gives no right of property to the person so acquiring it. *Id.*

It is not necessary for the shipper to advise the consignee expressly that he is not to use the bill of lading unless he accepts the bill of exchange. *Id.*

Where A. having sent orders to his correspondents abroad to ship cargoes of wheat, afterwards withdrew his orders, but his correspondents, nevertheless, shipped a cargo of wheat on his account and at his risk, sending with it an indorsed bill of lading enclosed to A., informing him of their having drawn bills on their agents in town for the amount, and requesting him to furnish funds for their acceptance, which bills were afterwards dishonoured, A. giving orders not to accept them:—Held, that no property vested in A. to enable him to receive the goods, he not having accepted the bills drawn upon the agents in town. *Brandt v. Bowlby*, 2 B. & Ad. 932.

Proof in Bankruptcy—Amount Due on Bills.]

—A party accepted bills to meet goods consigned to him. The acceptances were made payable "on delivery of the bills of lading." The bills of lading remained, with the bills of exchange, in the possession of the bank who had discounted the latter for the drawers:—Held, on the bankruptcy of the acceptor, that the goods

were part of his estate, which the bank held as security for their debt, and therefore that the bank could only prove for the amount due on the bills of exchange after deducting the value of the goods. *Brett, Ex parte, Howe, In re*, 6 L. R., Ch. 838; 40 L. J., Bk. 54; 25 L. T. 252; 19 W. R. 1101.

Forgery of Bill of Lading—Warranty.—A bill, drawn upon the plaintiff by his correspondent abroad against bill of lading, was sent through bankers, for presentation and collection. The bank presented the bill to the plaintiff with this memorandum: "The bank holds bill of lading and policy for 251 bales of cotton, per William Cummings." The plaintiff accepted the bill without asking to see the bill of lading, and afterwards retired it before it was due, paid the money and received the bill of lading, which proved to be a forgery. Upon a bill against the bank to recover back the money so paid upon the bill of exchange:—Held, that the memorandum did not amount to a guarantee by the bank that the so-called bill of lading was genuine; and that the plaintiff had no equity to recover back the money. *Leather v. Simpson*, 11 L. R., Eq. 398; 40 L. J., Ch. 177; 24 L. T. 286; 19 W. R. 431.

A bank presented a bill of exchange to the drawees for their acceptance, accompanied by a ticket representing that the bank held bills of lading to cover it. The drawees thereupon accepted the bill, relying on the statement that the bank held bills of lading which both parties thought to be genuine. The bills of lading had been forged by the drawer of the bill of exchange:—Held, that the drawees were not entitled to demand from the bank genuine bills of lading before paying the amount of the bill of exchange. *Baxter v. Chapman*, 29 L. T. 642.

Right on Transfer.—Corn merchants in California agreed to send cargoes of wheat to a miller in England, the reimbursement to be by his acceptance against bill of lading. The corn merchants shipped a cargo, and made out the bill of lading in six parts. Three parts, with corresponding bills of exchange drawn on the miller for the price of the cargo, were indorsed by the corn merchants, and transferred to a Californian bank for valuable consideration. These bills of exchange were, with the bills of lading annexed, accepted by the miller. One indorsed part of the bill of lading was inadvertently sent by the corn dealers to the miller, and by him transferred to an English bank for valuable consideration. The bills of exchange were not met by the miller:—Held, that the corn merchants were entitled to deal as they did with the cargo by transferring the bills of lading; that the English bank could not, under the circumstances, claim as holders of the bill of lading without notice; and that the English bank had no priority. *Gilbert v. Guignon*, 8 L. R., Ch. 16; 27 L. T. 733; 21 W. R. 281.

B., a Dantzic merchant, sold wheat to W., an Amsterdam merchant, to be paid for by drafts, to be drawn by B. on C., a London merchant, against bills of lading. W. was in fact, though that was not disclosed to B., acting for P., another London merchant. W. wrote to C., opening a credit on account of P., in favour of B., to be drawn on against bills of lading, P. to

be debited with the amount. B. forwarded a bill of lading, indorsed by him in blank to C., in a letter, stating that, "according to instructions from W., we hand you bill of lading, and request you to follow his instructions respecting the document, by whose order and for whose account we draw on you; which draft we recommend to your kind protection." On the day after C.'s receipt of this letter, the draft was left with C. for acceptance; P. on the same day, being in actual possession of the bill of lading, pledged it with G., who *bonâ fide* gave value for it. On the evening of the same day, P. was arrested on a criminal charge, and he afterwards became bankrupt. W. also failed. B. stopped the cargo in transitu. G. brought trover against him for the cargo:—Held, that B., *primâ facie*, had the right to stop in transitu, and that G., though a *bonâ fide* transferee for value of the indorsed bill of lading from P., was not entitled to the cargo, unless P. had, not merely possession of the bill of lading, but a right to transfer it, inasmuch as bills of lading are not negotiable to the same extent as bills of exchange. *Gurney v. Behrend*, 3 El. & Bl. 622; 23 L. J., Q. B. 265; 18 Jur. 856.

But held, that C. was entitled to hand over the bill of lading to P., the letter from B. not imposing any condition to prevent C. from doing so. *Id.*

By a bill of lading, goods were deliverable to S. if he should accept and pay a bill of exchange; if not, to the holder of the bill of exchange; S. accepted the bill, and indorsed the bill of lading for a valuable consideration, but did not pay the bill when due:—Held, that upon its dishonour the property in the goods vested in the holder of it, and that he might maintain trover for the goods against the indorser of the bill of lading. *Barrow v. Coles*, 3 Camp. 92.

Appropriation of Policy Moneys.—Bills were drawn against cotton consigned to England. The cotton was hypothecated, by means of a letter in favour of a bank which bought the bills; at the same time bills of lading and a policy were handed to the bank. The letter contained a power to keep insured, and a power to sell the cotton in case of non-payment, and to apply any balance, after satisfaction of the bills, towards other debts due from the consignor to the bank:—Held, that money received on the policy could not be applied in payment of anything beyond what was due on the bills. *Latham v. Chartered Bank of India*, 17 L. R., Eq. 205; 43 L. J., Bk. 612; 29 L. T. 795.

Other Conditions—Authority of Captain.—The plaintiffs were indorsees for value of bills of lading indorsed to them for value by M. under the following circumstances:—The defendants had agreed to buy of M. all the ore of a certain mine, the ore to be shipped at a Spanish port by him, *f. o. b.*, on vessels chartered by the defendants or by him, and to be paid for by bills of exchange against bills of lading on the execution of a charter, and on a certificate that there was enough iron in dock to load the vessel chartered. On being so paid for, the ore was to be the property of the defendants. Some cargoes of the ore having been taken, and all of it paid for, the Trowbridge, a vessel chartered by the defendants, was loaded with ore by M., who had, however, no intention to ship it for them, and previously informed them thereof. He then presented to the

captain the bills of lading, which stated that the shipment was by S., and made the cargo deliverable to the order of S.; but no such person as S. existed. The captain, being bound by the charter to sign bills of lading as presented, signed the bills. M. indorsed the name of S. and his own name on the bills of lading, and then pledged them to the plaintiffs:—Held, that they were entitled to the ore represented by such bills. *Gabarrow v. Kreeft, Kreeft v. Thompson*, 10 L. R., Ex. 274; 44 L. J., Ex. 238; 33 L. T. 365; 24 W. R. 146.

Another vessel, the *Macedonia*, having been also sent by the purchasers of the ore, under a charter-party, by which the shipowner agreed to deliver the cargo to the freighters or assignees, but which did not authorize the captain to sign bills of lading as presented, she was loaded by M., who at the commencement of the loading intended that it should be in fulfilment of his contract. He, however, obtained bills of lading as in the former case, and indorsed them to a third person, to whom the cargo was delivered. In an action by the purchasers of the ore against the shipowner for non-delivery of the cargo to them, according to the charter-party:—Held, that as the cargo had been delivered according to the bills of lading, the defendant was not liable. *Ib.*

As between Vendor and Purchaser of Goods.]

—C. agreed with P. to ship on board a vessel a cargo of fresh-water ice, and to despatch the vessel with all speed to any ordered port in the United Kingdom, "the vendor forwarding bills of lading to the purchaser, and upon receipt the purchaser takes upon himself all risks and dangers of the seas;" and purchaser agreed to buy and receive the ice on its arrival, and pay for it in cash on delivery, at the rate of 20s. a ton of 20 cwt., weighed on board during delivery. The vessel was lost during the voyage by risks and dangers of the seas within the meaning of the agreement, and after the receipt by the purchaser of the bills of lading. The vendor having brought an action against the purchaser to recover the value of the cargo:—Held, that he was entitled to recover. *Castle v. Playford*, 7 L. R., Ex. 98; 41 L. J., Ex. 44; 26 L. T. 315; 20 W. R. 440—Ex. Ch.

In January, 1868, C. & Co. contracted to purchase 1,400 quarters of rye, then at Salonica, from the plaintiffs, at 41s. per quarter, free on board, March shipment, the plaintiffs finding the vessel. The plaintiffs having chartered the *Agatha*, the captain on loading her informed the bank that she would take from 200 to 300 quarters of rye beyond that ordered by the defendants. The plaintiffs, being unable to obtain any rye, purchased seventy quarters of maize to make up the cargo. The rye and maize were shipped on board, and one bill of lading was made out for both rye and maize and sent to the plaintiffs. The maize was then offered to the defendants, and two invoices and two bills of exchange were made out, one for the rye, the other for the maize. The defendants, who refused to have anything to do with the maize, had in the meantime sold the rye to C. But C., on finding there was not a clean bill of lading, refused to accept either it or the bill of exchange. The plaintiffs on being informed of this informed the defendants that they would discharge the maize from the ship at their own expense, and shortly afterwards indorsed the bill of lading as follows: "Deliver

the rye to Messrs. C. & Co. or their order, and the within-mentioned maize to us or our order. The delivery of the maize, and the freight, and all charges thereon to be at our expense, and the maize to be delivered so as not to interfere with the working and delivery of the rye."—Held, that the delivery of a clean bill of lading was not a necessary condition of the contract, the plaintiffs having been ready to pay all the expenses incident to the maize being included in the bill of lading, and also absolutely and unconditionally to deliver the rye in time; and also that there was a sufficient delivery to entitle the plaintiffs to recover for non-acceptance. *Imperial Ottoman Bank v. Cowan*, 29 L. T. 52; 21 W. R. 770. Affirmed in Ex. Ch., 31 L. T. 836.

d. Stoppage in transitu.

Before Assignment.]—The consignor may stop goods in transitu before they get into the hands of the consignee, in case of the insolvency of the consignee; but if the consignee assigns the bills of lading to a third person for a valuable consideration, the right of the consignor as against such assignee is divested. *Lickbarrow v. Mason (in error)*, 4 Bro. P. C. 57; 5 T. R. 367, 683; 6 T. R. 131; 2 T. R. 63; 1 H. Bl. 357; 2 H. Bl. 211. And see 6 East, 20.

Without Notice of Consignee's Insolvency.]

The consignor loses his right of stoppage in transitu upon the insolvency of the consignee, when, prior to the insolvency, the bill of lading has been transferred, by indorsement, to a purchaser for value bonâ fide, and without notice of the consignee's insolvency, under 18 & 19 Vict. c. 111. *Kemp v. Canavan*, 15 Ir. C. L. R. 216.

The right of an unpaid consignor to stop in transitu is not taken away by an assignment of the bill of lading, for a valuable consideration, to a third person, with notice of the insolvency of the consignee. *Virtue v. Jewell*, 4 Camp. 31.

Mere Delivery to Consignee.]—The delivery by the consignor of a bill of lading to the consignee is not such a transfer of the property as will preclude him from stopping the goods in transitu. *Tucker v. Humphrey*, 4 Bing. 516; 1 M. & P. 378, n.

The unpaid vendor may stop goods in transitu before they come to the hands of the vendee's factor; although such factor has the bill of lading indorsed to order in his hands, and is under an acceptance to the vendee on a general account. *Patten v. Thompson*, 5 M. & S. 350. See 5 & 6 Vict. c. 39.

Indorsement Bonâ fide.]—A bill of lading for the delivery of goods to order and assigns is a negotiable instrument, which by indorsement and delivery passes the property in the goods to the indorsee, subject only to the right of the unpaid vendor to stop them in transitu. *Pease v. Gloaghe*, 1 L. R., P. C. 219; 35 L. J., P. C. 66; 12 Jur., N. S. 677; 15 L. T. 6; 15 W. R. 201; 3 Moore, P. C. C., N. S. 556; *S. C. nom. The Marie Joseph*, B. & L. 449.

The indorsee may deprive the vendor of this right by indorsing the bill of lading for a valuable consideration, although the goods are not paid for, even if bills had been given which are certain to be dishonoured, provided the indorsee for value has acted bonâ fide, and without notice. *Ib.*

If the vendee of goods having received from the vendor an indorsed bill of lading, making the goods deliverable to order or assigns, indorses and delivers it to a banker as a security for past and future advances, the banker's claim upon the goods for all such advances will prevail against a claim of the unpaid vendor to stop the goods in transitu. *Ib.*

The vendee of goods having received from the vendor an indorsed bill of lading, making the goods deliverable to order or assigns, and having given an acceptance for the price, returned a bill of lading to the vendor, to hold as security against the acceptance until the goods were sold or the vessel arrived, and afterwards by fraudulent representation again obtained possession of the bill of lading from the vendor, and negotiated it by indorsement and delivery to a third person, who took it without notice of the fraud:—Held, that the vendee's fraud did not vitiate his power to pass a good title by indorsement, and that the right of such third person under the indorsement should prevail against the claim of the unpaid vendor to stop the goods in transitu. *Ib.*

— **Of One of Set of Three.**—The mere indorsement and delivery of one of a triplicate set of bills of lading is not necessarily such a negotiation as to preclude a vendor from exercising his right of stoppage in transitu. *The Tigris*, B. & L. 38; 32 L. J., Adm. 37; 9 Jur., N. S. 361; 8 L. T. 117; 11 W. R. 538. And see cases *ante*, col. 1305.

When Goods Pledged.—The purchaser of goods (shipped by the vendor) consigned them abroad, and indorsed the bill of lading to a bank as security for an advance. Afterwards and before the arrival of the ship the consignees sold the goods "to arrive" to sub-purchasers, to whom they were delivered. The purchaser having become bankrupt, the unpaid vendor gave notice to the master, after the subsales but before delivery and before payment of the freight, to stop the goods in transitu. The consignees remitted the proceeds of the subsales to the bank, who, after repaying themselves their advance, handed to the trustee of the bankrupt the balance, which was less than the original purchase-money:—Held, that the principles established by *Westzynthius, In re* (5 B. & Ad. 817), and *Spalding v. Ruding* (6 Beav. 376; 12 L. J., Ch. 503) were applicable; that the right of stoppage in transitu was not at an end when the notice was given; and that the vendor was entitled to the balance after satisfaction of the bank's claim. *Kemp v. Falk*, 7 App. Cas. 573; 52 L. J., Ch. 167; 47 L. T. 454; 31 W. R. 125; 5 Asp. M. C. 1—H. L. (E.).

In equity the vendor may, when goods under a bill of lading have been pledged, by giving notice to the pledgee, resume his former interest in the goods, subject to the pledgee's claim, and will be entitled to the residue of their proceeds after the pledgee's demand has been satisfied out of them or to the goods themselves if it be satisfied aliunde, notwithstanding the pledgee may have other demands against the consignee. *Westzynthius, In re*, 5 B. & Ad. 817.

In equity a transfer of goods for valuable consideration by a consignee for a limited purpose, does not destroy the consignor's right of stoppage in transitu, ultra the particular lien of the transferee. *Spalding v. Ruding*, 6 Beav. 376; 12 L. J., Ch. 503.

A. consigned goods to the value of 1,000*l.* to B., who transferred the bill of lading to C. to secure 1,000*l.* B. having become bankrupt, C., as B.'s factor, claimed, as against A.'s title to stop in transitu, a right to retain the whole in satisfaction of a general balance due to him from B.:—Held, that he was entitled to retain the goods, but only against the advance of 1,000*l.* *Ib.*

Retaining Bill of Lading.—When an unpaid vendor shipping goods under a contract of sale takes a bill of lading making the goods deliverable to his order, and retains such bill of lading in his own or his agent's hands for his own protection, he does not reserve the vendor's lien only, in case of the purchaser's making default in payment of the price, but reserves a right of disposing of the goods so long at least as the purchaser continues in default. *Ogg v. Shuter*, 1 C. P. D. 47; 45 L. J., C. P. 44; 33 L. T. 492; 24 W. R. 100—C. A.

Purchase on Account of Third Person.—A merchant who purchases goods on his own credit for another, to whom he indorses a bill of lading of the goods, stands for the purpose of stoppage in transitu in the position of a vendor, and the indorsement by him of one bill of lading to the vendee does not of itself defeat his right to stop in transitu. *The Tigris*, B. & L. 38; 33 L. J., Adm. 97; 9 Jur., N. S. 361; 8 L. T. 117; 11 W. R. 538.

The vendor claiming to stop need not represent to the master that the bill of lading is still in the hands of the vendee. *Ib.*

Assignee of Bill of Lading becoming Partner with Consignee.—If the consignee of goods, to whom the bill of lading was indorsed in blank, assigns it over as a security for acceptances given by the assignee, not amounting to the value of the goods, and afterwards by an agreement between them they become partners in the goods, by which agreement it appears that the consignor has not been paid for them, the assignee of the bill of lading cannot maintain trover against the consignor if he stops the goods in transitu upon the insolvency of the consignee. *Salomons v. Nissen*, 2 T. R. 674.

Sub-Vendee taking Bill of Lading.—If the shipper of goods takes a receipt from the captain, who executes a bill of lading in favour of a sub-vendee, the former may stop the goods in transitu. *Craven v. Ryder*, 2 Marsh. 127; 6 Taunt. 433; Holt, 100.

Custom of Vendors to hold Bills of Lading.—A. having ordered goods from B., a firm at Calcutta, through C., their agent in this country, received an invoice of the goods, with a notice that B. had drawn upon him for the price at six months. On calling at C.'s office, A. was met by C.'s messenger, who handed to him for his acceptance the bill of exchange drawn upon him in respect of the goods, and the bill of lading, which was pinned to the bill of exchange. A. accepted the bill of exchange, and afterwards deposited the bill of lading with E. as a security for an advance, together with a policy of insurance upon the goods effected by himself in his own name, C. having declined to part with the original policy on the ground that it included other goods besides those purchased by A. A. having become bank-

rupt, and unable to take up his acceptance, the goods were claimed by B. and C., on the ground that the bill of lading had been improperly pledged, having come into A.'s hands irregularly, and without their knowledge, and contrary to an alleged custom amongst East India merchants not to part with the bill of lading of goods until the vendee has taken up his acceptances on account thereof:—Held, that the alleged custom of trade was merely exceptional, and was not established as being the usual course of business; and that the title of E., as *bonâ fide* assignee for value, must prevail over any claim by the unpaid vendors. *Coventry v. Gladstone*, 4 L. R., Eq. 493; 37 L. J., Ch. 30; 16 W. R. 304.

7. PLEDGING.

By Owners of Ship and Cargo.—The owner of a vessel, and part-owner of the cargo, sanctioning a pledge by his partners of the bills of lading, which were signed for the delivery of the goods on payment of freight, pledges the goods and the freight of them together, unless the freight is expressed to be excepted. *Grote v. Milne*, 4 Taunt. 133.

Effect of, on Stoppage in transitu.—See *cases ante*, col. 1318.

8. LIEN OF SHIPPING AGENT.

A shipping agent, having a lien on the bill of lading of goods which he has shipped, may, if the lien is not satisfied before they have reached their destination, have the goods brought home in order to retain his lien on them, and is not liable to an action for so doing. *Edwards v. Southgate*, 10 W. R. 528.

9. FORGED.

Bills of Exchange Accepted in Respect of—Rights of Acceptor.—A cotton broker of New Orleans was in the habit of sending cotton over to England, and the plaintiff was in the habit of accepting his bills, in consideration of the assignment to him of bills of lading for the cotton: In 1870, in the course of this business, a bank, to whom two bills of the cotton broker on the plaintiff were indorsed, sent them for the plaintiff's acceptance, and with the bills they sent a memorandum, "The bank holds bills of lading for 504 bales of cotton." The plaintiff thereupon accepted the bills, and retiring them before they became due received the bills of lading, and went to the captain of the ship on his arrival and presented the bills of lading, which turned out to be forgeries:—Held, that, notwithstanding the representation contained in the memorandum sent by the bank, the plaintiff could not call on the bank to repay him the value of the bills. *Leather v. Simpson*, 11 L. R., Eq. 398; 40 L. J., Ch. 177; 24 L. T. 286; 19 W. R. 431.

A bank presented a bill of exchange to the drawees for their acceptance, accompanied by a ticket representing that the bank held bills of lading to cover it. The drawees thereupon accepted the bill, relying on the statement that the bank held bills of lading, which both parties thought to be genuine. The bills of lading had been forged by the drawer of the bill of exchange:—Held, that the drawees were not

entitled to demand from the bank genuine bills of lading before paying the amount of the bill of exchange. *Baxter v. Chapman*, 29 L. T. 642.

XIII. CHARTERPARTY.

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1. STAMPING.

(See 33 & 34 Vict. c. 97, *Sched.*)

Under previous Statutes.—Brokers signed a properly-stamped charterparty as agents for their principals, and then, at the request of the owner of the ship, signed a guarantee as follows: "In consideration of our having signed the charterparty of — as agents of —, we hereby guarantee the due fulfilment of same:—Held, that this document was sufficiently stamped with a sixpenny stamp, as an agreement, and need not be stamped as a charterparty or an agreement for or relating to the freight or conveyance of money, goods, and effects on board a ship, under 5 & 6 Vict. c. 79, s. 2. *Rein v. Lane*, 8 B. & S. 83; 36 L. J., Q. B. 81; 15 L. T. 466; 15 W. R. 345.

A copy of the charter signed by or on behalf of the charterer, though that copy is signed by the shipowner, is a copy, and admissible unstamped, if there is any evidence that the original was stamped. *Smith v. Maguire*, 1 F. & F. 199.

It is for the objector to a copy, even if a charterparty, on the ground that the original was not stamped, to make out that fact; at all events, very slight evidence to the contrary will be sufficient to rebut the objection, and a memorandum on the charter, "the brokers hold the original, stamped," is sufficient. *Id.*

An unstamped charterparty was, within fourteen days allowed, by 5 & 6 Vict. c. 79, s. 21, for stamping such an instrument without payment of a penalty, delivered at the office of the sub-

distributor of stamps at Cardiff, for the purpose of being transmitted to London to be stamped, the proper amount of stamp duty and postage being left with it. The clerk in that office, to whom it was delivered, proved that he sent to London all documents left with him for that purpose, but he had no recollection of the document in question. The clerks in the office in London were unable to say whether or not the document reached their hands, but they said that, if it did, it would, in the usual course, be returned to the district office in the country. The clerk at Cardiff could not say whether the document was returned to him or not, but he stated that, on search being made for it, no trace of it could be discovered:—Held, that this sufficiently raised a presumption that the document was stamped, so as to let in secondary evidence of its contents. *Cloismadeuc v. Carril*, 18 C. B. 36; 25 L. J., C. P. 216; 2 Jur., N. S. 474.

2.-THE CONTRACT.

a. Parties.

Mistake as to.]—Action by charterer on a charterparty. Defence, that the charterparty was made between the defendant and a company, and not the plaintiff. Reply, that the agreement was between the plaintiff and the defendant; that in drawing up the charterparty one of the company's printed forms was used, on which the name of the company appeared as charterers; that by the mistake of the plaintiff and the defendant the company's name was omitted to be struck out, and remained instead of the plaintiff's name; that the charterparty was signed by the plaintiff and the defendant, and it was intended and agreed that the plaintiff should be liable and entitled under it:—Held, that it was unnecessary that the charterparty should be rectified, and that the reply was good. *Breslauer v. Barwick*, 36 L. T. 52.

To an action on a charterparty for not loading, the defendants pleaded, that they entered into the charterparty solely as agents for D., and that, before they signed, it was agreed that they were only to sign as agents, so as to bind D., and not to render themselves liable as principals for the performance of the charterparty, and that they signed it as follows, "For D., T. and H., agents;" they and the plaintiff bona fide believing at the time that they, having so signed, would not be personally liable, and that they had power to bind D., and that he was bound by it, and liable to be sued, and that the plaintiff was inequitably taking advantage of the mistake in drawing the charterparty so as to make the defendants personally liable as charterers, contrary to the intention of the plaintiff and the defendants:—Held, that the plea was good on equitable grounds, and also a good plea at law. *Wake v. Harrop*, 6 H. & N. 768; 30 L. J., Ex. 273; 7 Jur., N. S. 710; 4 L. T. 555; 9 W. R. 788. Affirmed, 1 H. & C. 202; 31 L. J., Ex. 451; 8 Jur., N. S. 845; 7 L. T. 96; 10 W. R. 626—Ex. Ch.

Who entitled to Sue—Principal or Agent.]—In an action on a charterparty executed not by the plaintiff but by a third person, who in the contract described himself as "owner of the ship:"—Held, that evidence was not admissible to shew that such person contracted merely as the plaintiff's agent. *Humble v. Hunter*, 12 Q. B. 310; 17 L. J., Q. B. 350.

A declaration alleged a charterparty to be made "between A., therein described as the owner of the good ship called, &c., of the one part, and S., merchant and freighter, of the other part." The charterparty when produced was expressed to be made between A. of the one part and S., "as agent of the freighter," of the other part, and stipulated that, "being concluded on behalf of another party, it is agreed that all responsibility on the part of S. cease as soon as the cargo is shipped." No principal was named in the charterparty, and it appeared that S. was, in point of fact, himself the real freighter, and not merely an agent in the matter:—Held, that he was entitled to sue as principal for a breach of the charterparty, notwithstanding he had contracted as agent, and that the above stipulation applying only to his character of agent, had not the effect of limiting his responsibility as principal. *Schalmiz or Schmalz v. Avery*, 16 Q. B. 655; 20 L. J., Q. B. 228; 15 Jur. 291.

A contract for the conveyance of goods from Liverpool to Australia was entered into as follows:—"It is this day mutually agreed between J. and R. W., owners of the ship *Jessica*, of the first part, and S. J. C. of the other part," that the ship should be ready by a given day to take on board certain goods, and should proceed therewith to Geelong and there deliver the same; "the rates of freight determined upon by the parties to this agreement are as under," &c., "one-third to be paid in London, on receipt of bills of lading, and the remainder by the Geelong and Melbourne Railway Company, at Geelong;" "goods to be taken on board at Liverpool at ship's expense;" and the agreement was signed "J. and R. W., S. J. C.:"—Held, that S. J. C. was personally bound by this contract and entitled to sue for a breach of it. *Cooke v. Wilson*, 1 C. B., N. S. 153; 26 L. J., C. P. 15; 2 Jur., N. S. 1094.

Whilst a vessel was yet to arrive, the charterer's agents (the consignees of the cargo) appropriated the cargo and indorsed the bill of lading through other persons to the plaintiffs. The ship was delayed and the cargo damaged. The plaintiffs sustained no loss by deterioration, for under their contract they paid for the cargo after deductions settled by arbitration for the damage done to it:—Held, that they were entitled to sue in their own names or even as trustees for the consignees. *The Wilhelm Schmidt*, 25 L. T. 34.

Broker for Commission under.]—A charterparty made between captain and charterers contained a clause providing for payment of commission to the broker for negotiating the charter:—Held, that the broker could not sue in rem under the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), s. 2, sub-s. 1, as he was not a party to the charter. *The Nuova Raffaele*, *Japp v. Durante*, 3 L. R., Adm. 483; 41 L. J., Adm. 37; 24 L. T. 321; 20 W. R. 216.

Liability to be Sued—Principal or Agent.]—The defendants, acting as agents for L., chartered a ship for the conveyance of a cargo of currants from the Ionian Islands. The charterparty was expressed to be made and was signed by the defendants, as "agents to merchants," the name of the principal not being disclosed:—Held, that

evidence was admissible in an action by the ship-owners against the defendants upon the charterparty, of a trade usage, by which, if the name of the principal is not disclosed within a reasonable time, the agents themselves are personally liable. *Hutchinson v. Tatham*, 8 L. R., C. P. 482; 42 L. J., C. P. 260; 29 L. T. 103; 22 W. R. 18.

The plaintiffs and defendants entered into a charter of the ship *R.* to load a cargo of deals. In the body of the charter the defendants were described as follows: "It is this day mutually agreed between Messrs. J. H. & Co., of Newcastle, for owners of the good ship *R.*" The defendants signed the charterparty at the foot, as follows: "For owners, J. H. & Co." A cargo was loaded on board the ship at Hudigval, and the captain signed a bill of lading for it, stating that he had received it in good condition. The cargo was ultimately delivered to the plaintiffs at Gloucester, and was found on delivery to have been injured to the extent of 50l. In an action by the plaintiffs against the defendants for the damage, in a county court, three letters, which had passed between the plaintiffs and the defendants and their solicitors, were admitted, and as soon as the plaintiffs' evidence was closed, the defendants' solicitor objected that there was no evidence against the defendants as principals, and applied for a nonsuit, on the ground that it appeared upon the charterparty that the defendants were not principals but only agents of the owner. The judge overruled the objection, and decided that the defendants were liable as principals. On an appeal:—Held, that there was evidence to support the decision that the defendants were liable as principals. *Adams v. Hall*, 37 L. T. 70.

Action on a contract alleged to have been made by the defendant, to charter a ship for the plaintiff. Proof, that the defendant made a memorandum of charterparty in B.'s name, and purporting to be signed by the defendant as agent of B.; that the defendant had no authority to contract for B., and knew that he had none, and that B. refused to adopt the contract:—Held, that the defendant was not liable as principal in an action on the contract itself, and a nonsuit was entered. *Jenkins v. Hutchinson*, 13 Q. B. 744; 18 L. J., Q. B. 274.

By charterparty it was agreed between the plaintiff, owner of a ship, and the defendants, of London, merchants, that the ship should proceed to T., and there load from the factors of the merchants a full and complete cargo at the merchants' risk and expense, which the merchants bound themselves to ship; and being so loaded should proceed to Memel, and deliver the same on being paid freight, half to be paid on unloading, in cash, and the remainder by good bills on London; thirty running days to be allowed the merchants for loading at T. and discharging at Memel. "By authority of and as agents for S. of Memel, R. and F., J. M. L." (signatures of the defendants and the plaintiff):—Held, that the defendants were contracting parties, and therefore were personally liable for breach of the charterparty. *Lennard v. Robinson*, 5 El. & Bl. 125; 24 L. J., Q. B. 275; 1 Jur., N. S. 883.

A memorandum of charterparty was expressed to be made between "P., of the good ship *C.*, and W., agent for E. W. & Son," to whom the ship was to be addressed. It was signed by W., without any restriction:—Held, that he was per-

sonally liable as charterer. *Parker v. Winlow*, or *Winlo*, 7 El. & Bl. 942; 27 L. J., Q. B. 49; 4 Jur., N. S. 64.

A charterparty was made in the following terms: "It is this day mutually agreed between George Deslandes & Son, owners of the ship called *The Deslandes*, now lying in the port of London, of the one part, and Messrs. Gregory Brothers, as agents to Samuel Ferguson, of Anamaboo, merchants and charterers, of the other part," and was signed, "For George Deslandes & Son, of Jersey, owners, H. Gamman, as agent; for Samuel Ferguson, Esq., of Anamaboo, Gregory Brothers, as agents:"—Held, that Gregory Brothers were not personally liable. *Deslandes v. Gregory*, 29 L. J., Q. B. 93; 6 Jur., N. S. 483. Affirmed, 2 El. & Bl. 602; 30 L. J., Q. B. 36; 6 Jur., N. S. 651; 8 W. R. 585—Ex. Ch.

On the 24th of June the defendants, who were shipbrokers, wrote to the plaintiffs, offering them "room" in a ship called *F. K. Dumas* for certain cement and stone from London to Callao. On the 25th of June the defendants chartered the ship for the voyage, the charterparty providing, inter alia, that the whole ship should be at the disposal of the charterers, except the space necessary for the crew and stores; that the master and owners should give the same attention to the cargo, and in every respect be responsible to all whom it might concern, as if the ship were loaded at her berth by and for the owners independently of the charter; that the master was to sign bills of lading at any rate of freight the charterers might require without prejudice to the charterparty; and that the charterers' responsibility, except for freight, should cease on the vessel being loaded. On the 26th of June an agreement was made between the defendants, acting for the owners of the *F. K. Dumas*, and the plaintiffs, that the former should receive on board cement and stone at certain freight from London to Callao, and sail on a certain day: freight to be paid one-half on signing bills of lading, and the remainder on final discharge at Callao. The cement and stone were shipped, the half freight paid, and the master signed bills of lading making the remainder payable at Callao. On her voyage the ship, being damaged by bad weather, put into an intermediate port, where the vessel was condemned. The master, being unable to forward the plaintiffs' goods to their destination, sold them. In an action against the defendants for their value, the jury found that the sale was not justified:—Held, that on the construction of the above documents there was no contract between the plaintiffs and the defendants for the carriage of the goods from London to Callao. *Wagstaff v. Anderson*, 5 C. P. D. 171; 49 L. J., C. P. 485; 42 L. T. 720; 28 W. R. 856—C. A.

A charterparty on its face purported to be accepted by M. G. by procuration of T. G. To shew the authority of M. G., evidence was adduced that T. G., although resident in London, carried on business of a corn factor at Limerick, where the charterparty was executed, and that M. G. was his brother, and had the general management of his business and warehouses there, and was in the habit of sending great quantities of corn to London by vessels hired and the charterparties signed by him, by procuration of T. G.:—Held, that the jury was at liberty to find that M. G. had a general authority so as to bind the brother, although in fact no

authority had been given by him to execute this charterparty, and it was one in which he had no interest. *Smith v. M'Guire*, 3 H. & N. 554; 27 L. J., Ex. 465; *S. C.*, at nisi prius, 1 F. & F. 199.

— **Agent of Government.**—A person entering into a charterparty in his own name, on behalf of government, is personally liable. *Cunningham v. Collier*, 4 Dougl. 233.

— **Partner.**—To a declaration for freight due on a charterparty made between the plaintiff as owner, and W. & Co. as merchants and freighters, they pleaded that they entered into the charterparty solely as agents for M.; and that before they signed the charterparty it was agreed and understood they were only to sign it as such agents, and were not to make themselves liable as principals for the payment of the freight to become due under such charter; that they signed as follows, "For M., of C., W. & Co., agents," the defendants and the plaintiff bona fide believing at the time the charter was made that they having so signed would not be liable to be sued on the charter; that they had power to bind M., and that the plaintiff was inequitably taking advantage of their mistake in drawing the charter. At the trial the defendant, who signed the charterparty on behalf of the defendants' firm, deposed to a conversation between himself and the plaintiff at the time of signing the charter, which supported the plea; the plaintiff admitted that the defendant had correctly testified to what he, the defendant, had said, but affirmed that he, the plaintiff, had said nothing, or if he had made any remark he could not then, at the trial, remember what he had said. The judge directed the jury that if they believed the defendant had at the time of signing expressed his intention not to render his firm personally liable by so doing they were to find for the defendants, which they accordingly did:—Held, on a motion for a new trial on the ground of misdirection, inasmuch as the judge should have gone on to tell the jury that they must find that the plaintiff was an assenting party to the defendant's expression of his intention not to render his firm liable by his signature to the charter, that the whole of the facts having been before the jury the direction was sufficient to bring before the jury the issue they had to decide. *Cowie v. Witt*, 23 W. R. 76.

b. Legality.

Cargo of Hay—Landing Forbidden.—By a charterparty made by the charterer's agent in France, a ship was chartered, and it was stipulated that the ship should load a cargo of pressed hay at Trouville, in France, and proceed direct to London; and all cargo was to be brought and taken from ship alongside. The agent verbally told the master that the consignees would require the hay to be delivered at a particular wharf in the port of London, to which the master assented. On arriving in that port the master was unable to land the hay at the wharf by reason of an Order in Council under the Contagious Diseases (Animals) Act, 1869, forbidding hay from a French port to be landed in the United Kingdom. The order had been made before the charterparty was entered into, but neither party knew of it. After some delay the charterer re-

ceived the hay from alongside the ship into another vessel, and exported it. There was no legal obstacle to doing this, but eighteen days were allowed by the charterer to elapse beyond the lay days. The shipowner having brought an action for this detention of his ship, the charterer contended that the contract was for an illegal purpose, and therefore void:—Held, that although it was the intention of the parties, when the charterparty was entered into, to land the hay at London, yet as the contract was not made knowingly with the intention to violate the law, and as it could be carried out (as it ultimately was) without violating the law, it was not void; and the charterer was, therefore, liable for the demurrage. *Waugh v. Morris*, 8 L. R., Q. B. 202; 42 L. J., Q. B. 57; 28 L. T. 265; 21 W. R. 438. See also *Haines v. Bush*, *post*, col. 1359.

c. Effect of.

i. Generally.

Intention.—It is important not to give to a mercantile instrument such as a charterparty an unnecessarily strict construction, but such a construction as with reference to the context and the object of the contract would effectuate the obvious and expressed intention of the parties. *Dimech v. Corlett*, 12 Moore, P. C. C. 199.

Agreement not in Writing.—An agreement between the owners and the merchants for the employment of a ship on a voyage, not in writing, but acted upon by the parties, is equivalent to a charterparty. *Lidgett v. Williams*, 4 Hare, 462.

Ratification by Master of.—G., a shipbroker at G. G., chartered the Finnish vessels F. and M. prior to their arrival at G. G., and without communication with the owners. G. had on several previous occasions chartered the F. and M. under similar circumstances, and all of these charterparties had been carried into effect. After the arrival of the F. and M. at G. G. their masters were on several occasions at G.'s office, and were shewn their charterparties. A fortnight after the vessels' arrival at G. G., during which time freights had risen, the masters refused to take up the charterparties:—Held, that the masters by their conduct had not ratified the charterparties in such a way as to make the act a complete ratification. *The Fanny, The Matilda*, 48 L. T. 771; 5 Asp. M. C. 75—C. A.

ii. By what Law.

Lex loci contractus.—Prima facie, the law of the place where a contract is made is that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and such law ought to prevail in the absence of circumstances indicating a different intention; but a contract of affreightment made between a charterer and owners of the ship, being persons of different nationalities, in a place where both of them were foreigners, to be performed partly there by the ship breaking ground in order to start for the port of lading, a place where both parties would also have been foreigners; partly at the latter port, by taking the cargo on board; and partly on board the ship at sea, subject there to the laws of the country of the ship; and partly by final delivery

at the port of discharge—is to be construed by the law of the nation of the ship. *Lloyd v. Guibert*, 1 L. R., Q. B. 115; 35 L. J., Q. B. 74; 13 L. T. 602; 6 B. & S. 100—Ex. Ch.

A British subject at a Danish West India Island chartered a ship belonging to French subjects, for a voyage from St. Marc, in Haiti, to Havre, London or Liverpool, at the charterer's option, he knowing that the ship was French. The charterparty was entered into by the master, in pursuance of his general authority as such, and not by any special authority from the owners. The charterer shipped a cargo at St. Marc for Liverpool. On her voyage the ship sustained damage from a storm, which compelled her to put into a Portuguese port. There the master properly borrowed money upon bottomry of the ship, freight and cargo, and repaired her, and she proceeded with the cargo, and arrived safely at Liverpool. The bondholder proceeded in the Court of Admiralty against the ship, freight and cargo, which being insufficient to satisfy the bond, he sued the owners to indemnify him for the deficiency. They abandoned the ship and freight in such a manner as, by the French law, absolved them from liability:—Held, that the charterer was not entitled to recover, because the French law, as being that of the ship, governed the case. *Id.*

The master of a German ship while at Constantinople, by a charterparty, partly in English and partly in German, and entered into with Germans, chartered his ship to take a cargo from Taganrog to England, Havre, or Hamburg:—Held, that the contract must be construed according to German law. *The Express*, 3 L. R., Adm. 597; 41 L. J., Adm. 79; 26 L. T. 956.

A German ship, while in a German port, was chartered by a charterparty in the English language by English charterers, and the ports of call for orders and of final delivery of cargo were English. On a question of delay in delivery of cargo:—Held, that the contract must be governed by English law. *The San Roman*, 3 L. R., Adm. 583; 41 L. J., Adm. 72; 26 L. T. 948. Affirmed, 5 L. R., P. C. 301; 42 L. J., Adm. 46; 21 W. R. 393.

Intention of Parties.—The master of a North German ship lying at Constantinople entered into a charterparty with North German subjects there resident, to carry a cargo to a port in the United Kingdom or on the Continent, to be delivered to English consignees. The charterparty and the bill of lading given under it were in the English language, and it was stipulated that the ship should call at one of three ports of the United Kingdom for orders. The ship duly called at Falmouth, and was ordered to proceed to an English port to discharge:—Held, that as the intention of the parties as to what law should govern was to be gathered from the circumstances of the case, and as the giving of the orders fixed the seat of the contract in England, the law of England applied. *The Wilhelm Schmidt*, 25 L. T. 34.

iii. Proceeding to a Port "as near as the Ship can safely get."

"So near thereto as she may safely get at all times of tide and always afloat."—A ship was chartered to unload at S. or "as near thereto as she might safely get at all times of tide and always

afloat," and for delay in unloading the charterers were to pay demurrage. The state of the tide prevented the ship from reaching S. four days after she arrived at the nearest point where she was able to float:—Held, that, according to the terms of the charterparty, this was a sufficient arrival of the ship at S. to found a claim for demurrage. *Horsley v. Price*, 11 Q. B. D. 244; 52 L. J., Q. B. 603; 49 L. T. 101; 31 W. R. 786.

"If sufficient Water."—A condition in a charterparty that the ship shall "discharge in a dock as ordered on arriving, if sufficient water, or so near thereunto as she may safely get, always afloat," means that she is to discharge in the dock ordered, if there is sufficient water at the time of giving the order. *Allen v. Coltart*, 11 Q. B. D. 782; 52 L. J., Q. B. 686; 48 L. T. 944; 31 W. R. 841.

"And there load a full cargo."—A stipulation that a ship shall proceed to a certain place, or as near thereto as she can safely get, and there load a full cargo, means such a place to which she can safely get, and from which, when loaded, she can safely get away. *Shield v. Wilkins*, 5 Ex. 304; 19 L. J., Ex. 238.

Ship unable to lie Afloat without being Lightened.—Where a vessel is chartered to proceed with cargo to a "safe port . . . as ordered, or as near thereunto as she can safely get, and always lay and discharge afloat," the master is not bound to discharge at a port where she cannot, by reason of her draught of water, "always lie and discharge afloat" without being lightened, even if she can be lightened with reasonable dispatch and safety in the immediate vicinity of the port or in the port itself. A vessel was chartered to proceed with a cargo of grain from Baltimore to Falmouth for orders, "thence to a safe port in the United Kingdom as ordered, or as near thereunto as she could safely get, and always lay and discharge afloat." The vessel was ordered to Lowestoft. Her draught of water, when loaded, was such that she could not lie afloat in Lowestoft Harbour without discharging a portion of her cargo, but the discharge of cargo might have been carried on with reasonable safety in Lowestoft Roads. The consignee offered at his own expense to lighten the vessel in the roads, but the master refused to proceed to Lowestoft to discharge, and went to Harwich as the nearest safe port, and there discharged the cargo:—Held, that the consignee could not recover damages against the shipowner for the refusal of the master to discharge at Lowestoft. *The Alhambra*, 6 Adm. D. 68; 50 L. J., Adm. 36; 43 L. T. 636; 29 W. R. 655—C. A.

To Sail to London, Surrey Commercial Docks.—A charterparty for a ship to sail to "London, Surrey Commercial Docks" is not satisfied by the ship arriving at the gate of the docks, but not entering into the docks. *Dahl v. Donkin or Nelson*, 6 App. Cas. 38; 50 L. J., Ch. 411; 44 L. T. 381; 29 W. R. 543—H. L. (E.).

Charterer's Duties as to securing a Discharging Berth.—There is no established custom in the port of London by which the charterer of a timber-loaded ship is bound to secure for the vessel, on its arrival in the river, and in close contiguity to the docks named, the authority to

enter into the docks. The charterparty was to "London, Surrey Commercial Docks, or as near thereto as she may safely get, and lie always afloat." As the docks were full the ship could not be given a discharging berth, and the dock manager therefore refused it entrance into the docks. Both parties having named these docks in the charterparty, this refusal of the dock authorities was held not to be the fault of either party. The cause of the delay as to being admitted into the docks was immaterial; the length of the delay was material. The charterer would not name any other docks to which the ship might be taken. The ship's master therefore took it to the Deptford Buoys (the nearest place to the Surrey Commercial Docks where it could lie in safety afloat), and there discharged the cargo by lighters, carrying the timber into the Surrey Commercial Docks, where it was afterwards sorted and put in order on the wharf:—Held, that, under the circumstances existing in this case, the delay in discharging the cargo was to be attributed to the charterer, who therefore became liable to demurrage, and to the charges for unloading. *Id.*

Expenses of Lightering to Place of Discharge.]

—By the terms of a charterparty the ship was to take in a full cargo at Bombay, and proceed therewith to a safe port on the Continent between Havre, and Hamburg as ordered, "or so near thereto as she might safely get." The cargo was to be brought to and taken from alongside at merchant's risk and expense. The ship was ordered by the charterers to Koogerpolder in Holland. Koogerpolder is some distance up a canal, and the vessel with her full cargo on board drew too much water to proceed up the canal. No arrangements had been made by the charterers or consignees for taking delivery of any part of the cargo at the mouth of the canal. The portion of the cargo that required to be unloaded in order to enable the vessel to enter the canal was at least a third. The question arising under these circumstances between the shipowners and the charterers was which of them ought to bear the expenses of lightering the cargo from the mouth of the canal to Koogerpolder:—Held, that, under the circumstances, the voyage under the charterparty ended at the mouth of the canal, and that consequently the charterers ought to bear the above-mentioned expenses. Meaning of the words "as near thereto as she may get" discussed. *Capper v. Wallace*, 5 Q. B. D. 163; 49 L. J., Q. B. 350; 42 L. T. 130; 28 W. R. 424.

Nature of Delay.]—The defendant agreed by a charterparty that the ship should proceed to Galatz, or as near thereto as she could safely get, and there load a cargo, the act of God, &c., and every other dangers and accidents of the seas, rivers and navigation during the voyage excepted. The ship arrived on the 5th November off the mouth of the Danube. At that time, and until the 7th January following, the water was unusually low on the bar and the ship was unable to cross. On the 11th December she was obliged by stress of weather to go to Odessa, as the nearest safe port, where she afterwards took in a cargo and sailed for England. On and after the 7th January, there was sufficient water in the port for the ship to have crossed and to have gone up to Galatz, and there shipped a cargo:—Held, that there was a breach of the charter-

party, and that the defendant was not justified in putting an end to the contract by any of the excepted causes. *Schilizzi v. Derry*, 4 El. & Bl. 873; 24 L. J., Q. B. 193; 1 Jur., N. S. 795.

Custom as to.]—See *post*, col. 1336.

iv. Frost preventing Loading.

Customary Manner of Loading.]—By the terms of the charterparty the ship was to proceed to the port of loading and there load a cargo of iron in the customary manner from the agents of the freighters. Cargo to be supplied as fast as steamer can receive. Time to commence from the vessel being ready to load, and ten days on demurrage over and above the said lay days at 40*l.* per day. ("Except in case of hands striking work, or frosts or floods, or any other unavoidable accidents preventing the loading; in which case owners to have the option of employing the steamer in some short-voyage trade until receipt of written notice from charterers that they are ready to resume employment without delay to the ship.") On the ship's arrival the loading was commenced, but shortly afterwards was wholly stopped for five days through frost:—Held, that the exception in the charterparty as to frost did not relieve the charterers from liability for demurrage, inasmuch as the detention of the cargo by ice occurred in the canals before the cargo reached the dock where the vessel was lying. *Coverdale v. Grant*, 11 Q. B. D. 543; 48 L. T. 701; 5 Asp. M. C. 74—C. A. Reversing 8 Q. B. D. 600; 46 L. T. 632; 4 Asp. M. C. 528.

By the terms of the charterparty the ship was to proceed to Cardiff, East Bute dock, and there load in the customary manner from the agents of the freighters a cargo of rail iron; the cargo to be loaded as fast as steamer could take on board and stow within the customary working hours of the port, commencing when steamer was in berth and ready to load; and if longer detained merchants to pay steamer 30*l.* per day demurrage. "Detention by frost, floods, &c., not to be reckoned as lay days." The shipowner, when the charterparty was made, did not know who were the freighters' agents at Cardiff. There were about six shippers of rail iron there, all of them (with the exception of the freighters' agents) having wharves in the West or East Bute dock. The agents' wharf was at a distance from the docks upon a canal communicating with the West Bute dock, and their rail iron was loaded on ships berthed in the East Bute dock by means of lighters passing down this canal through the West Bute dock, and from thence down a smaller canal connecting the two docks. The other shippers loaded in the East Bute dock, either from the quay or by lighters coming alongside the ship from the wharves in the East Bute dock, or by lighters from West Bute dock, passing down the connecting canal. The ship, on arrival, was berthed in the East Bute dock, and the loading was commenced, but shortly afterwards was stopped for sixteen days by frost, which covered the canal from the agents' wharf to the West Bute dock with ice and prevented the passage of the lighters, though the water in the docks was not frozen:—Held, that the exception in the charterparty with respect to detention by frost did not apply to relieve the freighters from liability to demurrage. *Kay v.*

Field, 52 L. J., Q. B. 17; 47 L. T. 423—C. A. Reversing 8 Q. B. D. 594; 46 L. T. 630.

A. by charterparty engaged to load on board B.'s ships a cargo of coals "with due despatch." The goods had to be brought by A. along a canal to the dock, and frost prevented the completion of the loading:—Held, that A. was responsible for the delay consequent thereon. *Kearon v. Pearson*, 7 H. & N. 386; 31 L. J., Ex. 1; 10 W. R. 12.

The exception in a charterparty whereby a certain number of laying days is allowed to the charterer, detention by ice is not to be reckoned as such, applies where the ice not only renders access to the ship impracticable in the port itself, but blocks up a river by means of which alone the intended cargo can be conveyed to the port. *Hudson v. Ede*, 2 L. R., Q. B. 566; 36 L. J., Q. B. 273; 16 L. T. 698; 15 W. R. 1111; 8 B. & S. 631. Affirmed, 3 L. R., Q. B. 412; 37 L. J., Q. B. 166; 18 L. T. 764; 16 W. R. 940; 8 B. & S. 640—Ex. Ch.

"Accident"—*Snowstorm*.]—A charterer agreed to load a ship with coal in regular and customary turn, "except in case of riots, strikes, or any other accidents beyond his control," which might prevent or delay her loading. To an action for breach of the above covenant in the charterparty, he pleaded that he was prevented loading the vessel by a snowstorm, which rendered it impossible to bring the cargo to the agreed place of shipment:—Held, that the snowstorm was not such an accident. *Fenwick v. Schmalz*, 3 L. R., C. P. 313; 37 L. J., C. P. 78; 18 L. T. 27; 16 W. R. 481.

v. Sailing.

Final Sailing.]—The term "final sailing" of a vessel from the port of loading, stated in a charterparty as the period for payment of freight, or part of it, means the final departure from the port, and being at sea ready to proceed on her voyage, and not merely having the clearances on board, and being ready to sail. *Roelands v. Harrison*, 9 Ex. 444; 2 C. L. R. 995; 23 L. J., Ex. 166.

In determining the point at which a vessel has "finally sailed," the circumstances of the particular port of loading must be considered; and where the vessel was wrecked after having her clearances on board, and had left the dock gates, and had reached a ship canal between high and low water, where she was subject to certain regulations under a local act, and where she was liable to be stopped by the harbour-master:—Held, that she had not finally sailed within the meaning of the charterparty. *Id.*

Extent of Port.]—By the terms of a charterparty the owners were entitled to an advance of one-third of the freight within eight days "from final sailing of the vessel from her last port in United Kingdom." The vessel was loaded at Penarth dock, and was towed by a steam-tug seven or eight miles, bringing her out about three miles into the Bristol channel. She there cast anchor, as the weather was threatening. While she was lying at anchor a storm broke her cables, and she ultimately ran ashore on Penarth beach, and the cargo was spoiled. The vessel had never been beyond the limits of the port of Cardiff as defined for fiscal purposes, but she had

left what, for commercial purposes, is considered the port, and had been out at sea. She went ashore within the limits of the port in its commercial sense. The owners sued for one-third of the freight, and the charterers resisted the claim on the ground that the vessel had never sailed from her last port in the United Kingdom:—Held, that the word "port" must be taken in its ordinary commercial sense, and that as the vessel had got out to sea without any intention of returning, she must be taken to have finally sailed from her last port, that her being driven back into it by the weather made no difference, and that the one-third of the freight was payable. *Price v. Livingstone*, 9 Q. B. D. 679; 53 L. J., Q. B. 118; 47 L. T. 629; 5 Asp. M. C. 13—C. A.

At the time a loss happened the ship had left the harbour, but her crew was not complete, the master and mate were not on board, her shrouds and cables were not in proper condition, and the bills of lading were not signed; the intention was that she should remain at anchor in the roadstead until the preparations for her voyage were complete:—Held, that she had not sailed within the meaning of the charterparty. *Thompson v. Gillespy*, 5 El. & Bl. 209; 24 L. J., Q. B. 340; 1 Jur., N. S. 779.

A vessel being loaded and in a fit state for sailing, but the clearances not being completed, nor the bills of lading signed, left the harbour with the captain on board. She crossed the bar, and the captain returned to land in order to get the papers completed and sign the bills of lading. The vessel stood off and on waiting for the captain; but it being found that she had been injured, she returned into harbour to repair and did not afterwards sail:—Held, that the vessel had not sailed. *Hudson v. Bilton*, 6 El. & Bl. 565; 26 L. J., Q. B. 27; 2 Jur., N. S. 784.

vi. Other Provisions.

As to Commission—Inwards and Outwards.]

—By a charterparty, a ship was to proceed with a cargo from Glasgow to San Francisco, where she was to be "consigned to the charterers' agents, inwards and outwards, paying the usual commissions":—Held, that the effect of the expression "outwards" was not to bind the master to take a cargo home from San Francisco; the meaning only was that, if a cargo was shipped from San Francisco, the charterers should be employed as shipbrokers to do all the business of the ship in respect of such cargo. *Cross v. Pagliano*, 6 L. R., Ex. 9; 40 L. J., Ex. 18; 23 L. T. 420; 19 W. R. 159.

—Memorandum Part of Contract.]—A

memorandum in a printed form between two brokers, used by a charterer, "commission to be paid to charterer, to whom the vessel is to be addressed, on her return to London," the charter being only for an outward voyage, and making no mention of a homeward voyage; and the ship not having returned direct from the port of discharge, but taken a cargo elsewhere, requires evidence that the memorandum was understood by the parties to be part of the contract, and that in mercantile usage it applied in such a case to the return cargo, and meant that the charterer should collect the freight and receive commission on it. *Hibbert v. Owen*, 2 F. & F. 502.

Void or Voidable in Event of War.]—The plaintiff chartered the ship *Edgar* to C. by charterparty in which it was agreed that the ship after completing intermediate employment (which she was to be at liberty to take) should proceed to Galatz for orders to load there, &c., and being so loaded proceed to Malta for orders. Upon the margin of the charterparty were the words, "In the event of war, blockade, or prohibition of export preventing loading, this charterparty to be cancelled." The plaintiffs then effected a policy with the defendants for the insurance of the freight of the ship against the perils of the sea, restraint of princes, &c. The *Edgar* sailed for Genoa under the charterparty on the 1st of May, 1877, war having been declared by Russia against Turkey on the 24th of April. Before her arrival at Genoa, the plaintiffs ascertained that Russia had closed the ports of loading mentioned in the charterparty. The *Edgar*, however, discharged her cargo and took in ballast at Genoa, and sailed for Constantinople, and upon her arrival there on the 28th of May, found that the loading ports were closed, and that there was no reasonable probability of their being open in time for her to load her chartered cargo. She therefore did not proceed farther towards Galatz, but obtained a homeward cargo at a freight less than that stipulated for by the charterparty. In an action upon the policy:—Held, by Cockburn, C. J., and Manisty, J. (Lush J., dissenting), that the plaintiffs could not recover, for according to the true construction of the charterparty the act of closing the ports by the Russian government was a prohibition of export preventing loading, and that upon the happening of that event the charterparty came to an end—without any election by either party. By Lush, J., that the effect of the memorandum in the margin was to make the charterparty voidable only at the option of either party, that neither party having elected to avoid it the charterparty continued in force up to the time when the loading became impracticable, and that the plaintiffs had sustained such a loss of the chartered freight as to entitle them to recover. *Adamson v. Newcastle Steamship Freight Insurance Association*, 4 Q. B. D. 462; 48 L. J., Q. B. 670; 41 L. T. 160; 27 W. R. 818.

And see cases XIII. 5. PERFORMANCE, *infra*.

Ship Damage.]—In a charterparty, between the East India Company and the owners of a ship taken into their service, was the following clause: "But nevertheless the part-owners shall not be charged with any sum of money in respect of goods damaged on board the ship, either in her outward or homeward bound voyage, but such as shall, by the condition and appearance of the package thereof, or by some other reasonable proof, appear to be ship damage." Part of the homeward-bound cargo was damaged in a storm:—Held, that this was not ship damage within the meaning of the clause, which was imputable only to such damage as happens by the insufficiency of the ship, or the negligence of those who have the charge of her. *East India Company v. Todd*, 1 Bro. P. C. 405.

Mistake as to.]—Although a clause, by way of condition or of warranty, contained in a charterparty, cannot be got rid of by reason of its being part of a printed form, not adverted to expressly by the parties, and intended by one

of them to be omitted; yet, if the other party was aware at the time that it could not be complied with, and after shewing that it was broken, treated the charter as subsisting, it will afford him no defence to an action on the charter. *Dixon v. Heriot*, 2 F. & F. 760.

Provisions as to Lighterage—Writing and Print.]—Charterers agreed with a shipowner by charterparty that his ship should load at Barbadoes, St. Kitts, or Trinidad, a full cargo of West India produce, "to be brought to and taken from alongside at merchant's risk and expense." These words, with others, were in print. The charterparty also contained the words "cargo at Trinidad as customary." These words, with others, were in writing. The custom at Trinidad is, that the ship pays for the lighterage, and the shipowner allows the charterer the reasonable expense thereof. The ship loaded at Trinidad in the customary manner, but the captain refused to pay the lighterage, whereupon the charterers had to bear the expense of it:—Held, that the stipulation, "cargo at Trinidad as customary," worked an exception to the stipulation as to loading at merchant's risk, and that the charterers were entitled to recover the lighterage from the defendant. *Scrutton v. Childs*, 36 L. T. 212.

vii. What Evidence Admitted to Explain.

Custom.]—By a charterparty, made at Riga, the ship was to proceed, with a cargo of timber, to Liverpool, and to deliver at such dock there as ordered on arrival. On arrival at Liverpool the ship duly entered into dock, but, in consequence of the crowded state of the dock, was unable for some days to obtain a berth alongside the quay from which she was allowed to discharge:—Held, that, in an action for demurrage, evidence was admissible tending to shew that, by the custom of the port of arrival, timber ships were not considered to have arrived until they had obtained a discharging berth within the dock. *Steamship Company "Norden" v. Dempsey*, 1 C. P. D. 654; 45 L. J., C. P. 764; 24 W. R. 984.

Where a vessel is chartered to proceed with cargo to a "safe port . . . as ordered, or as near thereto as she can safely get, and always lay and discharge afloat," the master is not bound to discharge at a port where she cannot, by reason of her draught of water, "always lie and discharge afloat," without being lightened. Evidence that it was the custom at the port of discharge for vessels to be lightened in the roads before proceeding into the harbour held to lie inadmissible. *The Alhambra*, 6 Adm. D. 68; 50 L. J., Adm. 36; 43 L. T. 636; 29 W. R. 655—C. A.

By a charterparty the vessel was to deliver at H., "or so near thereto as she could safely get;" to discharge as customary; the cargo to be brought to and taken from alongside the ship at merchant's risk and expense. The draught of water of the vessel with the cargo on board was too great to allow her to reach H. The nearest point to which she could safely get was S., where the merchant refused to accept delivery of any part of the cargo. In order to lighten the vessel, part of her cargo was discharged into lighters at S. and sent in them to H. Her owner having sued the charterer to re-

cover the lighterage expenses:—Held, that a defence alleging that by the custom of the port of H. the defendant was not bound to take delivery elsewhere than at H. was bad on demurrer, inasmuch as it sought to set up a custom inconsistent with the written contract, and that the plaintiff was entitled to recover the lighterage expenses. *Hayton v. Irwin*, 5 C. P. D. 130; 41 L. T. 666; 28 W. R. 665—C. A.

A. engaged with B. to have a full cargo for the ship, the rates of freight for which would average 40s. per ton, and at least nine cabin passengers, passage-money to average 75l. The contract was fulfilled as to the passengers, but the average rate of freight for goods amounted to 30s. only per ton. A. shipped, however, steerage passengers, the net profits from whom made the average earnings of the ship over 40s.:—Held, that as this was an unusual contract, evidence was not admissible to shew that the terms "cargo" and "freight" used with reference to the voyage on which the ship was engaged would, by the general usage and course of the trade, be considered to comprise steerage passengers, and the net profit arising from their passage-money. *Lewis v. Marshall*, 7 M. & G. 729; 8 Scott, N. R. 729; 13 L. J., C. P. 193; 8 Jur. 848.

Reading with Bill of Lading.—The excepted perils mentioned in the charterparty were more numerous than those in the bill of lading:—Held, that, under the circumstances, both instruments together contained the contract. *The San Roman*, 3 L. R., Adm. 583; 41 L. J., Adm. 72; 26 L. T. 948. Affirmed, 5 L. R., P. C. 301; 42 L. J., Adm. 46; 21 W. R. 393.

A vessel was chartered to carry a cargo of coals from Cardiff to Rouen. The charterparty provided that the liability of the charterers should cease "when the ship is loaded and advance of freight with demurrage at Cardiff paid. Ship to have a lien on cargo for freight, dead freight and demurrage." The bill of lading contained no restriction on the liability of the charterers. In an action for balance of freight:—Held, that the charterparty and bill of lading must be read together, and construed according to the plain meaning on the face of them, and that the charterers' liability ceased on performance of the conditions in the charterparty. *Barwick v. Burnyeat*, 36 L. T. 250; 25 W. R. 395. See also *Gullichsen v. Stewart*, post, col. 1368.

— **With Letters.**—A charterparty was explained and construed by letters for the purpose of fixing the liability under it upon persons signing the charterparty "for owners." *Adams v. Hall*, 37 L. T. 70.

d. Alteration, Variation, and Cancellation.

Authority of Agent.—An agent at a foreign port to whom a ship is addressed for loading under a charterparty has no implied authority to vary the contract by substituting another and a distant port of loading, or a different quality or description of cargo. *Sickens v. Irving*, 7 C. B., N. S. 165; 29 L. J., C. P. 25; 6 Jur., N. S. 200.

Effect of.—The stipulations in a charterparty may be varied by subsequent instructions, which may amount to a new contract pro tanto; and an insurance of freight upon a new voyage,

though different from that described in the charterparty, may be good. *Hall v. Brown*, 2 Dow, 367, 375.

In Margin.—A merchant entered into a charterparty in the following terms: "It is agreed between the owner of the good ship Zwaan, now at Amsterdam, and to sail from thence for Liverpool on or before the 15th of March next, and the charterer, that the ship, being tight, staunch and strong, shall with all convenient speed be made ready," &c., as in the usual printed form of charterparty. The exception was as follows: "Restrictions of princes and rulers, the dangers and accidents of the seas and navigation, the act of God, fire, pirates, and enemies, throughout this charterparty always excepted." After the signing of the charter, the broker who had acted for the owner wrote in the margin, to come after the words "March next," "wind and weather permitting, with cargo or in ballast, for ship's benefit." He then took the charter to the charterer, and told him that he had made the note in the margin, which he said did not affect it. The charterer said that the note altered the matter, and he did not know that he would then accept the charter; and he ultimately refused to do so. The ship did not sail from Amsterdam, in consequence of what was admitted to be "the act of God."—Held, that the charterparty was avoided by the alteration so made in the margin. *Crookewit v. Fletcher*, 1 H. & N. 893; 26 L. J., Ex. 153.

By Parol.—Assumpsit lies where a sealed charterparty was afterwards altered by parol, where the subsequent parol contract was distinct from, and not inconsistent with, the contract by deed; being anterior to it in point of time and execution. *White v. Parkin*, 12 East, 578; and see *Davies v. Hawkins*, 3 M. & S. 488.

Where a shipowner covenanted to sail from London to Gibraltar, and there to deliver an outward cargo, and receive from the agents of the freighter at Gibraltar, or at Malaga, Cadiz or Seville, as should be ordered by the agents at Gibraltar, such goods as they might load on board for the homeward cargo, and that the vessel should return direct to the port of London, and deliver the homeward cargo; and the agents at Gibraltar ordered the captain to proceed to Cadiz, at which place other agents directed by parol that the homeward cargo should be delivered at Liverpool instead of London:—Held, that the shipowner having delivered the cargo at Liverpool could not recover the freight, the substitution by parol of Liverpool for London being inconsistent with the covenant contained in the charterparty. *Thomson v. Brown*, 1 Moore, 358; 7 Taunt. 656.

Cancellation by Ship's Husband.—A ship's husband cannot bind his owners by an agreement to cancel a charterparty, and pay a sum of money on such cancellation. *Thomas v. Lewis or Osley*, 4 Ex. D. 18; 48 L. J., Ex. 7; 39 L. T. 669; 27 W. R. 111.

e. Conditions and Warranties.

i. Classification of Vessel.

What is.—In a charterparty made at New York, between British subjects, a vessel was described as "the A 1 Br. brig, Hannah Eastee,

of Liverpool :"—Held, that this description was a warranty by the owners that the vessel was at the time classed A 1 at Lloyd's in London. *Routh v. MacMillan*, 2 H. & C. 750; 33 L. J., Ex. 38; 10 Jur., N. S. 158; 9 L. T. 541; 12 W. R. 381.

Not Continuing.]—A description in a charterparty that a vessel is of a particular class is not a continuing warranty, but applies only to the classification at the time the charterparty is made. *French v. Newgass*, 3 C. P. D. 163; 47 L. J., C. P. 361; 38 L. T. 164; 26 W. R. 430—C. A.

In a charterparty the ship was described as newly classed "A 1." Record of American and Foreign Shipping Book." The ship was chartered to New Orleans to load cotton. Soon after her arrival there the certificate of her classification was cancelled, and the charterers were in consequence unable to obtain insurances on the cotton, and they refused to load the ship. In an action by the shipowners against the charterers for breach of the charterparty :—Held, that there was no breach of warranty by the shipowners, because the statement of the ship's classification in the charterparty was a warranty only that she was so classed at that time, and not that she was rightly, or would continue so classed, and that the shipowners were entitled to maintain their action. *Id.*

The description of a vessel in a charterparty as A 1, warrants only that she was A 1 at the time of making the charterparty, not that she should continue to be so. *Hurst v. Usborne*, 18 C. B. 144; 25 L. J., C. P. 209.

ii. Seaworthiness and Fitness for Cargo.

Extent of.]—If a chartered vessel is seaworthy at the commencement of the voyage, but is afterwards damaged by perils of the sea, though the owner is not bound to repair the vessel, yet if he elects not to do so, he ought not to proceed with the vessel in the unseaworthy condition. *Worms v. Storey*, 11 Ex. 427; 25 L. J., Ex. 1.

A shipowner who accepts goods which he is to deliver in good condition, impliedly contracts to perform the voyage in a ship which is seaworthy. *Steel v. State Line Steamship Company*, 3 App. Cas. 72; 37 L. T. 333.

The implied warranty of seaworthiness into which the owner of a ship enters with the owner of her cargo, attaches at the time when the perils of the intended voyage commence, that is, when she sets sail with the cargo on board for her port of destination; and this warranty is broken if she is then unfit to encounter these perils, although she may have been seaworthy whilst lying in the port of loading, and also at the times of starting from her anchorage for and arriving at the place of loading appointed by the charterer, and of commencing to take on board her cargo. *Cohn v. Davidson*, 2 Q. B. D. 455; 46 L. J., Q. B. 305; 36 L. T. 244; 25 W. R. 369.

A vessel was chartered for a voyage to Dundee, from the port of Sunderland, where she was lying in a seaworthy condition. Pursuant to the terms of the charterparty, and by the orders of the charterer, the vessel proceeded to a wharf situate in the port of Sunderland, and there loaded on board a cargo of cement. At the time when she commenced taking in the cargo she

was seaworthy; but by the time of setting sail on her voyage she had from some unknown cause become unseaworthy. The owners of the vessel were not guilty of negligence in sending her to sea in the condition in which she then was. Soon after starting from Sunderland she began to leak; but the wind being fair for the voyage to Dundee, the master resolved to keep his course, and he was not guilty of any negligence in not returning to Sunderland. The vessel did not reach Dundee, but foundered at sea, and the cargo of cement was totally lost :—Held, that the warranty of seaworthiness implied by law upon entering into the charterparty had been broken, and that the charterer was entitled to recover the value of the cargo shipped by him on board the vessel. *Id.*

In every contract for the conveyance of merchandise by sea there is, in the absence of express provision to the contrary, an implied warranty by the shipowner that his vessel is seaworthy. *Kopitoff v. Wilson*, 1 Q. B. D. 377; 45 L. J., Q. B. 436; 34 L. T. 677; 24 W. R. 706.

In an action to recover damages for the loss of iron armour-plates, which were lost on board a ship, it appeared that the shipowners, by their servants, stowed the ship, and that during rough weather one of the plates broke loose and went through the side of the ship, which in consequence was lost. At the trial the judge told the jury, as a matter of law, that a shipowner warrants the fitness of his ship when she sails, and not merely that he will honestly and bonâ fide endeavour to make her fit, and left to them the questions, was the vessel at the time of the sailing, in a state, as regards the stowing and receiving of these plates, reasonably fit to encounter the ordinary perils that might be expected on a voyage at that season? secondly, if she was not in a fit state, was the loss that happened caused by that unfitness?—Held, that the direction was right, and correctly stated the liability of a shipowner, even though he did not hold himself out as a common carrier. *Id.*

In the contract of a shipowner to carry goods shipped on board his vessel, there is no implied condition that the vessel shall be seaworthy. *Schloss v. Heriot*, 14 C. B., N. S. 59; 32 L. J., C. P. 211; 8 L. T. 246; 11 W. R. 596.

But to an action by the shipowner against the merchant who shipped goods on board, for the latter's share of an average loss, it is a good plea, on the ground of avoiding circuity of action, to plead that the ship was not seaworthy at the commencement of the voyage, and that the average loss was caused and arose from and in consequence of such unseaworthiness. *Id.*

Throwing up Charter by Reason of Unseaworthiness of Ship.]—A. agreed to charter a ship for twelve months after the completion of her then present voyage. After the completion of the voyage and when he was ready to load the ship she was detained as unseaworthy; and the repairs were not finished until more than two months after the completion of the voyage :—Held, that the charterer was entitled to throw up the charterparty. *Tully v. Howling*, 2 Q. B. D. 182; 46 L. J., Q. B. 388; 36 L. T. 163; 25 W. R. 290—C. A.

Fitness for Cargo.]—A ship was chartered to sail to Manila for orders to load there, or at Yloilo, a full and complete cargo of sugar in

bags, hemp in compressed bales, ^{and} or measurement goods, and therewith to sail to Cork, &c., the freight to be at the rate of 4l. 2s. 6d. for dry sugar, 4l. 5s. for wet sugar, and 4l. 15s. for hemp or measurement goods; the master engaging that the vessel before and when receiving cargo should be a good risk for insurance, and that during the voyage he would take all proper means to keep the vessel tight, staunch and strong, and in every way fitted and provided for the voyage. At Yloilo the charterer provided a full cargo of wet sugar in bags. In the course of loading it was found that the quantity of molasses which had drained, and which might have been expected to drain, from the wet sugar was so great as to render the ship unseaworthy unless removed, and that the ship's pumps were unable to remove it. The ship was in all other respects seaworthy, but could not have been rendered seaworthy for that cargo without a delay which would have frustrated the objects of the voyage:—Held, that the charterer was entitled under the charterparty to supply a full cargo of wet sugar, and to have a ship provided which was fit for such a cargo. *Stanton v. Richardson*, 45 L. J., C. P. 78; 33 L. T. 193; 24 W. R. 324.—H. L. Affirming *S. C.*, in Ex. Ch., 9 L. R., C. P. 290.

There is no undertaking on the part of a ship-owner that his vessel (if really fit) shall be free from suspicion of unfitness to receive a cargo on board. *Touss v. Henderson*, 4 Ex. 890; 19 L. J., Ex. 163.

Damages.—A ship was chartered and put up at the Mauritius as a general ship, and received on board sugars consigned to London. In consequence of the unseaworthiness of the ship she was forced to return to the Mauritius, and part of the sugars which were damaged was there landed and sold. The owners of the sugars brought actions against the charterers for the short delivery. They having no defence suffered judgment by default, and attended the execution of the writs of inquiry. The owner of the vessel had notice of the actions and of each step therein, and was invited to take upon himself the defence, which he declined to do:—Held, that the charterers were entitled to recover the sums paid by them in those actions, and also the costs incurred by them therein. *Blyth v. Smith*, 6 Scott, N. R. 360; 5 M. & G. 405; 12 L. J., C. P. 203; 7 Jur. 948.

Declaration for freight on a charterparty, whereby the ship being tight and every way fitted for the voyage should, at Sunderland, load a cargo of coals and proceed to Constantinople, being paid freight on the quantity delivered, "one-fourth of the freight to be advanced to the owners' agent in London, on the ship having sailed, less five per cent. thereon for assurance, interest and commission." Averment, that the defendant caused the ship to be loaded with a cargo of coals, and "that she, being so loaded, sailed for C. pursuant to the charterparty." Plea, that the ship was not, at the commencement of the voyage, tight and every way fitted for the voyage, and that by reason thereof the ship and cargo were lost; and a second plea, that after the ship sailed, the plaintiff was guilty of negligent and improper conduct with regard to the management of the ship, by reason whereof the ship and cargo were lost:—Held, that the first

plea was not a good plea in avoidance of circuity of action, as the damages sustained by the defendant were not necessarily identical in amount with the sum claimed by the plaintiff; but that it was a bar to the action, on the ground that the advance on the freight had never become payable. *Thompson v. Gillespie*, 5 El. & Bl. 209; 24 L. J., Q. B. 340; 1 Jur., N. S. 779.

iii. Position and Sailing of Vessel.

Position of Ship.—By a charterparty it was agreed that the ship *Ceres*, of the measurement, &c., "expected to be at Alexandria about the 15th of December," being tight, &c., "should with all convenient speed" sail and proceed to that port, and there receive from the charterers a cargo of cotton seed. In an action against the owner, the breach alleged in the declaration was, that the ship was not expected to be at Alexandria about the 15th of December, 1871, but was then in such part of the world and under such engagements that she could not perform those engagements and arrive at Alexandria about the said day:—Held, a good breach, the descriptive statement amounting to a warranty that the ship was in such a position that she might reasonably be expected to arrive at Alexandria by the day named. *Corking v. Massey*, 8 L. R., C. P. 395; 42 L. J., C. P. 153; 28 L. T. 636; 21 W. R. 680.

A plea, that, at the time of making the charterparty, the ship was, to the charterer's knowledge, engaged for a certain voyage, and that the charterparty was made subject to a condition that she should with all convenient speed fulfil her engagement and then proceed to the port of loading, and that she did so, is a good plea. *Ib.*

"Ship now at Rangoon."—In an action by the vendors against their vendees for refusal to accept, evidence was given to shew the circumstances under which the contract was made, and that it was of vital importance that the vessel should be in the port named at the time of making the contract. The jury found, that the condition "Ship now at Rangoon," had not been fulfilled, and that it was a condition absolutely vital:—Held, that it was rightly left to the jury to say under what circumstances the contract was made, and that the words "Ship now at Rangoon" amounted to a warranty justifying the defendants in saying that there had been a failure of performance of a condition precedent and in refusing to carry out the contract. *Oppenheim v. Fraser*, 34 L. T. 524.

Held, also, that the finding of the jury was rightly taken as an element in enabling the court to say that the words amounted to a condition precedent. *Ib.*

"Now in port."—By a charterparty, dated London, the 19th of October, 1860, A's ship was chartered to B. as follows: "It is this day mutually agreed between A., owner of the good ship or vessel called the M., of 420 tons or thereabouts, now in the port of Amsterdam, and B. of London, merchant, that the ship being tight, staunch, strong, and every way fitted and ready for the voyage, shall, with all possible despatch, proceed direct to Newport, Monmouthshire," and there take in cargo. On October 15th the ship was at Nieuwediep, sixty-two miles from Amsterdam, and not in the port of Amsterdam, and under

favourable circumstances would have reached the docks at Amsterdam in twelve hours more, but in consequence of contrary winds and the absence of steam-tug power, she remained at Nieuwediep over the 19th of October, and did not reach the docks till the 23rd of October. She discharged her cargo with all possible dispatch, was immediately made ready for sea, and proceeded direct to Newport, where she arrived on the 1st of December. B. altogether refused to load the ship:—Held, that the words "now in the port of Amsterdam," in the charterparty, imported a warranty, and that as the ship was not in the port of Amsterdam at the time when the charterparty was made, he was justified in saying that there had been a failure of performance of a condition precedent, and in refusing altogether to carry out the contract. *Behn v. Burness*, 3 B. & S. 751; 32 L. J., Q. B. 204; 9 Jur., N. S. 620; 8 L. T. 207; 11 W. R. 496—Ex. Ch.

Time for Sailing.—To an action for not loading a vessel, in pursuance of the terms of a charterparty, the defendant pleaded that it was agreed by the charterparty, between the plaintiff, original charterer of the good ship called the Dove, A 1, of the measurement of 149 tons or thereabouts, now at sea, having sailed three weeks ago or thereabouts, and the defendant, that the ship, being tight, staunch, &c., should proceed to Marseilles (after having delivered her cargo at Genoa), and there load goods of the defendant, and therewith proceed to a safe port in the United Kingdom, calling at Cork or Falmouth, for a certain rate of freight, thirty working days to be allowed, Sundays excepted. The plea then averred, that time was an essential and material part of the contract; and the probable situation of the ship, with reference to the date of her sailing and the object of her voyage, was also an essential part of the contract; and that, in point of fact, at the time of making the charterparty, the ship had not sailed three weeks, but a materially and unreasonably later time, of which the defendant had no notice or knowledge, for which cause the defendant neglected and refused to load the ship:—Held, that the time at which the ship sailed was material, and that the statement in the charterparty amounted to a warranty. *Ollive v. Booker*, 1 Ex. 416; 17 L. J., Ex. 21.

It was agreed by charterparty that a vessel should sail to Sydney ^{and} ^{or} Moreton Bay, and thence proceed to Callao, Peru, where the captain should report his arrival to G., who should send the captain orders for loading a cargo of guano at the Chincha Islands, to which place the vessel should at once proceed, and after completing her loading, proceed to any safe port in the United Kingdom; freight to be paid at the rate of 4l. sterling per ton weight of guano. "The owners guarantee that for the freight of 4l. per ton, the ship shall be dispatched for Australia within twenty-one days after arrival; if detained over twenty-one days 3l. 10s. per ton to be the rate of freight; if ordered from Sydney to Moreton Bay, the time so occupied not to be reckoned in the days as above." The vessel sailed from Liverpool on the 5th July, 1853, and anchored inside Sydney Heads on the 25th October, 1853. She was ordered to Moreton Bay, but bad weather and the insubordination of a portion of the crew prevented the vessel from leaving Sydney Har-

bour until the 4th November, when she proceeded on her voyage, and on the 12th anchored inside the Flanders Rocks and outside Moreton Bay. She was taken in charge of a pilot of the channel, and on the 14th arrived at her anchorage, where she remained until the 5th December. Some of the crew having deserted, and others refused to work, the remainder was not sufficient to navigate the vessel safely to Callao, and no addition to the crew could be procured at Moreton Bay. On the 5th December the master caused the anchor to be got up and the sails set by the men who were willing to work, with the assistance of the harbour-master and pilot's crew, and the vessel proceeded on her voyage to Callao, but shortly afterwards stopped from the wind failing. During the night several of the seamen deserted. On the 6th the vessel proceeded some distance further, when the greater part of the crew refused to proceed to Callao, on the ground that the ship was not sufficiently manned, and they compelled the captain to return to Sydney. The vessel arrived at Sydney on the 18th December, and remained there until the 6th January, 1854, when she sailed to Callao, where she ultimately arrived and brought home a cargo of guano:—Held, that under these circumstances the ship was not dispatched from Australia within twenty-one days after her arrival, and consequently that the owners of the vessel were not entitled to the freight of 4l. per ton. *Sharp v. Gibbs*, 1 H. & N. 801.

Condition precedent.—Where a charterparty, dated 6th of February, but averred not to be executed till the 15th of March, contained a covenant by the owner that the ship should and would proceed from D., where she then lay, on or before the 12th of February, on her outward-bound voyage, and return, &c., and a covenant by the freighter, that, in consideration of every thing above mentioned, he would pay freight for the voyage; the voyage being averred to be performed, and the freight earned, the owner may recover for it, without averring that the ship sailed on or before the 12th of February, such covenant that the ship should sail on or before the 12th of February being either no condition precedent, but only an independent covenant, for breach of which the party had his remedy in damages; or not of the substance of the contract, which was for the performing of the voyage for which the ship was chartered, and earning the freight; or being rendered impossible to be performed by the parties themselves not having executed the deed till after the time appointed for doing the act, and thereby dispensing with the performance of it. *Hall v. Cazenove*, 4 East, 477; 1 Smith, 272.

Stipulations in a charterparty, that the vessel, being tight, staunch and strong, shall sail with convenient speed, and within a reasonable time, are not conditions precedent to the performance of a contract to load on the part of the charterer, although if, by reason of the non-compliance with those stipulations, the object of the charterparty and of the voyage was wholly frustrated, that may be an answer to an action for breach of the contract. *Tarrabochia v. Hickie*, 1 H. & N. 183; 26 L. J., Ex. 26.

By a charterparty it was agreed, that the vessel should proceed to Trieste, and there load a full cargo of wheat, and, being so loaded, should there-with proceed to a port in the United Kingdom,

"the vessel to sail from England on or before the 4th of February then next :"—Held, that the sailing of the vessel from England on or before the day named was a condition precedent to the owner's right to sue the merchants for not providing a cargo at Trieste. *Glaholm v. Hayes*, 2 Scott, N. R. 471 ; 2 M. & G. 257.

The defendant chartered a ship of T. from Sunderland to Barcelona : by the charterparty, half the freight was to be advanced to the master on his signing the bills of lading. T., being indebted to the plaintiff, gave him an order on the defendant, requiring the defendant to pay to the plaintiff, on the ship "being loaded and sailed, out of the advance," 73*l*. The defendant wrote at the foot of the order, that he agreed to the above. The vessel being loaded and in a fit state for sailing, but the clearances not being completed, nor the bills of lading signed, left Sunderland Harbour, with the captain on board. She crossed the bar ; and the captain returned to land, in order to get the papers completed, and sign the bills of lading ; he signed them, and got the advance of freight from the defendant, who deducted a sum to meet the 73*l*. The vessel stood off and on, waiting for the captain ; but it being found that she had been injured, she returned into Sunderland Harbour to repair, the captain not having rejoined her, and did not afterwards sail :—Held, that the sailing of the vessel was a condition precedent to the liability of the defendant to pay the 73*l*. *Hudson v. Bilton*, 6 El. & Bl. 565 ; 26 L. J., Q. B. 27 ; 2 Jur., N. S. 784.

—"Leave Amsterdam."—A ship was chartered to "sail and proceed from Amsterdam with all convenient speed to Liverpool, to leave Amsterdam not later than all March." On the 30th of March the ship, having a portion of her ballast on board, left the docks at Amsterdam, and on the same evening got to the entrance of the North Holland Canal. On the 31st of March she proceeded to Alkmaar, where she remained during the 1st and 2nd of April, taking in the remainder of her ballast. On the 3rd of April she proceeded on her voyage, and quitted Nieuwediep, and arrived at Liverpool on the 17th :—Held, that the term "leave Amsterdam" did not mean "sail on her voyage from Amsterdam," and consequently the stipulation in the charterparty had been complied with. *Van Baggen v. Baines*, 9 Ex. 543 ; 2 C. L. R. 543 ; 23 L. J., Ex. 218.

—"Where Accident within Exceptions."—A merchant at Liverpool entered into a charterparty with the owner of the ship as follows : "It is mutually agreed between the owner of the good ship Zwaan, now at Amsterdam, and to sail from thence for Liverpool on or before the 15th of March next, that the ship, being tight, staunch and strong, shall with all convenient speed be made ready," &c., as in the usual printed form of charterparty. The exception was as follows : "Restrictions of princes and rulers, the dangers and accidents of the seas and navigation, the act of God, fire, pirates and enemies, throughout this charterparty always excepted." The ship did not sail from Amsterdam in consequence of what was admitted to be "the act of God :"—Held, that notwithstanding the words "throughout this charterparty," the sailing of the ship from Amsterdam on the 15th March was a con-

dition precedent to the obligation of the charterer to take and load the ship. *Croockewit v. Fletcher*, 1 H. & N. 893 ; 26 L. J., Ex. 153. See also cases post, col. 1350.

—"To Sail direct."—By a charterparty between the owner and the captain of a ship, and the charterer's agent abroad, for the carriage of timber from Riga to Portsmouth at a stipulated rate per load, the former bound himself, after receiving his cargo on board, to sail with the first favourable wind direct to the port of Portsmouth. The ship, however, unnecessarily entered the harbour of Copenhagen, where she was detained several weeks, by means whereof the charterer was put to considerable expense in having fresh insurances effected upon the cargo. In an action for the freight :—Held, that the covenant to sail direct to Portsmouth was not a condition precedent ; and that the deviation could not be given in evidence either as a bar to the action or to diminish the damages. *Bornmann v. Tooke*, 1 Camp. 377.

A shipowner, by charterparty of October 20th, 1832, agreed to go in ballast from P. to St. M., and bring back a cargo of fruit direct to L. ; the charterer was to be allowed thirty-five running days for loading and unloading, to commence on December 1st then next ; and if the vessel did not arrive at St. M. by the 31st January, 1833, the charterer was to be at liberty to rescind the charterparty :—Held, that the shipowner was bound to proceed at once to St. M., and was not at liberty to make an intermediate voyage for his own purposes, although, notwithstanding such intermediate voyage, he arrived at St. M. before the 31st January, 1833. *McAndrew v. Adams*, 4 M. & Scott, 517 ; 1 Bing. N. C. 29.

—"Waiver."—By a charterparty made at Malta, dated the 24th of February, 1854, the chartered ship was described as "coppered Al, of Malta," of a certain measurement, "now at anchor at this port," and it was agreed that she being tight, staunch, and strong, and properly manned, and every way fitted for the voyage, should, with all convenient speed, proceed in ballast to Alexandria, in Egypt, and there load from the charterer a cargo of beans and wheat. At the date of the charterparty the ship was not coppered, nor was she lying at anchor in port, nor had she obtained her register. She was an entire new vessel, in dry dock, her coppering being in course of completion. The ship was not ready to sail until the 28th of March, and, from the state of the weather, she did not sail until the 30th of that month, and reached Alexandria on the 12th of April. No objection was made by the charterer at the time of the delay. On her arrival the master gave notice to the charterer's agent there that he would be ready to receive cargo on the 14th of that month. Before the ship's arrival at Alexandria, the charterer's agent had made a cession to the charterparty, and the agent referred the master to the cessionary, informing him that his principal had nothing more to do with the charterparty than to guarantee the solvency of the cessionary. Freight had fallen considerably below the rates named in the charterparty between the date of the charterparty and the date of the cession. The cessionary sought to invalidate the cession on account of the delay in the arrival of the ship, and on that ground refused to give the cap-

tain any cargo. The captain refused to acknowledge the cessionary or release the charterer, but at the same time expressed his readiness to receive a cargo from any one under the order of the charterer's agent. The ship lay at Alexandria waiting for cargo the whole of her lay days and the ten demurrage days, but received no cargo from the charterer. The captain afterwards took a small cargo and returned to Malta. In an action brought by the shipowner against the charterer in Malta:—Held, first, that it was unnecessary to determine whether the completion of the copping of the ship was a condition precedent or not to the maintaining an action against the charterer, as it was clear that that statement had reference to the time of sailing and not to the date of the charterparty. *Dimech v. Corlett*, 12 Moore, P. C. C. 199.

Held, secondly, as to the stipulation that the ship should sail "with all convenient speed," that as the parties had not expressly stated for themselves in the charterparty that unless the ship sailed on a specified day the charterparty was to be at an end, and as the charterer resided at Malta and had made no objection at the time to the delay, or had given evidence that any other loss than that occasioned by the falling of freights had taken place in consequence of the delay, his position was not thereby altered, and an action was therefore maintainable against the charterer upon the charterparty. *Id.*

To Sail with Convoy.—The owner of a ship is bound by a representation of his broker, who put up the ship at the Royal Exchange, and at the coffee-house, as a general ship warranted to sail with convoy, and distributed handbills to the same effect. *Runquist v. Ditchell*, 3 Esp. 64; 2 Camp. 556, n.

To Arrive at Port of Loading.—Proviso in a charterparty, that, if a ship did not arrive at her port of loading on or before, &c., unless prevented by stress of weather or unavoidable impediment, the freighter should not be obliged to ship a cargo:—Held, that, if ordinary diligence was used in the voyage to reach the port of loading, the owners were within the exception of the proviso, though the ship was delayed till after the stipulated time by causes which extraordinary exertion might have counteracted. *Granger v. Dent*, M. & M. 475.

Where a ship was freighted to go in ballast to Jamaica, and bring home a cargo, and the freighter undertook to provide a full cargo for her in time for the July convoy, provided she arrived out and was ready by the 25th of June:—Held, where she did not arrive out till after the 25th of June, that the freighter was entirely discharged from his contract to furnish a cargo. *Shadforth v. Higgin*, 3 Camp. 385.

Where the plaintiff covenanted that on the arrival of a ship at a certain port, he would receive the defendant's cargo, and sail for England therewith with the next June convoy, provided the ship arrived and was ready to load sixty-five running days before the sailing of such convoy:—Held, that it was not a condition precedent to the defendant's part of the contract that the ship should so arrive, but he was still bound to supply a cargo under a stipulation to that effect in the contract. *Drffell v. Brocklebank*, 4 Price, 36; 3 Bligh, 561.

Damages.—The defendant having guaranteed that, in consideration of the plaintiff's shipping goods by his ship, she should sail with or before any other vessel in the berth, under penalty of forfeiting half the freight, and another ship having sailed before her, and the only plea being, payment into court:—Held, that the sailing of the vessel with or before any other was the event intended to be secured; that the half freight was therefore recoverable as liquidated damages; and that it was unnecessary for the plaintiff to give evidence of any actual damage sustained by him. *Sparrow v. Paris*, 7 H. & N. 594; 31 L. J., Ex. 137; 8 Jur., N. S. 391; 5 L. T. 799.

When a contract was made in the following terms: "We undertake to ship for you by the Warrior Queen, guaranteeing that she sails not later than the first week in July, or forfeit 2s. 6d. per ton, 300 or 400 packages, one-third yarn, at a through rate of 42s. 6d., free of commission, provided they are forwarded per M. & Co., on or before the 29th inst.;" and the defendant, in answer to a declaration for breach of the contract by reason of the nonshipment of a portion of the packages so sent, pleaded the payment of 2s. 6d. per ton on the packages as and for the forfeit according to the agreement:—Held, that the plea was good. *Heigh v. Escombe*, 4 L. T. 517.

iv. Capacity.

Description or Warranty.—To an action for not loading a ship according to the terms of a charterparty, in which the shipowner was described as "of the ship A., of the measurement of 180 to 200 tons, or thereabouts," the charterer pleaded that by the charterparty the ship was warranted to be of the measurement of 180 tons to 200 tons, or thereabouts; and that the ship was of a measurement greatly and unreasonably exceeding 200 tons, and was not of the measurement of 180 tons to 200 tons, or thereabouts; whereupon he did not load:—Held, that the plea was not proved, inasmuch as the statement of tonnage in the charterparty was matter of description only, and did not amount to a warranty. *Barker v. Windle*, 6 El. & Bl. 675; 25 L. J., Q. B. 349; 2 Jur., N. S. 1069—Ex. Ch.

A cargo of guano was shipped from the Chincha Islands to London, by the Oriente. The Oriente, having become disabled, put into Valparaiso, was condemned, and her cargo taken out of her. The captain, "for account and risk of the owner of the cargo," chartered the Fairy Queen to take on "the cargo brought by the Oriente, being 470 tons more or less, not exceeding what she can reasonably stow," at the rate of 51. 2s. 6d. per ton. The owner of the cargo had an agent at Valparaiso, of which the captains of the Oriente and the Fairy Queen were aware, but no reference was made to him. After the guano had been loaded on board the Fairy Queen, the captain of that vessel said that he had not more than 350 tons on board; and ultimately the captain of the Oriente agreed that freight should be paid on the full quantity of guano mentioned in the charterparty; and in order to carry out the agreement, a bill of lading was signed by the captain of the Fairy Queen, making the guano deliverable to M. & Co., the agents for the general average settlement of the Oriente, or their assigns, he or they paying freight for the guano as 470 tons, as per charterparty:—Held, that the charterparty contained no warranty that the cargo amounted to

470 tons more or less; and therefore the owners of the cargo were not liable under the charterparty for not loading a full cargo. *Gibbs v. Grey*, 2 H. & N. 22; 26 L. J., Ex. 286; 3 Jur., N. S. 543.

Condition Precedent.—Where, by a charterparty made at Liverpool for a voyage from Liverpool to Sydney, the charterer agreed to pay for the use and hire of the ship, in respect of the voyage, 1,550*l.* in full, on condition of her taking a cargo of not less than 1,000 tons of weight and measurement:—Held, that the stipulation or condition of the ship taking a cargo of not less than 1,000 tons of weight and measurement was not a condition precedent; and that, even if it was so originally, the charterer having had a substantial part of the consideration for his promise to pay, could not plead it in bar. *Pust v. Dowie*, 32 L. J., Q. B. 179; 9 Jur., N. S. 1322; 8 L. T. 244. Affirmed, 5 B. & S. 20; 34 L. J., Q. B. 127; 13 W. R. 459—Ex. Ch.

Measurement of Cargo, how ascertained.—By a charterparty it was agreed that "a ship should load a cargo, and proceed to a port in Great Britain, and deliver the same on being paid freight at and after the rate of 3*s.* per 180 English cubic feet taken on board, as per Gothenburg custom:—Held, that the freight was to be ascertained by measuring the cargo, according to the method used at Gothenburg, and not according to the method used at the port of discharge. *The Skandinav*, 51 L. J., P. 93—C. A. Reversing 60 L. J., P. 46.

As to Weight.—By a charterparty made at Liverpool for a voyage from Liverpool to Sydney, the charterer agreed to pay for the use and hire of the ship, in respect of the voyage, 1,550*l.* in full, on condition of her taking a cargo of not less than 1,000 tons of weight and measurement:—Held, that 1,000 tons of weight and measurement meant 1,000 tons of a cargo of goods in the ordinary proportions of the port of lading, viz., one-third weight and two-thirds measurement, and not as for the Sydney market, in which the proportion is two-thirds weight and one-third measurement. *Pust v. Dowie*, *supra*.

In Fresh or Salt Water.—A charterparty contained a guarantee that a vessel should carry 3,000 tons dead weight upon a draught of twenty-six feet of water:—Held, that both parties to the charter must have contemplated loading a cargo in the river, and that, consequently, the guarantee would apply to fresh as well as to salt water. *The Norway*, 3 Moore, P. C. C., N. S. 245; B. & L. 404; 11 Jur., N. S. 892; 13 L. T. 50; 13 W. R. 1085.

3. EXEMPTIONS FROM LIABILITY.

"Perils of the Seas."—Where there is an exception in a charterparty of perils of the sea, a loss from the ship's running foul of another by misfortune is within the exception, and is a loss by perils of the sea. *Buller v. Fisher*, 3 Esp. 67.

A vessel chartered for a voyage from the Cape to Hondeklip Bay, there to load a cargo of copper ore, and proceed therewith to Swansea, having loaded part of her cargo, received damage to her capstan in a storm, such that she was unable to load the rest of her cargo, 120 tons, which were ready, until the damage was repaired. The master, instead of running for the Cape, 180 miles

distant, where the damage could have been repaired, proceeded to St. Helena, 1,800 miles distant, expecting to be able to repair there, and intending to return for the rest of the cargo; but not being able to get repairs at St. Helena, he proceeded to Swansea with a cargo short of the 120 tons. The shipowner having sued the underwriter upon a policy of insurance upon chartered freight, as for a total loss of freight upon the 120 tons by perils of the sea, the jury found that the master acted throughout as a prudent owner, uninsured, would have acted:—Held, that the shipowner could not recover, for that the master was not prevented by perils of the seas from procuring repairs and earning the freight. *Philpot v. Swann*, 11 C. B., N. S. 270; 30 L. J., C. P. 358; 7 Jur., N. S. 1291; 5 L. T. 183.

The exception in a charterparty of perils of the sea applies not only to the voyage contracted for, but also to the preliminary voyage to the port of loading. *Hudson v. Hill*, 43 L. J., C. P. 273; 30 L. T. 555.

Condemnation.—The capture of a chartered ship, and condemnation and sale by a decree of a Vice-admiralty court, do not, if the decree is reversed by the Court of Appeal (although more than three years afterwards), with costs and damages, amount to a prevention by the perils enumerated in the charter; but the shipowner is bound to perform his contract or to pay damages. *The Newport*, Swabey, 335—P. C.

Duration of Exception.—A charterparty provided that a ship should proceed from a port where she was lying to a usual loading-place, and there load a full and complete cargo, and proceed to a certain other port. The charterparty contained a clause, "The act of God, the Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, and rivers, and navigation, of whatever nature and kind soever, during the voyage, always excepted:—Held, that the passage from the port where the ship lay to a usual place of loading was part of the voyage, and within the exception. *Barker v. M'Andrew*, 18 C. B., N. S. 759; 34 L. J., C. P. 191; 11 Jur., N. S. 637; 12 L. T. 459; 13 W. R. 779.

"Perils of Navigation."—H., by a charterparty, engaged a vessel of G., name to be given up by G. to H. as soon as known, the vessel to proceed from the port of Hull to the port of Alexandria, with liberty to G. to ship cargo on the outward voyage to Alexandria, and to call at intermediate ports; the ship on arriving at the port of Alexandria to take in a cargo to be shipped by H.'s agents and proceed with the same at a certain stipulated rate of freight to be paid by H. to G. to the ports of Hull or London. The ship was to arrive at Alexandria within three weeks of November 15th, 1870, but the charterparty contained the usual exceptions as to perils of navigation. The ship did not arrive at the port of Alexandria until considerably after the margin of time allowed by the charterparty, whereby H., by losing the market for his cargo, sustained damage. The delay was caused by perils of navigation within the exception clause of the charterparty arising on the outward voyage from Hull to Alexandria to take in H.'s cargo. G. pleaded the exception and the delay:—Held, that the plea afforded an answer to the

1. The purpose of this document is to provide a comprehensive overview of the current state of the project and to identify the key areas for improvement. The document is organized into several sections, each focusing on a different aspect of the project.

2. The first section discusses the overall goals and objectives of the project. It outlines the scope of the work and the expected outcomes. The second section provides a detailed analysis of the current progress and identifies the challenges that are being faced.

3. The third section describes the various resources that are being utilized in the project, including personnel, equipment, and materials. It also discusses the budget and the financial aspects of the project. The fourth section provides a summary of the findings and recommendations.

4. The fifth section discusses the future plans for the project and the steps that will be taken to ensure its successful completion. It also includes a timeline for the project and a list of the key milestones. The sixth section provides a final summary and conclusions.

5. The seventh section discusses the impact of the project on the organization and the industry. It also includes a list of the key stakeholders and a description of their roles. The eighth section provides a detailed analysis of the risks and the mitigation strategies. The ninth section discusses the lessons learned from the project.

6. The tenth section provides a final summary and conclusions. It also includes a list of the key findings and recommendations. The eleventh section discusses the future plans for the project and the steps that will be taken to ensure its successful completion.

7. The twelfth section provides a detailed analysis of the risks and the mitigation strategies. The thirteenth section discusses the lessons learned from the project. The fourteenth section provides a final summary and conclusions. The fifteenth section discusses the future plans for the project and the steps that will be taken to ensure its successful completion.

also *Seeger v. Duthie*, 8 C. B., N. S. 45; 29 L. J., C. P. 253; 6 Jur., N. S. 1095. Affirmed, 8 C. B., N. S. 72; 30 L. J., C. P. 65; 7 Jur., N. S. 239; 9 W. R. 166—Ex. Ch.

— **On Terms of Sub-charter—Notice of Lien.**]

—A shipper who has loaded on the terms of a sub-charter is not affected by notice of a stipulation in the original charter-party that the owner is to have "a lien on the cargo for arrears of hire." He has a right to have bills of lading signed on the terms of the sub-charter. *Tharrie Sulphur and Copper Mining Company v. Culliford*, 22 W. R. 46.

— **Obligation to inquire as to Existence of Bills of Lading.**]

—The goods of a shipper in a general ship are not affected by a clause in a charterparty of which he has no notice or knowledge, giving the shipowner a lien on all cargo and freight for arrears of hire due under the charterparty. Semble, the fact that no bills of lading were given for the goods makes no difference in this respect as to the rights and liabilities of the parties. T. hired a ship from M., and by the charterparty gave M. a lien on all cargo and freight for arrears of hire. T. advertised the ship as a general ship, and gave no notice of the charterparty. B. shipped goods and obtained a receipt, but no bill of lading. The hire being in arrears, M. detained the goods of B. for the whole of the arrears:—Held, that M. was not entitled to detain the goods of B., and that B. was entitled to damages for their detention. *The Stormoway*, 51 L. J., Adm. 27; 46 L. T. 773; 4 Asp. M. C. 529.

To obtain Consular Manifest.—In an action by the owners of a vessel against a charterer, the declaration alleged that it was customary at Liverpool for the shippers of goods by vessel to make out for the captain a correct copy of each bill of lading, and that the shippers of the cargo did make out copies of eight bills of lading for the captain, and did deliver the copies to the charterer for the captain, and that it was necessary, as the charterer knew, for the purposes of the voyage, that before sailing a consular manifest should be made out, and that it was his duty as charterer, and having in his possession the captain's copies of the bills of lading, on request of the owners of the ship, to hand over and give all such copies for the purpose of enabling a complete consular manifest to be made out, and that he was requested to do so, but only handed over six out of the eight bills of lading:—Held, that there was no such duty as alleged to hand over the copies of the bills of lading, and that, therefore, the declaration was bad, and there was no cause of action. *Dutton v. Powles*, 30 L. J., Q. B. 169; 7 Jur., N. S. 725; 3 L. T. 695; 9 W. R. 371. Affirmed, 2 B. & S. 174; 31 L. J., Q. B. 191; 8 Jur., N. S. 970; 6 L. T. 224; 10 W. R. 408—Ex. Ch.

As to Bill of Health.—In an action on a charterparty, in which the shipowner covenanted "that the vessel should be sufficiently furnished with everything necessary and needful for the voyage in question," which was to Cagliari, in Sardinia:—Held, that it was his duty to have a bill of health on board; and, the charterer having been put to great inconvenience and expense on account of the ship not being provided with such document, that the shipowner

was responsible for the loss occasioned thereby. *Lery v. Costerton*, Holt, 167; 4 Camp. 389; 1 Stark. 212.

As to Passes.—A declaration on a charterparty, whereby it was agreed between the owners of a vessel called the *Brevet* and the charterers, stated that the vessel should sail to Melbourne, and thence proceed to Callao, Peru, where the captain should report his arrival to G. & Co.; that, the vessel being tight, staunch, strong and well conditioned for the voyage, G. & Co. should send the captain orders for loading a cargo of guano at the Chincha Islands, to which place the vessel should at once proceed, calling on her way at Pisco, to obtain the necessary pass to load, which should be given to the captain by the charterers' agent free of expense, within twenty-four hours of his application. Breach, that the charterers made default in providing the agreed guano, and only provided an insufficient and a less quantity. Plea, that Callao and the Chincha Islands are a part of the republic of Peru, and that by the laws of that republic, a vessel proceeding from Callao to the Chincha Islands, for the purpose of taking on board a cargo of guano, is obliged to procure from the government a written pass so to do, and the vessel could not lawfully have proceeded from Callao to the Chincha Islands without such pass; that the vessel was, after her arrival at Callao, surveyed by officers of that government, and the government did, upon the report of the surveyors, refuse to give such pass or to allow the vessel to proceed to the Chincha Islands; and thereupon reparations were done to the vessel by the owners at Callao, and the government did afterwards give a written pass for the vessel to proceed to the island to take in a cargo of guano, but upon the condition expressed in the pass, that more guano should not be placed on board than would make the vessel draw eighteen and a half feet of water; that the vessel did, by virtue of such pass, proceed to the Chincha Islands, and the charterers caused to be loaded on board her sufficient guano to make her draw eighteen and a half feet of water, and they could not, without violating the laws of the republic of Peru, have loaded a greater quantity, and if they had done so, the vessel and cargo would have been liable to seizure by the government:—Held, that the plea was bad, since the obligation was on the charterers to procure the proper pass, and it was not alleged that they were prevented from so doing by reason of the vessel not being well conditioned. *Kirk v. Gibbs*, 1 H. & N. 810; 26 L. J., Ex. 209.

5. PERFORMANCE.

a. Nominating Port.

Duty of Captain to wait for Orders at Port of Call.—The master of a ship, under a charterparty to load a cargo at a foreign port, and thence proceed to a port in Great Britain, as ordered, is not bound, in default of orders, to wait at the foreign port until he has communicated with the charterer. *Sieveling v. Maas*, 25 L. J., Q. B. 275; 2 Jur., N. S. 426. Affirmed, 6 El. & Bl. 670; 25 L. J., Q. B. 358; 2 Jur., N. S. 515—Ex. Ch.

— **To Obey Directions as to Place of Discharge.**—Under an open charterparty to deliver

Void or Voidable in Event of War.]—The plaintiff chartered the ship *Edgar* to C. by charterparty in which it was agreed that the ship after completing intermediate employment (which she was to be at liberty to take) should proceed to Galatz for orders to load there, &c., and being so loaded proceed to Malta for orders. Upon the margin of the charterparty were the words, "In the event of war, blockade, or prohibition of export preventing loading, this charterparty to be cancelled." The plaintiffs then effected a policy with the defendants for the insurance of the freight of the ship against the perils of the sea, restraint of princes, &c. The *Edgar* sailed for Genoa under the charterparty on the 1st of May, 1877, war having been declared by Russia against Turkey on the 24th of April. Before her arrival at Genoa, the plaintiffs ascertained that Russia had closed the ports of loading mentioned in the charterparty. The *Edgar*, however, discharged her cargo and took in ballast at Genoa, and sailed for Constantinople, and upon her arrival there on the 28th of May, found that the loading ports were closed, and that there was no reasonable probability of their being open in time for her to load her chartered cargo. She therefore did not proceed farther towards Galatz, but obtained a homeward cargo at a freight less than that stipulated for by the charterparty. In an action upon the policy:—Held, by Cockburn, C. J., and Manisty, J. (Lush J., dissenting), that the plaintiffs could not recover, for according to the true construction of the charterparty the act of closing the ports by the Russian government was a prohibition of export preventing loading, and that upon the happening of that event the charterparty came to an end—without any election by either party. By Lush, J., that the effect of the memorandum in the margin was to make the charterparty voidable only at the option of either party, that neither party having elected to avoid it the charterparty continued in force up to the time when the loading became impracticable, and that the plaintiffs had sustained such a loss of the chartered freight as to entitle them to recover. *Adamson v. Newcastle Steamship Freight Insurance Association*, 4 Q. B. D. 462; 48 L. J., Q. B. 670; 41 L. T. 160; 27 W. R. 818.

And see cases XIII. 5. PERFORMANCE, *infra*.

Ship Damage.]—In a charterparty, between the East India Company and the owners of a ship taken into their service, was the following clause: "But nevertheless the part-owners shall not be charged with any sum of money in respect of goods damaged on board the ship, either in her outward or homeward bound voyage, but such as shall, by the condition and appearance of the package thereof, or by some other reasonable proof, appear to be ship damage." Part of the homeward-bound cargo was damaged in a storm:—Held, that this was not ship damage within the meaning of the clause, which was imputable only to such damage as happens by the insufficiency of the ship, or the negligence of those who have the charge of her. *East India Company v. Todd*, 1 Bro. P. C. 405.

Mistake as to.]—Although a clause, by way of condition or of warranty, contained in a charterparty, cannot be got rid of by reason of its being part of a printed form, not adverted to expressly by the parties, and intended by one

of them to be omitted; yet, if the other party was aware at the time that it could not be complied with, and after shewing that it was broken, treated the charter as subsisting, it will afford him no defence to an action on the charter. *Dixon v. Heriot*, 2 F. & F. 760.

Provisions as to Lighterage—Writing and Print.]—Charterers agreed with a shipowner by charterparty that his ship should load at Barbadoes, St. Kitts, or Trinidad, a full cargo of West India produce, "to be brought to and taken from alongside at merchant's risk and expense." These words, with others, were in print. The charterparty also contained the words "cargo at Trinidad as customary." These words, with others, were in writing. The custom at Trinidad is, that the ship pays for the lighterage, and the shipowner allows the charterer the reasonable expense thereof. The ship loaded at Trinidad in the customary manner, but the captain refused to pay the lighterage, whereupon the charterers had to bear the expense of it:—Held, that the stipulation, "cargo at Trinidad as customary," worked an exception to the stipulation as to loading at merchant's risk, and that the charterers were entitled to recover the lighterage from the defendant. *Scrutton v. Childs*, 36 L. T. 212.

vii. What Evidence Admitted to Explain.

Custom.]—By a charterparty, made at Riga, the ship was to proceed, with a cargo of timber, to Liverpool, and to deliver at such dock there as ordered on arrival. On arrival at Liverpool the ship duly entered into dock, but, in consequence of the crowded state of the dock, was unable for some days to obtain a berth alongside the quay from which she was allowed to discharge:—Held, that, in an action for demurrage, evidence was admissible tending to shew that, by the custom of the port of arrival, timber ships were not considered to have arrived until they had obtained a discharging berth within the dock. *Steamship Company "Norden" v. Dempsey*, 1 C. P. D. 654; 45 L. J., C. P. 764; 24 W. R. 984.

Where a vessel is chartered to proceed with cargo to a "safe port . . . as ordered, or as near thereto as she can safely get, and always lay and discharge afloat," the master is not bound to discharge at a port where she cannot, by reason of her draught of water, "always lie and discharge afloat," without being lightened. Evidence that it was the custom at the port of discharge for vessels to be lightened in the roads before proceeding into the harbour held to lie inadmissible. *The Alhambra*, 6 Adm. D. 68; 50 L. J., Adm. 36; 43 L. T. 636; 29 W. R. 655—C. A.

By a charterparty the vessel was to deliver at H., "or so near thereto as she could safely get;" to discharge as customary; the cargo to be brought to and taken from alongside the ship at merchant's risk and expense. The draught of water of the vessel with the cargo on board was too great to allow her to reach H. The nearest point to which she could safely get was S., where the merchant refused to accept delivery of any part of the cargo. In order to lighten the vessel, part of her cargo was discharged into lighters at S. and sent in them to H. Her owner having sued the charterer to re-

cover the lighterage expenses:—Held, that a defence alleging that by the custom of the port of H. the defendant was not bound to take delivery elsewhere than at H. was bad on demurrer, inasmuch as it sought to set up a custom inconsistent with the written contract, and that the plaintiff was entitled to recover the lighterage expenses. *Hayton v. Irwin*, 5 C. P. D. 130; 41 L. T. 666; 28 W. R. 665—C. A.

A. engaged with B. to have a full cargo for the ship, the rates of freight for which would average 40s. per ton, and at least nine cabin passengers, passage-money to average 75l. The contract was fulfilled as to the passengers, but the average rate of freight for goods amounted to 30s. only per ton. A. shipped, however, steerage passengers, the net profits from whom made the average earnings of the ship over 40s.:—Held, that as this was an unusual contract, evidence was not admissible to shew that the terms "cargo" and "freight" used with reference to the voyage on which the ship was engaged would, by the general usage and course of the trade, be considered to comprise steerage passengers, and the net profit arising from their passage-money. *Lewis v. Marshall*, 7 M. & G. 729; 8 Scott, N. R. 729; 13 L. J., C. P. 193; 8 Jur. 848.

Reading with Bill of Lading.—The excepted perils mentioned in the charterparty were more numerous than those in the bill of lading:—Held, that, under the circumstances, both instruments together contained the contract. *The San Roman*, 3 L. R., Adm. 583; 41 L. J., Adm. 72; 26 L. T. 948. Affirmed, 5 L. R., P. C. 301; 42 L. J., Adm. 46; 21 W. R. 393.

A vessel was chartered to carry a cargo of coals from Cardiff to Rouen. The charterparty provided that the liability of the charterers should cease "when the ship is loaded and advance of freight with demurrage at Cardiff paid. Ship to have a lien on cargo for freight, dead freight and demurrage." The bill of lading contained no restriction on the liability of the charterers. In an action for balance of freight:—Held, that the charterparty and bill of lading must be read together, and construed according to the plain meaning on the face of them, and that the charterers' liability ceased on performance of the conditions in the charterparty. *Barwick v. Burnyeat*, 36 L. T. 250; 25 W. R. 395. See also *Gullichsen v. Stewart*, *post*, col. 1368.

— **With Letters.**—A charterparty was explained and construed by letters for the purpose of fixing the liability under it upon persons signing the charterparty "for owners." *Adams v. Hall*, 37 L. T. 70.

d. Alteration, Variation, and Cancellation.

Authority of Agent.—An agent at a foreign port to whom a ship is addressed for loading under a charterparty has no implied authority to vary the contract by substituting another and a distant port of loading, or a different quality or description of cargo. *Sickens v. Irving*, 7 C. B., N. S. 165; 29 L. J., C. P. 25; 6 Jur., N. S. 200.

Effect of.]—The stipulations in a charterparty may be varied by subsequent instructions, which may amount to a new contract *pro tanto*; and an insurance of freight upon a new voyage,

though different from that described in the charterparty, may be good. *Hall v. Brown*, 2 Dow, 367, 375.

In Margin.]—A merchant entered into a charterparty in the following terms: "It is agreed between the owner of the good ship Zwaan, now at Amsterdam, and to sail from thence for Liverpool on or before the 15th of March next, and the charterer, that the ship, being tight, staunch and strong, shall with all convenient speed be made ready," &c., as in the usual printed form of charterparty. The exception was as follows: "Restrictions of princes and rulers, the dangers and accidents of the seas and navigation, the act of God, fire, pirates, and enemies, throughout this charterparty always excepted." After the signing of the charter, the broker who had acted for the owner wrote in the margin, to come after the words "March next," "wind and weather permitting, with cargo or in ballast, for ship's benefit." He then took the charter to the charterer, and told him that he had made the note in the margin, which he said did not affect it. The charterer said that the note altered the matter, and he did not know that he would then accept the charter; and he ultimately refused to do so. The ship did not sail from Amsterdam, in consequence of what was admitted to be "the act of God."—Held, that the charterparty was avoided by the alteration so made in the margin. *Croockewit v. Fletcher*, 1 H. & N. 893; 26 L. J., Ex. 153.

By Parol.]—Assumpsit lies where a sealed charterparty was afterwards altered by parol, where the subsequent parol contract was distinct from, and not inconsistent with, the contract by deed; being anterior to it in point of time and execution. *White v. Parkin*, 12 East, 578; and see *Davies v. Hawkins*, 3 M. & S. 488.

Where a shipowner covenanted to sail from London to Gibraltar, and there to deliver an outward cargo, and receive from the agents of the freighter at Gibraltar, or at Malaga, Cadiz or Seville, as should be ordered by the agents at Gibraltar, such goods as they might load on board for the homeward cargo, and that the vessel should return direct to the port of London, and deliver the homeward cargo; and the agents at Gibraltar ordered the captain to proceed to Cadiz, at which place other agents directed by parol that the homeward cargo should be delivered at Liverpool instead of London:—Held, that the shipowner having delivered the cargo at Liverpool could not recover the freight, the substitution by parol of Liverpool for London being inconsistent with the covenant contained in the charterparty. *Thomson v. Brown*, 1 Moore, 358; 7 Taunt. 656.

Cancellation by Ship's Husband.]—A ship's husband cannot bind his owners by an agreement to cancel a charterparty, and pay a sum of money on such cancellation. *Thomas v. Lewis* or *Oxley*, 4 Ex. D. 18; 48 L. J., Ex. 7; 39 L. T. 669; 27 W. R. 111.

e. Conditions and Warranties.

i. Classification of Vessel.

What is.]—In a charterparty made at New York, between British subjects, a vessel was described as "the A 1 Br. brig, Hannah Eastee,

of Liverpool :—"Held, that this description was a warranty by the owners that the vessel was at the time classed A 1 at Lloyd's in London. *Routh v. MacMillan*, 2 H. & C. 750; 33 L. J., Ex. 38; 10 Jur., N. S. 158; 9 L. T. 541; 12 W. R. 381.

Not Continuing.]—A description in a charterparty that a vessel is of a particular class is not a continuing warranty, but applies only to the classification at the time the charterparty is made. *French v. Newgass*, 3 C. P. D. 163; 47 L. J., C. P. 361; 38 L. T. 164; 26 W. R. 430—C. A.

In a charterparty the ship was described as newly classed "A 1." Record of American and Foreign Shipping Book." The ship was chartered to New Orleans to load cotton. Soon after her arrival there the certificate of her classification was cancelled, and the charterers were in consequence unable to obtain insurances on the cotton, and they refused to load the ship. In an action by the shipowners against the charterers for breach of the charterparty :—"Held, that there was no breach of warranty by the shipowners, because the statement of the ship's classification in the charterparty was a warranty only that she was so classed at that time, and not that she was rightly, or would continue so classed, and that the shipowners were entitled to maintain their action. *Id.*

The description of a vessel in a charterparty as A 1, warrants only that she was A 1 at the time of making the charterparty, not that she should continue to be so. *Hurst v. Osborne*, 18 C. B. 144; 25 L. J., C. P. 209.

ii. Seaworthiness and Fitness for Cargo.

Extent of.]—If a chartered vessel is seaworthy at the commencement of the voyage, but is afterwards damaged by perils of the sea, though the owner is not bound to repair the vessel, yet if he elects not to do so, he ought not to proceed with the vessel in the unseaworthy condition. *Worms v. Storey*, 11 Ex. 427; 25 L. J., Ex. 1.

A shipowner who accepts goods which he is to deliver in good condition, impliedly contracts to perform the voyage in a ship which is seaworthy. *Steel v. State Line Steamship Company*, 3 App. Cas. 72; 37 L. T. 333.

The implied warranty of seaworthiness into which the owner of a ship enters with the owner of her cargo, attaches at the time when the perils of the intended voyage commence, that is, when she sets sail with the cargo on board for her port of destination; and this warranty is broken if she is then unfit to encounter these perils, although she may have been seaworthy whilst lying in the port of loading, and also at the times of starting from her anchorage for and arriving at the place of loading appointed by the charterer, and of commencing to take on board her cargo. *Cohn v. Davidson*, 2 Q. B. D. 455; 46 L. J., Q. B. 305; 36 L. T. 244; 25 W. R. 369.

A vessel was chartered for a voyage to Dundee, from the port of Sunderland, where she was lying in a seaworthy condition. Pursuant to the terms of the charterparty, and by the orders of the charterer, the vessel proceeded to a wharf situate in the port of Sunderland, and there loaded on board a cargo of cement. At the time when she commenced taking in the cargo she

was seaworthy; but by the time of setting sail on her voyage she had from some unknown cause become unseaworthy. The owners of the vessel were not guilty of negligence in sending her to sea in the condition in which she then was. Soon after starting from Sunderland she began to leak; but the wind being fair for the voyage to Dundee, the master resolved to keep his course, and he was not guilty of any negligence in not returning to Sunderland. The vessel did not reach Dundee, but foundered at sea, and the cargo of cement was totally lost :—"Held, that the warranty of seaworthiness implied by law upon entering into the charterparty had been broken, and that the charterer was entitled to recover the value of the cargo shipped by him on board the vessel. *Id.*

In every contract for the conveyance of merchandise by sea there is, in the absence of express provision to the contrary, an implied warranty by the shipowner that his vessel is seaworthy. *Kopitoff v. Wilson*, 1 Q. B. D. 377; 45 L. J., Q. B. 436; 34 L. T. 677; 24 W. R. 706.

In an action to recover damages for the loss of iron armour-plates, which were lost on board a ship, it appeared that the shipowners, by their servants, stowed the ship, and that during rough weather one of the plates broke loose and went through the side of the ship, which in consequence was lost. At the trial the judge told the jury, as a matter of law, that a shipowner warrants the fitness of his ship when she sails, and not merely that he will honestly and bonâ fide endeavour to make her fit, and left to them the questions, was the vessel at the time of the sailing, in a state, as regards the stowing and receiving of these plates, reasonably fit to encounter the ordinary perils that might be expected on a voyage at that season? secondly, if she was not in a fit state, was the loss that happened caused by that unfitness?—"Held, that the direction was right, and correctly stated the liability of a shipowner, even though he did not hold himself out as a common carrier. *Id.*

In the contract of a shipowner to carry goods shipped on board his vessel, there is no implied condition that the vessel shall be seaworthy. *Schloss v. Heriot*, 14 C. B., N. S. 59; 32 L. J., C. P. 211; 8 L. T. 246; 11 W. R. 596.

But to an action by the shipowner against the merchant who shipped goods on board, for the latter's share of an average loss, it is a good plea, on the ground of avoiding circuity of action, to plead that the ship was not seaworthy at the commencement of the voyage, and that the average loss was caused and arose from and in consequence of such unseaworthiness. *Id.*

Throwing up Charter by Reason of Unseaworthiness of Ship.]—A. agreed to charter a ship for twelve months after the completion of her then present voyage. After the completion of the voyage and when he was ready to load the ship she was detained as unseaworthy; and the repairs were not finished until more than two months after the completion of the voyage :—"Held, that the charterer was entitled to throw up the charterparty. *Tully v. Howling*, 2 Q. B. D. 182; 46 L. J., Q. B. 388; 36 L. T. 163; 25 W. R. 290—C. A.

Fitness for Cargo.]—A ship was chartered to sail to Manilla for orders to load there, or at Yloilo, a full and complete cargo of sugar in

bags, hemp in compressed bales, ^{and} _{or} measurement goods, and therewith to sail to Cork, &c., the freight to be at the rate of 4*l.* 2*s.* 6*d.* for dry sugar, 4*l.* 5*s.* for wet sugar, and 4*l.* 15*s.* for hemp or measurement goods; the master engaging that the vessel before and when receiving cargo should be a good risk for insurance, and that during the voyage he would take all proper means to keep the vessel tight, staunch and strong, and in every way fitted and provided for the voyage. At Yloilo the charterer provided a full cargo of wet sugar in bags. In the course of loading it was found that the quantity of molasses which had drained, and which might have been expected to drain, from the wet sugar was so great as to render the ship unseaworthy unless removed, and that the ship's pumps were unable to remove it. The ship was in all other respects seaworthy, but could not have been rendered seaworthy for that cargo without a delay which would have frustrated the objects of the voyage.—Held, that the charterer was entitled under the charterparty to supply a full cargo of wet sugar, and to have a ship provided which was fit for such a cargo. *Stanton v. Richardson*, 45 L. J., C. P. 78; 33 L. T. 193; 24 W. R. 324.—H. L. Affirming *S. C.*, in Ex. Ch., 9 L. R., C. P. 290.

There is no undertaking on the part of a shipowner that his vessel (if really fit) shall be free from suspicion of unfitness to receive a cargo on board. *Towse v. Henderson*, 4 Ex. 890; 19 L. J., Ex. 163.

Damages.—A ship was chartered and put up at the Mauritius as a general ship, and received on board sugars consigned to London. In consequence of the unseaworthiness of the ship she was forced to return to the Mauritius, and part of the sugars which were damaged was there landed and sold. The owners of the sugars brought actions against the charterers for the short delivery. They having no defence suffered judgment by default, and attended the execution of the writs of inquiry. The owner of the vessel had notice of the actions and of each step therein, and was invited to take upon himself the defence, which he declined to do.—Held, that the charterers were entitled to recover the sums paid by them in those actions, and also the costs incurred by them therein. *Blyth v. Smith*, 6 Scott, N. R. 360; 5 M. & G. 405; 12 L. J., C. P. 203; 7 Jur. 948.

Declaration for freight on a charterparty, whereby the ship being tight and every way fitted for the voyage should, at Sunderland, load a cargo of coals and proceed to Constantinople, being paid freight on the quantity delivered, "one-fourth of the freight to be advanced to the owners' agent in London, on the ship having sailed, less five per cent. thereon for assurance, interest and commission." Averment, that the defendant caused the ship to be loaded with a cargo of coals, and "that she, being so loaded, sailed for C. pursuant to the charterparty." Plea, that the ship was not, at the commencement of the voyage, tight and every way fitted for the voyage, and that by reason thereof the ship and cargo were lost; and a second plea, that after the ship sailed, the plaintiff was guilty of negligent and improper conduct with regard to the management of the ship, by reason whereof the ship and cargo were lost:—Held, that the first

plea was not a good plea in avoidance of circuity of action, as the damages sustained by the defendant were not necessarily identical in amount with the sum claimed by the plaintiff; but that it was a bar to the action, on the ground that the advance on the freight had never become payable. *Thompson v. Gillespy*, 5 El. & Bl. 209; 24 L. J., Q. B. 340; 1 Jur., N. S. 779.

iii. Position and Sailing of Vessel.

Position of Ship.—By a charterparty it was agreed that the ship *Ceres*, of the measurement, &c., "expected to be at Alexandria about the 15th of December," being tight, &c., "should with all convenient speed" sail and proceed to that port, and there receive from the charterers a cargo of cotton seed. In an action against the owner, the breach alleged in the declaration was, that the ship was not expected to be at Alexandria about the 15th of December, 1871, but was then in such part of the world and under such engagements that she could not perform those engagements and arrive at Alexandria about the said day:—Held, a good breach, the descriptive statement amounting to a warranty that the ship was in such a position that she might reasonably be expected to arrive at Alexandria by the day named. *Corkling v. Massey*, 8 L. R., C. P. 395; 42 L. J., C. P. 153; 28 L. T. 636; 21 W. R. 680.

A plea, that, at the time of making the charterparty, the ship was, to the charterer's knowledge, engaged for a certain voyage, and that the charterparty was made subject to a condition that she should with all convenient speed fulfil her engagement and then proceed to the port of loading, and that she did so, is a good plea. *Id.*

"Ship now at Rangoon."—In an action by the vendors against their vendees for refusal to accept, evidence was given to shew the circumstances under which the contract was made, and that it was of vital importance that the vessel should be in the port named at the time of making the contract. The jury found, that the condition "Ship now at Rangoon," had not been fulfilled, and that it was a condition absolutely vital:—Held, that it was rightly left to the jury to say under what circumstances the contract was made, and that the words "Ship now at Rangoon" amounted to a warranty justifying the defendants in saying that there had been a failure of performance of a condition precedent and in refusing to carry out the contract. *Oppenheim v. Fraser*, 34 L. T. 524.

Held, also, that the finding of the jury was rightly taken as an element in enabling the court to say that the words amounted to a condition precedent. *Id.*

"Now in port."—By a charterparty, dated London, the 19th of October, 1860, A.'s ship was chartered to B. as follows: "It is this day mutually agreed between A., owner of the good ship or vessel called the M., of 420 tons or thereabouts, now in the port of Amsterdam, and B. of London, merchant, that the ship being tight, staunch, strong, and every way fitted and ready for the voyage, shall, with all possible despatch, proceed direct to Newport, Monmouthshire," and there take in cargo. On October 15th the ship was at Nieuwediep, sixty-two miles from Amsterdam, and not in the port of Amsterdam, and under

favourable circumstances would have reached the docks at Amsterdam in twelve hours more, but in consequence of contrary winds and the absence of steam-tug power, she remained at Nieuwediep over the 19th of October, and did not reach the docks till the 23rd of October. She discharged her cargo with all possible dispatch, was immediately made ready for sea, and proceeded direct to Newport, where she arrived on the 1st of December. B. altogether refused to load the ship:—Held, that the words "now in the port of Amsterdam," in the charterparty, imported a warranty, and that as the ship was not in the port of Amsterdam at the time when the charterparty was made, he was justified in saying that there had been a failure of performance of a condition precedent, and in refusing altogether to carry out the contract. *Behn v. Burness*, 3 B. & S. 751; 32 L. J., Q. B. 204; 9 Jur., N. S. 620; 8 L. T. 207; 11 W. R. 496—Ex. Ch.

Time for Sailing.—To an action for not loading a vessel, in pursuance of the terms of a charterparty, the defendant pleaded that it was agreed by the charterparty, between the plaintiff, original charterer of the good ship called the *Dove*, A 1, of the measurement of 149 tons or thereabouts, now at sea, having sailed three weeks ago or thereabouts, and the defendant, that the ship, being tight, staunch, &c., should proceed to Marseilles (after having delivered her cargo at Genoa), and there load goods of the defendant, and therewith proceed to a safe port in the United Kingdom, calling at Cork or Falmouth, for a certain rate of freight, thirty working days to be allowed, Sundays excepted. The plea then averred, that time was an essential and material part of the contract; and the probable situation of the ship, with reference to the date of her sailing and the object of her voyage, was also an essential part of the contract; and that, in point of fact, at the time of making the charterparty, the ship had not sailed three weeks, but a materially and unreasonably later time, of which the defendant had no notice or knowledge, for which cause the defendant neglected and refused to load the ship:—Held, that the time at which the ship sailed was material, and that the statement in the charterparty amounted to a warranty. *Ollive v. Booker*, 1 Ex. 416; 17 L. J., Ex. 21.

It was agreed by charterparty that a vessel should sail to Sydney ^{and} _{or} Moreton Bay, and thence proceed to Callao, Peru, where the captain should report his arrival to G., who should send the captain orders for loading a cargo of guano at the Chincha Islands, to which place the vessel should at once proceed, and after completing her loading, proceed to any safe port in the United Kingdom; freight to be paid at the rate of 4l. sterling per ton weight of guano. "The owners guarantee that for the freight of 4l. per ton, the ship shall be dispatched for Australia within twenty-one days after arrival; if detained over twenty-one days 3l. 10s. per ton to be the rate of freight; if ordered from Sydney to Moreton Bay, the time so occupied not to be reckoned in the days as above." The vessel sailed from Liverpool on the 5th July, 1853, and anchored inside Sydney Heads on the 25th October, 1853. She was ordered to Moreton Bay, but bad weather and the insubordination of a portion of the crew prevented the vessel from leaving Sydney Har-

bour until the 4th November, when she proceeded on her voyage, and on the 12th anchored inside the Flanders Rocks and outside Moreton Bay. She was taken in charge of a pilot of the channel, and on the 14th arrived at her anchorage, where she remained until the 5th December. Some of the crew having deserted, and others refused to work, the remainder was not sufficient to navigate the vessel safely to Callao, and no addition to the crew could be procured at Moreton Bay. On the 5th December the master caused the anchor to be got up and the sails set by the men who were willing to work, with the assistance of the harbour-master and pilot's crew, and the vessel proceeded on her voyage to Callao, but shortly afterwards stopped from the wind failing. During the night several of the seamen deserted. On the 6th the vessel proceeded some distance further, when the greater part of the crew refused to proceed to Callao, on the ground that the ship was not sufficiently manned, and they compelled the captain to return to Sydney. The vessel arrived at Sydney on the 18th December, and remained there until the 6th January, 1854, when she sailed to Callao, where she ultimately arrived and brought home a cargo of guano:—Held, that under these circumstances the ship was not dispatched from Australia within twenty-one days after her arrival, and consequently that the owners of the vessel were not entitled to the freight of 4l. per ton. *Sharp v. Gibbs*, 1 H. & N. 801.

— **Condition precedent.**—Where a charterparty, dated 6th of February, but averred not to be executed till the 15th of March, contained a covenant by the owner that the ship should and would proceed from D., where she then lay, on or before the 12th of February, on her outward-bound voyage, and return, &c., and a covenant by the freighter, that, in consideration of every thing above mentioned, he would pay freight for the voyage; the voyage being averred to be performed, and the freight earned, the owner may recover for it, without averring that the ship sailed on or before the 12th of February, such covenant that the ship should sail on or before the 12th of February being either no condition precedent, but only an independent covenant, for breach of which the party had his remedy in damages; or not of the substance of the contract, which was for the performing of the voyage for which the ship was chartered, and earning the freight; or being rendered impossible to be performed by the parties themselves not having executed the deed till after the time appointed for doing the act, and thereby dispensing with the performance of it. *Hall v. Cazenove*, 4 East, 477; 1 Smith, 272.

Stipulations in a charterparty, that the vessel, being tight, staunch and strong, shall sail with convenient speed, and within a reasonable time, are not conditions precedent to the performance of a contract to load on the part of the charterer, although if, by reason of the non-compliance with those stipulations, the object of the charterparty and of the voyage was wholly frustrated, that may be an answer to an action for breach of the contract. *Tarrabochia v. Hickie*, 1 H. & N. 183; 26 L. J., Ex. 26.

By a charterparty it was agreed, that the vessel should proceed to Trieste, and there load a full cargo of wheat, and, being so loaded, should there-with proceed to a port in the United Kingdom,

"the vessel to sail from England on or before the 4th of February then next :"—Held, that the sailing of the vessel from England on or before the day named was a condition precedent to the owner's right to sue the merchants for not providing a cargo at Trieste. *Glaholm v. Hayes*, 2 Scott, N. R. 471; 2 M. & G. 257.

The defendant chartered a ship of T. from Sunderland to Barcelona : by the charterparty, half the freight was to be advanced to the master on his signing the bills of lading. T., being indebted to the plaintiff, gave him an order on the defendant, requiring the defendant to pay to the plaintiff, on the ship "being loaded and sailed, out of the advance," 73*l*. The defendant wrote at the foot of the order, that he agreed to the above. The vessel being loaded and in a fit state for sailing, but the clearances not being completed, nor the bills of lading signed, left Sunderland Harbour, with the captain on board. She crossed the bar ; and the captain returned to land, in order to get the papers completed, and sign the bills of lading ; he signed them, and got the advance of freight from the defendant, who deducted a sum to meet the 73*l*. The vessel stood off and on, waiting for the captain ; but it being found that she had been injured, she returned into Sunderland Harbour to repair, the captain not having rejoined her, and did not afterwards sail :—Held, that the sailing of the vessel was a condition precedent to the liability of the defendant to pay the 73*l*. *Hudson v. Bilton*, 6 El. & Bl. 565 ; 26 L. J., Q. B. 27 ; 2 Jur., N. S. 784.

—"Leave Amsterdam."—A ship was chartered to "sail and proceed from Amsterdam with all convenient speed to Liverpool, to leave Amsterdam not later than all March." On the 30th of March the ship, having a portion of her ballast on board, left the docks at Amsterdam, and on the same evening got to the entrance of the North Holland Canal. On the 31st of March she proceeded to Alkmaar, where she remained during the 1st and 2nd of April, taking in the remainder of her ballast. On the 3rd of April she proceeded on her voyage, and quitted Nieuwediep, and arrived at Liverpool on the 17th :—Held, that the term "leave Amsterdam" did not mean "sail on her voyage from Amsterdam," and consequently the stipulation in the charterparty had been complied with. *Van Baggen v. Baines*, 9 Ex. 543 ; 2 C. L. R. 543 ; 23 L. J., Ex. 218.

—"Where Accident within Exceptions."—A merchant at Liverpool entered into a charterparty with the owner of the ship as follows : "It is mutually agreed between the owner of the good ship *Zwaan*, now at Amsterdam, and to sail from thence for Liverpool on or before the 15th of March next, that the ship, being tight, staunch and strong, shall with all convenient speed be made ready," &c., as in the usual printed form of charterparty. The exception was as follows : "Restrictions of princes and rulers, the dangers and accidents of the seas and navigation, the act of God, fire, pirates and enemies, throughout this charterparty always excepted." The ship did not sail from Amsterdam in consequence of what was admitted to be "the act of God :"—Held, that notwithstanding the words "throughout this charterparty," the sailing of the ship from Amsterdam on the 15th March was a con-

dition precedent to the obligation of the charterer to take and load the ship. *Crookevitt v. Fletcher*, 1 H. & N. 893 ; 26 L. J., Ex. 153. See also cases post, col. 1350.

—"To Sail direct."—By a charterparty between the owner and the captain of a ship, and the charterer's agent abroad, for the carriage of timber from Riga to Portsmouth at a stipulated rate per load, the former bound himself, after receiving his cargo on board, to sail with the first favourable wind direct to the port of Portsmouth. The ship, however, unnecessarily entered the harbour of Copenhagen, where she was detained several weeks, by means whereof the charterer was put to considerable expense in having fresh insurances effected upon the cargo. In an action for the freight :—Held, that the covenant to sail direct to Portsmouth was not a condition precedent ; and that the deviation could not be given in evidence either as a bar to the action or to diminish the damages. *Bornmann v. Tooke*, 1 Camp. 377.

A shipowner, by charterparty of October 20th, 1832, agreed to go in ballast from P. to St. M., and bring back a cargo of fruit direct to L. ; the charterer was to be allowed thirty-five running days for loading and unloading, to commence on December 1st then next ; and if the vessel did not arrive at St. M. by the 31st January, 1833, the charterer was to be at liberty to rescind the charterparty :—Held, that the shipowner was bound to proceed at once to St. M., and was not at liberty to make an intermediate voyage for his own purposes, although, notwithstanding such intermediate voyage, he arrived at St. M. before the 31st January, 1833. *M. Andrew v. Adams*, 4 M. & Scott, 517 ; 1 Bing. N. C. 29.

—"Waiver."—By a charterparty made at Malta, dated the 24th of February, 1854, the chartered ship was described as "coppered Al, of Malta," of a certain measurement, "now at anchor at this port," and it was agreed that she being tight, staunch, and strong, and properly manned, and every way fitted for the voyage, should, with all convenient speed, proceed in ballast to Alexandria, in Egypt, and there load from the charterer a cargo of beans and wheat. At the date of the charterparty the ship was not coppered, nor was she lying at anchor in port, nor had she obtained her register. She was an entire new vessel, in dry dock, her coppering being in course of completion. The ship was not ready to sail until the 28th of March, and, from the state of the weather, she did not sail until the 30th of that month, and reached Alexandria on the 12th of April. No objection was made by the charterer at the time of the delay. On her arrival the master gave notice to the charterer's agent there that he would be ready to receive cargo on the 14th of that month. Before the ship's arrival at Alexandria, the charterer's agent had made a cession to the charterparty, and the agent referred the master to the cessionary, informing him that his principal had nothing more to do with the charterparty than to guarantee the solvency of the cessionary. Freight had fallen considerably below the rates named in the charterparty between the date of the charterparty and the date of the cession. The cessionary sought to invalidate the cession on account of the delay in the arrival of the ship, and on that ground refused to give the cap-

tain any cargo. The captain refused to acknowledge the cessionary or release the charterer, but at the same time expressed his readiness to receive a cargo from any one under the order of the charterer's agent. The ship lay at Alexandria waiting for cargo the whole of her lay days and the ten demurrage days, but received no cargo from the charterer. The captain afterwards took a small cargo and returned to Malta. In an action brought by the shipowner against the charterer in Malta:—Held, first, that it was unnecessary to determine whether the completion of the copping of the ship was a condition precedent or not to the maintaining an action against the charterer, as it was clear that that statement had reference to the time of sailing and not to the date of the charterparty. *Dimech v. Currett*, 12 Moore, P. C. C. 199.

Held, secondly, as to the stipulation that the ship should sail "with all convenient speed," that as the parties had not expressly stated for themselves in the charterparty that unless the ship sailed on a specified day the charterparty was to be at an end, and as the charterer resided at Malta and had made no objection at the time to the delay, or had given evidence that any other loss than that occasioned by the falling of freights had taken place in consequence of the delay, his position was not thereby altered, and an action was therefore maintainable against the charterer upon the charterparty. *Ib.*

To Sail with Convoy.—The owner of a ship is bound by a representation of his broker, who put up the ship at the Royal Exchange, and at the coffee-house, as a general ship warranted to sail with convoy, and distributed handbills to the same effect. *Runquist v. Ditchell*, 3 Esp. 64; 2 Camp. 556, n.

To Arrive at Port of Loading.—Proviso in a charterparty, that, if a ship did not arrive at her port of loading on or before, &c., unless prevented by stress of weather or unavoidable impediment, the freighter should not be obliged to ship a cargo:—Held, that, if ordinary diligence was used in the voyage to reach the port of loading, the owners were within the exception of the proviso, though the ship was delayed till after the stipulated time by causes which extraordinary exertion might have counteracted. *Granger v. Dent*, M. & M. 475.

Where a ship was freighted to go in ballast to Jamaica, and bring home a cargo, and the freighter undertook to provide a full cargo for her in time for the July convoy, provided she arrived out and was ready by the 25th of June:—Held, where she did not arrive out till after the 25th of June, that the freighter was entirely discharged from his contract to furnish a cargo. *Shadforth v. Higgin*, 3 Camp. 385.

Where the plaintiff covenanted that on the arrival of a ship at a certain port, he would receive the defendant's cargo, and sail for England therewith with the next June convoy, provided the ship arrived and was ready to load sixty-five running days before the sailing of such convoy:—Held, that it was not a condition precedent to the defendant's part of the contract that the ship should so arrive, but he was still bound to supply a cargo under a stipulation to that effect in the contract. *Deffel v. Brocklebank*, 4 Price, 36; 3 Bligh, 561.

Damages.—The defendant having guaranteed that, in consideration of the plaintiff's shipping goods by his ship, she should sail with or before any other vessel in the berth, under penalty of forfeiting half the freight, and another ship having sailed before her, and the only plea being, payment into court:—Held, that the sailing of the vessel with or before any other was the event intended to be secured; that the half freight was therefore recoverable as liquidated damages; and that it was unnecessary for the plaintiff to give evidence of any actual damage sustained by him. *Sparrow v. Paris*, 7 H. & N. 594; 31 L. J., Ex. 137; 8 Jur., N. S. 391; 5 L. T. 799.

When a contract was made in the following terms: "We undertake to ship for you by the Warrior Queen, guaranteeing that she sails not later than the first week in July, or forfeit 2s. 6d. per ton, 300 or 400 packages, one-third yarn, at a through rate of 42s. 6d., free of commission, provided they are forwarded per M. & Co., on or before the 29th inst.;" and the defendant, in answer to a declaration for breach of the contract by reason of the nonshipment of a portion of the packages so sent, pleaded the payment of 2s. 6d. per ton on the packages as and for the forfeit according to the agreement:—Held, that the plea was good. *Heugh v. Escombe*, 4 L. T. 517.

iv. Capacity.

Description or Warranty.—To an action for not loading a ship according to the terms of a charterparty, in which the shipowner was described as "of the ship A., of the measurement of 180 to 200 tons, or thereabouts," the charterer pleaded that by the charterparty the ship was warranted to be of the measurement of 180 tons to 200 tons, or thereabouts; and that the ship was of a measurement greatly and unreasonably exceeding 200 tons, and was not of the measurement of 180 tons to 200 tons, or thereabouts; whereupon he did not load:—Held, that the plea was not proved, inasmuch as the statement of tonnage in the charterparty was matter of description only, and did not amount to a warranty. *Barker v. Windle*, 6 El. & Bl. 675; 25 L. J., Q. B. 349; 2 Jur., N. S. 1069—Ex. Ch.

A cargo of guano was shipped from the Chincha Islands to London, by the Oriente. The Oriente, having become disabled, put into Valparaiso, was condemned, and her cargo taken out of her. The captain, "for account and risk of the owner of the cargo," chartered the Fairy Queen to take on "the cargo brought by the Oriente, being 470 tons more or less, not exceeding what she can reasonably stow," at the rate of 5l. 2s. 6d. per ton. The owner of the cargo had an agent at Valparaiso, of which the captains of the Oriente and the Fairy Queen were aware, but no reference was made to him. After the guano had been loaded on board the Fairy Queen, the captain of that vessel said that he had not more than 350 tons on board; and ultimately the captain of the Oriente agreed that freight should be paid on the full quantity of guano mentioned in the charterparty; and in order to carry out the agreement, a bill of lading was signed by the captain of the Fairy Queen, making the guano deliverable to M. & Co., the agents for the general average settlement of the Oriente, or their assigns, he or they paying freight for the guano as 470 tons, as per charterparty:—Held, that the charterparty contained no warranty that the cargo amounted to

470 tons more or less; and therefore the owners of the cargo were not liable under the charterparty for not loading a full cargo. *Gibbs v. Grey*, 2 H. & N. 22; 26 L. J., Ex. 286; 3 Jur., N. S. 543.

Condition Precedent.—Where, by a charterparty made at Liverpool for a voyage from Liverpool to Sydney, the charterer agreed to pay for the use and hire of the ship, in respect of the voyage, 1,550*l.* in full, on condition of her taking a cargo of not less than 1,000 tons of weight and measurement:—Held, that the stipulation or condition of the ship taking a cargo of not less than 1,000 tons of weight and measurement was not a condition precedent; and that, even if it was so originally, the charterer having had a substantial part of the consideration for his promise to pay, could not plead it in bar. *Pust v. Dowie*, 32 L. J., Q. B. 179; 9 Jur., N. S. 1322; 8 L. T. 244. Affirmed, 5 B. & S. 20; 34 L. J., Q. B. 127; 13 W. R. 459—Ex. Ch.

Measurement of Cargo, how ascertained.—By a charterparty it was agreed that "a ship should load a cargo, and proceed to a port in Great Britain, and deliver the same on being paid freight at and after the rate of 3*s.* per 180 English cubic feet taken on board, as per Gothenburg custom:"—Held, that the freight was to be ascertained by measuring the cargo, according to the method used at Gothenburg, and not according to the method used at the port of discharge. *The Skandinav*, 51 L. J., P. 93—C. A. Reversing 50 L. J., P. 46.

As to Weight.—By a charterparty made at Liverpool for a voyage from Liverpool to Sydney, the charterer agreed to pay for the use and hire of the ship, in respect of the voyage, 1,550*l.* in full, on condition of her taking a cargo of not less than 1,000 tons of weight and measurement:—Held, that 1,000 tons of weight and measurement meant 1,000 tons of a cargo of goods in the ordinary proportions of the port of lading, viz., one-third weight and two-thirds measurement, and not as for the Sydney market, in which the proportion is two-thirds weight and one-third measurement. *Pust v. Dowie*, *supra*.

In Fresh or Salt Water.—A charterparty contained a guarantee that a vessel should carry 3,000 tons dead weight upon a draught of twenty-six feet of water:—Held, that both parties to the charter must have contemplated loading a cargo in the river, and that, consequently, the guarantee would apply to fresh as well as to salt water. *The Norway*, 3 Moore, P. C. C., N. S. 245; B. & L. 404; 11 Jur., N. S. 892; 13 L. T. 50; 13 W. R. 1085.

3. EXEMPTIONS FROM LIABILITY.

"Perils of the Seas."—Where there is an exception in a charterparty of perils of the sea, a loss from the ship's running foul of another by misfortune is within the exception, and is a loss by perils of the sea. *Buller v. Fisher*, 3 Esp. 67.

A vessel chartered for a voyage from the Cape to Hondeklop Bay, there to load a cargo of copper ore, and proceed therewith to Swansea, having loaded part of her cargo, received damage to her capstan in a storm, such that she was unable to load the rest of her cargo, 120 tons, which were ready, until the damage was repaired. The master, instead of running for the Cape, 180 miles

distant, where the damage could have been repaired, proceeded to St. Helena, 1,800 miles distant, expecting to be able to repair there, and intending to return for the rest of the cargo; but not being able to get repairs at St. Helena, he proceeded to Swansea with a cargo short of the 120 tons. The shipowner having sued the underwriter upon a policy of insurance upon chartered freight, as for a total loss of freight upon the 120 tons by perils of the sea, the jury found that the master acted throughout as a prudent owner, uninsured, would have acted:—Held, that the shipowner could not recover, for that the master was not prevented by perils of the seas from procuring repairs and earning the freight. *Philpot v. Swann*, 11 C. B., N. S. 270; 30 L. J., C. P. 358; 7 Jur., N. S. 1291; 5 L. T. 183.

The exception in a charterparty of perils of the sea applies not only to the voyage contracted for, but also to the preliminary voyage to the port of loading. *Hudson v. Hill*, 43 L. J., C. P. 273; 30 L. T. 555.

Condemnation.—The capture of a chartered ship, and condemnation and sale by a decree of a Vice-admiralty court, do not, if the decree is reversed by the Court of Appeal (although more than three years afterwards), with costs and damages, amount to a prevention by the perils enumerated in the charter; but the shipowner is bound to perform his contract or to pay damages. *The Newport*, Swabey, 335—P. C.

Duration of Exception.—A charterparty provided that a ship should proceed from a port where she was lying to a usual loading-place, and there load a full and complete cargo, and proceed to a certain other port. The charterparty contained a clause, "The act of God, the Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, and rivers, and navigation, of whatever nature and kind soever, during the voyage, always excepted:"—Held, that the passage from the port where the ship lay to a usual place of loading was part of the voyage, and within the exception. *Barker v. M'Andrew*, 18 C. B., N. S. 759; 34 L. J., C. P. 191; 11 Jur., N. S. 637; 12 L. T. 459; 13 W. R. 779.

"Perils of Navigation."—H., by a charterparty, engaged a vessel of G., name to be given up by G. to H. as soon as known, the vessel to proceed from the port of Hull to the port of Alexandria, with liberty to G. to ship cargo on the outward voyage to Alexandria, and to call at intermediate ports; the ship on arriving at the port of Alexandria to take in a cargo to be shipped by H.'s agents and proceed with the same at a certain stipulated rate of freight to be paid by H. to G. to the ports of Hull or London. The ship was to arrive at Alexandria within three weeks of November 15th, 1870, but the charterparty contained the usual exceptions as to perils of navigation. The ship did not arrive at the port of Alexandria until considerably after the margin of time allowed by the charterparty, whereby H., by losing the market for his cargo, sustained damage. The delay was caused by perils of navigation within the exception clause of the charterparty arising on the outward voyage from Hull to Alexandria to take in H.'s cargo. G. pleaded the exception and the delay:—Held, that the plea afforded an answer to the

action, inasmuch as the exception in the charterparty covered dangers of navigation occurring on the outward voyage before H.'s cargo was shipped as well as the transit with his cargo on board from Alexandria to Hull or London. *Harrison v. Garthorne*, 26 L. T. 508; 20 W. R. 722.

"Restraints of Princes."—In an action for breach of a charterparty, by which it was agreed that a vessel should proceed to a port of loading, and after loading a cargo convey it to a foreign port, the act of God, queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas . . . during the voyage excepted, it was pleaded that before breach there was a war between the country of the port of destination and another country, so that the performance of the charterparty became illegal, and the shipowner refused to perform it:—Held, that the plea was good, as the blockade was, within the meaning of the exception, "restraints of princes," and that the shipowner was not bound to have proceeded to the port of loading, or to have waited in anticipation of the removal of the blockade, in the absence of anything to lead to the inference that it would be removed within a reasonable time. *Geipel v. Smith*, 7 L. R., Q. B. 404; 41 L. J., Q. B. 153; 26 L. T. 361; 20 W. R. 332.

—Duration of Exception.—The plaintiff and the defendants agreed, by charterparty, that a ship then at Liverpool, of which the plaintiff was master, should with all convenient speed be made ready, and should, at Liverpool, receive and load from the charterer's agents a full cargo, and, being so loaded, should proceed to Stettin and deliver the same, and so end the voyage, restraint of princes, &c., during the voyage, always excepted, and the ship was to be loaded at Liverpool without detention; and the defendant thereby agreed to load the vessel at Liverpool, as in the charterparty stated, with the cargo at Liverpool:—Held, that the exception was applicable only after the ship had quitted Liverpool. *Crow v. Palk*, 8 Q. B. 467; 15 L. J., Q. B. 183; 10 Jur. 374.

A vessel, after discharging her outward cargo for the owners' benefit, was to proceed to Galatz or Ibraila, as ordered at Constantinople or Sulina by the charterer's agents, and there load a cargo of corn, and therewith proceed homewards and discharge at a port in the United Kingdom, and so end the voyage; restraints of princes and rulers, the dangers of the seas, navigation, fire, pirates and enemies during the voyage always mutually excepted:—Held, that the voyage commenced from the period of the discharge of the outward cargo, and that the exception as to the restraints of princes applied to the loading at Ibraila, where the vessel proceeded; and, consequently, that it was a good plea to an action by the owner against the charterer, for not loading a cargo at Ibraila, that he was prevented from loading by the restraint and prohibition of the ruler of the country wherein Ibraila is situate. *Bruce v. Nicolopulo*, 11 Ex. 129; 24 L. J., Ex. 321.

"Queen's Enemies."—When a charterparty contains the exception "queen's enemies," an apprehension of capture, founded upon circumstances calculated to affect the mind of a master of ordinary courage, judgment, and experience, will justify delay in port during the continuance of the risk; nor is such delay less justifiable in

the case of a ship belonging to a belligerent nation, but carrying a neutral cargo. *The San Roman*, 3 L. R., Adm. 583; 41 L. J., Adm. 72; 26 L. T. 948. Affirmed, 5 L. R., P. C. 301; 42 L. J., Adm. 46; 28 L. T. 381; 21 W. R. 393.

—Reading Charterparty with Bill of Lading.]

—When a charterparty contains the exceptions "queen's enemies, restraints of princes," &c., and a stipulation that the master is to sign bills of lading in pursuance thereof "without prejudice to this charterparty," and the bills of lading are signed containing no exception but "dangers of the seas only excepted," the cargo being thereby consigned to consignees named therein, who had notice of the terms of the charterparty at the time it was entered into, the contract is contained in both instruments, and the stipulation in the bills of lading does not supersede the stipulations in the charterparty. *Id.*

Prevention from Loading by Accident, &c.]—

When a charterer by his charterparty undertakes to load a ship within certain given lay days, "accidents or causes occurring beyond the control of the shippers or affreighters, which may prevent or delay her loading or discharging, including civil commotion, strikes, riots, stoppage of trains, always excepted," or to pay demurrage, he cannot excuse default in loading within the lay days by giving evidence of general disturbance and cessation of work in the district about the time; but to exempt himself from liability must shew a disturbing cause, actually preventing the loading of the particular ship. *The Village Belle*, 30 L. T. 232. See *Croockewit v. Fletcher*, ante, col. 1346.

Want of Men.—Where a charterparty provided that, in case of the "inability of the ship to execute or proceed on the service," certain persons should be at liberty to make such abatement out of the freight as they should think reasonable:—Held, that an inability of the ship to proceed to sea for want of men to navigate her, was within the proviso, although such want of men arose from the ravages of the smallpox amongst the original crew, the death of some, and the desertion of others from fear of the distemper, and an impossibility of procuring others on the spot in their room. *Beaton v. Shank*, 3 East, 233.

4. OBLIGATIONS AS TO BILLS OF LADING AND NECESSARY DOCUMENTS.

Master Bound to Sign Bills of Lading.—It was stipulated by a charter-party made between the plaintiffs and the defendants that the master of the ship should sign bills of lading as presented, or pay a named penalty. He refused to do so, and sailed from the port of loading without having signed any bills of lading. He proceeded to the port of discharge, delivered a portion of the cargo to the consignees, but ceased doing so and warehoused the remainder, as they, acting under instructions from the charterers, claimed to deduct from the freight an amount equal to the penalty named in the charterparty. In an action by the charterers against the ship-owners for conversion and for penalties:—Held, that the plaintiffs could recover nominal damages for the breach of contract in not signing bills of lading as presented. *Jones v. Hough*, 5 Ex. D. 115; 49 L. J., Ex. 211; 42 L. T. 108—C. A. See

also *Seeger v. Duthie*, 8 C. B., N. S. 45; 29 L. J. C. P. 253; 6 Jur., N. S. 1095. Affirmed, 8 C. B., N. S. 72; 30 L. J., C. P. 65; 7 Jur., N. S. 239; 9 W. R. 166—Ex. Ch.

— **On Terms of Sub-charter—Notice of Lien.**]

—A shipper who has loaded on the terms of a sub-charter is not affected by notice of a stipulation in the original charter-party that the owner is to have "a lien on the cargo for arrears of hire." He has a right to have bills of lading signed on the terms of the sub-charter. *Tharsis Sulphur and Copper Mining Company v. Culliford*, 22 W. R. 45.

— **Obligation to inquire as to Existence of Bills of Lading.**—The goods of a shipper in a general ship are not affected by a clause in a charterparty of which he has no notice or knowledge, giving the shipowner a lien on all cargo and freight for arrears of hire due under the charterparty. Semble, the fact that no bills of lading were given for the goods makes no difference in this respect as to the rights and liabilities of the parties. T. hired a ship from M., and by the charterparty gave M. a lien on all cargo and freight for arrears of hire. T. advertised the ship as a general ship, and gave no notice of the charterparty. B. shipped goods and obtained a receipt, but no bill of lading. The hire being in arrears, M. detained the goods of B. for the whole of the arrears.—Held, that M. was not entitled to detain the goods of B., and that B. was entitled to damages for their detention. *The Stornoway*, 51 L. J., Adm. 27; 46 L. T. 773; 4 Asp. M. C. 529.

To obtain Consular Manifest.—In an action by the owners of a vessel against a charterer, the declaration alleged that it was customary at Liverpool for the shippers of goods by vessel to make out for the captain a correct copy of each bill of lading, and that the shippers of the cargo did make out copies of eight bills of lading for the captain, and did deliver the copies to the charterer for the captain, and that it was necessary, as the charterer knew, for the purposes of the voyage, that before sailing a consular manifest should be made out, and that it was his duty as charterer, and having in his possession the captain's copies of the bills of lading, on request of the owners of the ship, to hand over and give all such copies for the purpose of enabling a complete consular manifest to be made out, and that he was requested to do so, but only handed over six out of the eight bills of lading.—Held, that there was no such duty as alleged to hand over the copies of the bills of lading, and that, therefore, the declaration was bad, and there was no cause of action. *Dutton v. Poyles*, 30 L. J., Q. B. 169; 7 Jur., N. S. 725; 3 L. T. 695; 9 W. R. 371. Affirmed, 2 B. & S. 174; 31 L. J., Q. B. 191; 8 Jur., N. S. 970; 6 L. T. 224; 10 W. R. 408—Ex. Ch.

As to Bill of Health.—In an action on a charterparty, in which the shipowner covenanted "that the vessel should be sufficiently furnished with everything necessary and needful for the voyage in question," which was by Cagliari, in Sardinia.—Held, that it was his duty to have a bill of health on board; and, the charterer having been put to great inconvenience and expense on account of the ship not being provided with such document, that the shipowner

was responsible for the loss occasioned thereby. *Lery v. Costerton*, Holt, 167; 4 Camp. 389; 1 Stark. 212.

As to Passes.—A declaration on a charterparty, whereby it was agreed between the owners of a vessel called the Brevet and the charterers, stated that the vessel should sail to Melbourne, and thence proceed to Callao, Peru, where the captain should report his arrival to G. & Co.; that, the vessel being tight, staunch, strong and well conditioned for the voyage, G. & Co. should send the captain orders for loading a cargo of guano at the Chincha Islands, to which place the vessel should at once proceed, calling on her way at Pisco, to obtain the necessary pass to load, which should be given to the captain by the charterers' agent free of expense, within twenty-four hours of his application. Breach, that the charterers made default in providing the agreed guano, and only provided an insufficient and a less quantity. Plea, that Callao and the Chincha Islands are a part of the republic of Peru, and that by the laws of that republic, a vessel proceeding from Callao to the Chincha Islands, for the purpose of taking on board a cargo of guano, is obliged to procure from the government a written pass so to do, and the vessel could not lawfully have proceeded from Callao to the Chincha Islands without such pass; that the vessel was, after her arrival at Callao, surveyed by officers of that government, and the government did, upon the report of the surveyors, refuse to give such pass or to allow the vessel to proceed to the Chincha Islands; and thereupon reparations were done to the vessel by the owners at Callao, and the government did afterwards give a written pass for the vessel to proceed to the island to take in a cargo of guano, but upon the condition expressed in the pass, that more guano should not be placed on board than would make the vessel draw eighteen and a half feet of water; that the vessel did, by virtue of such pass, proceed to the Chincha Islands, and the charterers caused to be loaded on board her sufficient guano to make her draw eighteen and a half feet of water, and they could not, without violating the laws of the republic of Peru, have loaded a greater quantity, and if they had done so, the vessel and cargo would have been liable to seizure by the government.—Held, that the plea was bad, since the obligation was on the charterers to procure the proper pass, and it was not alleged that they were prevented from so doing by reason of the vessel not being well conditioned. *Kirk v. Gibbs*, 1 H. & N. 810; 26 L. J., Ex. 209.

5. PERFORMANCE.

a. Nominating Port.

Duty of Captain to wait for Orders at Port of Call.—The master of a ship, under a charterparty to load a cargo at a foreign port, and thence proceed to a port in Great Britain, as ordered, is not bound, in default of orders, to wait at the foreign port until he has communicated with the charterer. *Sieveling v. Maas*, 25 L. J., Q. B. 275; 2 Jur., N. S. 426. Affirmed, 6 El. & Bl. 670; 25 L. J., Q. B. 358; 2 Jur., N. S. 515—Ex. Ch.

— **To Obey Directions as to Place of Discharge.**—Under an open charterparty to deliver

at a certain port, it is the duty of the master to obey the directions of the owner of the cargo as to the place of discharge in such port. *The Felix*, 2 L. R., Adm. 273; 37 L. J., Adm. 48; 18 L. T. 587; 17 W. R. 102.

Condition Precedent.—It was agreed by a charterparty that a ship should proceed to a safe port near Cape Town, Cape of Good Hope, and there load a full and complete cargo of lawful merchandise, and thence proceed to Cork or Falmouth for orders to discharge in a safe port in the United Kingdom; the charterer undertaking to load the vessel with the cargo, and pay the freight:—Held, that the nomination of the port near Cape Town was a condition precedent to the voyage, to be performed by the charterer, and that he was not entitled to send a supercargo on the voyage to indicate it to the shipowner. *Rae v. Hackett*, 12 M. & W. 724; 13 L. J., Ex. 216; 8 Jur. 427.

At what Time.—A charterparty, by which it is agreed, that a ship, after delivering her outward cargo at Malta, shall, with all convenient speed, sail to one of the several ports as shall be ordered at Malta, contains an implied promise, on the part of the charterer, that the ship shall be ordered at Malta to sail to such port, within a reasonable time after her arrival at Malta. *Woolley v. Reddclien*, 5 M. & G. 316; 6 Scott, N. R. 199; 12 L. J., C. P. 152; 7 Jur., 930.

What Port.—A ship was to proceed to Honduras, and there load "at one of the usual and customary ports or places of loading, including the rivers Ulna and Dulce," a cargo of mahogany and logwood. The freighter by letter directed the captain to proceed to Belize, in the Bay of Honduras, and address himself to S., "who will furnish you with a homeward cargo of mahogany and logwood agreeable to charterparty." The captain took the ship to Belize, where S. put a small quantity of logwood on board, and directed the ship to go to Ulna, where about half a cargo was put on board. S. then sent the ship to two other places of loading in Honduras, at which the cargo was completed:—Held, that it was a question for the jury, whether the ship was sent to Belize as her port of loading; and that, if she was, the freighter was liable for the extra expenses of her going to all the other places for the residue of her cargo; but that, if Belize was not to be considered her port of loading, Ulna certainly was, and the freighter would, at all events, be liable for the extra expense of her going for cargo to other places after Ulna, as by the charterparty the freighter was to load at one of the usual ports or places of loading in Honduras. *Brown v. Johnson*, Car. & M. 440.

b. Hostile and Blockaded Ports.

Operation of War on Contract.—The master of a North German ship, lying at Constantinople, entered into a charterparty with North German subjects, there resident, to carry a cargo to a port in the United Kingdom or on the continent to be delivered to English consignees. The charterparty and the bill of lading given under it were in the English language, and it was stipulated that the ship should call at one of three ports of the United Kingdom for orders. The ship duly called at Falmouth, and was

ordered to proceed to an English port to discharge:—Held, that as the intention of the parties as to what law should govern, was to be gathered from the circumstances of the case, and, as the giving of the orders fixed the seat of the contract in England, the law of England applied. *The Wilhelm Schmidt*, 25 L. T. 34.

War then existed between France and Germany. The master sailed from Falmouth, but through a reasonable fear of capture, put into Dunkirk. The ship remained there for two months, waiting for a steam-tug, which was considered necessary by the charterers' agents to avoid capture, the master expressing himself ready to sail with the first fair wind. The ship was then sent forward by steam power, at the charterers' agents' expense. The cargo was damaged, and the plaintiffs lost profits by the delay:—Held, that the master was justified in putting into and remaining in port, and that the shipowners were not liable for the damage caused by the delay. *Id.*

By a charterparty in the English language entered into at Constantinople between the master of a North German vessel, and North German merchants there resident, it was agreed that the vessel should load a cargo and proceed therewith to Falmouth, Plymouth, or Queenstown, for orders for a safe port in the United Kingdom, or on the continent between Havre and Hamburg, queen's enemies, &c., excepted. The cargo was laden and the vessel sailed, but her master learning on his voyage that war existed between France and Germany, put into Gibraltar. During the war there would have been great risk of capture off that port and off the port of call if the vessel had proceeded on her voyage; her master in consequence remained there until the end of the war (nine months). He then sailed, and arriving at a port of call was ordered to an English port. The cargo was damaged by the delay. In a claim by the consignees:—Held, that by both English and North German law the master was justified in putting into and remaining in port, and that the shipowners were not responsible for the damage caused by the delay. *The Express*, 3 L. R., Adm. 597; 41 L. J., Adm. 79; 26 L. T. 956.

A charterparty for a voyage from Liverpool to Lima or Valparaiso provided that the vessel should proceed to the port of discharge, or as near thereto as she could safely get, and there deliver her cargo in the usual and customary manner. A specified number of days was agreed upon for loading the vessel at Liverpool; but there was no such agreement as to the discharge at her port of destination. The vessel arrived at the port of discharge, and remained there discharging till, owing to the apprehension of a bombardment by a hostile fleet, the authorities suspended all landing of goods for seven days, after which she returned and her discharge was completed:—Held, that the discharge of the cargo being an act to be done by the shipowner and freighter, the shipowner could not maintain an action against the freighter for the loss from the delay. *Ford v. Cotesworth*, 5 L. R., Q. B. 544; 39 L. J., Q. B. 188; 23 L. T. 165; 18 W. R. 1169; 10 B. & S. 991—Ex. Ch.

A Prussian ship, carrying a cargo of nitrate of soda (contraband of war), arrived off Dunkirk, to which port she had been ordered by the consignees of cargo, and whilst lying there waiting for the tide, her master heard that war had

broken out between France and Prussia, and he thereupon put back to the Downs, where he arrived on July 17th, to make inquiries, but hearing nothing more, and being stopped by his owner, he put into Dover on the 18th, and there getting intelligence, refused to proceed to Dunkirk. The ship was running under charter entitling her to be sent to a safe port. War was not actually declared till July 19, but was imminent on July 16 :—Held, that the ship on July 16 was not bound to go to Dunkirk, as she would have been liable to penalties for trading with the enemies of her country and capture by French cruisers; that even if war did not actually exist till July 19 the master was justified in pausing for a reasonable time to make inquiries, and that under the circumstances he did not exceed that time by staying in Dover till after the declaration of war. *The Teutonia*, 3 L. R., Adm. 394; 41 L. J., Adm. 57; 24 L. T. 521; 20 W. R. 261. Affirmed, 4 L. R., P. C. 171; 41 L. J., Adm. 57; 26 L. T. 48; 20 W. R. 421; 8 Moore, P. C. C., N. S. 411.

Whilst the ship was lying at Dover, the consignees demanded the delivery of cargo without any payment of freight. The master refused to deliver without payment:—Held, that he was entitled to freight. *Id.*

A North German vessel shipped goods in the Black Sea for a port in the United Kingdom or on the continent under an English charterparty, by which she was to call at Falmouth or Plymouth for orders, such orders to be given by the charterer's agents in London by return of post on receipt of the master's announcement of his arrival. She arrived at Falmouth on August 9th. Orders were given, but not till September 3rd, to proceed to Leith; but from that date until the arrest of the ship, on September 21st, negotiations were going on for discharge of the cargo at Falmouth. Between those dates the winds were light and variable, and the master remained in port for fear of capture by French cruisers in the channel, war then existing between France and North Germany:—Held, that the delay was reasonable, and that neither by English nor North German law was the master bound to proceed, and that the negotiations waived the orders to proceed. *The Heinrich*, 3 L. R., Adm. 424; 24 L. T. 914.

A charterparty between two British subjects on a voyage to Constantinople and thence to Odessa, there to load a cargo from the agent of the defendant, contained a stipulation that "in case of war having commenced previously to and continuing on the ship's arrival at Constantinople," he was to load the ship there at a reduced rate of freight:—Held, that this stipulation related to war between Great Britain and Russia, and therefore an action could not be maintained for not loading at Constantinople, by reason of war between Russia and Turkey having commenced before and continuing on the ship's arrival there. *Avery v. Bowden*, 6 El. & Bl. 953; 26 L. J., Q. B. 3; 3 Jur., N. S. 238—Ex. Ch.

A declaration stated that the plaintiff and the defendant agreed by charterparty that the plaintiff's ship should proceed to Odessa, and there load a cargo from the defendant's agent, a certain number of running days to be allowed for loading: that the ship proceeded to Odessa; that the time for loading had elapsed, but the defendant made default in loading. Plea, that before breach of contract war was declared

between Great Britain and Russia, by which the contract was rescinded. After the ship had arrived, and before the declaration of war, the defendant's agent repeatedly told the master that he should be unable to procure a cargo for the ship, and he endeavoured to persuade the master to quit Odessa without a cargo upon terms inconsistent with the charterparty. The master continued to demand a cargo until the declaration of war was known at Odessa; and on a later day, but before the expiration of the running days, left Odessa in ballast:—Held, that the declarations of the defendant's agent did not amount to a breach of contract, and therefore, inasmuch as the defendant had the whole of the running days for performing his contract, the plea was proved. *Reid v. Hoskins*, 6 El. & Bl. 953; 26 L. J., Q. B. 5; 3 Jur., N. S. 238—Ex. Ch.

A captain of an Austrian vessel, which was chartered prior to the war between France and Sardinia and Austria, but which broke out before the charterparty was terminated, while the war was going on, and being then at Falmouth, was ordered by the charterers to go to Copenhagen, which he said he could not do then, but must go somewhere else, or wait till the war was over, as he should be captured by the French cruisers; and he was eventually ordered to go to Plymouth:—Held, that he was justified in thus delaying. *Pole v. Cetovitch*, 9 C. B., N. S. 430; 30 L. J., C. P. 102; 3 L. T., 438; 9 W. R. 279.

Refusal of Foreign Power to allow Ship to Load.—Plaintiff knowing that the ship R. was under a contract with the British Government to load military stores as dead-weight at Malta, and that with such stores on board she would not, without special permission, be permitted by the Spanish government to load any cargo at a Spanish port, entered into a charterparty with her owners by which it was agreed that the R., "after loading dead-weight at Malta for owners' benefit" should proceed to a Spanish port, and there load a cargo of fruit. The ship proceeded with the military stores on board to Valencia to load plaintiff's cargo, but permission could not be obtained from the Spanish government to load. The ship was in all other respects ready to load:—Held, that no action could be maintained by the charterers against the shipowners for not being ready to load, as both parties were prevented from performing their contract to be ready with a ship and cargo by the action of the superior power. *Cunningham v. Dunn*, 3 C. P. D. 443; 48 L. J., C. P. 62; 38 L. T. 631—C. A.

Liability of Charterers Nominating.—A ship was chartered to proceed from England to a safe port in Chili, with leave to call at Valparaiso. On her arrival at Valparaiso, the charterers' agent named the port of Carrisal Bajo as the port of discharge, and directed the master to proceed thither. At the time Carrisal Bajo was named as the port of discharge, that port was closed by order of the Chilean government, and the ship could not proceed thither without confiscation. The ship was consequently detained for some time at Valparaiso, and, on the port being opened, sailed for Carrisal Bajo, and there discharged her cargo:—Held, that the charterers were liable in damages to the shipowners for the detention of the ship at Valparaiso, as they had not named a safe port within the meaning of the charterparty. *Ogden*

v. *Graham*, 1 B. & S. 773 ; 31 L. J., Q. B. 26 ; 8 Jur., N. S. 613 ; 5 L. T., 396 ; 10 W. R. 77.

Hostile or Neutral Port.—If a vessel is chartered to any ports of an island, part of which is hostile and part neutral, and the freighter covenants to procure a licence ; if the ship trades to a neutral port of the island, it is no breach of the covenant, that the freighter has procured a licence which would not authorize the like trade to a hostile port. *Johnson v. Greaves*, 2 Taunt. 344.

Licence—Illegal Contract.—A. commissioned B. to get a charterparty effected on his ship, Russian built and British owned. She was accordingly chartered to go to America, and take in there a cargo of permitted goods, rice and cotton being specified, and to sail therewith to Cadiz, Lisbon, or Gottenburgh, as directed by a previous agreement ; it appeared to have been in the contemplation of the parties to carry the goods to some port in the United Kingdom, and that the ship should carry no licence :—Held, that this was not an illegal contract, so as to deprive A. of his right to his commission for procuring the charterparty to be effected. *Haines v. Bush*, 1 Marsh. 191 ; 5 Taunt. 521.

Knowledge of Blockade.—It is no defence for not sailing on the voyage towards a port agreed on, that the port was in a state of blockade, if the defendant knew the fact at the time of entering into the charterparty. *Medeiros v. Hill*, 8 Bing. 231 ; 1 M. & Scott, 311 ; 5 C. & P. 182.

But whether the damages are to be nominal or otherwise must depend upon the opinion of the jury as to whether, if the vessel had gone to the place, she would have been able to get in. *Ib.*

Condemnation of Cargo.—The general, but not universal, rule is, that where a ship is condemned for breach of blockade, the cargo follows the same fate. *Baltazzi v. Ryder*, 12 Moore, P. C. C. 168.

The presumption is against a vessel captured in entering a blockaded port, and an imperative and overwhelming necessity for so doing must be established by the owner to exempt from condemnation. *Ib.*

It is not competent to owners of a cargo on board a vessel condemned for breach of blockade, to save the cargo from condemnation by shewing their innocence in the transaction, as the owners of the cargo are concluded by the illegal act of the master, although it was done without the privity of the owners of the cargo, and even if it was done contrary to their wishes. *Ib.*

When a blockade is known, or might have been known, to the owners of the cargo, at the time when the shipment was made, and they might, therefore, by possibility, be privy to an intention of violating the blockade, such privity will be assumed as an irresistible inference of law, and it is not competent to rebut it by evidence, as in cases of blockade, for the purpose of affecting the cargo with the rights of the belligerent. The master is to be treated as the agent for the cargo, as well as for the ship. *Ib.*

Law of Nations.—It is not a municipal offence by the law of nations for a neutral to carry on trade with a blockaded port. *The Helen*, 1 L. R., Adm. 1 ; 34 L. J., Adm. 2 ; 11 Jur., N. S. 725 ; 14 W. R. 136.

c. Deviation and Delay.

Deviation—Implied Contract.—The law implies a contract by the owner of a vessel whether a general ship, or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual and customary course. *Davis v. Garrett*, 4 M. & P. 540 ; 6 Bing. 716.

The plaintiff chartered a ship to the defendant from London to Madeira, and the Cape of Good Hope, and thence to Bombay, and back to London. Instead of proceeding by the direct and usual course from the Cape of Good Hope to Bombay, the captain made a deviation to the Mauritius ; and the defendant's agents at Bombay, in consequence of such deviation, refused to find a cargo. In an action by the owner against the defendant for not loading the ship with a cargo at Bombay, pursuant to the charterparty, it was left to the jury to say whether the deviation was of such a nature and description as to deprive the freighter of the benefit of the contract into which he had entered ; and they were told, that, if such was their opinion, the defendant was excused by the act of the plaintiff from furnishing a cargo. The jury having found for the defendant, the court refused to grant a new trial, holding the direction right. *Freeman v. Taylor*, 1 M. & Scott, 182 ; 8 Bing. 124.

— **Justifiable.**—A deviation for the purpose of saving life is justifiable, but not a deviation for the mere purpose of saving property. The defendants' ship was chartered by the plaintiffs to carry a cargo of wheat from Cronstadt to the Mediterranean, the usual perils of the sea excepted. Whilst on her voyage she sighted and went to the assistance of a vessel in distress, called the *Arion*, and the master in consideration of 1,000*l.* agreed to tow her into the Texel, which was out of his direct course. Whilst so doing, the defendants' vessel was stranded, and ultimately (with her cargo) was totally lost. In answer to questions put to them by the learned judge, the jury found that it was not reasonably necessary to take the *Arion* to the Texel in order to save the lives of those on board her ; but that it was reasonably necessary to do so in order to save her and her cargo :—Held, that the deviation was unjustifiable, and consequently that the plaintiffs were entitled to recover against the owners the value of the cargo. *Scaramanga v. Stamp*, 4 C. P. D. 316 ; 48 L. J., C. P. 478 ; 40 L. T. 191. Affirmed, 5 C. P. D. 295 ; 49 L. J., C. P. 674 ; 42 L. T. 840 ; 28 W. R. 691—C. A.

Delay—To Sail with Convoy.—Where the plaintiff covenanted, that, on the arrival of a ship at a certain port, he would receive the defendant's cargo, and sail for England therewith, with the next June convoy, provided the ship arrived and was ready to load sixty-five running days before the sailing of such convoy ; and the defendant covenanted to provide a cargo of produce in time for her to load the same, and join the June convoy for England, provided she arrived out and was ready to load and a notice thereof was given to his agents, sixty-five running days previously to the sailing of the convoy, and on her arrival to receive the cargo and pay the current freight :—Held, that it was not a condition precedent to the defendant's part of the contract that the ship should so arrive, but he was

still bound to supply a cargo, though not in time to enable the plaintiff to sail with that convoy. *Defel v. Brooklebank*, 4 Price, 36; 3 Bligh, 561.

— **Freighter Countermanding.**—Where the master covenanted with the freighter that the vessel should proceed with the first convoy from England for Spain and Portugal, or either, as he should be directed by the freighter or his agents; and there make a right and true delivery of the cargo, agreeably to the bills of lading signed for the same; and so to take in a home cargo, and return and make a right and true delivery thereof at London, in consideration whereof, and of everything above mentioned, the freighter covenanted to load the vessel out and home, and pay certain freight per ton per month, part before, and the remainder on the right and true delivery of the homeward cargo at London:—Held, first, that the freighter, having first ordered the master to proceed to Lisbon, in consequence of which the master had taken in goods and signed bills of lading for that port, could not afterwards countermand that order, and order him to proceed to Gibraltar, without first recalling the bills of lading, or at least tendering sufficient indemnity to the master against the consequence of his liability thereon: secondly, that, supposing the freighter had such a power, yet his supercargo and agent, who was on board the vessel, had the like authority in the absence of his principal, even before the vessel sailed from this country, to alter again the destination to Lisbon: thirdly, that the master having proceeded with the outward cargo to Lisbon under the first order, and brought home a return cargo and delivered the same to the freighter at London, was entitled to his freight for that voyage, though he had not sailed with the first convoy; the sailing with the first convoy not being a condition precedent to his recovering freight for the voyage actually performed under the first order, but a distinct covenant for the breach of which he was liable. *Davidson v. Guynne*, 13 East, 381.

Delay without Damage.—A declaration stated, that it was agreed by a charterparty that the plaintiff's ship should load from the agents of the defendant at Nantes a cargo of wheat, and deliver the same at London on being paid freight; that the ship went to Nantes, and that the defendant refused to load a cargo. Plea, that the charterparty was entered into at London, while the ship was at London, and that the plaintiff, without the defendant's consent, sailed from London to Newcastle, and thence to other places than Nantes, by reason of which the ship did not arrive at Nantes "within a reasonable and proper time in that behalf," but "after a long and unreasonable time, to wit, thirty-eight days, after she would have arrived at Nantes, according to the usual length of the voyage, if she had sailed direct."—Held, that the plea was bad, as it did not appear that the defendant had, in consequence of the delay, lost the benefit of the voyage. *Clipham v. Vertue*, D. & M. 343; 5 Q. B. 265; 13 L. J., Q. B. 2; 8 Jur. 32.

Bringing back Ship—Refusal to Despatch again.—In an action upon a charterparty, by which the owner covenanted to take on board at London the freighter's goods, and to proceed therewith to Monte Video, and there deliver them, and receive another cargo, and proceed

therewith to the port of discharge in Great Britain, and there deliver the same and end the voyage; in consideration of which the freighter covenanted to pay so much per month for freight during the voyage to Monte Video and back to her port of discharge; it is not enough to allege in the declaration that the ship, after taking in a cargo in Great Britain, and proceeding in part on her outward voyage, was, against the will and without the default of the owner, and through the act of the supercargo, the servant of the freighter, seized and brought back to London, and detained until restored to the owner, in consequence of which she required repair, and which the plaintiff caused to be done with proper despatch, and was ready and willing to cause the ship to prosecute and complete her voyage, and offered her to the defendant for that purpose, and requested him to despatch her; and upon this to assign a breach that he refused to despatch her and renounced the charterparty and further prosecution of the voyage, and discharged the plaintiff from the same, per quod he was hindered from endeavouring to complete the voyage, and to earn the money stipulated by the charterparty to be paid at her port of discharge; for the defendant having once despatched the ship, there was no obligation upon him to despatch her a second time. *Smith v. Wilson*, 6 M. & S. 78; 8 East, 437.

Master not Signing Bills of Lading—Refusal to Receive Goods.—It was stipulated in a charterparty made between the plaintiffs and the defendants that the master of the ship should sign bills of lading as presented, or pay a named penalty. He refused to do so, and sailed from the port of loading without having signed any bills of lading. He proceeded to the port of discharge, delivered a portion of the cargo to the consignees, but ceased doing so, and warehoused the remainder, as they, acting under instructions from the charterers, claimed to deduct from the freight an amount equal to the penalty named in the charterparty. In an action by the charterers against the shipowners for conversion and for penalties:—Held, that the plaintiffs could not recover against the defendants for conversion of the cargo, as they had carried it for the plaintiffs, had intended to deliver the whole of it to the consignees of the plaintiffs, and had been prevented by the acts of the plaintiffs from completing the delivery. *Jones v. Hough*, 5 Ex. D. 118; 49 L. J., Ex. 211; 42 L. T. 108.

Discharging Cargo, Means for.—The duty of providing, and making proper use of, sufficient means for the discharge of a cargo, when a ship, which has been chartered, arrives at its destination, and is ready to discharge, lies upon the charterer. But that general duty may be qualified by words in the charterparty, and by the circumstances of the case. If, by the terms of the charterparty, the charterer has agreed to discharge the ship within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it. If there is no fixed time, the law implies an agreement, on his part, to discharge the cargo within a reasonable time. *Postlethwaite v. Free-*

land, 5 App. Cas. 599; 49 L. J., Ex. 630; 42 L. T. 845; 28 W. R. 833—H. L. (E.).

Per Lord Hatherley: When the covenant merely engages that the merchant shall with all despatch, according to the custom of the port, unload the vessel, he will fulfil his contract if he employs all the usual methods of despatch at the port. *Ib.*

—**Expenses of.**—The contract in the charterparty as to demurrage was this:—The cargo was to be supplied as fast as it could be taken on board, "and to be received at port of discharge as fast as steamer can deliver as above . . . and ten days' demurrage over and above the said laying days" (there were no laying days mentioned in the charterparty) "at 30*l.* per day, payable day by day, it being agreed that for the payment of all freight, dead freight and demurrage, the owner shall have absolute charge and lien on the said cargo . . ." "The cargo to be brought to and taken from alongside the ship at merchants' risk and expense." The ship did not fulfil an engagement in the charterparty to proceed to the Surrey Commercial Docks by merely going to the gates of the docks, but when it had fulfilled the alternative to go as near thereto as it could safely get, the charterer was bound to take the cargo from alongside at his risk and expense. The shipowner was not bound to wait for an unreasonable period, until the dock authorities should be able to assign the ship a discharging berth in the docks. When a difficulty arose about the ship being admitted into the Surrey Commercial Docks, and the charterer would not name any other docks or place where the vessel might be unloaded, the shipowner gave notice to the charterer of the discharge of the cargo by lighters, and, on taking the timber into the docks, gave notice to the dock authorities that it was delivered there subject to the claim for freight, demurrage, and delivery charges:—Held, that he was warranted in so doing. *Dahl or Donkin v. Nelson*, 6 App. Cas. 38; 50 L. J., Ch. 411; 44 L. T. 381; 29 W. R. 453.

Duty to perform Voyages within Limited Time.—In an action for a breach of a charterparty by the freighter against the owner of the vessel, the declaration stated that it was agreed by the parties that the vessel should proceed with all convenient speed to S. H., and there load a cargo of coals, and therewith proceed to L., and deliver the cargo at a safe wharf, at a certain amount of freight being payable per ton; that the charterparty should be in force for six successive voyages, and that they should be made not later than the last day of February. A breach, that the defendant would not permit the vessel for the fourth successive time, or for any time except three times, after the making of the charterparty, to proceed to S. H., and there to load a cargo of coals on board. Plea, that before breach, the last day of February expired:—Held, that the plea was no answer. *Wheeler v. Barridge*, 9 Ex. 668; 2 C. L. R. 1077; 23 L. J., Ex. 221.

Outward and Homeward Voyages—Time of Payment.—By a charterparty the vessel was to sail from London with a cargo for Kingston, or any other port in Jamaica, and having discharged the same, receive on board a cargo from thence, or from a port on the Spanish

Main, if required, and deliver the same at a port in the United Kingdom; freight to be paid, 250*l.* in ten days after sailing from Gravesend, 750*l.* more in two months after a right delivery of the homeward cargo at her port of discharge in the United Kingdom, provided she should be required to proceed to one port only in Jamaica, and 25*l.* more should she be required to go to two or more ports in that island; and in case the vessel should be ordered to the Spanish Main, 4*l.* per day was to be paid for every day after the 25th day after her arrival at Jamaica, until despatched from her loading port; demurrage 100*l.* per month, or in proportion for a less period, payable on settlement of the hire of the vessel. The vessel sailed from London, and discharged a portion of her outward cargo at Kingston, and the residue at another port in Jamaica, and sailed thence to a port in the Spanish Main to receive a homeward cargo, and there remained 139 days beyond the stipulated twenty-five days:—Held, that the 4*l.* per day was not payable until two months after the delivery of the homeward cargo at the ship's port of discharge in the United Kingdom. *Crozier v. Smith*, 1 Scott, N. R. 338; 1 M. & G. 407.

6. LIABILITY OF CHARTERER OR AGENT.

Indefinite Period of Employment.—By a charterparty to government for transporting emigrants from this country to the Cape of Good Hope, a ship-broker, on behalf of the owners, let a vessel to the commissioners of the navy for the space of — calendar months certain, and thenceforward until they should give him notice that she was discharged, such notice to be given after her return to Deptford or Portsmouth; and the commissioners covenanted to pay freight at the rate of 14*s.* per ton per calendar month for so long time as the vessel should be continued in his Majesty's service; and that after she had been in such service six months, the broker should have a bill of imprest for two months' freight more; and after ten months a like bill for two months; and a like bill whenever eight months should be due; and the following memorandum was written in the margin: "Notwithstanding, it is herein agreed, that the ship shall be discharged at Deptford or Portsmouth, it is hereby covenanted that she shall be discharged at the Cape of Good Hope, when the service will admit of it:—Held, that, under the terms of the charterparty, the voyage was general, and that the ship was chartered for an indefinite period; and that the broker was only entitled to claim commission as for a voyage of that description, and not for a specific voyage outwards. *Holl v. Pincent*, 6 Moore, 228.

—**Dating from Condemnation.**—In an action on a charterparty, whereby it was agreed to employ a ship of which the plaintiff was the captor, as soon as sentence of condemnation should have passed, the sentence must be taken to mean a legal sentence; and the party who sues for the freight must aver that the ship was condemned by a court having competent jurisdiction. *Unwin v. Wolseley*, 1 T. R. 674.

Date of Loss.—By a charterparty for a voyage from the port of London to Calcutta and back on the usual terms, it was further agreed that

the freighter, if he thought proper, might hire the vessel for an intermediate voyage, within certain limits, for not less than six months; that, in that event, the master should refit the vessel for such voyage, and the complement of men should be kept up, and all necessities provided; in consideration of which the freighter agreed to pay the owner of such voyage at the rate of 1*l.* a ton per month on the ship's tonnage, and to pay four months of such hire in advance; and at the end of six months two further months' pay, and so in every succeeding two months; and the balance due at the termination of such hiring in cash or approved bills. It was further stipulated, that, if the vessel should be lost or captured, the freight by time should be payable up to the period when she should be so lost or captured, or last heard of:—Held, that, under the former clauses of this agreement, the freighter could not claim a return of any part of the four months' advance, on the vessel being lost within that period; but that the advance, being in respect of freight, was absolute; and that the stipulation on this head was not qualified by the subsequent clause. *Saunders v. Drew*, 3 B. & Ad. 445.

Court-martial—Condition precedent to Payment under Covenant.—Covenant in a charterparty, whereby, if the ship should be lost, burnt, or taken, and it should appear to a court-martial that the master had made the best defence he could, the freighters covenanted to pay the value of the ship. The holding of the court-martial is a condition precedent. *Davison v. Mure*, 3 Dougl. 28.

During Repairs.—Where a vessel was chartered for six months certain, the freighter to pay 200*l.* per month, and so in proportion for any longer time she might be employed, the owner to keep the ship in repair during the voyage; and, in consequence of perils of the sea, the vessel was obliged to be repaired twice in the course of the voyage, which detained her uselessly to the freighter for twenty-eight days:—Held, that he was still liable for freight during such detention. *Ripley v. Scaife*, 7 D. & R. 818; 5 B. & C. 167; 2 C. & P. 132.

A covenant in a charterparty, that the owner shall at his expense forthwith make the ship tight and strong for a voyage for twelve months, and keep her so, is not a condition precedent to the recovery of freight after the freighter has taken the ship into his service, and used her for a certain period; but if the freighter is afterwards delayed or injured by the necessity of repairing her, he has his remedy in damages; but if the owner's neglect to repair in the first instance precluded the freighter from making any use of the vessel, that would have gone to the whole consideration, and might have been insisted on as a bar to the action. *Havelock v. Geddes*, 10 East, 555.

For non-constat, but that, after she had been used by the freighter, she wanted repair, without any default of the owner; or that he was guilty of any delay in making the repairs; and the freight would still run on during the time of repair. *Id.*

After Loading—Delay in Loading.—By a charterparty it was agreed that a ship should, with all convenient speed, proceed to Sunder-

land, and that the charterer should there load the ship in regular turn with a full cargo of coals, and the ship should proceed with it to Kiel, and deliver to freighter or assigns, on payment of freight; "and, that the charter being concluded by the charterer on behalf of another party resident abroad, all his liability should cease as soon as he had shipped the cargo:"—Held, that this clause only exempted the charterer from liability accruing after the loading of the cargo; and that he, therefore, remained liable for delay in loading, although he had ultimately loaded a full cargo. *Christoffersen v. Hansen*, 7 L. R., Q. B. 509; 41 L. J., Q. B. 217; 26 L. T. 547; 20 W. R. 626.

A memorandum for a charterparty made between shipowners, and Y., "as agent for the freighter" (no principal being named), after providing for "demurrage over and above the laying days at 7*l.* per day," stated that, "it is further agreed, that, this charterparty being concluded by" Y. "for another party, the liability of the former in every respect, and as to all matters and things, as well before as after the shipping of the cargo, shall cease as soon as they have shipped the cargo:"—Held, that Y. was not liable upon this memorandum for demurrage at the port of discharge. *Oglesby v. Iglesias*, El., Bl. & El. 930; 27 L. J., Q. B. 356.

By a charterparty between the owners of a ship and the agents for the charterers who were persons resident in Spain, it was agreed that the ship should proceed to L., and there load in regular turn from the agents of the charterers a full and complete cargo. It was also agreed that all liability of the agents "in every respect, and as to all matters and things as well before and during as after the shipping of the cargo, shall cease as soon as they have shipped the cargo." A cargo was loaded and shipped, but not in regular turn:—Held, that the agents were protected by the clause from liability for not so loading in regular turn, they having loaded and shipped the cargo before the commencement of the action. *Milvain v. Perez*, 3 El. & El. 495; 30 L. J., Q. B. 90; 7 Jur., N. S. 336; 3 L. T. 736; 9 W. R. 269.

A charterparty, by which it was agreed that the cargo should be loaded and discharged with all despatch, contained the following clause: "The charterers' liability on this charter to cease when the cargo is shipped (provided the same is worth the freight on arrival at the port of discharge), the captain having an absolute lien on it for freight, dead freight, and demurrage, which he or owner shall be bound to exercise." The charterers having shipped a cargo worth the freight on arrival at the port of discharge:—Held, that they were protected by the clause from liability to the shipowner for not loading the ship in due time according to the charter. *Bannister v. Breslauer*, 2 L. R., C. P. 497; 36 L. J., C. P. 195; 15 L. T. 418; 15 W. R. 840.

A charterparty contained the following clause: "Charterer's liability to cease when the ship is loaded, the captain having a lien upon the cargo for freight and demurrage." In an action for demurrage at the port of loading:—Held, first, that the lien extended to demurrage at the port of loading, as well as at the port of discharge. *Francesco v. Massey*, 8 L. R., Ex. 101; 42 L. J., Ex. 75; 21 W. R. 440.

Held, secondly, that the ship having been

loaded, the charterer could not be sued for demurrage incurred during the loading. *Ib.*

By a charterparty the ship was, after loading a full cargo, to proceed to a port of call for orders, to be forwarded within forty-eight hours after notice of arrival given to the charterers, to discharge at a good and safe port. Twelve working lay days to be allowed the freighters for loading the ship at the port of loading, and waiting for orders at the port of call, and fifteen days over and above the laying days at fourpence per ton per day. Charterers' liability to cease when the ship was loaded, the owners of the ship to have an absolute lien on the cargo for all freight, dead freight, and demurrage. In an action by the shipowners against the charterers for not giving orders as to the port of discharge, and for giving orders that the ship should proceed and discharge at a port which was not a safe port within the meaning of the charterparty:—Held, that inasmuch as delay at the port of call was provided for by the stipulation in respect of demurrage, the charterers were discharged, whether the actual damages claimed were covered by the owners' lien or not. *French v. Gerber*, 2 C. P. D. 247; 46 L. J., C. P. 320; 36 L. T. 350; 25 W. R. 355—C. A.

A vessel was chartered to carry a cargo of coals to Callao, to be delivered to the order of the charterer's agent. The charterparty provided that the ship should be loaded at the rate of seventy-five tons per clear working day, "stiffening coal to be, if required, supplied at the expense of the ship, and at the rate of forty tons per clear working day, . . . but all days on which stiffening coal is to be taken on board, or the ship is detained for the same, are to be excluded from the computation of the working days allowed for loading; the vessel to be discharged at the rate of forty tons per clear working day. . . . Demurrage to be paid for each day beyond the days allowed for loading and discharging respectively at the rate of 3*d.* per registered ton per day. The master to have a lien upon the cargo for all freight, dead freight, and demurrage. All liability of the charterer under this agreement shall cease as soon as the cargo is on board. . . . All questions, whether of short delivery, demurrage or otherwise, are to be settled by the charterer's agent at the port of destination." The vessel arrived at Callao, where the captain, at the request of the charterer's agent, delivered the cargo to him without insisting on his lien for freight and demurrage. In an action on the charterparty for undue detention of the vessel in putting stiffening coal on board:—Held, that the shipowner had no cause of action on the charterparty; the clause providing for the cesser of the charterer's liability operating as an absolute discharge, notwithstanding that the charterer and consignee were the same person. *Sanguinetti v. Pacific Steam Navigation Company*, 2 Q. B. D. 238; 46 L. J., Q. B. 105; 35 L. T. 659; 25 W. R. 150—C. A.

Held, also, that the demurrage clause extended to detention of the vessel in putting stiffening coal on board, and that damages for such detention were covered by the owner's lien. *Ib.*

By a charterparty cargo was to be loaded in thirteen working days, and to be discharged at not less than thirty tons per working day. Ten days' demurrage to be allowed above the said days. The charterer's liability to cease when ship is loaded, the captain or owner having a

lien on cargo for freight and demurrage:—Held, that the charterer upon loading the cargo, was discharged from liability for demurrage incurred at the port of loading. *Kish v. Cory*, 10 L. R., Q. B. 553; 44 L. J., Q. B. 205; 32 L. T. 670; 23 W. R. 880—Ex. Ch. See *Petroccchino v. Bott*, ante, col. 1294.

"Loading excepted."—A charterparty contained a clause: "This charter being concluded by the charterers on behalf of another party, it is agreed that all liability of the former shall cease as soon as the cargo is shipped, loading excepted, the owners and master of the vessel agreeing to rest solely on their lien on the cargo for freight, demurrage, and all other claims, and which lien it is hereby agreed that they shall have."—Held, that "loading excepted" extended to delay in loading, and was not confined to the loading a full and complete cargo; and the charterers, therefore, remained liable for the delay, though they had shipped a complete cargo. *Lister v. Van Haansbergen*, 1 Q. B. D. 269; 45 L. J., Q. B. 495; 24 W. R. 395.

Constructing Bill of Lading by Charterparty.]

—A vessel was chartered to carry a cargo of coals from Cardiff to Rouen. The charterparty provided that the liability of the charterers should cease "when the ship is loaded and advance of freight with demurrage at Cardiff paid." "Ship to have a lien on cargo for freight, dead freight, and demurrage." The bill of lading contained no restriction on the liability of the charterers. In an action for balance of freight:—Held, that the charterparty and bill of lading must be read together, and construed according to the plain meaning on the face of them, and that the charterers' liability ceased on performance of the conditions in the charterparty. *Barwick v. Burnyeat*, 36 L. T. 250; 25 W. R. 395.

A charterparty contained stipulations in the usual form for payment of freight and demurrage, and also a stipulation that "as this charterparty is entered into by the charterers for account of another party, their liability ceases as soon as the cargo is on board, the vessel holding a lien upon the cargo for freight and demurrage." The charterers having placed the cargo on board at the port of loading, a bill of lading was signed whereby the goods were made deliverable to themselves at the port of discharge, "they paying freight and all other conditions as per charterparty." In an action by the shipowner against them as consignees of the cargo, for demurrage in respect of delay at the port of discharge:—Held, that the cesser clause in the charterparty must be rejected as inapplicable in reading the bill of lading, which incorporated all the conditions of the charterparty applicable to the reception of the goods at the port of discharge, and therefore that the plaintiff was entitled to maintain the action. *Gullichsen v. Stewart*, 11 Q. B. D. 186; 52 L. J., Q. B. 648; 49 L. T. 198; 31 W. R. 745. See also *The San Roman*, ante, col. 1337.

Liability for Expenses incurred by reason of Additional Clause.]

—D. chartered a vessel to Puerto Cabello and home from Maracaibo at a fixed freight, and an additional clause was subsequently inserted in the charterparty, giving the charterer the option of sending a part of the outward cargo on to Maracaibo, and stipulating

that "any and every expense the vessel may incur in consequence of this additional clause shall be borne by the charterers." The charterer loaded the vessel with a cargo, part for Puerto Cabello and part for Maracaibo, and made out two manifests. On arriving at Puerto Cabello, the custom-house authorities insisted on seeing both manifests, and prohibited the discharge of the part of the cargo intended for Puerto Cabello, on the false ground that there were contraband goods on board, by which the cargo was confiscated, and they also imposed a fine of 500 dollars on the master for having two manifests, and prohibited the discharge of the cargo or the clearing out until the fine was paid. The master appealed to the tribunals of the country, and made counter-claims for delay. A revolution occurred in Venezuela about the same time, which prevented all commercial and legal proceedings; but eventually the government agreed with the master to pay him 5,000 dollars as compensation for the detention of the ship; and, after a further delay, she proceeded to Maracaibo. The 5,000 dollars were not paid:—Held, that the owner of the vessel was not entitled to recover from the charterer the damages or expenses he had been put to, either in repairing damage to the vessel occasioned by delay, or the costs attendant upon the proceedings, or otherwise, such damages not being contemplated by the additional clause. *Sully v. Duranty*, 3 H. & C. 270; 33 L. J., Ex. 319.

Advances to Captain by Charterers' Agent.]—

A ship was chartered on a voyage from London to San Francisco, and Victoria, Vancouver's Island. By the terms of the charter, the cargo was "to be brought to and taken from alongside at merchant's risk and expense. The freight was to be a lump sum of 1,650*l.*, which was to be paid, 1,000*l.* on sailing, and the remainder on right delivery of the cargo; say, if the captain should so require, one moiety at each of the ports of discharge." The ship was to be consigned to charterers' agents at the port of discharge, paying a commission of not exceeding 2*l.* per cent. on amount of freight of 1,650*l.*; and the stevedore recommended by the charterers was "to be employed at ship's expense on usual charge." Owing to the fault of the stevedore in the stowage of the cargo, an expense to the amount of 70*l.* was incurred in getting at the cargo intended for San Francisco; this sum was advanced by the charterers' agents to the captain, with other money, as ship's disbursements, and included in an account which they laid before him, and which he signed under protest:—Held, in an action by the owner of the ship against the charterers for freight, that the 70*l.* could not be pleaded either as a set-off or as a payment. *Roberts v. Shaw*, 4 B. & S. 44; 32 L. J., Q. B. 308; 10 Jur., N. S. 147; 8 L. T. 634; 11 W. R. 829.

It is doubtful whether a captain has authority to bind an owner by stipulations in a charterparty with respect to advances to be made to the captain by the charterer against the freight. *Gibbs v. Charleton*, 26 L. J., Ex. 321.

Charterers' Duty to Clear Ship.]—Where a ship had been addressed to a consignee, who was not in a position to clear the ship, and the captain was led by the charterers to have recourse to brokers, who cleared the ship, and

charged commission for so doing, which the captain paid on behalf of the owner:—Held, that an action was maintainable by the shipowner against the charterers, who had agreed that the ship should be consigned to their agents free of commission, and the cargo cleared free of expense to the shipowner. *Russell v. Griffith*, 2 F. & F. 118.

Primage.]—By a charterparty the charterer engaged to ship in Australia a full cargo for a port in England at a freight of 60*s.* per ton in full; ship paying all port-charges, pilotages, and towages: the freight to be paid in cash on right delivery of cargo at port of discharge, less advances, exchange, and commission: the captain to sign bills of lading for cargo as presented, at any rate of freight required by charterer; but, should the total freight by bills of lading amount to less than the total chartered freight, the difference to be paid the master in cash before sailing. The master (who was paid a fixed salary, "to include all charges and allowances,") signed a bill of lading for the whole cargo, making the goods deliverable to "order or assigns, freight to be paid in cash at port of discharge, the rate of discharge, rate of freight, and other conditions as per charterparty, with 5 per cent. primage in cash on delivery as customary." The cargo was received at the port of discharge by the indorsees of the bill of lading, as agents of the charterer, and the freight paid:—Held, that they were not liable for primage. *Caughy v. Gordon*, 3 C. P. D. 419; 27 W. R. 50. *And see ante*, col. 1219.

7. DEMISE OF SHIP.

Liability of Owner for Negligence of Master and Crew.]—

The plaintiffs hired from the defendant a vessel under a charterparty, by which the vessel was let to the plaintiffs for a specified time, and they were to have the whole reach of her holds, except what was reserved to the owner for the crew; the crew was to assist in loading and discharging, and the captain was to sign bills of lading and to furnish to the charterers a copy of the log. The defendant engaged and paid the master and crew. Whilst the vessel was upon a voyage under the charterparty, with a cargo on board belonging to the plaintiffs, she and her cargo were lost by the negligence of the master and crew:—Held, that the master and crew were the servants of the defendant for the purpose of navigating the vessel, and that he was liable to compensate the plaintiffs for the loss sustained by them. *Omoa and Cleland Coal and Iron Company v. Huntley*, 2 C. P. D. 464; 37 L. T. 184; 25 W. R. 675.

The owner of a ship who, by a verbal agreement, gives up all control over her to the captain, but retains a right to one-third of the net profits, and is subsequently registered as managing owner under the Merchant Shipping Act, 1875, is liable for the negligent management of the vessel by the captain, though occurring under a charterparty of which the owner knew nothing. *Steel v. Lester*, 3 C. P. D. 121; 47 L. J., C. P. 43; 87 L. T. 642; 26 W. R. 212.

What Amounts to—Lien of Owner.]—By a charterparty it was covenanted that the owner should receive on board in London all such goods as the freighter thought fit to load, and

should proceed therewith to Madras, and there, after delivering her outward cargo, receive from the freighter's agents a homeward cargo, and deliver the same in London; and that all the cabins but one, which was reserved for the use of the captain, should be at the disposal of the freighter, who was to appoint a supercargo to superintend the stowage of the goods. Freight to be paid at so much per ton on the register tonnage of the ship. The captain and crew were employed and paid by the owner:—Held, that, there being no express words of demise of the ship itself in the charterparty, the freighter did not thereby become the owner for the voyage, but that the possession continued in the owner, and that he, therefore, had a lien upon the cargo for his freight. *Saville v. Campion*, 2 B. & A. 503.

The owner of a ship entered into a charterparty with the freighter, by which the former granted and to freight let, and the latter hired and to freight took, the ship, for a voyage, out and home. The owner covenanted, that the vessel being well manned and furnished, as is usual for vessels in merchant service, the master should receive on board at London goods to be sent alongside her there by the freighter, and deliver them from alongside at Newfoundland to the agents of the freighter, according to his bills of lading; and, such cargo having been discharged there, should receive other goods in like manner, and deliver them at Demerara, and, having discharged the same, should receive other goods there, and deliver them at London, agreeably to bills of lading. The owner also agreed that the ship's boats should assist in unloading and loading the cargoes when required by the freighter, provided no impediment was thereby to be made in carrying on the exclusive duties of the ship, in consideration whereof the freighter covenanted to send and take the goods from alongside, and to pay for the freight and hire of the vessel for the voyage 2,600*l.* with prime, one quarter part on delivery of the cargo at Newfoundland, by good bills at sixty days' sight on London, and the remainder by good bills at two months' date from the day of the ship's report inwards at the port of London. The voyage was performed, and goods of third persons brought from Demerara, under bills of lading deliverable to the consignees, on payment of certain specified freight therein mentioned, which freight the owner received. Bills of exchange for one quarter's freight were drawn on the freighter at Newfoundland, which were afterwards accepted and dishonoured by him, and no sum or bill for the remaining three-quarters' freight per charterparty was given or tendered to him on the return of the ship:—Held, that, taking the whole of the charterparty into consideration, the possession of the ship did not pass to the freighter, but remained in the owner, notwithstanding the words of grant used in its commencement; and that the mere circumstance of his having entered into an agreement with the charterer as to the mode by which he should be paid for freight did not divest him of his lien on the cargo for freight; and that it made no difference that he had delivered the homeward cargo to the consignees, and received the freight due upon the bills of lading, which was different from that due upon the charterparty. *Christie v. Lewis*, 5 Moore, 111; 2 B. & B. 410.

Where no Possession by Owner.—The owner of a ship has no lien for the hire stipulated by a charterparty for the voyage on goods shipped by the charterer, because the latter is the owner of the ship for the voyage; and the first owner has no possession of the ship or goods, without which there can be no lien. *Hutton v. Bragg*, 7 Taunt. 14; 2 Marsh. 339.

As Transport to Crown.—Where A. chartered his ship to the commissioners of the transport service on behalf of the crown, to be employed as a transport, and the ship in the course of such employment made several voyages from Deptford to foreign ports and back:—Held, that, by the terms of the charterparty, coupled with the nature of the service, a temporary ownership passed to the crown, so that A., during the time of such service, was not to be considered as owner within the charters granted to the Trinity House, which impose lighthouse duties and for buoyage and beaconage on the masters and owners of ships. *Trinity House v. Clark*, 4 M. & S. 288.

With Right to Surplus—Presence of Agent.—The owners of a ship by deed appointed A. to the command of the ship, on a voyage from London to Calcutta and back. A. was to load the ship out and home, and to secure to the owners a certain amount of freight, retaining the surplus, or making good the deficiency. An agent of the owners was to go on board to superintend the management of the stores, with power to displace A. and appoint another commander, in case of his breaking the agreement on his part:—Held, that the deed released the owners from their liability, as such, to make good the loss upon goods sent from Calcutta to London by the ship, and lost or damaged on the voyage, and that A. alone was responsible to the shippers for such non-delivery, he being owner of the vessel *pro hac vice*. *Newberry v. Colvin*, 4 M. & P. 876; 7 Bing. 190; 1 C. & J. 192; 1 Tyr. 55—Ex. Ch. Affirmed in Dom. Proc. nom. *Colvin v. Newberry*, 1 C. & F. 283.

Hire for Day—Owners' Servants.—The defendants hired a steam vessel for the day to convey them to R. and back to L. The vessel was navigated by the master, engineer and crew of the owners, at their expense:—Held, that the defendants had not such exclusive possession of the vessel as to entitle them forcibly to expel the plaintiff, who had come on board, with the master's permission, for the purpose of being conveyed to R. *Dean v. Hogg*, 4 M. & Scott, 188; 10 Bing. 345.

Possession—Right to Maintain Trespass.—An owner of a ship, notwithstanding he has let her out by charterparty for twelve months, containing no terms of conveyance of possession, has a sufficient possession of her to maintain trespass. *Lucas v. Nockells*, 4 Bing. 729; 1 M. & P. 783; 2 Y. & J. 304; 1 C. & F. 438.

Tests of Possession.—By a charterparty, it was agreed that A. should let, and B. should hire, A.'s vessel for six months, during which time B. was to possess the entire and exclusive use and disposal of the whole reach and burden of the vessel, with the exception of the space occupied with the cabin, with room for the usual accommodation of the crew, and for the stowage of

stores and provisions; that the master should, from time to time, and as often as B.'s interest should require, take on board, and properly stow, all such lawful goods, to the extent of a full and complete cargo, as should be tendered to him for that purpose, and proceed therewith upon such lawful voyage or voyages as B. or his agent should direct him to do; and that he should deliver the goods agreeably to the bills of lading; that the freight and primage for such goods should be payable to B., or his order; that, in the event of the completion of the six months whilst the vessel was upon a voyage, or after she had commenced taking goods on board for a voyage, the term of that agreement should be prolonged until the discharge of her cargo after her arrival at, or return to, a port in Great Britain; and that the owners or master should keep the vessel tight and manned, and provisioned and fitted with necessary stores. In consideration whereof, B. agreed to pay to A., at a certain rate per ton per month, to be paid by—one month's pay in advance in cash,—one month's pay after the vessel should be entered outwards,—one month's pay that day two months,—and one month's pay at the expiration of each succeeding month till the end of the term she might be employed, and the balance in cash on her final discharge, together with port charges; and that B. should have the privilege of putting in a master of his own appointment, he finding the cabin with all stores, and paying his wages, A. allowing whatever rate of wages A. paid his own master; and, as the master was to be appointed by B. to superintend his interests, A. was not to be responsible for such master's acts and conduct, should he deviate from the charter; but B. was to be responsible to A. for the conduct and integrity of such master whilst he should have the navigation of the vessel:—Held, that the possession of the vessel was given up by A. to B. during the continuance of the contract; that the master so appointed by B. was in possession of the cargo as his agent, and not as the servant of A.; that personal credit was given to B. for the payment of the hire of the vessel; and that no lien upon or right of stoppage of the goods was reserved to the owners as a security for the payment of such hire. *Belcher v. Capper*, 4 M. & G. 502; 5 Scott, N. R. 257.

8. PLEADINGS, EVIDENCE, AND DAMAGES.

Declarations.—As to allowing several counts on a charterparty, varying its statements, see *Hernod v. Wilkin*, 11 Q. B. 1. See *Hoggett v. Ezley*, 6 Bing., N. C. 207; 8 Scott, 480.

The owner of a ship covenanted by a charterparty with the freighters to take on board six pipes of brandy at Havre, and proceed therewith to Terceira, where the master was to take on board a full and complete cargo of green fruit, or other goods, as the freighters might think fit to send alongside, and despatch her therewith to London; and the freighters covenanted to pay freight for the fruit at certain terms therein specified, and on the brandy, at a certain rate therein also stipulated, and guaranteed the ship a complete cargo of fruit home. In an action by the owner against the freighters, for not putting a full cargo of fruit on board at Terceira, he averred a general performance of the covenants contained in the charterparty to be fulfilled:—Held, sufficient, as the covenant by the owner to

take the brandy to Terceira was an independent and distinct covenant, and not to be considered as a condition precedent, as it went only to a part of the consideration of the contract. *Fothergill v. Walton*, 2 Moore, 630.

Action on a charterparty by a freighter against a shipowner for not receiving cargo. Proof was given of a charterparty expressed to be between the defendant of one part, and G. S. & Co. (agents of the freighters) of the other, containing a memorandum, as follows:—"This charter being concluded on behalf of another party, it is agreed that all responsibility on the part of G. S. & Co. shall cease as soon as the cargo is shipped." No notice of this memorandum was taken in the declaration:—Held, that it was not necessary to notice the memorandum. *Schmaltz or Schmaltz v. Aery*, 16 Q. B. 655; 20 L. J., Q. B. 228; 15 Jur. 291.

In an action for breach of a charterparty by the freighter against the owner of a ship, for not performing the terms of a charterparty, the declaration alleged that it was agreed by the parties that the ship should proceed with all convenient speed to St. Helena, and there load a cargo, and therewith proceed to Liverpool, and deliver the cargo at a safe wharf, for a certain amount of freight (the act of God, the Queen's enemies, fire and all other dangers of the seas and navigation during the voyage always excepted); that the charterparty should be in force for six voyages, and that they should all be made not later than a certain day specified. The declaration averred that the freighter had done all things necessary on his part to entitle him to have the voyages performed, yet the ship did not make the voyages as agreed:—Held, that the declaration was good, although it did not contain any averment negating the fact of the owner being within any of the exceptions contained in the charterparty, and that if he relied upon such fact, he was bound to plead it. *Wheeler v. Davidge*, 9 Ex. 668; 23 L. J., Ex. 221.

A declaration stated that by a charterparty between the defendant, the shipowner and the plaintiff, it was agreed that the ship should proceed to two ports in Sicily, or usual place of loading, on and after the delivery of her outward cargo, and there load from the plaintiff's factors a full cargo, and thence proceed to Bristol, and that the vessel should have her orders before leaving Messina. The declaration alleged that the ship arrived at Messina, and laid as a breach, that the defendant within a reasonable time after the delivery of her outward cargo, and before the plaintiff could have given orders for the ship to proceed to the ports, made a contract with a third party for the conveyance of goods from Messina, and therewith and within such reasonable time as aforesaid, and before such reasonable time had elapsed, loaded his ship, and afterwards proceeded to London, without taking on board the cargo agreed to be taken from the plaintiff, and thereby wholly incapacitated and deprived himself of the power of fulfilling the charterparty, although the plaintiff within such reasonable time as aforesaid provided merchandize, and was ready and willing to load on board the ship the merchandize, and although the plaintiff would have been ready and willing to have named and appointed and given orders to the defendant to proceed to two ports and to have there loaded a full cargo:—Held, that the declaration was bad, as it did not shew that the vessel had sailed

before the lapse of a reasonable time for the performance by the plaintiff of his part of the contract, and so did not shew that the defendant had incapacitated himself from performing his part of the contract, and that it ought to have contained an averment that the plaintiff had performed his part by giving orders, naming a port, &c., and by tendering a cargo within such reasonable time. *Matthews v. Lowther*, 5 Ex. 574; 19 L. J., Ex. 364.

Action on a charterparty, not under seal, varied by a subsequent agreement. The declaration stated, that, by a charterparty between G. L. J. & Sons, on behalf of the owners (not stating the plaintiffs to be the owners) of a ship at Pembroke, and the defendant described as the charterer, it was mutually agreed that the ship should, with all convenient speed, proceed to Cardiff, and there load a cargo of iron and coals at certain freight, and deliver the same at Alexandria; forty running days to be allowed the charterer for loading at Cardiff and unloading. That the ship, with the consent of the plaintiffs, and at the request of the defendant, remained at Pembroke to receive coals, part of the cargo, instead of being loaded therewith at Cardiff, and that she there received coals on board. That the defendant did dispense with, and discharge the plaintiffs from, performing that part of the charterparty which related to the sailing of the ship with all convenient speed from Pembroke to Cardiff up to and until the time of the completing the loading of coals at Pembroke. That the ship sailed to Cardiff. Breach, that the defendant detained the ship there in loading for twenty days over and above the lay days and ten days of demurrage. It then stated, that the ship, being fully laden, proceeded to Alexandria; assigning, as a second breach, that the defendant detained the ship there in unloading for a further time, viz. thirty days over and above the lay days and days of demurrage. There were two more breaches, one the non-payment of freight for the cargo, which the plaintiffs duly delivered at Alexandria, and the other the non-payment of demurrage:—Held, that the declaration was defective for not shewing by distinct averment or necessary implication that the plaintiffs were parties contracting by the charterparty as owners of the ship, and that such defect could not be cured by any admission in the pleas, whether found for or against the defendant. *Galloway v. Jackson*, 3 M. & G. 960; 3 Scott, N. R. 753; 12 L. J., C. P. 502—Ex. Ch.

Pleas.—In a declaration on a charterparty, by which the ship was to sail from Hamburg, being tight, staunch, strong, and every way fitted for the voyage, in the course of the next November, and proceed to Lima, and having discharged her outward cargo, forthwith to be made ready and proceed to Costa Rica, and there take on board a cargo, and then proceed to Liverpool;—breaches were alleged as follows: that the vessel was not, in November or afterwards, until or when she sailed on the 20th December, tight, staunch, strong, or in any way fitted for the voyage: and that, though she did then sail from Hamburg, yet, by reason of her not being tight, &c., when she so sailed, she was obliged to, and did, put back into Altona, and was detained there for a long time; though she did then again

set sail on her voyage from Altona, she did not proceed on the voyage according to its due course, or with proper despatch, but was unnecessarily delayed, and deviated; by means of which premises, the vessel did not arrive at Lima, and the plaintiff lost the benefit of a homeward cargo from Costa Rica. The defendant pleaded, as to so much of the declaration as related to the vessel not being fitted for the voyage, and by reason thereof being obliged to put back into Altona, and being detained there for such time as was necessary to put further ballast on board, payment into court of 1*s.* and no damages ultra; and as to so much as related to her being detained at Altona beyond the time necessary to put the ballast on board, that she was not detained there by reason of her not being tight, staunch, &c.:—Held, that the latter plea was bad, as answering only a part of the breach to which it applied, viz., the detention at Altona, and the subsequent delay and deviation, even if that was a breach, and was not merely a statement of special damage. *Porter v. Izat*, 1 M. & W. 381; 1 Tyr. & G. 639.

Evidence—Letters as to Agency.—A captain was instructed to apply for a cargo to A., and in the event of A. not being on the spot, then to apply to B. (both being agents of the charterers) for the same purpose. He applied to both accordingly, and was refused a cargo by both. An action was brought by the owners to recover the freight; and in order to do away with the effect of the proof as to B.'s refusal, a letter from B. to the charterers was tendered to shew, that, prior to such refusal, B. had renounced their agency:—Held, to be inadmissible. *Hassell v. Watson*, 2 C. & K. 141.

Held, also, that A. having been on the spot, what passed between B. and the captain was important only in so far as it was confirmed and adopted by A. *Id.*

Notarial Copy of Charterparty made Abroad.—In Batavia, parties about to make a contract go before a notary, who writes in his book the contract, which is then signed by them. Copies of this contract may be obtained by either party in the absence of the other. A notarial copy of a charterparty was entered into at Batavia:—Held, not to be evidence either of the original contract, nor properly secondary evidence of it. *Brown v. Thornton*, 1 N. & P. 339; 6 A. & E. 185.

Of Restraint of Princes.—On an issue joined on a plea by the charterer that he was prevented from loading by restraint of princes, it was proved no corn was exported from Ibraila during the vessel's stay; and evidence was given that Wallachia, in which Ibraila is situate, was invaded by the Russians, and at the time in question was under the command of Prince Gortschakoff, a Russian general, who, while at Ibraila, being applied to, to allow grain to be exported, refused, and desired the applicant to petition the commissary at Bucharest. Evidence was also tendered of copies of placards, in the name of Gortschakoff, posted on the walls of Ibraila, at the period of the ship's arrival, prohibiting the exportation of grain:—Held, that such evidence was admissible, and, coupled with the other evidence, proved the plea. *Bruce v. Nicolopulo*, 11 Ex. 129; 24 L. J., Ex. 321.

— **Nature of Trade.**—When by a charterparty the owner agreed that the ship then bound for Havre should proceed with all convenient speed to the North of England for coals, thence to Limerick, and there load a cargo of grain or other merchandize for the charterer, and the ship having been delayed by bad weather did not arrive at Limerick till long after the time expected:—Held, in an action by the owner on the charterparty that evidence on behalf of the charterer that the Limerick export grain trade is carried on only at a certain season, which had expired before the ship arrived, was inadmissible. *Hurst v. Osborne*, 18 C. B. 144; 25 L. J., C. P. 209.

— **Custom to control Contract.**—*See cases ante*, col. 1336.

Damages—Penalty and Profits.—A ship was chartered to go to New Zealand, where the charterers were to load her, or by an agent there to give the owner notice that they abandoned the adventure; in which case they were to pay him 500*l*. The ship went to New Zealand, but found neither agent nor cargo there, and the captain made a circuitous voyage home by way of Batavia. This voyage, after making every allowance for increased expenses and loss of time, was more profitable than the original adventure to New Zealand would have been. The owner sued the charterer on the charterparty for breach of covenant:—Held, that he could not recover the 500*l*. penalty in addition to the profit of the homeward voyage. *Staniforth v. Lyall*, 7 Bing. 169; 4 M. & P. 829.

In an action against a charterer of a ship for not landing a cargo, the measure of damage is the amount of freight which would have been earned after deducting the expenses, and also any profit which the ship may have earned during the period over which the charter extended. *Smith v. McGuire*, 3 H. & N. 554; 27 L. J., Ex. 465.

Seem, that a shipowner is not bound to take a new cargo for the most he can get, in order to reduce the damages to be paid by the charterer. *Ib*.

XIV. CARGO AND VOYAGE.

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1. ADVERTISEMENT OF VOYAGE.

General Ship—Inquiry by Shipper as to Charterparty.—When a vessel about to sail is advertised as a general ship, an intending shipper is not bound to inquire as to the existence of any charterparty. *Peek v. Larsen*, 12 L. R., Eq. 378; 40 L. J., Ch. 763; 25 L. T. 580; 19 W. R. 1045.

A person who, without notice of any charterparty, has placed goods on board a vessel which has been advertised as a general ship, is entitled to have his goods returned to him if the captain refuses to sign bills of lading except subject to a charterparty containing objectionable provisions. *Ib*.

A Norwegian vessel was advertised as a general ship by C. & Co., an English firm, described in the advertisement as brokers. The plaintiffs entered into an agreement with C. & Co. for the carriage of certain goods at a stipulated rate of freight, and placed the goods on board before they had notice of any charterparty affecting the ship. It was afterwards proved that C. & Co. were charterers of the vessel under a charterparty, which provided that the owner should have a lien for freight, dead freight and demurrage. The captain refused to sign bills of lading, except subject to the charterparty, or to return the goods to the plaintiffs:—Held, that the owners of the ship were not entitled to retain the goods in satisfaction of their claims under the charterparty, and that the plaintiffs were entitled to have the goods delivered to them free from any claim by the shipowners. *Ib*.

A shipper, who has loaded on the terms of a sub-charter, is not affected by notice of a stipulation in the original charterparty that the owner is to have "a lien on the cargo for arrears of hire." He has a right to have bills of lading signed on the terms of the sub-charter. *Tharsis Sulphur and Copper Mining Company v. Culliford*, 22 W. R. 46.

Obligation to Inquire as to Existence of Bills of Lading.—The goods of a shipper in a general ship are not affected by a clause in a charterparty of which he has no notice or knowledge, giving the shipowner a lien on all cargo and freight for arrears of hire due under the charterparty. *The Stornoway*, 51 L. J., Adm. 27; 46 L. T. 773.

Alteration of Destination.—Where a general ship has been advertised for a particular voyage, if her destination is in any respect altered, the

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owner is bound to give specific notice of the alteration to every person who has shipped goods on board. *Peel v. Price*, 4 Camp. 243.

2. SUFFICIENCY OF CARGO.

a. Meaning of "Cargo."

Equivalent to Shipload.—In a contract to deliver at a port to be named by the purchaser "a small cargo of about sixty fathoms of lathwood," the word "cargo" means an entire shipload; and therefore the purchaser is not bound to accept sixty fathoms, measured and set apart for him by the seller's agent at the port named, out of a shipload containing eighty-three fathoms of lathwood. *Kreuger v. Blank*, 5 L. R., Ex. 179; 39 L. J., Ex. 160; 23 L. T. 128; 18 W. R. 813.

Where a defendant contracted to buy of the plaintiff "a cargo of from 2,500 to 3,000 barrels (seller's option) petroleum at one shilling and three farthings per gallon weighed 8 lbs. delivered, to be shipped from New York within a certain time, and the terms of the contract shewed that the defendant was to have complete control over the destination of the vessel:—Held, that "cargo" meant an entire shipload and not a shipment, and that it was a condition precedent that the 2,500 to 3,000 barrels tendered should be the whole cargo of the vessel, although the additional quantity shipped was kept distinct, and the defendant was not, in fact, deprived of the control of the vessel's destination. *Borrowman v. Drayton*, 2 Ex. D. 15; 46 L. J., Ex. 273; 35 L. T. 727; 25 W. R. 194—C. A.

b. Full and Complete Cargo.

What is.—By a charterparty a ship was described to be of the burden of 261 tons, and the freighter covenanted to load a full and complete cargo:—Held, that the loading of goods equal in number of tons to the tonnage described in the charterparty was not a performance of this covenant; but that the freighter was bound to put on board as much cargo as the ship was capable of carrying with safety. *Hunter v. Fry*, 2 B. & A. 421.

A charterparty provided that the ship should proceed to the port of loading and there load "a full and complete cargo of iron ore, say about 1,100 tons." The charterer provided a cargo of 1,080 tons, the actual capacity of the ship being 1,210 tons:—Held, that the words, "say about 1,100 tons," were not mere words of expectation, but words of contract, and that the charterer's undertaking was not to load the ship up to her actual capacity; but that three per cent. was a fair amount of excess over 1,100 tons to allow in estimating what was a full and complete cargo of about 1,100 tons, and consequently that the cargo actually provided fell short of the charterer's obligation by fifty-three tons. *Morris v. Levison*, 1 C. P. D. 155; 45 L. J., C. P. 409; 34 L. T. 576; 24 W. R. 517.

Covenant as to Survey.—A covenant in a charterparty, "that no claim shall be admitted or allowance made for short tonnage, unless such short tonnage be found and made to appear on her arrival, on a survey by four shipwrights to be indifferently chosen by both parties," is not

a condition precedent to the right of recovering for short tonnage; but is a matter of defence to be taken advantage of. *Hotham v. East India Company*, 1 T. R. 638.

Accident in Course of Loading.—By a charterparty between the owner and the charterer of a ship, it was agreed that the ship should proceed to P., and there load a full and complete cargo of cotton with a certain amount of sugar as ballast. The ship proceeded to P., and after a portion of the cargo had been loaded, and while another portion was in a lighter lying alongside ready for loading, the ship caught fire accidentally, and the portion of cargo on board was so injured that the master necessarily sold it. He forwarded the portion alongside to its destination by a different ship. After the ship had been repaired, the shipowner tendered it to the charterer's agents and required them to load the residue of the cargo, which they refused to do:—Held, that the charterer was not exonerated by the circumstances from his obligation to complete the loading of a full and complete cargo. *Jones v. Holmes*, 2 L. R., Ex. 335; 36 L. J., Ex. 192; 16 L. T. 794; 16 W. R. 62.

Goods Dispatched by other Vessels.—A ship was chartered on the 12th of September, 1861, for the conveyance of a cargo of wheat from Harwich to St. Malo; ten days to be allowed for loading. The usual course was to load a portion of the cargo at a quay in the River Orwell, and to proceed lower down the river to take in the residue. The vessel having arrived on the 14th of September, and taken in 900 quarters (which were about three-fourths of the whole cargo), was proceeding down the river in charge of a pilot, when she got aground. The master, finding it necessary to take out the cargo in order to examine and repair the ship, gave notice to the charterers' agent, who accordingly, at the request of the master, and at the expense of the charterers, unloaded the 900 quarters, and dispatched the whole quantity to its destination by other vessels. On the 4th of October the master gave notice that he was ready to receive the cargo, and demanded it. The agent had none to ship:—Held, that the owners could not maintain an action against the charterers for not supplying a cargo. *Strugnell v. Friedrichsen*, 12 C. B., N. S. 452; 9 Jur., N. S. 77.

Unforeseen Cause—Impossibility of Supplying Goods.—An owner of a ship agreed that she should proceed direct to Ichaboe, and there load a full and complete cargo of guano by the ship's boats' tackle, and by the labour of the crew, and being so loaded, should proceed therewith to Cork or Falmouth, and deliver the same, on being paid freight at 4l. 15s. per ton; restraint of princes and rulers, the acts of God and the Queen's enemies, fire and perils of navigation, always excepted; twenty-one working days to be allowed to the charterer if the ship was not sooner discharged at the port of unloading. The charterer to ship bags and other materials requisite for loading the ship, and to supply the stores for the ship, at cash prices, for the voyage, and to deduct the amount from the balance of freight; but in the event of the vessel being lost, or any other unforeseen causes preventing the completion of the charterparty, the owner agreed to pay the charterer the amount of his

disbursements for such stores. To a declaration on this charterparty, alleging as a breach that the shipowner did not land a full and complete cargo of guano on board the ship at Ichaboe, he pleaded that he was prevented from doing so from an unforeseen cause, namely, that on the arrival of the ship at Ichaboe, and within a reasonable time afterwards, no guano was to be found there, and that he had paid to the charterer the amount of his disbursements for stores for the ship:—Held, that the plea was bad in substance, for that the fact of no guano being to be found was not such an unforeseen cause, preventing the completion of the charterparty, as entitled the shipowner to pay the amount of the disbursements, and treat the charterparty as at an end, but that he was nevertheless bound by his positive contract to load a full cargo. *Hills v. Sughrue*, 15 M. & W. 253.

Ballast.—Where the freighter covenanted to provide for the ship a full and complete cargo, consisting of copper, tallow and hides, or other goods, on which separate rates of freight were to be paid:—Held, that having supplied her with as large a quantity of tallow and hides as the master chose to take on board, he was not bound to provide any copper, although for the want of it the ship was obliged to keep in her ballast, and did not make so advantageous a freight as she might have done. *Moorsom v. Page*, 4 Camp. 103.

Merchandise for Ballast.—A shipowner is entitled to take merchandise on board as ballast, provided it occupies no more space than the ballast would have done, and leaves to the charterer the full space of the vessel for his cargo. *Towse v. Henderson*, 4 Ex. 890; 19 L. J., Ex. 163.

Light Cargo—Duty of Shipowner to provide Ballast.—A charterer agreed to load at Archangel a full and complete cargo of oats or other lawful merchandize, which the shipowners were to deliver "on being paid freight at the rate of 4s. 6d. per 320 lbs. for oats, and if any other cargo be shipped, in full and fair proportion thereto, according to London Baltic printed rates." The cargo shipped consisted of flax and other light articles (all mentioned in the London Baltic rates), i.e., of as much as the ship could safely carry of such light articles, which rendered the shipment of 120 tons of ballast necessary:—Held, that the charterer had a right, in the absence of any stipulation to the contrary expressed or implied, to ship a full and complete cargo of any one or more of the articles constituting lawful merchandize within the meaning of the charterparty, and that when he had supplied a full and complete cargo, it was the shipowner's duty to procure the ballast necessary for that cargo; that in this case no stipulation to the contrary was expressed by the words "in full and fair proportion" in the charterparty, nor was any such stipulation implied by law; so that the shipowner not being protected from the extreme use by the charterer of his privilege, could not recover from him more than the freight payable according to the London Baltic rates on the quantities of the several articles actually shipped. *Southampton Steam Collier Company v. Clarke*, 6 L. R., Ex. 53; 40 L. J., Ex. 8; 19 W. R. 214—Ex. Ch.

Under an agreement to proceed to the East

Indies, and there load a full and complete cargo; the fore-cabin to be filled with light goods; freight 4l. 15s. per ton of 20 cwt. for sugar, coffee, and rice, and for pepper for 18 cwt. to the ton; 100 tons of rice or sugar to be shipped, previously to any other part of the loading, to ballast the vessel:—Held, that the owner was obliged to furnish what further ballast was necessary, and that the freighter, after shipping the 100 tons of rice or sugar, was at liberty to complete the cargo with light goods. *Irring v. Clegg*, 1 Bing. N. C. 53; 4 M. & Scott, 572.

Broken Stowage.—By a charterparty the charterer bound himself to load at Havana "a full and complete cargo of sugar and other lawful produce." Certain goods were enumerated, including timber, and certain rates of freight were mentioned; and the charterparty proceeded; "other goods, if any should be shipped, to pay in proportion to the foregoing rates, except what might be shipped for broken stowage, which should pay as customary" (half freight). A full cargo of mahogany logs was shipped, but no broken stowage was supplied to fill up the interstices, and the vessel was in consequence obliged to retain thirty tons of ballast:—Held, that it being impossible to ship a "full and complete cargo" without broken stowage, the charterer was bound by his contract to furnish it. *Cole v. Meek*, 15 C. B., N. S. 795; 33 L. J., C. P. 183; 9 L. T. 653; 12 W. R. 349.

By a charterparty the charterers were to load "a full and complete cargo of sugar in cases or other lawful merchandize, with sufficient bags for stowage," and the freight was to be at a certain rate if the cargo "should be sugar in cases, with sufficient bags for broken stowage," "and for other produce at a rate proportionate to sugar in cases, with sufficient bags for broken stowage:"—Held, that the obligation on the charterers to load bags of sugar for broken stowage did not attach to any other cargo than sugar in cases. *Duckett v. Satterfield*, 3 L. R., C. P. 227; 37 L. J., C. P. 144.

What Goods.—A ship was chartered to proceed to Port Phillip, and there load from the freighter's factors "a full and complete cargo of wool, tallow, bark, and other legal merchandize," the quantity of bark not to exceed 100 tons, and the quantity of tallow and hides not to exceed 80 tons, and was to proceed therewith to London, and deliver the same "on being paid freight as follows:—For wool, 1½d. per lb., pressed, and 1½d. and one-eighth of a penny per lb. unpressed gross weight; tallow, 3l. per ton; bark, 4l. per ton; and hides, 2l. per ton; the latter not to exceed 20 tons, without the consent of the captain; one-third of the freight to be paid in cash, on unloading and right delivery of the cargo, and the remainder in cash or by approved bills at two months following:—Held, that the freighter was entitled to load the ship with an assorted cargo of any legal merchandize, but that the owners were entitled to be paid freight, upon the supposition that the loading consisted of the stipulated quantities of the enumerated goods, viz., 100 tons of bark, 60 tons of tallow, and 20 tons of hides, and the residue of wool, pressed or unpressed. *Cockburn v. Alexander*, 6 C. B. 791; 18 L. J., C. P. 74.

By a charterparty it was agreed that the ship should sail to Baltimore, and there load a full

cargo of produce, and proceed therewith to the United Kingdom, and deliver the same, on being paid freight, "at and after the rate of 5s. 6d. per barrel of flour, meal and naval stores, and 11s. per quarter of 480 lbs. for Indian corn or other grain; that the cargo was not to consist of less than 3,000 barrels of flour, meal, or naval stores, and that not less flour or meal than naval stores, was to be shipped. The vessel arrived with a cargo consisting of 769 cwts. of tobacco, 6,047 bushels of bran, 2,000 bushels of oats, 5,000 oak-staves, and three barrels of flour. The evidence shewed that a quarter of Indian corn or wheat would occupy a space of 10½ cubic feet, and that a quarter of American oats, which weighed upon an average 272 lbs., would occupy a space of sixteen cubic feet. It also appeared that oats were not a usual shipment from America:—Held, that "other grain" in this charterparty must be taken to mean such description of grain as would average 480 lbs. to the quarter, and therefore to exclude oats; and that the shipowner was entitled to receive freight, upon the supposition that 3,000 barrels of flour, meal and naval stores had been shipped; and for the rest of the space, at the rate of 11s. per quarter of Indian corn, or other grain, of the average weight of 480 lbs. to the quarter. *Warren v. Peabody*, 8 C. B. 800; 19 L. J., C. P. 43; 14 Jur. 150. See also *Southampton Steam Collier Company v. Clarke*, ante, col. 1381.

Goods in Cabin—Freight.—The defendant, a merchant in London, chartered a vessel of the plaintiff's, to bring from Bombay a full and complete cargo at 3l. 5s. per ton. The defendant's agents at Bombay filled the carrying part of the vessel, and also the cabin, with their own goods, and consigned them to the defendant, as their factor, for sale. There was contradictory evidence as to the terms upon which the cabin was filled. The bill of lading was annexed to a bill of exchange, drawn by the agents upon the defendant, which bill of exchange was sold to a third party. On the arrival of the ship in London, the plaintiff claimed freight for the cabin at the then current rate of 7l. per ton. The defendant insisted that he was entitled to the use of the cabin as well as the other part of the ship at the rate of 3l. 5s. per ton, but he charged his agents for freight at the rate of 7l. per ton, and allowed them commission at that rate. The goods were stopped, the bill of exchange not having arrived at maturity, when the action was brought to recover the above rate of freight for the use of the cabin. The defendant, after action brought, paid the bill, and obtained possession of the goods:—Held, first, that the defendant was not, under the terms of the charterparty, entitled to load the cabin. *Mitcheson v. Nicol*, 7 Ex. 929; 21 L. J., Ex. 323.

Held, secondly, that the judge properly directed the jury, that, although the defendant's agents at Bombay had no authority from the defendant to put goods in the cabin, yet, as the defendant adopted their act by accepting the goods, and charging his agents' freight in respect of them, he was bound to pay the plaintiff the current rate of freight at the time of loading. *Id.*

Held, thirdly, that the action was not brought too soon, since the taking to the goods for the purpose of obtaining freight, rendered the defendant liable irrespectively of his actual possession after action brought. *Id.*

Passengers instead of Goods.—A., a shipbroker, engaged with B., a shipowner, to have a full cargo for the ship, the rates of freight for which would average 40s. per ton, and at least nine cabin passengers, passage-money to average 75l. The contract was fulfilled as to the passengers, but the average rate of freight for goods put on board by A. amounted to 32s. only per ton. He shipped on board, however, steerage passengers for the voyage, the passage-money paid by whom, after deducting the expense of their diet, &c., when added to the freight of the cargo properly so called, made the average earnings of the whole ship per ton amount to more than 40s.:—Held, that this was not a performance of the stipulations of the contract, cargo and freight being terms applicable to goods only. *Lewis v. Marshall*, 7 M. & G. 729; 8 Scott, N. R. 729; 13 L. J., C. P. 193; 8 Jur. 848.

3. FITNESS OF GOODS FOR SHIPMENT.

Where Warranty cannot be Implied.—When the owner of a vessel has an opportunity of examining goods shipped on board of her, no warranty on the part of the owner of the goods can be implied that they are fit to be carried on the voyage. *Acatus v. Burns*, 3 Ex. D. 282; 47 L. J., Ex. 566; 26 W. R. 624—C. A.

In a voyage policy on goods there is no implied warranty that the goods are seaworthy for such voyage. *Koebel v. Saunders*, 17 C. B., N. S. 71; 33 L. J., C. P. 310; 10 Jur., N. S. 920; 10 L. T. 695; 12 W. R. 1106.

Goods Unfit for Carriage in ordinary Ship.—A ship was chartered to sail to Manila for orders to load there, or at Yloilo, a full and complete cargo of sugar in bags, hemp in compressed bales, ^{and} _{or} measurement goods, and therewith to sail to Cork, &c., the freight to be at the rate of 4l. 2s. 6d. for dry sugar, 4l. 5s. for wet sugar, and 4l. 15s. for hemp or measurement goods; the master engaging that the vessel before and when receiving cargo should be a good risk for insurance, and that during the voyage he would take all proper means to keep the vessel tight, staunch and strong, and in every way fitted and provided for the voyage. At Yloilo the charterer provided a full cargo of wet sugar in bags. In the course of lading it was found that the quantity of molasses which had drained, and which might have been expected to drain, from the wet sugar was so great as to render the ship unseaworthy unless removed, and that the ship's pumps were unable to remove it. The ship was in all other respects seaworthy, but could not have been rendered seaworthy for that cargo without a delay which would have frustrated the objects of the voyage:—Held, that the charterer was entitled under the charterparty to supply a full cargo of wet sugar, and to have a ship provided which was fit for such a cargo. *Stanton v. Richardson*, 45 L. J., C. P. 78; 33 L. T. 193; 24 W. R. 324—H. L. Affirming *S. C.*, in Ex. Ch., 9 L. R., C. P. 290.

Dangerous Goods.—Under 17 & 18 Vict. c. 104, s. 329, and 25 & 26 Vict. c. 63, s. 38, the shippers of goods in a general ship undertake that they will not deliver, to be carried on the voyage, packages of goods of a dangerous nature, which those employed on behalf of the shipowner

may not, on inspection, be reasonably expected to know to be of a dangerous nature, without expressly giving notice that they are of a dangerous nature. By Lord Campbell, C. J., and Wightman, J. *Brass v. Maitland*, 6 El. & Bl. 471; 26 L. J., Q. B. 49; 2 Jur., N. S. 710.

But, semble, by Crompton, J., the undertaking by the shippers that the goods are safe, and fit to be carried on the voyage, does not extend beyond the cases where they have knowledge, or the means of knowledge, of the dangerous nature of the goods when shipped. *Ib.*

If a shipper, knowing an article to have corrosive properties, desires it to be shipped on board a general ship, and stowed in bulk, without communicating the character of the article to the shipowner, and it is shipped accordingly; and being placed in the ship, in contact with certain casks it corrodes their hoops, so that liquids contained in them flow out of them, and into the above-mentioned article, and spoil it; the shipowner, being unaware of the character of the article, is not liable to the shipper, as for negligence in carrying and conveying, although the article is well known in commerce. *Hutchinson v. Guion*, 5 C. B., N. S. 149; 28 L. J., C. P. 63; 4 Jur., N. S. 1149.

But in such case it is not an answer to the action that the shipper directed the articles to be stowed in bulk. *Ib.* See also 36 & 37 Vict. c. 85, s. 23.

4. DECK CARGOES.

"At Merchant's Risk."—It was stipulated in a charterparty that the "ship should be provided with a deck cargo, if required, at full freight, but at merchant's risk."—Held, that the words, "at merchant's risk," did not exclude the right of the charterers to general average contribution from the shipowners in respect of deck cargo shipped by the charterers and jettison. *Burton v. English*, 12 Q. B. D. 218; 53 L. J., Q. B. 133—C. A. Reversing 10 Q. B. D. 426; 52 L. J., Q. B. 386; 48 L. T. 730; 31 W. R. 566.

By a charterparty it was agreed, that the ship should proceed to Quebec, and there load, from the factors of the plaintiffs, a full and complete cargo of pine timber and deals, not exceeding what she could reasonably stow and carry over and above her tackle. In an action upon this charterparty, the declaration assigned for breach, that the defendants did not nor would load in and on board the ship a full and complete cargo, not exceeding what she could reasonably stow and carry over and above her tackle, but, on the contrary, loaded on board the ship a cargo much exceeding what the vessel could reasonably stow and carry over and above her tackle. The judge, in the summing up, told the jury, that, *prima facie*, the deck was not the proper place for the stowage of the cargo, or any part of it; that, in some cases, custom might sanction the practice, but that, without reference to any custom, if it increased the perils of the navigation, if it increased the danger of the ship, or increased the danger of that part of the cargo, in either case it was an improper stowage:—Held, that this direction was correct, in the absence of any evidence of a general custom to load deck cargo at the risk of the shipper. *Gould v. Oliver*, 2 Scott, N. R. 241; 2 M. & G. 208.

The proprietor of goods laden on the deck of a ship, according to the custom of a particular

trade, is entitled to contribution from the shipowner for a loss by jettison. *S. C.*, 4 Bing. N. C. 134; 5 Scott, 446; 3 Hodges, 307.

Insurable Interest.—An insurance broker effected an open policy on a cargo of cotton on board the ship of his principal. It was intended to ship the cotton on board at the shipper's risk, which should have been expressed in the bill of lading, but by a mistake of the shipowners' agent in the foreign port at which the cotton was put on board, a clean bill of lading was given. On the voyage the vessel encountered heavy weather, and the cotton, owing to its being carried on deck, was compelled to be jettisoned. The broker gave notice to the insurance company of the loss, but other open policies having been effected with the same insurance company by the same shipowners for cotton shipped subsequently, and declarations having been made on these policies by the broker, although no declaration had been made in respect of the cotton that had been lost, he, on discovering that a mistake had been made, and that contrary to his instructions, a clean bill of lading had been given, instead of one expressing that the cotton was shipped at the shipper's risk, altered the declarations on the policies by substituting for certain cotton therein the cotton which had been jettisoned:—Held, that the shipowners being liable for the loss of the goods by jettison through their being carried on deck, had an insurable interest in respect of which they, and therefore their agent, were entitled to recover. *Stephens v. Australasian Insurance Company*, 8 L. R., C. P. 18; 42 L. J., C. P. 12; 27 L. T. 585; 21 W. R. 228.

By 16 & 17 Vict. c. 107, s. 170, before any clearing officer permits any ship, wholly or in part laden with timber, to clear out from any British port in North America after the 1st September, and before the 1st May, he shall ascertain that the whole of the cargo is below deck, and give the master a certificate to that effect. By s. 172, the master shall not sail without such certificate, or place or permit to be upon the deck any part of the cargo, under a penalty of 100*l.* In an action upon a policy of insurance on the cargo and freight:—Held, that a plea that the master had acted in contravention of s. 172, "as the plaintiff well knew before and at the time of loading and of sailing," was no answer, inasmuch as the statute did not by reason thereof make the voyage illegal, and the plea did not shew privity and consent of the plaintiff. *Cunard v. Hyde*, 27 L. J., Q. B. 408; 5 Jur., N. S. 408.

But when a party, who was interested in a cargo of a ship coming within the provisions of 16 & 17 Vict. c. 107, s. 170, and about to sail from M. to the United Kingdom, gave orders for the insurance of the cargo after the 1st of September, and also knew, at the time of giving such orders, that part of the cargo of the ship was upon the deck, and he intended that she should sail after the 1st of September and before the 1st of May, with such cargo on deck, and the insurance was effected by the plaintiff, for the purpose of covering the cargo and the freight, including the portion above deck, and the ship having been lost:—Held, that the whole voyage was illegal, and that the plaintiff could not recover upon the policy. *Cunard v. Hyde*, El., Bl. & El. 670; 29 L. J., Q. B. 6; 6 Jur., N. S. 14.

The owner of a ship effected a policy on freight from a British port in North America to Liverpool. The ship sailed with a cargo of timber between the 1st September and 1st May. The master, without the knowledge or privity of his owner, stowed a portion of the cargo on deck, and sailed without any certificate from a clearing officer that the whole cargo was below deck, contrary to 16 & 17 Vict. c. 107, ss. 170—172. On a loss by perils insured against:—Held, that although the master had general authority from his owner to stow the cargo, no authority could be implied to load it so as to violate the statute, neither was it an act of the master which the owner must be presumed to have assented to. That the fact of the ship having sailed without the certificate did not render her unseaworthy at the commencement of her voyage so as to prevent the policy attaching; and, consequently, that the owner was not precluded from recovering against the underwriter. *Wilson v. Rankin*, 1 L. R., Q. B. 162; 35 L. J., Q. B. 203; 11 Jur., N. S. 173; 13 L. T. 564; 14 W. R. 198—Ex. Ch.

5. NOTICE OF ARRIVAL OF SHIP AND READINESS TO RECEIVE CARGO.

Notice of Arrival.—In an action by a shipowner against the charterers for not loading a cargo of coals pursuant to a charterparty, by the terms of which the owner engaged that the vessel, then in the port of Sunderland, should with all possible dispatch proceed direct to the South dock, Sunderland, and there load, in the usual and customary manner at any one of the collieries the freighters might name, a full cargo of coals, which the freighters bound themselves to ship by a given day for Calcutta, they pleaded that they had not any notice of the ship having proceeded to and having arrived at the South dock, and of her being ready to receive cargo, wherefore they did not nor could load:—Held, that the allegation in the plea must be treated as an allegation of fact, meaning that by reason of want of notice of the ship's arrival at the dock and being ready to load, the charterers were prevented loading her; and that, so read, the plea was an answer to the action. *Stanton v. Austin*, 7 L. R., C. P. 651; 41 L. J., C. P. 218.

— **On Return Voyage.**—Where a ship is to proceed to a port, and there to load a full cargo for the agents of the freighter; but the freighter has no interest in the outward cargo, his agents are entitled to notice from the captain, that the vessel is ready to receive her homeward cargo; and, if no such notice is given, the freighter is not liable for not providing such cargo. *Fairbridge v. Pace*, 1 C. & K. 317.

Readiness to Receive.—Action on a charterparty in these terms:—"It is this day agreed between the agent for the owner of the *Lydia*, new ship, now on the stocks, of 1,100 tons, or thereabouts, now at Quebec, to be launched and ready to receive cargo in all May, guaranteed to sail in all June, and the charterer, that the ship shall proceed to, &c., and there load a full cargo of timber:—"Held, that the readiness to receive a cargo in all May was a condition precedent to the shipowner's right to recover against the charterer for not loading a full cargo, and that a

plea stating the ship was not ready to receive cargo in all May was good. *Oliver v. Fielden*, 4 Ex. 135; 18 L. J., Ex. 353.

6. LOADING.

a. Generally.

Light Cargo—Duty of Shipowner to provide Ballast.—A charterer agreed to load at Archangel a full and complete cargo of oats or other lawful merchandize, which the shipowners were to deliver "on being paid freight at the rate of 4s. 6d. per 320 lbs. for oats, and if any other cargo be shipped in full and fair proportion thereto, according to the London Baltic printed rates." The cargo shipped consisted of flax and other light articles (all mentioned in the London Baltic rates), i. e. of as much as the ship could safely carry of such light articles, which rendered the shipment of 120 tons of ballast necessary:—Held, that the charterer had a right, in the absence of any stipulation to the contrary expressed or implied, to ship a full and complete cargo of any one or more of the articles constituting lawful merchandize within the meaning of the charterparty, and that when he had supplied a full and complete cargo, it was the shipowner's duty to procure the ballast necessary for that cargo; that in this case no stipulation to the contrary was expressed by the words "in full and fair proportion" in the charterparty, nor was any such stipulation implied by law; so that the shipowner, not being protected from the extreme use by the charterer of his privilege, could not recover from him more than the freight payable according to the London Baltic rates on the quantities of the several articles actually shipped. *Southampton Steam Collier Company v. Clarke*, 6 L. R., Ex. 53; 40 L. J., Ex. 8; 19 W. R. 214—Ex. Ch.

The shipowner is bound to furnish whatever ballast is necessary, and the freighter under a contract to ship a full and complete cargo, part heavy goods for ballast, is entitled to complete the cargo with light goods. *Irving v. Clegg*, 1 Bing. N. C. 53; 4 M. & Scott, 572.

Duty to Load—Delay in Proceeding to Destination "forthwith"—Perils of Sea.—By a charterparty dated the 28th of December, a ship was to forthwith proceed from England to Barbadoes, in the West Indies, and having there loaded a cargo of sugar for the defendants, to return to England. The vessel was to be allowed to take an outward cargo of coals to specified places, and the charterparty contained a clause excusing performance if it could not be complied with, owing to perils of the sea. Delay on her voyage outwards was occasioned by unfavourable winds, and she was injured by a collision with a steamer, which rendered necessary further repairs. She finally sailed for Rio on the 9th of March, and reached Rio on the 26th of May. Having there discharged the cargo of coals, she started on the 1st of July, and reached Barbadoes on the 28th of July, too late for the season for exporting sugar thence. The defendants' agent offered to provide a cargo of sugar if the vessel would go under protest to St. Vincent, an island ninety miles off. The captain refused this offer and remained at Barbadoes, insisting upon the performance of the charterparty by the defen-

dants' agent. The plaintiffs having sued for a breach of the charterparty in refusing to load a cargo at Barbadoes, the judge directed the jury that, if the vessel sailed without unreasonable delay, she proceeded "forthwith" within the meaning of the charterparty; that the clause excusing performance, on the ground of perils of the sea, applied to the preliminary voyage to Rio, and that the captain might reasonably think that, if he shipped a cargo elsewhere than at Barbadoes, he might put an end to the original charterparty:—Held, a right direction. *Hudson v. Hill*, 43 L. J., C. P. 273; 30 L. T. 555.

Prompt Dispatch.—A charterparty provided that the ship should proceed to a port, and there load from the factors of the charterers a cargo of "coal, taking her turn with other steamers," and receive "prompt dispatch in loading." The charterers employed the persons at the port of loading who were employed to load other ships, and the ship was loaded in her turn, but, by reason of an insufficient supply of coal, the ship was delayed:—Held, that the charterers were responsible for the delay. *Elliott v. Lord*, 52 L. J., P. C. 23; 48 L. T. 542; 5 Asp. M. C. 63.

Usual Dispatch.—A., by charterparty, engaged to load on board B.'s ship a cargo of coals, "To be loaded with usual dispatch." A. commenced loading by bringing the coal in boats along a canal to the dock where the ship was, but before the cargo was completed a severe frost rendered the canal unnavigable, and the ship was detained thirty-four days:—Held, that the expression "usual dispatch" meant "usual dispatch of persons who have a cargo ready for loading," and that A. was responsible for the delay. *Kearon v. Pearson*, 7 H. & N. 386; 31 L. J., Ex. 1; 10 W. R. 12. See also cases post, col. 1390, et seq.

Ship Detained as Unseaworthy.—A. agreed to charter a ship for twelve months after the completion of her then present voyage. After the completion of her voyage and when he was ready to load the ship she was detained as unseaworthy; and the repairs were not finished until more than two months after the completion of the voyage:—Held, that the charterer was entitled to throw up the charterparty. *Tully v. Howling*, 2 Q. B. D. 182; 46 L. J., Q. B. 388; 36 L. T. 163; 25 W. R. 290—C. A.

Loading of Cargo prevented by Superior Force.—By a charter-party it was agreed that the ship, the R., should after loading "dead weight" at Malta, proceed to V., a Spanish port, and there load a cargo of fruit for the plaintiff. At the time of entering into the charterparty the plaintiff knew that the "dead weight" intended to be put on board the R. at Malta would consist of military stores, and he knew that by the ordinary law of Spain a vessel with warlike stores on board would not be allowed to load at a Spanish port. Upon application being made to the Spanish government to relax the prohibition, permission to load was refused. The R. arrived at V. with the warlike stores on board, but otherwise ready and fit to load the agreed cargo: she left immediately on learning that permission to load would not be granted:—Held, that the

plaintiff could not sue the owners of the ship for not having the R. ready to load, for, through the act of a superior power, the parties were unable to perform their respective duties under the contract, the plaintiff being unable to load the cargo and the defendants to receive it. *Cunningham v. Dunn*, 3 C. P. D. 443; 48 L. J., C. P. 62; 38 L. T. 631—C. A.

Where the master covenanted to go to a port of America, and receive a loading from the freighter alongside the ship, and bring home the same, with an exception of the restraints of rulers, &c.; but the freighter covenanted absolutely to provide the loading without any such exception; it seems that an embargo in the American port, which prevented the freighter from loading the ship, did not discharge him from his covenant. *Sjoerds v. Luscombe*, 16 East, 201.

The master and the freighter of a vessel of 400 tons, having actually agreed in writing that the ship, being fitted for the voyage, should proceed to St. Petersburg, and there load from the freighter's factor a complete cargo of hemp and iron, and proceed therewith to London, and deliver the same, on being paid freight:—Held, that the master, after taking in at St. Petersburg about half a cargo, having sailed away upon a general rumour of a hostile embargo being laid on British ships by the Russian government, was liable to the freighter for the short delivery of the cargo, though the jury found that he acted bona fide, and under a reasonable and well-grounded apprehension at the time, and a hostile embargo and seizure were in fact laid on six weeks afterwards. *Atkinson v. Ritchie*, 10 East, 530.

If goods put on board a ship to be carried from one place to another are wrongfully seized by the officers of government, so that they cannot be delivered to the consignee, the owner of the goods has a right of action for the non-delivery against the owner of the ship, who must seek his remedy against the officers of government. *Gosling v. Higgins*, 1 Camp. 451. See also cases ante, col. 1355, et seq.

Fear of Infection.—A charterer, who covenants to send a cargo alongside at a foreign port, is not excused from sending it alongside, though in consequence of the prevalence of an infectious disorder at the port, all public intercourse is prohibited by the law at the port, and though he could not have communication without danger of contracting and communicating the disorder. *Barker v. Hodgson*, 3 M. & S. 267.

b. Custom and Manner of Loading.

Effect of Custom.—Where freighters covenanted to provide for the ship a full cargo, consisting of cotton, wool, rice, or other goods, on which separate rates of freight were to be paid:—Held, that it was the duty of such freighters to have shipped goods according to the custom of the country whence they were imported, although the shippers were put to an expense by so doing, and such shipment would exceed the stipulations contained in the charterparty. *Benson v. Schneider*, 1 Moore, 21, 76; 7 Taunt. 272; Holt, 416.

Where a full cargo was not taken in, in consequence of arrangements in the stowage varying from those contemplated by the charterparty:—Held, that the freighters were not entitled to re-

cover, as it appeared that one of them and the broker who managed the business were present from time to time during the loading and cognizant of the arrangements, but did not make any objection. *Ilorill v. Stephenson*, 4 C. & P. 469.

By a charterparty the defendant agreed to load on board a vessel at Trinidad "a full and complete cargo of sugar, molasses and other produce:"—Held, first, that evidence was admissible of a custom at Trinidad to load sugar in hogsheads and molasses in puncheons; and therefore that a full and complete cargo of sugar and molasses so packed was a compliance with the contract. *Cuthbert v. Cumming*, 10 Ex. 809; 24 L. J., Ex. 198. Affirmed, 11 Ex. 405; 24 L. J., Ex. 810; 1 Jur., N. S. 686—Ex. Ch.

Held, secondly, that the custom was reasonable and good in law. *Id.*

Evidence of Custom.—A. agreed by charterparty to load B.'s vessel at Sunderland, with coke, with all possible dispatch, in the customary manner, in regular turn. In an action for delay in loading according to the terms of the charterparty:—Held, that evidence was not admissible to shew that, according to the custom of the port of Sunderland, under such a contract, the shipowner was bound to wait until a manufacturer of coke not named in the contract, had supplied all ships, whose names were put down in a turn-book, kept by the manufacturer, which he had previously contracted to load with coke in the port, provided he used reasonable dispatch, and that the manufacturer's name was mentioned at the time the contract was made. *Hudson v. Clementson*, 18 C. B. 213; 25 L. J., C. P. 234.

Turn for Loading—Evidence of Negligence.—By a charterparty the freighters agreed with the owner that the ship, being fit for the voyage, should proceed to Port Talbot, and there load a cargo, the ship to be loaded in turn, certain working days to be allowed, and a further number of days for demurrage. The owner brought an action on this agreement, alleging, first, that although the ship, being fit for the voyage, sailed and arrived at Port Talbot, yet the defendants did not, within a reasonable time after her arrival there, load a cargo; and secondly, that the defendants did not, at Port Talbot, load the ship in turn, but long after the proper and regular turn. Pleas—first, that the defendants did, within a reasonable time after her arrival, load the ship; secondly, that the defendants did, at Port Talbot, load the ship in turn; and thirdly, that the plaintiff was master, and had the care, direction and management of the ship; and that after the ship's arrival, and before the defendants could load, the plaintiff, so being master, and the crew, took such bad care of the ship, and governed and navigated her so improperly, that the ship, by the carelessness, unskilfulness, and mismanagement of the master and crew, became damaged and unfit to receive a cargo, and so remained for a long time, by reason whereof the defendants could not load. By a local act, regulating the port, the master of every ship coming in was bound, under a penalty, to moor, anchor and place the same in such situation as the harbour-master should direct, and the harbour-master was authorized to cause the ship to be removed in such manner as he should deem necessary. The ship's master was also bound to

take on board a pilot, who, by the bye-laws of the port, was to obey the orders of the harbour-master. It was proved on the trial that the ship, with a pilot, arrived at the port, and received directions from the harbour-master as to entering, but the master and crew worked the ship in a manner contrary to his directions, and in consequence she received injury, lost her then turn of loading, and was unable to load till the expiration of some days, when she loaded without further delay:—Held, that, the judge rightly directed the jury to find for the plaintiffs, if they thought the accident was the fault of the master and crew; for, first, the ship, though under the harbour-master's direction, was, for the purposes of the plea, under the care and management of the plaintiff; and secondly, that the defendants might allege the delay, occasioned as above, in order to shew that they loaded in reasonable time, and in turn, within the meaning of the charterparty. *Taylor v. Clay*, 9 Q. B. 713; 16 L. J., Q. B. 44; 11 Jur. 277.

Ignorance of Contracting Party as to the Port Custom.—The plaintiffs' sailing vessel was chartered by the defendant to proceed to Whitehaven for a cargo of coals. The charterparty provided that "regular turn" should be allowed for loading. By the custom of the port of Whitehaven, steam vessels, though they arrive in port after sailing vessels, are loaded with coals before the sailing vessels; but as between sailing vessels themselves sailing vessels are loaded in the order of their arrival in port. The plaintiffs were ignorant that this was the usage of the port. The plaintiffs' vessel, though she arrived before several steam vessels, was delayed until they were first loaded, but she was loaded in the order of her arrival as regarded the other sailing vessels in harbour. The plaintiffs claimed demurrage:—Held, that the expression "regular turn" in the charterparty should, in the absence of exclusive words, be construed as "regular turn" according to the usage of the port of Whitehaven; that it was not material that the plaintiffs were ignorant of such usage, and that, accordingly, the plaintiffs could not recover. *King v. Hinde*, 12 L. R., Ir. 113.

The defendant chartered the plaintiff's vessel to proceed to Newcastle-on-Tyne, and there be ready forthwith, "in regular turns of loading," to take on board, by spout or keel, as directed, a complete cargo of four keels of coal, and the remainder coke. In an action for not loading the vessel with coke within a reasonable time:—Held, that evidence was admissible to explain the meaning of the expression in the charterparty, "in regular turns of loading," by shewing that there was a usage at the port of Newcastle that vessels should take in their cargoes of coke in a certain regular order or turn, and that the question whether the vessel was loaded within a reasonable time ought not to be decided without reference to such usage, if proved. *Leidemann v. Schultz*, 14 C. B. 38; 2 C. L. R. 87; 23 L. J., C. P. 17; 18 Jur. 42.

Delay caused by Negligence of Third Party.—By a charterparty, a vessel was to proceed with all convenient speed to Cardiff, and there load from the factors of the freighters a full cargo of coals, in the customary manner, no time being mentioned:—Held, that this meant a loading, according to the usage of the port,

and within a reasonable time, without reference to unforeseen casualties; and consequently, the loading having been delayed for an unreasonable time, the freighters were not excused by reason of the delay having arisen from difficulties connected with the railway and the collieries, which were beyond their control. *Adams v. Royal Mail Steam Packet Company*, 5 C. B., N. S. 492; 28 L. J., C. P. 33.

By a charterparty the master engaged to proceed with his vessel to a particular colliery, and there take on board for the freighters a cargo of coal. Before the charterparty was signed both parties knew that the colliery was not at work, an accident having happened to the steam-engine, and both were told it would be repaired in a short time, and that the vessel would be loaded in her turn within a few days after the colliery got to work again, according to the practice of the port, which was, that the ships were loaded in their regular turns as they were entered on the colliery books. The freighters had no control over the colliery. The ship was loaded in her turn, but not until several days later than the colliery agents had led the parties to expect:—Held, that if the steam-engine was repaired and the colliery got to work in a reasonable time after the execution of the charterparty, and if the vessel was loaded within a reasonable time after the colliery got to work, the freighters were not liable to compensate the master of the vessel for the delay in the loading. *Harris v. Dreesman*, 23 L. J., Ex. 210. *And see cases infra*, XIV. 10, DELIVERY AND DISCHARGE OF CARGO.

c. Employment of Lighters.

The master is not bound by usage in London to take care of a lighter employed in unloading his ship, after it is fully laden, until the time when it could be properly removed from the ship to the wharf. *Robinson v. Turpin*, Peake, 202.

By the custom of the River Thames, the master is bound to guard goods laden into a lighter sent for them by the consignee until the loading is complete, and cannot discharge himself from that obligation by telling the lighterman he has not sufficient hands on board to take care of them. *Catley v. Wintringham*, Peake, 150.

A party executed a charterparty, under which a cargo was to be sent alongside the ship at the merchant's expense; the captain rendered the usual and customary assistance with his boats and crew. Some of the cargo lying about thirty yards from the edge of the wharf, the captain applied to the charterer's factor for the labourers to remove it into the boats. The factor having refused, saying he would abide by the charterparty, the captain hired labourers for the purpose:—Held, that the expense so incurred might, notwithstanding the charterparty, be recovered. *Fletcher v. Gillespie*, 3 Bing. 635; 11 Moore, 547.

On a charter to receive a cargo alongside a ship, at a port where the ship cannot safely load inside a bar, if she is loaded outside, the freighter cannot throw extra expense of lighterage on the shipowner. *Trindade v. Levy*, 2 F. & F. 441.

Goods were delivered to the owners of a ship to be conveyed by their ship. The goods were destroyed by a casual fire on board a lighter employed by the owners to convey them to the ship:—Held, that the 26 Geo. 2, c. 86, s. 2,

similar to 17 & 18 Vict. c. 104, s. 503, did not protect the owners, as the fire was not on board their ship. *Morewood v. Pollok*, 1 El. & Bl. 743; 1 C. L. R. 78; 22 L. J., Q. B. 250; 17 Jur. 881.

d. Place of.

Option.—The plaintiff by charterparty, dated the 26th of May, 1871, agreed with the defendant that his ship should sail to Bullo, and there load from the plaintiffs' factors a cargo of coals and proceed therewith to Highbridge or Dunball and deliver same on being paid freight at the rate of 2s. 9d. per ton in cash on unloading and right delivery. The ship was to be loaded and discharged with all possible dispatch, and to load with G. or H. till the end of September, at captain's option, but after September with H.; and was to continue at the above rate until March, 1872. In September the captain exercised his option in favour of loading with G., but the plaintiff refused to load him from G.; whereupon the defendant declined further to perform the charterparty:—Held, that the breach of the charterparty which the plaintiff had committed went to the root of the contract between the parties, and justified the defendant in his refusal. *Bradford v. Williams*, 7 L. R., Ex. 259; 41 L. J., Ex. 164; 26 L. T. 641; 21 W. R. 782.

e. Return Cargo.

Condition precedent—Discharge of Outward Bound.—The discharge of an outward-bound cargo at a particular place is not in general a condition precedent to the providing a return cargo; therefore a freighter, who covenants to load a return cargo, must, if he objects to the ship's delay in proceeding to take it on board, make the objection before he loads the cargo, and within a reasonable time, and must not by any act take to the ship. *Olshen v. Drummond*, 2 Chit. 705; 4 Dougl. 356.

Seizure of Outward Cargo.—Where a shipowner covenanted to proceed from L. to N., and there make a right and true delivery of the outward cargo, and having so done receive on board a certain cargo, restraint of princes, &c., excepted; and the freighters covenanted, in consideration of the premises, that at N. they would find and provide, as they did warrant and assure to the shipowner, a full and complete return cargo, and that 1,750l. should be paid on delivery of the outward cargo, which should be considered as earned for outward freight:—Held, that, in an action against the freighters for not providing a return cargo at N., they could not plead in excuse of performance that the outward cargo was seized by the government at N., and never delivered to them; for the delivery of the outward cargo was not a condition precedent to the providing a return cargo; but the delivery of the outward cargo was a condition precedent to the payment of the 1,750l.; and therefore a breach assigned for non-payment thereof was under these circumstances not sustainable. *Storer v. Gordon*, 3 M. & S. 308.

Non-Arrival of Vessel.—Where, in a charterparty on the ship St. P., for a voyage

from G. to bring home a cargo to Europe, it was provided, that in the event of the non-arrival at the same port of another ship, called the G. (which had been chartered by the same parties, and was then at sea), then the charter on the G. should be void to all intents and purposes whatsoever:—Held, that the word "non-arrival" could not be construed so as to defeat the purposes of the voyage for which the G. had been chartered; and her non-arrival for these purposes not being attributable to the fault of the charterers, the charter on the St. P. became void, and the charterers were not bound to provide her with a homeward cargo. *Soames v. Loneragan*, 4 D. & R. 74; 2 B. & C. 564.

— **Delay.**—A charterparty provided that the ship E., being tight, staunch, and strong, and every way fitted for the voyage, should, with all convenient speed (on being ready), having liberty to take an outward cargo for owners' benefit, direct or on the way, proceed to A. The ship was not completed when the charterparty was made. As soon as she was ready for her trial trip she went to sea, and (in order to avoid the danger of crossing the bar at the mouth of the Tyne a second time) went on to L. Whilst her repairs were being completed in L., she took on board a cargo of goods for C., at which place she stopped to unload her cargo on the voyage to A., arriving at the latter place a few days later than she otherwise would have done. The charterer's agent at A. refused to provide cargo in consequence of the delay:—Held, that there was no condition precedent, the non-fulfilment of which by the shipowner would exonerate the charterer from providing a cargo, but that there was merely a stipulation, for the breach of which an action for damages would lie against the shipowner. *MacAndrew v. Chapple*, 1 L. R., C. P. 643; 12 Jur., N. S. 56; 14 L. T. 556; 14 W. R. 891.

— **Obligation to Accept.**—A charterparty made between the charterers through the agency of G. & Co. and the captain of the *Elvezia*, provided that the ship should proceed with a cargo to San Francisco, "where the ship shall be consigned to charterers' agents inwards and outwards, paying the usual commissions . . . and deliver the same . . . and so end the voyage;" and that "on her return to her port of discharge in the United Kingdom" she should be reported to the Custom-house by G. & Co.:—Held, that these provisions did not impose on the captain an obligation to accept a homeward cargo for the United Kingdom from the agents of the charterers at San Francisco, but merely bound him, if he had determined upon taking a return cargo on board there, to employ them to procure and ship it. *Cross v. Pagliano*, 6 L. R., Ex. 9; 40 L. J., Ex. 18; 23 L. T. 420; 19 W. R. 159.

Under a charterparty a ship was to proceed from London to Bombay, and there discharge her cargo, and then load a cargo, with which she was to proceed direct to London, the merchant to have the privilege of sending the ship to Calcutta from Bombay, upon paying for the extra time occupied. If the ship returned from Bombay direct to London, the merchant was to have the power of sending her to one port on the Malabar coast, to receive cargo, paying for the extra time:—Held, that the shipowner, after discharging at Bombay, was not bound to take

on board a cargo there for Calcutta. *Cockburn v. Wright*, 6 Bing. N. C. 223; 8 Scott, 489.

Notice of Arrival.—See *ante*, col. 1387.

f. Damages for not Loading.

— **Measure of.**—In an action against a charterer of a ship for not loading a cargo, the measure of damage is the amount of freight which would have been earned after deducting the expenses, and also any profit which the ship may have earned during the period over which the charter extended. *Smith v. McGuire*, 3 H. & N. 54; 27 L. J., Ex. 465.

In an action on a charterparty for not loading a cargo, the loading ports being Rangoon or Bassein, and the captain having been to Rangoon, and there received orders to go to Bassein (three days' sail), where no cargo could be obtained, and he was requested to go back to Rangoon or elsewhere, in hopes of obtaining a cargo, which he declined to do, and remained inactive at Rangoon until the time for loading had elapsed, the judge having told the jury that they were not bound to give the plaintiff the full amount of freight, 3,000*l.*, but that if they deemed the master's conduct unreasonable they might diminish the damages on that account, and left it to them to say whether the plaintiff should recover the full amount, or any other amount they might deem reasonable; and they having found for the plaintiff damages 500*l.*, the court held that there had been no misdirection, but granted a new trial on the ground that the verdict was against the evidence and the amount of damages considerably too low, making it, however, a condition that the plaintiff should relinquish the costs of the first trial. *Wilson v. Hicks*, 26 L. J., Ex. 242.

— **Duty of Captain.**—By a charterparty it was stipulated that a ship should proceed to Limerick with her then present cargo, and there take a cargo of oats for London, at a freight of 2*s.* 8*d.* a quarter; six days being allowed for loading at Limerick. Before the expiration of the six days, the freighter's agent offered the captain a cargo at 2*s.* 6*d.*, and said that the freighter's brother would pay the difference. The captain refused to take anything not according to the terms of the charterparty:—Held, that, as the contract had not then been broken by the freighter, the captain was not bound to accept this offer; but that, if the contract had been broken by the freighter, not putting any cargo on board within the six days, it would have been the captain's duty to have taken a cargo at the most he could get, so that the damages to be paid by the freighter should be reduced as much as possible. *Harries v. Edmonds*, 1 C. & K. 686.

7. STOWAGE OF CARGO.

a. Employment of Stevedore.

— **Who Liable to Pay for Services of.**—The owner of a ship had chartered her to A. for the purpose of being loaded; the charterparty provided that the stevedore was to be nominated by the charterer, and be under the control of the captain, and was to be paid by the owner. A. sub-chartered the ship to B., entering into a

charterparty with a similar clause. B. employed the plaintiff, who was a stevedore, to load the ship, and introduced him to the defendant as a person who was to load the ship. The defendant frequently came on board while the ship was being loaded, and superintended and gave instructions relative to the stowage of the cargo. In an action by the plaintiff against the defendant for non-payment of his charges:—Held, that there was evidence of a contract between the plaintiff and defendant. *Eastman v. Harry*, 33 L. T. 800—C. A.

On completion of the loading the plaintiff sent in his account to B., headed "To captain and owners," and pressed B. for payment. B. had sent in his account to A., and A. had sent in his account to the defendant, with the item "Stevedore's account" charged. The defendant had paid A.'s account, and A. had paid B.'s account. B. became bankrupt, and did not pay the plaintiff:—Held, that the defendant was liable to pay his account. *Ib.*

Liability for Acts of.]—K., a master stevedore, having contracted to unload a ship, employed D., one of the ship's crew, at the owner's request, to assist in the work. K. could have refused to so employ D. if he thought him incompetent; and during the time K. employed him D. could not have been employed by the master of the ship on the ship's work, and, though D. was paid by the owner, such pay was deducted from what K. received for the unloading. In the course of such employment D. so negligently worked a winch used in the unloading as to injure one of K.'s men, with whom D. was put to work by K.'s foreman:—Held, that the owner was not responsible for such injury, as at the time of the accident D. was not working for him, but for K. *Murray v. Currie*, 6 L. R., C. P. 24; 40 L. J., C. P. 26; 23 L. T. 557; 19 W. R. 104.

A stevedore employed to ship iron rails had a foreman whose duty it was (assisted by labourers) to carry the rails from the quay to the ship after the carman had brought them to the quay and unloaded them there. The carman not unloading the rails to the foreman's satisfaction, the latter got into the cart and threw out some of them so negligently that one fell upon and injured a person who was passing by:—Held (per Grove and Denman, JJ., Brett, J., dissentiente), that there was evidence for a jury that the foreman was acting within the scope of his employment, so as to render the stevedore responsible for his acts. *Burns v. Paulson or Poulson*, 8 L. R., C. P. 563; 42 L. J., C. P. 302; 29 L. T. 329; 22 W. R. 20.

When a stevedore is appointed by the shipper, and acts in the stowage, the master is not responsible for damage done to the goods in the course of taking on board or of stowage. Custom or agreement may vary the above rule, but a mere stipulation that a stevedore shall act under the orders of the master, does not throw on the latter the responsibility for acts of the former not shewn to be done under orders from the master. *Blaikie v. Stenbridge*, *infra*. See also *cases infra*.

b. Duty of Master and Owner.

Duty of Master as to.]—If a cask is accidentally staved in, in letting it down into the hold

of a ship, the master must answer for the loss. *Goff v. Clinkard*, cited 1 Wils. 288.

By the maritime law it is the duty of the master, on behalf of the owner, to receive and properly stow on board goods delivered to him alongside. For any damage to the goods, arising from his negligence, either in taking them on board or in stowing them, he is responsible to the shipper of the goods. If the damage happens from his misconduct, he is responsible to the owner; if from the misconduct of the mate or other of the crew, and not from any fault of his own, he is not responsible to the owner. *Blaikie v. Stenbridge*, 6 C. B., N. S. 894; 28 L. J., C. P. 330; 5 Jur., N. S. 1128. Affirmed, 6 C. B., N. S. 911; 29 L. J., C. P. 212; 6 Jur., N. S. 825; 8 W. R. 239—Ex. Ch.

Duty of Owners as to.]—The owners of a general ship are liable to a shipper for damage done to his goods from other goods stowed in the hold without proof of any wilful or negligent default on their part. *Gillespy v. Thompson*, 6 El. & Bl. 477, n., 483; 2 Jur., N. S. 712.

It is the duty of the owner of a vessel to stow the cargo with as much skill as a competent stevedore can do. *Anglo-African Company v. Lamzed*, 1 L. R., C. P. 226; 35 L. J., C. P. 145; 12 Jur., N. S. 294; 13 L. T. 796; 14 W. R. 477; 1 H. & R. 216.

In an action by charterers against shipowners, for not loading as much as the vessel could reasonably carry, the charterparty containing the words "charterers' stevedore to be employed by ship," it is no answer that the charterers had not appointed a stevedore, and that the cargo was stowed to the best of the master's skill and ability. *Ib.*

The owner, and not the charterer, of a ship is *prima facie* liable to the consignees for damage done to goods on the voyage, by reason of improper stowage. *Swainston v. Garrick*, 2 L. J., N. S., Ex. 255.

The master is *prima facie* liable for the safe stowage of the cargo, but he is exonerated by the special appointment of his own stower by the freighter; and if the freighter, by a verbal agreement with the owner, undertakes to appoint his own, and he acts as such, the mere silence of a charterparty, subsequently entered into, does not subject the master to his original liability. *Ib.*

— Question for Jury.]—In an action by a shipper against a shipowner, for non-delivery of goods, not arising from any of the excepted causes, and also for bad stowage; the evidence was that the goods had been in the course of the voyage, and in bad weather, stowed in the tank upon coals, and that they arrived damaged by sea water and coal dust. The judge told the jury that they must find for the shipowner, if they thought that, under the circumstances, what had been done was the best that could be done. And the court could not agree to set aside this direction. *Zipsey v. Hill*, 1 F. & F. 570.

Exceptions as to Injuries.]—Under a charterparty the shippers put a cargo, consisting of casks of oil, wool, and rags, on board the chartered vessel, and personally superintended the stowage of the cargo in the hold of the vessel. In the margin of the bill of lading of the casks of oil there was this memorandum: "Weight, measurement, and contents unknown, and not ac-

countable for leakage." The bill of lading was indorsed in blank by the shippers, and assigned to B. & Co. In the course of the voyage the oil casks became heated by the action and contiguity of the wool and rags, and a very large portion of the oil was lost:—Held, first, that ignorance of the shipowners as to the latent effect of heat, in storing the casks of oil with wool and rags, did not, under the circumstances of the shippers superintending the stowage, amount to such negligence as to make them liable to the holders of the bill of lading for the loss occasioned by the leakage of the oil. *Ohrloff v. Briscall*, 1 L. R., P. C. 231; 35 L. J., P. C. 63; 12 Jur., N. S. 675; 14 L. T. 873; 15 W. R. 202; 4 Moore, P. C. C., N. S. 70; *S. C.*, nom. *The Helene*, B. & L. 429.

Held, secondly, that the limitation by the memorandum in the bill of lading, that the shipowners were not to be accountable for leakage, was not restricted as to the quantity of leakage, and protected the shipowners, in the absence of proof that the leakage was occasioned by their negligence. *Id.*

A bill of lading excepted liability in respect of "all accidents, loss, and damage of whatsoever nature . . . occasioned by any act, neglect, or default whatsoever of the pilot, master, or mariners, in navigating the ship . . . it being agreed that the captain, officers, and crew of the vessel in the transmission of the goods . . . be considered the servants of the shipper, owner, or consignee," of the goods:—Held, that the owners were liable for negligent stowage. *Hayn v. Culliford*, 3 C. P. D. 410; 47 L. J., C. P. 755; 39 L. T. 288. Affirmed, 4 C. P. D. 182; 48 L. J., C. P. 372; 40 L. T. 536; 27 W. R. 541—C. A.

On an allegation that damage to cargo originated from defective stowage, and heat and fermentation arising from the cargo being stowed in too close conjunction with other cargo, the parties must establish affirmatively that the cargo on its arrival at its port of destination was in a damaged condition; and the onus then falls on the ship to prove that the original stowage was good, and that the perils of the sea subsequently occurring created the damage. *The Alexandra*, 14 L. T. 742; 14 W. R. 466.

Damage to cargo caused by the oozing of wine from casks through straining in bad weather is damage occasioned by perils of the sea, and the shipowners are, under the usual exceptions, exempt from liability therefore, where the cargo is properly stowed, or is stowed in such a manner that the master is not responsible for bad stowage. *The Catherine Chalmers*, 32 L. T. 847.

Where a charterparty stipulates that a vessel is "to be stowed by charterer's stevedore, at risk and expense of vessel," and a cargo is supplied by the charterers and is stowed by their stevedore, the shipowner is not responsible for damage occasioned by bad stowage. *Id.*

Damage to cargo occasioned by salt water does not come within the excepted perils when by reason of the place in which it is stowed it is exceptionally liable to such damage in severe weather. *The Oquendo*, 38 L. T. 151.

Where Ship Chartered.—A ship was chartered for a voyage from Oporto to the United Kingdom to load from the factors of the affreighter a full cargo of wine or other merchandize at 18s. per ton; the captain to sign bills of lading at any rate of freight without prejudice to the charter;

the ship to be addressed to charterer's agents at Oporto on usual terms. The ship was accordingly consigned to the charterer's agents at Oporto, and was put up by them as a general ship, without any intimation that she was under charter; a party shipped some casks of wine, and received bills of lading in the usual form signed by the master. The wine was stowed by a stevedore appointed by the charterer's agents and paid by them, the money being ultimately repaid them by the master. The wine having leaked from improper stowage:—Held, that as the charter did not amount to a demise of the ship, and the owners remained in possession by their servants, the master and crew, the shipper was entitled to look to the owners as responsible for the safe carriage of the wine: inasmuch as he had delivered it to be carried in the ship in ignorance that she was chartered, and had dealt with the master, who was still the owner's master, as clothed with the ordinary authority of a master to receive goods and give bills of lading by which his owners would be bound. *Sandeman v. Scurr*, 2 L. R., Q. B. 86; 36 L. J., Q. B. 58; 15 L. T. 608; 15 W. R. 277; 8 B. & S. 50.

Held, also, that the employment of the stevedore made no difference, at all events as regarded the shipper, as he was no party to the employment, and had a right to look to the owners for the safe stowage of the goods, as part of the carriers' duty, in the absence of any special agreement. *Id.*

A shipowner who charters his vessel to another, but not so as to give up possession, is liable for a breach of the contract contained in a bill of lading signed by the master, such as injury to the goods by improper stowage, if it is not proved that at the time of shipment the shipper had notice of the charter. *The St. Cloud*, B. & L. 4; 8 L. T. 54.

So, under similar circumstances, the owner not being domiciled in England or Wales, the ship is liable under 24 & 25 Vict. c. 10, ss. 6, 35. *Id.*

If a person ships goods on board a vessel, knowing that she is chartered, the consignee of the goods can maintain no action against the owner of the ship if the goods are injured by bad stowage. *Major v. White*, 7 C. & P. 41.

If the shipper of goods was warned as to the way in which the goods were to be stowed, the consignee cannot maintain any action for damage occasioned by such stowage, even if the stowage was bad. *Id.*

By a charterparty an owner agreed to let, and a charterer to hire, a ship for a certain period, the ship being in good and working order, and her master, officers, and crew, being duly shipped, to be placed at the disposal of the charterer in the port of London on a given day, and the hire to commence from and after the time that she should have been placed at the disposal of the charterer, with a clean and clear hold, and ready to load. The owner was to appoint, victual, and pay the master, officers and crew, and to provide and pay for the necessary equipment for the working of the ship, and to pay all other charges whatsoever, save and except for coals, pilotages, port charges, and labour, which were to be paid by the charterer; the cargoes were to be taken on board, and discharged by the charterer, the crew of the vessel rendering customary assistance, so far as they might be under the orders of the master; and the charterer was to

have liberty to employ stevedores and labourers, to assist in the loading, stowage, and discharge thereof; but such stevedores and labourers being under the control and direction of the master, the charterer was not in any case to be responsible to the owners for damage or improper stowage; and "the master and owner of the ship should devote the same attention to the cargo, should use the same endeavours to promote dispatch, and should in every respect be and remain responsible to all whom it might concern, as if the ship was loading and discharging her cargoes and performing her voyages for account of the owner, and independently of that charterparty."—Held, that there was nothing in this charterparty to exonerate the owner from responsibility for negligent and improper stowage by the stevedores employed by the charterer, under the above stipulation. *Sack v. Ford*, 13 C. B., N. S. 90; 32 L. J., C. P. 12; 9 Jur., N. S. 750.

Expenses of Preparing Cargo.—Where a ship was chartered to proceed to a port and there load from the freighter's factors "a full and complete cargo of wool, tallow, bark, and other legal merchandize" at a specified rate of freight for each kind:—Held, that parol evidence was not admissible to shew that by the custom of the place of loading the cost of pressing wool was to be borne by the shipowner. *Cockburn v. Alexander*, 6 C. B. 791; 18 L. J., C. P. 74.

c. Special Contract to Carry.

Liability under.—Where carriers by sea received a cask of brandy to carry, on the terms that they should not be liable for any loss or damage arising from any cause whatever during the transit:—Held, that they were not liable, as common carriers, for an injury to the cask. *Phillips v. Edwards*, 4 H. & N. 813; 28 L. J., Ex. 52.

Owners of a steam vessel plying between London and Bristol, issued every month handbills of the times of their vessels' sailing, and which contained a notice that they "received goods for shipment on the conditions and agreement only that they are not liable for inward condition, leakage and breakage, and that they would not receive any goods for conveyance by their vessels except upon the terms that they should not be responsible for any loss or damage of or to such goods from any cause whatever during the voyage." On the 8th March, the plaintiffs, who had received these handbills, shipped on board one of the defendants' vessels two casks of brandy to be carried to Falmouth. On the 11th March the shipping broker delivered to the plaintiffs a freight note, at the foot of which was a notice that the defendants did not hold themselves liable for leakage of oils, spirits or other liquids, unless from bad stowage. In the course of the voyage one of the casks of brandy was staved in and nearly all its contents lost:—Held, that the notice in the handbills constituted the terms of the contract under which the goods were shipped, and that those terms were not qualified by the notice at the foot of the freight note, and, consequently, that the defendants were not responsible. *Id.*

d. Damages.

Amount Recoverable.—In the case of injury

to goods by improper stowage, loss upon a contract of resale entered into before delivery, and of which the shipowners had no notice at the time of making the original contract, is not to be allowed. *The St. Cloud*, B. & L. 4; 8 L. T. 54.

8. DEMAND OF RE-DELIVERY BY SHIPPER.

After Accident.—An owner of goods shipped to proceed to a foreign port has a right to have them redelivered to him when the vessel, having commenced her voyage, meets with a disaster whereby the goods are damaged so much that they cannot be profitably carried to their destination. *Blasco v. Fletcher*, 14 C. B., N. S. 147; 32 L. J., C. P. 284; 9 Jur., N. S. 1105; 9 L. T. 169; 11 W. R. 997.

Without Payment of Freight.—But after goods have been taken on board a general ship to be conveyed on freight, and bills of lading have been signed by the captain, the owner of the goods cannot, before the sailing of the ship, insist on the goods being redelivered to him without paying the freight that might be earned, and indemnifying the master against the consequences of the bills of lading signed by him. *Tindall v. Taylor*, 4 El. & Bl. 219; 3 C. L. R. 199; 24 L. J., Q. B. 12; 1 Jur., N. S. 112.

A ship was chartered for a voyage from London to Sydney, the charterer to have the entire use of the ship, and to pay the owner 1,600*l.* in London in two months. The ship cleared at the Custom-house. The charterer bought goods, to be paid for before the ship left London; and the vendor delivered the goods on board, and took the mate's receipt for them. Before the ship was ready to sail, the charterer was unable to pay for the goods (though not bankrupt nor taking the benefit of the Insolvent Debtors Act), and the vendor thereupon gave notice to the captain to redeliver them, and, on his refusal, made an arrangement with the charterer, and again applied to the captain in the charterer's name for the redelivery, offering to pay all reasonable charges. The captain having refused to redeliver:—Held, that the shipowner had no lien upon the goods, but that the charterer had a right, as between himself and the shipowner, to take the goods out of the ship, at all events, until the stipulated sum had become due, and that the captain was therefore liable in trover. *Thompson v. Small*, 1 C. B. 328; 14 L. J., C. P. 157.

9. DUTY OF MASTER TO PRESERVE, TRANSHIP OR SELL CARGO.

a. To Preserve and Reship.

There is a duty on the master, as representing the shipowner, to take reasonable care of the goods intrusted to him, not merely in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking active measures, when reasonably practicable under all the circumstances, to check and arrest the loss or deterioration resulting from accidents, for the necessary and immediate consequences of which the shipowner is not liable by reason of exceptions in the bill of lading. And for neglect of this duty by the master the shipowner is responsible to the shipper.

Notara v. Henderson, 7 L. R., Q. B. 225; 41 L. J., Q. B. 158; 26 L. T. 442; 20 W. R. 442—Ex. Ch.

In an action by a shipper against a shipowner it appeared that beans were shipped under a bill of lading, containing the usual exception of perils of the sea (including collision). The vessel sustained damage by a collision, and put into a port for repairs. The beans having become wetted by salt water, the shippers, through their agent, offered to receive the cargo and pay pro rata freight. The master refused to deliver the cargo except upon receipt of the whole freight, and proceeded with his vessel to the port of discharge. Upon its arrival it was found that the damage to the beans by the collision had been materially enhanced by their detention on board after they had been saturated with salt water. The increased damage would have been avoided if the beans had been unshipped, dried, and reshipped at the port of refuge, the cost of which might have been charged to the cargo as particular average:—Held, that, assuming that the precautions above mentioned would not have unreasonably delayed the voyage, the shipowner was liable for the additional damage to plaintiff. *Ib.*

b. To Tranship.

Duty of Master.]—When a question is raised as to the duty of the master in a port of distress to have transhipped the cargo, it must be considered that his first duty is to carry his cargo to its port of destination in the same bottom. *The Hamburg, Duranty v. Hart*, 2 Moore, P. C. C., N. S. 289; B. & L. 253; 33 L. J., Adm. 116; 10 Jur., N. S. 600; 10 L. T. 206; 12 W. R. 628.

Where a master has a reasonable opportunity, according to the circumstances of the case, of communicating from the port of distress with the owners of the cargo and receiving directions from them, it is his first duty to endeavour to obtain such directions. *Ib.*

The master only becomes agent for the owners of the cargo ex necessitate rei. *Ib.*

Where a ship is by perils of the sea so much damaged as to be incapable of repair so as to prosecute the adventure, except at an expense exceeding her value, together with the freight, when repaired, the master is justified in abandoning the voyage, and is not bound as agent of his owner to send the goods on in another bottom. *De Cuadra v. Swann*, 16 C. B., N. S. 772.

— Ascertained by what Law.]—The duty of a master to carry on, tranship, or deliver the cargo at an intermediate port of refuge, implied in a bill of lading given by the master of a foreign vessel, will be ascertained by reference to the law of the flag which the vessel carries, not by reference to the *lex loci contractus* or the *lex fori*, or the law of the place where the alleged breach of contract by the master is committed. *The Bahia*, B. & L. 292; 11 Jur., N. S. 90; 12 L. T. 146.

If a vessel, during her voyage, is injured, and is compelled to put into a port of refuge, then, by English law, the master is not bound to tranship. He is allowed a reasonable time, either to repair and carry on or to tranship. If he declines to do either, he may be called upon to deliver, without payment of any freight; but before a reasonable time has elapsed he cannot be re-

quired to deliver, except on payment of full freight, or waiver thereof. In estimating what is reasonable time, the court will take all circumstances into consideration, including any delay caused by the vis major of competent authorities, administrative or judicial. *Ib.*

A bill of lading in English was given by the master of a French vessel lying in New York, by which the goods were made deliverable in a French port. The vessel during her voyage suffered injury, and put into a port in England. The assignees of the bill of lading and owners of the cargo being British subjects, instituted an action in the Court of Admiralty for a breach of duty by the master in respect of his obligation to carry on, tranship, or deliver. The court ascertained the duty of the master by reference to the law of France. *Ib.*

Vessel Liable to Capture.]—By German law, if a vessel is liable to risk of capture, either party may withdraw from the contract of affreightment, but the master is not obliged to part with the cargo or to tranship it, unless distance freight, as well as all other claims of the shipowner and the contributions due from the cargo for general average, have been paid or secured:—Held, that a demand upon the master to tranship at his own risk and expense was not such a compliance with the German law as obliged him to tranship. *The Express*, 3 L. R., Adm. 597; 41 L. J., Adm. 79; 26 L. T. 956.

Repairing instead of.]—If in the course of a voyage a ship carrying cargo is damaged by perils of the sea, the shipowner intending to carry the cargo to its destination is entitled to a reasonable time for repairing his ship or for transhipping, and for this purpose to retain the cargo. *Cleary v. McAndrew, Cargo ex Galam*, B. & L. 167; 2 Moore, P. C. C., N. S. 216; 33 L. J., Adm. 97; 10 Jur., N. S. 477; 9 L. T. 550; 12 W. R. 495.

Negligent Reshipping of Cargo by Third Parties—Consent of Captain.]—Gunpowder was shipped for Valparaiso on board a vessel chartered on a voyage to that port, with liberty to touch and stay at the Falkland Islands. On the arrival of the vessel at Port Stanley, where the captain had goods to unload for the defendants, it was found that by the regulations of the port it would be necessary to land and store the powder before the vessel could enter the harbour. To avoid the inconvenience and expense of this, the captain accepted the offer of the agent of the defendants of the use of a vessel belonging to them, called the *Fairy*, in which to place the powder during his stay at Port Stanley. The defendants' agent afterwards requiring the *Fairy* for another purpose, without the consent of the captain transhipped the powder to a half-decked vessel called the *Lily*, which was an unsafe and improper vessel for the purpose. Whilst the *Lily* was anchored outside the harbour a storm arose, and she was sunk, and the powder lost:—Held, that the defendants were responsible for the value, for that they were either trespassers in removing the powder without the captain's consent, or bailees who had been guilty of want of reasonable care. *Ronneberg v. Falkland Islands Company*, 17 C. B., N. S. 1; 10 Jur., N. S. 940; 10 L. T. 530; 12 W. R. 914.

— **Costs of Unsuccessful Defence.**—On the arrival of the ship at Valparaiso, the consignees of the powder demanded it from the captain, and, not obtaining it, took proceedings against the ship, which the captain unsuccessfully resisted, being ultimately compelled to pay the consignees the value of the powder and the costs:—Held, that the owners of the ship could not claim these costs from the defendants, they not being a necessary consequence of their wrongful act. *Ib.*

c. To Sell Damaged and Useless Cargo.

At Intermediate Port without Owner's Consent.—A master of a vessel cannot at an intermediate port sell goods which are damaged, and cannot be carried to the port of discharge, without communicating with their owner. *Acatos v. Burns*, 3 Ex. D. 282; 47 L. J., Ex. 566; 26 W. R. 624—C. A.

Possibility of Communication with Owner.—The possibility of communicating with the owner depends on the circumstances of each case, involving the consideration of the facts which create the urgency for an early sale, the distance of the port from the owner, the means of communication which may exist, and the general position of the master in the particular emergency. *Australasian Steam Navigation Company v. Morse*, *infra*.

Such a communication need only be made when an answer can be obtained, or there is a reasonable expectation that it can be obtained, before the sale. *Ib.*

When, however, there is ground for such an expectation, every endeavour, so far as the position in which he is placed will allow, should be made by the master to obtain the owner's instructions. *Ib.*

The master is bound to employ the telegraph as a means of communication, where it can usefully be done; but the state of the particular telegraph, the way in which it is managed, and the possibility of transmitting explanatory messages, are proper subjects to be considered in determining the question of the practicability of communication. *Ib.*

Necessity for Sale must be Shewn.—On the 19th of April an Austrian ship, with a valuable cargo on board, ran upon a rock on the eastern side of Algoa Bay, distant fifty miles by sea and about eighty by land from Port Elizabeth. The Austrian consul at Port Elizabeth came to the spot, and, there being no hope of getting the vessel off, he advised the master to sell her with the cargo. The master accordingly advertised the ship and cargo for sale, and they were sold in one lot by auction on the 30th of April for 9,500*l.*, after a brisk competition. The purchaser got some part of the cargo out of the wreck, but on the 19th of June the ship went to pieces with the rest of the cargo on board. The owners of the cargo having abandoned it to the underwriters as a total loss, the underwriters filed their bill to have the goods which had been brought to land delivered to them as not having been effectually sold. The master had not gone to Port Elizabeth, nor endeavoured to procure funds to enable him to save the cargo; nor had he made any effort to induce any persons to undertake the salvage of the cargo. Several witnesses at Port Elizabeth deposed that in their

opinion no person could have been induced to undertake the salvage; others gave their opinion that offers to save the cargo could have been obtained if a large percentage of the net proceeds had been offered. There was a good deal of evidence to shew that, in the opinion of persons on the spot, the course which had been adopted of selling the wreck and cargo was the most advisable one in the interest of all parties concerned:—Held, that no such necessity was proved to have existed as would make the master the agent of the owners of the cargo to effect a sale; that the sale was void; and that the plaintiffs were entitled to the cargo saved, subject to a proper allowance for salvage and other expenses. *Atlantic Mutual Marine Insurance Company v. Huth*, 16 Ch. D. 474; 44 L. T. 67; 29 W. R. 387—C. A.

The authority of the master to sell the goods of an absent owner is derived from the necessity of the situation in which he is placed; and, consequently, to justify his selling, he must establish a necessity for the sale; and an inability to communicate with the owner. *Australasian Steam Navigation Company v. Morse*, 4 L. R., P. C. 222; 27 L. T. 357; 20 W. R. 728; 8 Moore, P. C. C., N. S. 482.

Under these conditions, and by force of them, the master becomes the agent of the owner, not only with the power, but under the obligation (within certain limits) of acting for him; but he is not, in any case, entitled to substitute his own judgment for the will of the owner, in selling the goods, where it is possible to communicate with the owner. *Ib.*

In cases of necessity affecting the interest of the shipper, and where the sale of the cargo is directly or indirectly for his benefit, the master of the vessel becomes his agent for the purpose of selling the cargo. *Duncan v. Benson*, 1 Ex. 537; 17 L. J., Ex. 238. Affirmed, 3 Ex. 644; 18 L. J., Ex. 169; 12 Jur. 218—Ex. Ch.

Sufficiency of Evidence of Authority.—B. chartered a ship warranted tight and seaworthy, and took on board the goods of several persons. The ship proved unseaworthy, the goods were damaged, and the master sold them at a foreign port. The owners brought an action against the charterer for the loss of the cargo; a correspondence then ensued between him and the owner, and it was ultimately settled that a jury should assess damages, which they did at 5,000*l.*, and costs 1,000*l.* The charterer then sued the owner of the vessel for this decree, on the breach of the conditions of the charterparty, and allowed him the amount received by the master for the sale of the sugar:—Held, that very slight evidence would be sufficient to prove the master's authority to sell the damaged cargo. *Blythe v. Smith*, 6 Scott, N. R. 360; 5 M. & G. 405; 12 L. J., C. P. 203; 7 Jur. 948.

More Deterioration of Cargo.—A cargo of opium, shipped at Calcutta, was, by the bill of lading, to be delivered at Hong Kong. The ship came in collision at sea with another vessel, and received so much injury as to compel her to put in at Singapore, where the cargo was found to be partially damaged by the salt water. The master, who acted bonâ fide, and to the best of his judgment, selected the damaged chests of opium, and sold them by auction, and forwarded the remainder to Hong Kong. The master might have

had the damaged opium redried and repacked while the vessel was refitting, and have forwarded it, though deteriorated in value, with the other opium:—Held, that it was the duty of the master to carry the cargo to its place of destination, as the goods could have been delivered in a merchantable, although in a damaged state. *Tronson v. Dent*, 8 Moore, P. C. C. 419.

Sale Abroad—Effect of Foreign Law.]—The agent in Russia of an English merchant, resident in England, shipped in Russia a cargo of deals on board a Prussian vessel, owned by a Prussian captain, to be carried to Hull, consigned to the English merchant, under an ordinary bill of lading. The vessel was wrecked on the coast of Norway, but the cargo was brought safely on shore there, and could have been reshipped and sent on to England. By the law of Norway, a captain of a vessel placed in this position, though responsible to the owners if he sells improperly, has power to sell the cargo so as to convey a good title to a bonâ fide purchaser. The captain, in the exercise of his discretion, and without any absolute necessity, sold the cargo to a bonâ fide purchaser, who resold the cargo to the defendant, who sent it to England, when the plaintiff, representing the English merchant, the original owner, claimed the cargo and brought an action for it:—Held, that the action could not be maintained, on the ground that the property in the cargo passed to the purchaser by the sale in Norway, according to the law of that country; that the courts of this country will recognize the Norwegian law in this respect, and that the property could not be divested by the cargo being afterwards brought to England. *Cam-mell v. Sewell*, 5 H. & N. 728; 29 L. J., Ex. 350; 6 Jur., N. S. 918; 8 W. R. 630—Ex. Ch.

Liability of Shipowner.]—The plaintiffs wishing to send cement and stone from London to Callao, the defendants, on the 24th of June, wrote offering them "room" for it in the ship *F. K. Dumas*, and on the 25th of June the defendants chartered the ship of the owners for a voyage from London to Callao by a charterparty, providing, inter alia, that the whole ship should be at the disposal of the charterers, except the space necessary for the crew and stores; that the master and owners should give the same attention to the cargo, and in every respect be responsible to all whom it might concern, as if the ship were loaded in her berth by and for the owners independently of the charter; that the master was to sign bills of lading at any rate of freight the charterers might require without prejudice to the charterparty; that the ship should be addressed to the charterers' nominees at the port of discharge; and the charterers' responsibility, except for freight, was to cease on the vessel being loaded. On the 26th of June an agreement was made between the defendants "acting for the owners" of the ship, and the plaintiffs, that the former should receive on board cement and stone at a certain freight from London to Callao and sail on a certain date; freight to be paid one-half on signing bills of lading and the remainder on final discharge at Callao. The cement and stone were shipped, half freight was paid, and the master signed bills of lading making the other half payable at Callao; and the ship sailed, but being damaged by bad weather put into an

intermediate port, where she was condemned, and the captain sold the plaintiffs' goods, believing that he was unable to forward them. The plaintiffs having sued the defendants for the value, the jury found that the sale was not justified:—Held, that the captain, in selling the goods, was not acting as the servant or agent of the defendants, and they were therefore not liable for the conversion. *Wagstaff v. Anderson*, 4 C. P. D. 283; 48 L. J., C. P. 759; 39 L. T. 332. Affirmed, 5 C. P. D. 171; 49 L. J., C. P. 485; 44 L. T. 720; 28 W. R. 856.

Trover lies against a shipowner for a sale by the master, of goods at a place short of the port of destination, under circumstances not inconsistent with the general scope of the authority conferred upon the master by the owner. *Ewbank v. Nutting*, 7 C. B. 797.

A cargo of salt was shipped at Liverpool for Calcutta, under a bill of lading, making the same deliverable to A. & Co. on payment of freight there as per charterparty. The ship sustained damage in quitting the harbour at Liverpool, and ultimately became so leaky, that the master was compelled to run for Bahia, where, finding the state of the ship such as to render her incapable of continuing the voyage, and being unable to forward the salt to its destination, he sold it by public auction, remitting the proceeds to his owner, who tendered the amount, after making deductions for general average and expenses, to the shipper of the salt:—Held, that the master and owner were jointly liable for the conversion, that it was not necessary to give the charterparty in evidence, and that the jury was warranted in estimating the damages at the cost price of the salt, and the sum the shipper had paid on account of the freight. *Id.*

Sale of Part—Measure of Damages.]—Where a master sells part of a shipper's goods at an intermediate port, in order to raise money to provide for the repairs or other expenses of the vessel which are necessary to enable him to prosecute and complete the voyage, and the ship does not arrive at her port of destination, the shipper is not entitled to receive the clear value for which the goods would have sold at that port. *Atkinson v. Stephens*, 7 Ex. 567; 21 L. J., Ex. 329.

10. DELIVERY AND DISCHARGE OF CARGO.

a. Time.

Delay caused by Vis major.]—When a charterparty is silent as to the time within which the cargo is to be unloaded at the port of destination, the contract implied by law is that the shipowner and the charterer shall each perform his part, and neither is answerable for delay caused by vis major. *Ford v. Cotesworth*, 5 L. R., Q. B. 544; 39 L. J., Q. B. 188; 23 L. T. 165; 18 W. R. 1169; 10 B. & S. 991—Ex. Ch.

A charterparty for a voyage from Liverpool to Lima or Valparaiso provided that the vessel should proceed to the port of discharge, or as near thereto as she could safely get, and there deliver her cargo in the usual and customary manner. A specified number of days was agreed upon for loading the vessel at Liverpool, but there was no such agreement as to the discharge at her port of destination. The vessel arrived at the port of discharge and remained discharging

till, owing to apprehension of a bombardment by a hostile fleet, the authorities suspended all landing of goods for seven days, after which she returned, and her discharge was completed:—Held, that the discharge of the cargo being an act to be done by the shipowner and freighter, the shipowner could not maintain an action against the freighter for the loss from the delay occasioned by the vis major. *Ib.* See *Cunningham v. Dunn*, 3 C. P. D. 443; 48 L. J., C. P. 62; 38 L. T. 631—C. A. And cases ante, col. 1355.

Refusal of Authorities to allow Cargo to be Landed—Freight.—A cargo of petroleum belonging to an English owner was shipped on board an English ship in London, under a bill of lading whereby the goods were to be delivered in the port of Havre, subject to the usual exceptions. It was stipulated that demurrage was to be paid if the goods were not taken out within twenty-four hours after arrival. The local authorities refused to allow the petroleum to be landed at Havre, and compelled the ship to leave the port without unloading any of her cargo. The master, having made unsuccessful attempts to land the petroleum at other ports, returned to Havre and transhipped it into a lighter in the roads while he went into dock, unloaded the rest of his cargo, and reloaded for his return voyage. He was then compelled by the authorities to re-ship the petroleum, and brought it back to London. No bill of lading was presented to him, nor any request made by the consignees for delivery:—Held, first, that the master having been ready and able to give delivery in the harbour, and having kept the goods a reasonable time there for the purpose, the freight had been earned. *Gaudet v. Brown, Cargo ex Argos*, 5 L. R., P. C. 134; 28 L. T. 745; 21 W. R. 707. Affirming 42 L. J., Adm. 49.

Held, secondly, that all obligation on the part of a master to act for the merchant does not cease after a reasonable time for the latter to take delivery of the cargo has expired, and that therefore the master was entitled to compensation for bringing the goods back to England, as that was the best way of making them available to the owner, and also for the expenses incurred at Havre. *Ib.*

Held, thirdly, that he was not entitled to demurrage, and the expenses of attempting to enter other ports, as they were incurred before the ship was ready to deliver at all in the port of Havre. *Ib.*

Embargo.—The defendant contracted to carry the plaintiff's goods from Liverpool to Leghorn; on the vessel's arriving at Falmouth, in the course of her voyage, an embargo was laid on her "until the further order of council:—Held, that such embargo only suspended, but did not dissolve, the contract between the parties; and that, even after two years, when the embargo was taken off, the defendant was answerable to the plaintiff in damages for the non-performance of the contract. *Hadley v. Clarke*, 8 T. R. 259.

Obligation to Unload Ship in reasonable Time.—By a charterparty entered into between the plaintiff and G. it was agreed that the plaintiff's vessel should at the port of discharge be unloaded as fast as the custom of the port would allow. By the bill of lading, signed by the master, the

cargo was stated to have been shipped by G. and was to be delivered to the defendant or his assigns, he or they paying freight for the goods as per charterparty. No time for the discharge of the cargo was mentioned in the bill of lading. At the port of discharge there was no custom as to unloading vessels, but a delay occurred in unloading the ship. The defendant never assigned the bill of lading, but before the arrival of the ship he sold the cargo, and the ultimate purchaser took delivery of it upon an order signed by the defendant:—Held, in an action for not discharging within a reasonable time, that, as there was no custom of the port of discharge as to unloading vessels, the charterparty did not by its terms vary the implied contract contained in the bill of lading to deliver the cargo within a reasonable time. *Fowler v. Knoop*, 4 Q. B. D. 229; 48 L. J., Q. B. 333; 40 L. T. 180; 27 W. R. 299—C. A.

Deviation in Course of Voyage and Delay in Delivery—Risk of War.—The master of a Prussian vessel, a subject of the king of Prussia, having on board a cargo of nitrate of soda (contraband of war) under a charterparty, and a bill of lading from Pisagua, bound to Cork, Cowes or Falmouth, for orders to proceed to any safe port in Great Britain or on the continent between Havre and Hamburg, both included, and there deliver the cargo, "the act of God, the Queen's enemies, fire, and all and every other risk, dangers, and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted;" arrived at Falmouth on the 10th of July, 1870, and received orders on the 11th of that month to proceed to the French port Dunkirk, and there deliver her cargo. On the ship's arrival off Dunkirk on the 16th the master was informed by a French pilot that war had broken out between France and Prussia, whereupon the master put back to the Downs to make inquiries, and anchored there on the 17th, which was Sunday. On the 18th, having telegraphed to the owner of the vessel for instructions, he was ordered not to go to Dunkirk, and on the 19th he put into Dover, where he was informed, as the fact was, that war, which had been imminent from the 10th, had been declared between France and the North German Confederation, formal declaration thereof having been given as upon the 19th of July:—Held, that the master was justified in putting back to the Downs for the purpose of ascertaining whether war had been declared, and was guilty of no improper deviation or delay in not returning to Dunkirk before the 19th of July, when war was actually declared. *Duncan v. Koster, The Teutonia*, 4 L. R., P. C. 171; 41 L. J., Adm. 57; 26 L. T. 48; 20 W. R. 421; 8 Moore, P. C. C., N. S. 411.

Held, also, that the master committed no breach of contract in refusing to deliver the cargo at Dunkirk, and as the charterparty provided what freight was to be paid if the cargo was delivered, the delivery at Dover was within the terms of the charterparty, and the master was entitled to freight for the cargo from the owners before delivery. *Ib.*

When a master receives credible information that if he continues in the direct course of his voyage his ship will be exposed to some imminent peril—as from pirates, or icebergs, or other dangers of navigation—he is justified in pausing and deviating from the direct course, and taking

any step that a prudent man would take for the purpose of avoiding the danger. *Ib.*

By a charterparty in the English language entered into at Constantinople between the master of a North German vessel, and North German merchants there resident, it was agreed that the vessel should load a cargo, and proceed therewith to Falmouth, Plymouth, or Queens-town, for orders for a safe port in the United Kingdom, or on the continent between Havre and Hamburg, Queen's enemies, &c., excepted. The cargo was laden. The vessel sailed, but her master learning on his voyage that war existed between France and Germany, and fearing capture by French cruisers, put into Gibraltar. During the war there would have been great risk of capture off that port and off the ports of call if the vessel had continued her voyage; her master in consequence remained there until the end of the war (nine months). He then sailed, and arriving at a port of call was ordered to an English port. The cargo was damaged by the delay. In a claim by the consignees:—Held, that by both English and North German law the master was justified in putting into and remaining in port, and that the shipowners were not responsible for the damage caused by the delay. *The Express*, 3 L. R., Adm. 597; 41 L. J., Adm. 79; 26 L. T. 956.

— **Risk of Capture.**—An apprehension of capture founded on circumstances calculated to affect the mind of a master of ordinary courage, judgment and experience, will justify delay in the prosecution of a voyage; and a ship is not answerable in a suit under the Admiralty Court Act, 1861, s. 6, for damage to cargo caused by such delay. *Anderson v. Owners of the San Roman*, 5 L. R., P. C. 301; 42 L. J., Adm. 46; 12 W. R. 393; *S. C.*, nom. *The San Roman*, 28 L. T. 381.

A charterparty was entered into between an English and a German firm, the owners of a vessel belonging to Hamburg. The charterparty provided that the vessel should proceed to a foreign port, and there load a cargo, and proceed to a port within certain limits mentioned. After the making of the charterparty, and the shipment of the goods, war broke out between Germany and France. On the homeward voyage the ship sustained damage, and was compelled to put into a neutral port for repairs; and finding that French cruisers were in the vicinity, she remained there for a long time after the repairs were completed, to avoid the risk of capture. The risk was such as to render it reasonable and prudent for the master to remain in port. On the departure of the cruisers the master sailed on his voyage, and delivered the cargo according to orders:—Held, that the delay was justifiable. *Ib.*

The master of a North German ship lying at Constantinople entered into a charterparty with North German subjects, there resident, to carry a cargo to a port in the United Kingdom or on the Continent, to be delivered to English consignees. The charterparty and the bill of lading given under it were in the English language, and it was stipulated that the ship should call at one of three ports in the United Kingdom for orders. The ship duly called at Falmouth, and was ordered to proceed to an English port to discharge. War then existed between France and Germany. The master sailed from Falmouth,

but, through a reasonable fear of capture, put into Dunkirk. The cargo was damaged by the delay:—Held, that the contract was to be construed according to English law, and that the master was justified. *The Wilhelm Schmidt*, 25 L. T. 34.

A North German vessel shipped goods in the Black Sea for a port in the United Kingdom or on the Continent under an English charterparty, by which she was to call at Falmouth or Plymouth for orders, such orders to be given by the charterer's agent in London by return of post, on receipt of the master's announcement of his arrival. She arrived at Falmouth on August 9th. Orders were given, but not till September 3rd, to proceed to Leith; but from that date to the arrest of the ship, on September 21st, negotiations were going on for discharge of the cargo at Falmouth. Between those dates the winds were light and variable, and the master remained in port for fear of capture by French cruisers in the Channel, war then existing between France and Germany:—Held, that the delay was reasonable, and that neither by English nor German law was the master bound to proceed, and that the negotiations waived the orders to proceed. *The Heinrich*, 3 L. R., Adm. 424; 24 L. T. 914.

Loss of Cargo after Deviation.—The law implies a duty on the owner of a vessel, whether a general ship or hired for the special purpose of the voyage, to proceed without unnecessary deviation from the usual course. *Davis v. Garrett*, 6 Bing. 716; 4 M. & P. 540.

A. put on board B.'s barge, lime to be conveyed from the Medway to London. The master of the barge deviated unnecessarily from the usual course, and, during the deviation, a tempest wetted the lime, and the barge taking fire thereby, the whole was lost:—Held, that B. was liable, and the cause of loss sufficiently proximate to entitle A. to recover under a declaration alleging B.'s duty to carry the lime without unnecessary deviation, and averring a loss by unnecessary deviation. *Ib.*

A count, stating that the defendants being owners of a ship at Liverpool bound on a voyage thence to Waterford, the plaintiff shipped goods on board, to be carried upon that voyage by the defendants, and to be delivered at W. to the plaintiff's assigns, and thereupon the plaintiff insured the goods at and from L. to W.; and then averring that it was the duty of the defendants, as such owners, to cause the ship to proceed on the voyage from L. to W. without deviation; and alleging a breach of such duty by their causing the ship to deviate from the course of that voyage; after which she was lost with the goods; and the plaintiff by reason of such deviation lost his goods and the benefit of his policy—cannot be sustained for want of alleging, that the goods were delivered to or received by the defendants for the purpose of carriage, or that they had notice of the shipment, whence a promise or a duty founded upon an agreement to carry the goods might be inferred; and also for want of an allegation, that the defendants undertook to carry the goods directly to W. from L.; for, though the ship's ultimate destination might be W., yet she might have been first destined to other places on a coasting voyage. *Max v. Roberts*, 12 East, 89.

The owners of vessels on the navigation be-

tween A. and C., having given public notice that they would not be answerable for losses in any case, except the loss was occasioned by the want of care in the master, nor even in such case beyond 10l. per cent., unless extra freight was paid, the master of one of the ships took on board goods to be carried from A. to B. (an intermediate place between A. and C.) and delivered at B.: the vessel passed by B. without delivering the goods there, and sunk before her arrival at C., without any want of care in the master:—Held, that the owner of the vessel was responsible to the owner of the goods for the whole loss. *Ellis v. Turner*, 8 T. R. 531.

"Cargo to be brought to and taken from Alongside free of Expense and Risk to the Ship."—The defendants chartered the plaintiffs' vessel, the C., for a voyage to the port of L. The charterparty provided that the cargo was "to be brought to and taken alongside free of expense and risk to the ship;" but it contained no other clause as to discharging the cargo. The number of lighters at L. was small, and when the C. arrived, the port was crowded with vessels, about half of which belonged to the defendants or had been consigned to them. Seventy-two days elapsed after the arrival of the C. before her discharge was completed by the defendants' agents; but the number of days upon which the cargo was unloaded was only thirty-four. The delay arose from the lighters being engaged in discharging the other vessels lying at the port:—Held, that in determining whether the terms of the charterparty had been broken by the defendants, the delay occasioned by the lighters being engaged in discharging other vessels was not to be taken into account. *Wright v. New Zealand Shipping Company*, 4 Ex. D. 165; 40 L. T. 413—C. A.

"Cargo to be Discharged with all Despatch according to the Custom of the Port."—The defendants chartered the plaintiff's vessel, the C., to carry a cargo of rails to the port of L. The charterparty provided that the cargo should be taken from alongside at merchants' risk and expense, and should be "discharged with all despatch according to the custom of the port." By the custom of the port of L. vessels were discharged by lighters worked along a warp, and upon the arrival of a vessel she was reported at the port office, and in her turn, with respect to vessels which had previously arrived, one lighter was sent to her every working day until she was discharged. Upon the arrival of the C. at L., in consequence of the scarcity of suitable lighters, and the number of vessels lying there, the defendants were unable to begin to discharge until twenty-four working days had elapsed. In an action to recover damages for the detention of the C. at L. during these twenty-four days, the judge directed the jury that there was no obligation upon the defendants to provide one lighter for unloading the cargo of the C. for every working day after she was ready to unload, and that if the defendants used the existing appliances at L. with due despatch, according to the custom of the port, the jury ought to find for them:—Held, that the direction was correct. *Postlethwaite v. Freeland*, 4 Ex. D. 155; 48 L. J., Ex. 353; 40 L. T. 601; 27 W. R. 568—C. A. Affirmed in *H. L.*, 5 App. Cas. 599; 49 L. J., Ex. 630; 42 L. T. 845; 28 W. R. 833.

Delivery of Cargo according to Custom of Port.]

—A shipowner was sued on a clause in a bill of lading, by which he was bound to forward the goods by steamer from London to a foreign port, the breach of duty being in not using due diligence to do so, whereby the season was lost:—Held, that it was not enough that he had let the discharge and sorting of the cargo take the usual course of business at the docks where the vessel discharged, if he neglected means which might well have been used to hasten the sorting, and to procure vessels for the transhipment. *Carali v. Xenos*, 2 F. & F. 740.

Delivery Prevented by Circumstances beyond Charterer's Control—Implied Contract.]

—When, by a charterparty, a given number of days is allowed to the charterer for unloading, a contract is implied on his part that, from the time when the ship is at the usual place of discharge he will take the risk of any ordinary vicissitudes which may occur to prevent his releasing the ship at the expiration of the lay days. *Thiess, Tils, or Thus v. Byers*, 1 Q. B. D. 244; 45 L. J., Q. B. 511; 34 L. T. 526; 24 W. R. 611.

Delayed by Stress of Weather.]—When the shipowner was prevented from unloading and the charterer from receiving by stress of weather after the arrival of the ship:—Held, that the charterer was liable under the above rule. *Id.*

Delivery and Payment of Freight—Concurrent Acts.]

—By the terms of a bill of lading freight was to be paid, one-third in cash on arrival at B. and two-thirds on right delivery of cargo, by good and approved bills or cash, at shipper's option. The vessel arrived at B., the one-third freight was paid, and the consignee elected to pay the two-thirds in cash:—Held, that the delivery of the cargo and payment of the balance of the freight were to be concurrent acts, and that the master was not bound to deliver the cargo unless the consignee paid, or was ready and willing at the same time to pay, the balance of the freight. *Paynter v. James*, 2 L. R., C. P. 348; 16 L. T. 660; 15 W. R. 493. Affirmed, 18 L. T. 449; 16 W. R. 768—Ex. Ch.

A master hearing that war had broken out between two powers, to one of which his vessel belonged, stopped at a neutral port for the purpose of obtaining intelligence. While he was thus justifiably engaged in inquiries the consignees demanded delivery of cargo without any payment of freight:—Held, that the master was justified in refusing to deliver the cargo. *The Teutonia*, 3 L. R., Adm. 394; 41 L. J., Adm. 57; 24 L. T. 521; 20 W. R. 261. Affirmed, *post*, col. 1435.

b. Place.

Delivery of Cargo at Safe Port.]—A shipowner entered into a charterparty with the consignor of goods by which he was to deliver them at a good and safe port to be named by the consignor. The consignor named a port at which it was found that the ship could not safely unload, and the captain proceeded elsewhere and unloaded. The consignee brought an action against the captain for damages for delivering elsewhere; the consignor wrote to the captain, "We would recommend you to settle the matter in the best way you can." The shipowner defended the

action, and was ultimately successful; but he incurred considerable costs in excess of those which the unsuccessful party had to pay:—Held, in an action by the shipowner against the consignor, that, such costs not being damages flowing from the consignor's breach of contract, and the consignor not having given authority to incur them, the shipowner could not recover them; that the amount recoverable by the shipowner in respect of port dues was only the difference between what he would have paid had the ship unloaded at the port named, and what he actually did pay; and that insurance on the voyage from the port named to a safe port must be taken to have been included in the claim for demurrage, which had been allowed in full. *Evans v. Bullock*, 38 L. T. 34.

At which Port or Dock.—The plaintiffs were indorsees of the bill of lading of a cargo which, according to the charterparty, which contained a reference to the bill of lading, was to be unloaded at S., "at the usual place of discharge, and according to the custom of the port." On the arrival of the vessel at S. the master put into the South Dock, when the indorsees of the bill of lading ordered him to remove her to the Gill Dock, which the master refused to do until he had been paid the expenses incurred by entering the South Dock. Both docks were usual places of delivery for a similar cargo as that in the bill of lading:—Held, that, in default of a custom to the contrary being proved, the master was not bound to lie in the river waiting for instructions, and was justified in mooring in the South Dock, but that, having received directions to deliver his cargo in the Gill Dock, he was bound to obey them. *The Felix*, 2 L. R., Adm. 273; 37 L. J., Adm. 48; 18 L. T. 587.

Under an open charterparty to deliver a cargo at a certain port, it is the duty of the master to obey the directions of the owner of the cargo as to the place of discharge in such port. *Ib.*

If before the directions of the owner of the cargo are received, the master has already incurred expenses by going to another place of discharge, he is not entitled to prepayment of those expenses as a condition of going to the place of discharge directed. *Ib.* See *The Bahia*, post, col. 1431.

Refusal of Freight to name Wharf.—By a charterparty the owner of a ship was to carry a cargo of coals to London, and there deliver the same "at a good and safe wharf" to the freighter or assigns, paying freight 6s. per ton. One market-day to be allowed for sale or 1½d. per ton additional freight for each market-day's detention thereafter. The vessel came into collision with a steam-tug in the Thames, and was sunk with the cargo on board, but was got up, and on the afternoon of the 23rd of April arrived at a pier at Wapping, whither she was ordered by the harbour-master. Notice of her arrival was on the same day given to the agents of the freighter, and they were required to name a wharf; but they declined to do so. On the 24th the ship and freight were arrested by process out of the Admiralty Court in a suit instituted by the owners of the tug:—Held, that the shipowner was entitled to recover, as damages for the refusal to name a wharf, and so refusing to accept the cargo, the amount which he would have re-

ceived as freight if the cargo had been duly delivered—there having been a complete breach before the arrest; but that he was not entitled to demurrage. *Stewart v. Rogerson*, 6 L. R., C. P. 424.

Obtaining Pratique or Permission.—A declaration on a charterparty stated, that "the vessel was ready to be unloaded on a certain day at W., and had received pratique," and issue thereon. It was proved that no custom-house existed at W.; that no sanitary regulations were adopted; and that a licence to unload was never granted. The jury found, that the vessel was ready to be unloaded on the said day, but that she had not received pratique, and they found a verdict for the defendant:—Held, that what took place was equivalent to pratique, and that in substance the issue was found for the plaintiff. *Balley v. D'Arroyave*, 3 N. & P. 114; 7 A. & E. 919.

c. Refusal to Receive Cargo.

Dispensing with Delivery.—A declaration set forth an executory contract, by which the defendant was, on the arrival of a vessel at Belfast, to become the purchaser of a third of her cargo, at a stipulated price, which was to be paid by him to the plaintiff, after delivery of the cargo to the defendant, at Belfast, and alleged that the defendant, before the arrival of the ship at Belfast, discharged the plaintiff from delivering the cargo, and thenceforth wholly refused to perform the contract:—Held, that the defendant was not bound to answer an inquiry made by the plaintiff before the arrival of the ship, as to whether he intended to fulfil the contract. *Ripley v. McCure*, 4 Ex. 345; 18 L. J., Ex. 419.

Held, also, that a refusal by the defendant to perform the contract made before the arrival of the ship was not in itself a breach of the contract, but that a refusal at any time, unretracted up to the time of the arrival of the vessel, was evidence of a continuing refusal down to and inclusive of the time when he was bound to receive the cargo, and that a continuing refusal was a breach of the contract. *Ib.*

Held, also, that such a refusal before arrival was a waiver, at the time of the delivery of the cargo, and if unretracted, dispensed with the actual delivery of the cargo after arrival. *Ib.*

Held, also, that the defendant, by insisting that the cargo should be delivered to him at Belfast, but upon terms other than those of the contract, did not withdraw his refusal, or retract his waiver, discharging the plaintiff from delivering the cargo then under the contract. *Ib.*

It was stipulated by a charterparty, made between the plaintiffs and the defendants, that the master of the ship should sign bills of lading as presented, or pay a named penalty. He refused to sign bills of lading, and sailed without doing so. He proceeded to the port of discharge, delivered a portion of the cargo to the consignees, but ceased doing so, and warehoused the remainder, as they, acting under instructions from the charterers, claimed to deduct from the freight an amount equal to the penalty named in the charterparty:—Held, that the charterers were entitled to nominal damages against the owners for not signing the bills as presented, but that they were not entitled to recover for conversion, as the acts of the plaintiffs had prevented the delivery. *Jones v. Hough*, 5 Ex. D.

115: 49 L. J., Ex. 211; 42 L. T. 108—C. A. And see *Shirwell v. Shaplock*, post, col. 1423, and cases infra.

d. Warehousing.

No Warehouses.]—Where consignees do not appear to claim goods at the port of discharge, and there is no statutable warehouse, semble that the master may still land the cargo without losing his possession and control over it (placing the goods in a warehouse belonging to or hired for his owners), and so preserve his lien. *Mors-le-Blanch v. Wilson*, 8 L. R., C. P. 227; 42 L. J., C. P. 70; 28 L. T. 415.

Where no application for delivery is made, the captain may land and warehouse the cargo at the expense of the merchant; and where that is forbidden by the authorities of the port, he is not justified in destroying the cargo; but in the absence of advices, he may take it to such a place as in his judgment is most convenient, and may charge to the merchant all expenses properly incurred. *Cargo ex Argos, Gaudet v. Brown*, 5 L. R., P. C. 134; 28 L. T. 745; 21 W. R. 707. Affirming 42 L. J., Adm. 49.

Late Delivery.]—Under the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), s. 67, a shipowner may land goods whenever the delivery of them to the owner within the proper time has been prevented by the force of circumstances, whether the owner is or is not to blame. *Miedbrodt v. Fitzsimon, The Energie*, 6 L. R., P. C. 366; 44 L. J., Adm. 25; 32 L. T. 579; 23 W. R. 932.

And see FREIGHT (*Lien on Cargo*).

Duty of Shipowner—Notice.]—When goods are landed under sub-s. 6, 25 & 26 Vict. c. 63, s. 67, sub-s. 7, does not apply, for the latter refers only to the discharging of cargo overside, and not to the landing of it for the purposes of assortment on the wharf, and the written notice referred to in sub-s. 7 applies, therefore, to cases arising under that sub-section only. It is the duty of the owner of goods who receives either a written or verbal notice that he can have them to take them away within a reasonable time, and that whether sub-s. 6 or 7 applies to the case. Notice to the lighterman employed by the owner of the goods is notice to the owner himself. A ship arrived in dock with a general cargo on the 12th of December, and began to unload on the quay on the 13th. The plaintiffs (owners of some of the goods) sent a lighterman and barge to receive their portion of the cargo on the 13th. It was not then ready. On the 14th the lighterman again attended, but could obtain no information. On the 14th the firm of lightermen wrote to the defendants (the shipowners), stating they had made application for the goods, and inclosing a notice requiring twenty-four hours' notice of the defendants' readiness to deliver the goods, and stating that they would not be responsible for any landing charges. On the 15th the landing of the cargo was completed, and the lighterman was that day verbally informed he could have the goods on the morning of the 16th. He did not attend, and the goods were not taken away till the 29th. The plaintiffs paid the dock charges under protest, and brought an action to recover them back:—Held,

that they could not recover them. *The Clan Macdonald*, 8 Adm. D. 178; 52 L. J., Adm. 89; 49 L. T. 408; 32 W. R. 154.

Ability of Owner to take Delivery.]—By 25 & 26 Vict. c. 63, s. 67, where the owner of goods imported fails to make entry thereof, or having made entry, to land the same or take delivery thereof within a certain time, the shipowner may make entry of, and land or unship the goods at the time and in the manner and subject to certain conditions, and, if at any time before the goods are landed or unshipped, the owner has made entry for the landing and warehousing thereof at any particular wharf or warehouse other than that at which the ship is discharged, and has offered and been ready to take delivery thereof, and the shipowner has failed to make such delivery, and has also failed at the time of such offer to give the owner of the goods correct information of the time at which such goods can be delivered, then the shipowner shall, before landing or unshipping such goods under the power hereby given to him, give to the owner of the goods, or of such wharf or warehouse as last aforesaid, twenty-four hours' notice in writing of his readiness to deliver the goods:—Held, that to entitle himself to notice under this condition, the owner of the goods must at the time of his offer be in a condition actually to take delivery thereof. *Berrisford v. Montgomerie*, 17 C. B., N. S. 379; 34 L. J., C. P. 41; 10 Jur., N. S. 823; 10 L. T. 814; 12 W. R. 1060.

Where the shipowner at the time of the offer to take delivery is not able to make it, he is not excused from the duty of giving twenty-four hours' notice of his readiness to deliver, because the owner of the goods or his agent does not ask for correct information of the time at which such can be delivered. *Id.*

Goods Landed on Wharf instead of Lighter.]

—A bill of lading provided that "simultaneously with the ship being ready to unload the goods or any part thereof," the consignee should be ready to receive the same from the ship's side, either on the wharf or quay at which the ship might lie for discharge, or into lighters, and in default, the master or agent of the ship was authorized to land the goods at the risk and expense of the consignee. Under this bill of lading, sixty-five pipes of lemon-juice were loaded on board a steamer trading between the Mediterranean and London, which arrived at London on the 23rd of March, and early on the morning of the 24th was ready to deliver at the wharf, and had landed fifteen of the sixty-five pipes on the wharf before the holders of the bills of lading were ready with their lighter; they then applied for the delivery of the remainder into their lighter, which the shipowners refused, and landed them on the wharf. In an action to recover wharfage charges and demurrage for detention of the lighter:—Held, that under the bill of lading and 25 & 26 Vict. c. 63, s. 67 (5), the shipowners assuming that they would incur no loss or expense by unloading the remaining pipes into the lighter, instead of on the wharf, were bound to deliver them to the holders of the bill of lading; and therefore they were entitled to recover. *Willson v. London, Italian and Adriatic Steam Navigation Company*, 1 L. R., C. P. 61; 35 L. J., C. P. 9; 12 Jur., N. S. 52; 13 L. T. 435; 14 W. R. 101; 1 H. & R. 29.

Goods Landed—Fire.]—To a declaration on a contract by the master of a steam-vessel, to convey goods from Dublin to London, and to deliver the same at the port of London, a plea that, after the arrival of the vessel at London, the defendant caused the goods to be deposited on a wharf, there to remain until they could be delivered to the plaintiff, the wharf being a place where goods from Dublin were accustomed to be landed, and fit and proper for such purposes, and that, before a reasonable time for delivery elapsed, they were destroyed by a fire, which broke out there by accident:—Held, ill. *Gatliffe v. Bourne*, 4 Bing. N. C. 314; 5 Scott, 667.

— **Dock Expenses.]**—In an action by consignees against a shipowner for non-delivery of goods according to bills of lading, in which there was a condition that the goods should be taken from the ship by the consignees immediately the ship was ready for discharge, and that otherwise they would be landed or put into craft at the merchant's risk and expense, and the goods having been landed at a dock the day after the ship was ready for discharge, but after the consignees were ready to receive on payment of freight, and the goods having been detained for some time for dock charges, payment of which was refused:—Held, that it was for the jury whether the consignees had complied with the condition, or whether, if not, the shipowner had gone beyond it in landing the goods, but that even if the consignees were entitled to recover, yet since they might have received the goods on payment of a small sum under protest, they would not be entitled to recover full damages for the delay, as their proper course was to have paid the disputed sum, under protest. *Alexiadi v. Robinson*, 2 F. & F. 679.

11. SALE AND ASSIGNMENT OF CARGO.

Sale on the Hypothesis of its Existence.]—Merchants at Smyrna chartered a vessel, and loaded it at Salonica with a cargo of Indian corn. The bill of lading was indorsed by them, and sent, together with the charterparty, to B., their agent in London, with instructions to sell the cargo on their account. They also, through B., insured the cargo "at and from Salonica to the port of discharge in the United Kingdom," "corn warranted free from average, unless general, or the ship be stranded." Corn factors in London were accordingly, on the 1st May, 1848, employed by B. to sell the cargo, and they sold it to C. on the 15th May. The bought note stated that C. had bought of them "a cargo of about 1,180 quarters of Salonica Indian corn," &c., "of a fair average quality when shipped," &c., "27s. per quarter free on board, and including freight and insurance to a safe port in the United Kingdom;" "payment at two months from this date, or in cash, less discount," &c., "upon handing shipping documents." The vessel sailed from Salonica with a cargo described in the bought note, and was obliged to put into Tunis in distress. It was there found that from the heated and damaged state of the corn it was unfit to be carried farther, and it was consequently unshipped, and sold by the captain on the 24th April. The parties interested in the cargo were ignorant of these facts till after the sale to C.:—Held, that the contract was for the sale of a cargo supposed to exist and

to be capable of transfer, and that, as it had been sold and delivered to others before the sale to C., the corn factors were not liable. *Hastie v. Couturier*, 9 Ex. 102; 22 L. J., Ex. 299; 17 Jur. 1127—Ex. Ch. Affirmed in Dom. Proc., 5 H. L. Cas. 673; 25 L. J., Ex. 253; 2 Jur., N. S. 1241; sub nom. *Couturier v. Hastie*.

Assignment—"Appurtenances."]—B., being entitled to a moiety of a ship engaged in the whale fishery, executed a bill of sale of such moiety, together with a moiety of the tackle of the ship and the appurtenances to the ship belonging, to H., for the purpose of indemnifying him against certain bills accepted by H. to accommodate B.:—Held, that the cargo did not pass under the word "appurtenances." *Langton v. Horton*, 5 Beav. 9; 6 Jur. 357.

— **Bankruptcy, Order and Disposition.]**—A. was owner of a ship which, in March, 1857, sailed for the coast of Africa, and in May and July she was supposed by him to be upon that coast, completing her cargo of palm-oil, and it was also expected that she would be home again about October. On the 11th of November, 1857, the ship had not arrived, and A. assigned the cargo to B.; and on the 23rd of January, 1858, B. sent by post, to the captain, notice of such assignment. This notice never reached the captain. The ship remained on the coast of Africa till the 12th of February, 1858, when she set sail, and arrived at Bristol on the 14th of April. A. had become bankrupt on the 1st of March, 1858, and when the ship arrived his assignees claimed the cargo:—Held, that they were not entitled to it, as there had been no default upon the part of B., and as, therefore, the cargo could not be said to be in the possession of A. at the time of his bankruptcy, as reputed owner, by the consent and permission of the true owner. *Acraman v. Bates*, 2 El. & El. 456; 29 L. J., Q. B. 78; 6 Jur., N. S. 294.

12. ACTION FOR LOSS, DETENTION, AND NON-DELIVERY.

a. Parties.

Consignor or Consignee.]—By a bill of lading, the captain undertook to deliver goods therein specified for the consignor, and in his name, to the consignee. At the time of shipment the consignee had no property whatever in the goods:—Held, that an action against the owner of the ship for damage done to the goods by their being imperfectly stowed must be brought in the name of the consignor, although the consignee had insured the goods, and advanced the premiums of insurance before the ship arrived. *Sargent v. Morris*, 3 B. & A. 277.

A consignee of goods has such a right of property in the goods consigned to him, as to maintain an action of assumpsit against the shipowner for non-delivery of the goods. *Trenson v. Dent*, 8 Moore, P. C. C. 419.

A., as captain, by a charterparty between himself and B., agreed to receive a cargo from the agents and assigns of B., and B. agreed to procure the same; A., having received a cargo aboard, signed a bill of lading, stating the goods to have been shipped by order of C., and to be delivered to his order, and freight to be paid according to the charterparty. In an action for

negligence in stowing the goods, brought by C. against A., held that C. was only an agent, and that the action should have been brought in the name of B. *Moore v. Hopper*, 2 N. R. 411.

Amount of Interest.]—A., a resident at Naples, sent an order to M. & Co., hardwaremen at Birmingham, to despatch to him certain goods, on insurance being effected. Terms, three months' credit from the time of arrival. M. & Co. having marked the package with A.'s initials, despatched the goods by the canal to Liverpool, and effected an insurance declaring the interest to be in A. At Liverpool the goods were delivered by the agent of M. & Co. to the owner of a vessel bound to Naples, through whose negligence they were damaged:—Held, that the property in the goods vested in A. as soon as they were despatched from Birmingham, and that the terms of the order did not make the arrival of the goods at Naples a condition precedent to A.'s liability to pay for them, and that he might therefore maintain an action for an injury done to the goods through the negligence of the shipowner. *Fragano v. Long*, 4 B. & C. 219; 6 D. & R. 283.

Where S. had been in the habit of making consignments of goods to the plaintiff, to be sold on account of the former, and of frequently drawing bills of exchange on the plaintiff, in anticipation of future consignments; and on the 5th of January there was a balance due to the plaintiff of 1,659*l.*; and on the 6th, S. shipped goods on board the defendant's vessel to the amount of 5,926*l.*, consigned to the plaintiff, sending him the bill of lading and invoice, and at the same time drew a bill on him for 500*l.*, which the plaintiff having refused to accept, S. indemnified the defendant, who thereupon relanded the goods, and redelivered them to S.:—Held, that the plaintiff might sue the defendant for the non-delivery of the goods, as he had at all events a sufficient qualified interest in them to enable him to maintain such an action. *Anderson v. Clarke*, 2 Bing. 20.

Parties to be Sued—Negligence of Third Party.]—An action will lie by the owners of goods in a ship against the owners for a loss occasioned by the ship's striking against an anchor lying under water in the River Trent, without a buoy. *Trent and Mersey Navigation v. Wood*, 3 Esp. 127; 4 Dougl. 287; 1 T. R. 28, n.

—Master or Owner.]—A separate action cannot be maintained against the master and the owner of a ship for the same identical cause of action. The creditor has an election to sue either the one or the other; but he cannot, after he has sued the one to judgment, maintain another action against the other. *Priestley v. Fernie*, 3 H. & C. 977; 34 L. J., Ex. 173; 11 Jur., N. S. 813; 13 L. T. 208; 13 W. R. 1089.

Where a cargo consisting of oranges had been materially damaged through the improper conduct of the captain, who was also a part owner of the vessel, and the freighters brought an action against him and his co-partners, for negligence in the conveyance of the goods:—Held, that such action was well brought, although the captain had entered into a charterparty under seal with the freighters, by which he engaged to convey the cargo to its port of destination; it not appearing from that instrument that he

possessed any other character or interest than that of commander or master. *Leslie v. Wilson*, 6 Moore, 415; 3 B. & B. 171.

b. Proof of Receipt.

What is Sufficient.]—If a ship is chartered for a particular voyage, and put up as a general ship by the charterer, it is not enough, to make the owners liable for the non-delivery of goods, to shew that they were put on board the ship to be carried on this voyage, unless it is proved that they were received on board by some person appointed or authorized by the owners. *MacKenzie v. Rowe*, 2 Camp. 482.

It is not necessary, in order to render a shipowner liable for the loss of the goods of a shipper, that the goods should have been actually delivered on board the ship. *British Columbia and Vancouver's Island Spar, Lumber and Saw Mill Company v. Nettleship*, 3 L. R., C. P. 330; 37 L. J., C. P. 235; 18 L. T. 291; 16 W. R. 1046.

Where goods are to be carried coastwise, and the usage of the wharf is to deliver them on the wharf to the mate of the ship by which they are to be carried; if they are delivered to the mate, the wharfinger's responsibility is at an end, and he is not liable, though the goods are lost from the wharf before they are shipped. *Cobban v. Downe*, 5 Esp. 41.

c. Proof of Loss or Negligence.

In Unloading.]—Where goods were landed according to the custom of the port of London, on one of the quays of the Victoria Dock, and the dock company loaded the lighter, and it was proved that although all the bales were landed on the quay one of them was lost and was never put upon the lighter:—Held, that by the terms of the bill of lading, "goods to be delivered from the ship's deck, where the ship's responsibility shall cease," the shipowner's liability was over, and that he was therefore not liable for the non-delivery of the missing bale. *Petrococcino v. Bott*, 9 L. R., C. P. 355; 43 L. J., C. P. 214; 30 L. T. 840.

Prima facie Evidence.]—In an action against the owner of a chartered vessel for negligence, in consequence of which the plaintiff's goods were lost, the non-arrival of the vessel at her destined port is not even prima facie evidence of negligence. *Boyson v. Wilson*, 1 Stark. 236.

As to Condition of Goods.]—In a suit against shipowners for damage to cargo, the onus is upon the shipper to shew in the first instance that the goods were shipped in good order and condition before he can call upon the shipowners to shew excuse for the injury done to the goods. *The Prosperino Palasso*, 29 L. T. 622.

There is no rule of law by which the consignee of goods under a bill of lading stating the goods to have been shipped in good order and condition, but containing the words "quantity and quality unknown," is bound to shew that the goods were shipped in good order and condition, or fail in his suit against the shipowner for damage done to the cargo; but failing proof of the condition of the cargo when shipped, the consignee is bound to shew that the damage which it sustained is traceable to causes for

which the shipowner is responsible. *The Ida*, 32 L. T.—P. C.

And see cases ante, col. 1280, et seq.

Stowing.]—In an action against the proprietors of a steam-vessel, to recover compensation for damage done to goods sent by them as carriers, if, on the whole, it is left in doubt what the cause of the injury was, or, if it may as well be attributable to perils of the sea as to negligence, the plaintiff cannot recover;—but if the perils of the sea require that more care should be used in the stowing of the goods on board than was bestowed on them, that will be negligence for which the owners of the vessel will be answerable. *Muddle v. Stride*, 9 C. & P. 380.

Management of Boiler.]—Where damage was done to the cargo of a steam-vessel, by water escaping through the pipe of a steam boiler, in consequence of the pipe having been cracked by frost:—Held, that this was not an act of God, but negligence in the captain in filling his boiler before the time for heating it, although it was the practice to fill over-night when the vessel started in the morning. *Stordet v. Hall*, 4 Bing. 607; 1 M. & P. 561.

Delay in Taking in Stores.]—The master, whilst waiting for cargo, omitted to take in sufficient stores and provisions for his voyage, and whilst subsequently taking in such provisions and stores the frost set in, and the ship was frozen in port, and detained from the beginning of October until the breaking up of the ice in the ensuing year:—Held, that the owners of the ship were responsible to the owners of the cargo for any loss accruing from such detention; it being, by maritime law, the duty of the master to convey the cargo to its port of delivery with all expedition; and if by neglecting to avail himself of all fair opportunity the voyage is delayed, and damage accrues to the owners of the cargo, the owners of the ship are liable to make good the loss. *The Wilhelm*, 14 L. T. 636.

Incorrect Entry at the Excise.]—Where a consignee was not ready to receive a cargo consisting of rums, and the owners of the ship, being desirous to get her cleared, unloaded the cargo, and incorrectly entered it at the Excise, in consequence of which the cargo was seized:—Held, that the shipowners were not liable to the consignees for the non-delivery of the cargo, as the bill of lading did not properly describe the same. *Shirwell v. Shaplock*, 2 Chit. 397.

Seizure of Goods and Acknowledgment of Master.]—In an action against the master for not safely conveying goods consigned to the plaintiffs at a foreign port agreeably to bills of lading, evidence that the goods were seized in another foreign port, coupled with a letter of the master, in which he acknowledged that he was accountable for the goods, agreeably to the tenor of the bills of lading, is sufficient to warrant the jury in finding for the plaintiffs. *Cullen v. Mac Alpine*, 2 Stark. 552.

Mate's Receipts.]—The plaintiff having verbally chartered a ship to carry iron from Glasgow

to Swansea, the ship was loaded with iron bought by the plaintiff from W. & Co. The iron was weighed by the agents of W. & Co., to whom the mate gave a receipt signed by him for 330 tons, but there was no bill of lading. On delivery at Swansea, the quantity of iron was discovered to be 326½ tons only, but the mate deposed, and was not contradicted, to the delivery of all that had been shipped. The plaintiff having paid on the full amount of 330 tons to W. & Co., who refused to repay them the difference, sued the shipowner for short delivery:—Held, that there was no evidence of negligence in the shipowner, and that if there had been, it would not be negligence causing loss to the plaintiff. *Biddulph v. Bingham*, 30 L. T. 30.

Short Delivery of Cargo by Porters in the Mersey Docks.]—The Mersey Docks Acts Consolidation Act, 1858, s. 36, making the master porters, appointed under that act to discharge cargoes in the Mersey Docks, responsible for any loss, damage, or injury sustained by the cargoes discharged by them during the receiving, weighing, and loading off by the master porters or their servants, does not in any way discharge the shipowner from his liability existing before he delivers to the master porter, and his responsibility for short delivery remains unaffected by the act. *The Emilien Marie*, 44 L. J., Adm. 9; 32 L. T. 435.

d. Damages.

Market Value—Price.]—The defendants, by charterparty, agreed with the plaintiff that their ship should, at a specified time, load 1,300 tons of coal in the River Tyne, to be carried to Havre for the plaintiff. They broke their contract, and the plaintiff had, in consequence, first, to hire other vessels at an advanced freight, and, secondly, to buy 1,300 tons of coal at an enhanced price. He was unable, according to the custom of the colliery trade in the Tyne, to secure a cargo until he had chartered vessels to carry it. The plaintiff having sued the defendants in respect of both these heads of damage, they admitted their liability to pay the advanced freight, but denied that they were liable for the enhanced price of the coal. At the trial the rise in price at the pit's mouth was not disputed; but it was not directly proved that there had been an equivalent rise at Havre:—Held, that the fact of the plaintiff having paid the additional price was *prima facie* evidence of damage to that extent, and entitled him, in the absence of evidence to the contrary, to recover. *Featherston v. Wilkinson*, 8 L. R., Ex. 122; 42 L. J., Ex. 78; 28 L. T. 448; 21 W. R. 422.

Loss of Market.]—The carriage of goods by ship on a long voyage is entirely different from the carriage of goods by railway, when they may be expected to arrive on a particular day or for a particular market, and loss of market on such a voyage cannot (in the absence of express stipulation) be said to have been within the contemplation of both parties at the time of making the contract so as to be recoverable as damages in case of delay in the carriage. *The Parana*, 2 P. D. 118; 36 L. T. 388; 25 W. R. 596—C. A.

The assignee of a cargo of hemp and other

goods instituted a cause under s. 6 of the Admiralty Court Act, 1861 (24 Vict. c. 10), against a British ship, and claimed to recover damage for a breach of contract resulting from unreasonable delay in the carriage of the goods. The shipowner admitted his liability, and the amount of damage was referred to the registrar, assisted by merchants, to report upon. The registrar found that there had been a fall in the market value of the hemp between the date when the ship ought to have delivered her cargo and the date when the delivery actually took place, and reported that the plaintiff was entitled as compensation for the delay to interest at 5l. per cent. on the invoice value of the hemp, but not to any further compensation for loss of market. On appeal to the judge of the Admiralty Division:—Held, that the registrar was wrong, and that the proper measure of damage was the difference between the market value of the hemp when it was delivered and when it ought to have been delivered; but, on appeal to the Court of Appeal:—Held, that the registrar's decision must be restored, and that the plaintiff was not entitled to any claim for loss of market. *Id.*

Extent of Liability when Ship Sold—Value of Ship and Freight.—In an action against an owner to recover damages, in consequence of the loss of goods laden on board his ship, the extent to which he is liable, where the completion of the voyage was prevented by the improper sale of the ship, is her value at the time of such sale, and the amount of freight she would have earned had she completed her voyage, and not the amount of freight as calculated at the time of its commencement. *Cannan v. Meaburn*, 2 Moore, 633; 1 Bing. 465.

Loss of Part of Goods—Deterioration of Rest.—In the absence of notice of the consequences which will ensue from a part of goods shipped being lost, and of any contract express or implied to be answerable for such consequences, the shipper of such goods, on a part being lost, is, over and beyond the sum necessary to replace it, only entitled as for the delay to receive interest on the said sum till payment, even though the rest of the goods has been rendered useless till the portion lost was replaced. *British Columbia and Vancouver's Island Spar, Lumber and Saw Mill Company v. Nettleship*, 3 L. R., C. P. 330; 37 L. J., C. P. 235; 18 L. T. 291; 16 W. R. 1046.

Insurance Policy.—Where goods destined to a foreign port are captured in consequence of a deviation, the owners of the goods are entitled to recover from the owners of the ship only the prime cost of the goods, together with the shipping charges, and not the expense of effecting a policy of insurance upon them, without direct proof that the goods, at the time of the loss, were enhanced in value beyond their first price, to the amount sought to be recovered for insurance. *Parker v. James*, 4 Camp. 112.

Neglect to obtain Possession.—Through the negligence of a pilot, not compulsorily taken, a vessel got aground in the course of the voyage, and part of the cargo (rice) was thereby damaged, and other parts it became necessary to throw overboard. The vessel subsequently put into the Mauritius for repairs, where the damaged

portion was sold. On the arrival of the vessel at her port of discharge, the master, who was under the circumstances entitled to land and warehouse the cargo, neglected to cause it to be assorted, and also wrongfully refused delivery to the consignee:—Held, that the consignee was entitled to damages for the goods jettisoned; for the goods sold at the Mauritius; for the non-assortment of the cargo at Liverpool; and for the loss of interest occasioned by the wrongful withholding of the cargo. In estimating the damages for non-delivery of cargo, the court will not take into account that the consignee might have prevented some damage if he had availed himself of 25 & 26 Vict. c. 63, ss. 70, 71, to obtain possession of his cargo; that privilege being conditional upon the consignee depositing with the wharfinger the full amount claimed by the master. *The Norway*, 12 L. T. 57; 13 W. R. 296.

e. Jurisdiction of Court of Admiralty.

Under 24 & 25 Vict. c. 10, s. 6.—The court has jurisdiction only where the breach of contract complained of has been committed by the ship which actually brings the goods into a port in England and Wales. *The Ironsides*, Lush. 458; 31 L. J., Adm. 129; 6 L. T. 59.

Where, therefore, a part of goods shipped on board vessel A. was lost, and the remainder was transhipped and brought into an English port on board vessel B.:—Held, that no jurisdiction was given to it to arrest B. to satisfy the owner of the goods lost. *Id.*

But the Court of Admiralty has jurisdiction over a claim for short delivery of cargo as per bill of lading, in a British port, though the goods not delivered were not in fact carried into port. *The Danzig*, B. & L. 112; 32 L. J., Adm. 164; 9 L. T. 236.

A foreign vessel was chartered to carry coals on the charterer's account to a foreign port, and bring home to England a return cargo of timber; the charterers sued the ship claiming damages for non-delivery of certain coals on the outward voyage, and for the improper delivery of the timber on the return voyage:—Held, that they were not entitled to sue in respect of the non-delivery of the coals abroad, as the 24 & 25 Vict. c. 10, s. 6, did not give the Court of Admiralty such jurisdiction. *The Kasun*, B. & L. 1; 32 L. J., Adm. 97; 9 Jur., N. S. 234.

To a claim for damage to goods imported, instituted under the above provision, a claim of set-off for freight due under the bills of lading will not be allowed. *The Don Francisco*, Lush. 468; 31 L. J., Adm. 14.

For what Acts.—The words "goods carried into any port in England," in 24 & 25 Vict. c. 10, s. 6, do not mean goods imported into England exclusively. *The Bahia*, B. & L. 61.

When, therefore, the master of a foreign ship, having a cargo consigned from New York to Dunkirk, in France, put into Ramsgate, and landed the cargo and refused either to carry it on to Dunkirk or to give delivery to the owners at Ramsgate:—Held, that for such breach of duty by the master the ship could be sued in the Admiralty Court. *Id.*

Upon a vendor asserting his right to stop in transitu, the master, unless aware of some legal defeasance of such right, is bound to deliver

the goods to him, and his refusal to deliver constitutes a breach of duty for which the ship will be liable. *The Tigris*, B. & L. 38; 32 L. J., Adm. 97; 9 Jur., N. S. 361; 8 L. T. 117; 11 W. R. 538.

But the omission by the master of certain particulars in his protest is not a breach of duty or contract on the part of the shipowner or his servants, so as to give the owner of the damaged goods a right of action, even if such omission has been made from improper motives. *The Santa Anna*, 32 L. J., Adm. 198.

In cases brought under 24 & 25 Vict. c. 10, s. 6, the damages will be referred to the registrar and merchants, with instructions to follow the rules of the courts of common law as to the measure of damage. *The St. Cloud*, B. & L. 4; 8 L. T. 54.

13. LIEN ON CARGO.

By Indorsees of Bill drawn against Cargo.—B. consigned a cargo of maize to O. & Co., for sale by them on a joint speculation of himself and them, and he drew upon them against the cargo six bills of exchange for sums amounting to 1,500*l*. He wrote them a letter advising them of the bills and sent them the bill of lading of the cargo, and asked them to protect the bills on presentation. They replied that they would do so. The bills of exchange were on the face of them expressed to be on account of the cargo. B. afterwards indorsed three of the bills to R. & Co. Before the bills were presented to O. & Co. for acceptance they had heard that B. had stopped payment, and when the bills were presented they declined to accept them:—Held, that R. & Co. were not entitled to any lien upon the cargo as against O. & Co. in respect of the three bills indorsed to them. *Robey & Co.'s Preference Ironworks v. Ollier*, 7 L. R., Ch. 695; 27 L. T. 362; 20 W. R. 956.

Of Agent for Expenses.—A vessel having gone ashore with a cargo on board, a ship agent was put in possession of the ship and cargo by the captain, with authority from the captain to do, as his agent, what was for the benefit of all concerned. The agent did work and expended money in discharging the cargo, and brought it to a place of safety, where he took possession of it. The hull broke up and became a wreck. The expenditure by the agent was not for the purpose of enabling the shipowner to perform his contract and to earn freight, but was an extraordinary expenditure for the purpose of saving the property at risk, namely, the cargo:—Held, that the agent had a lien on the cargo for his charges as against the owner, though such charges were incurred without authority from the owner, the claim being analogous to that for general average or salvage. *Hingston v. Wendt*, 1 Q. B. D. 367; 45 L. J., Q. B. 440; 34 L. T. 181; 24 W. R. 664.

Authority of Agent to pay Charges on Cargo.—Held, also, that an agent to whom bills of lading are handed for the purpose of obtaining possession of the cargo of a stranded vessel, is impliedly authorized to bind the owner by an agreement to pay, on condition of the cargo being given up, charges for which there is a lien on the cargo. *Ib.*

When Goods Loaded under Agreement with Broker and without Notice of Charterparty.—A firm of brokers, having chartered a ship, advertised her as about to sail, and invited shippers to send their goods by her. Under the charterparty, the captain was to have an absolute lien on the cargo for freight, dead freight and demurrage. The plaintiff, who had no notice of the charterparty, dealing with the charterers only, sent some tea on board, to be carried at a rate of freight agreed upon between himself and the charterers. Afterwards the charterers were unable to fill the ship, and so to carry out their contract with the owner, and the ship accordingly did not sail. No bills of lading for the tea had been signed, and the captain refused to sign them unless they were expressly made subject to the charterparty. The shipowner claimed a lien on the tea, for the expenses incurred by him through his dealings with the charterers:—Held, that he had no such lien, the plaintiff having had no notice of the charterparty, and there being nothing to put him on inquiry; and the tea was ordered to be given up to the plaintiff, the intended carriage thereof having failed. *Peck v. Larsen*, 12 L. R., Eq. 378; 40 L. J., Ch. 763; 25 L. T. 580; 19 W. R. 1045.

The goods of a shipper in a general ship are not affected by a clause in a charterparty of which he has no notice or knowledge, giving the shipowner a lien on all cargo and freight for arrears of hire due under the charterparty. Semble, the fact that no bills of lading were given for the goods makes no difference in this respect as to the rights and liabilities of the parties. T. hired a ship from M., and by the charterparty gave M. a lien on all cargo and freight for arrears of hire. T. advertised the ship as a general ship, and gave no notice of the charterparty. B. shipped goods and obtained a receipt, but no bill of lading. The hire being in arrears, M. detained the goods of B. for the whole of the arrears:—Held, that M. was not entitled to detain the goods of B., and that B. was entitled to damages for their detention. *The Stornoway*, 51 L. J., P. 27; 46 L. T. 773; 4 Asp. M. C. 529.

Default of Owner of Goods.—If a shipowner is prevented from carrying the cargo to its destination by the act or default of the owner, he has a possessory lien on the cargo for the entire freight and for contribution to any general average expenses incurred. *Cleary v. McAndrew*, *Cargo ex Galam*, B. & L. 167; 2 Moore, P. C. C., N. S. 216; 33 L. J., Adm. 97; 10 Jur., N. S. 477; 9 L. T. 550; 12 W. R. 495.

Landing and Warehousing Cargo—Excessive Claim.—Under the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), s. 67, a shipowner may land goods whenever the delivery of them to the owner within the proper time has been prevented by the force of circumstances, whether the owner of the goods is or is not to blame. *Miedbrodt v. Fitzsimon*, *The Energie*, 6 L. R., P. C. 306; 44 L. J., Adm. 25; 32 L. T. 579; 23 W. R. 932.

If, on landing the goods, the shipowner warehouses them under a stop order for a sum manifestly, and to his knowledge, in excess of the amount of his lien, such conduct is equivalent to a wrongful detention of the goods, for

which the owner of them may bring an action.

Ib.

A fortiori an action will lie against the ship-owner if, on payment of a sum due for average by the owner of the goods, he refuses to reduce the stop order to the amount for which he then has, or can reasonably claim, a lien. *Ib.*

Where no Statutable Warehouses.]—Semble, that the master may still land the cargo without losing his possession and control over it (placing the goods in a warehouse belonging to or hired for his owners), and so preserve his lien. *Morsle-Blanch v. Wilson*, 8 L. R., C. P. 227; 42 L. J., C. P. 70; 28 L. T. 415.

For Freight.]—See FREIGHT, *infra*.

XV. FREIGHT.

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1. NATURE OF.

Admissibility of Evidence to Explain.]—Evidence is not admissible to explain the meaning of the word "freight," which is not an ambiguous term. *Krall v. Burnett*, 25 W. R. 305.

What it is.]—Freight is the reward payable to a carrier for the safe carriage and delivery of goods. It is payable only on safe carriage and delivery. If the goods are safely carried, the master has a lien on the goods for the amount of the freight due for such carriage, and cannot be compelled to part with the goods till such freight

is paid. *Kirchner v. Venus*, 12 Moore, P. C. C. 361; 5 Jur., N. S. 395; 7 W. R. 455.

Freight, for many purposes, is considered as part of the ship, inseparably appurtenant thereto. *Willis v. Palmer*, 7 C. B., N. S. 340; 6 Jur., N. S. 732.

The term "freight," in common parlance, is ambiguous, and may mean a sum of money to be paid at all events upon the taking of goods on board to be carried on a voyage, in lieu of the expectation of earning freight upon the contingency of the ship's arrival. *Andrew v. Moorhouse*, 5 Taunt. 435; 1 Marsh. 122.

2. WHEN PAYABLE.

a. In General.

Legality.]—A vessel freighted from Dantzic to London was, on her arrival, and after a delivery of part of her cargo, seized by the revenue officers on suspicion that she was not Prussian built; the Treasury on petition ordered the ship to be restored on condition that the cargo should be exported, and on payment of 50*l.* as a satisfaction to the seizing officers:—Held, that this was sufficient to shew that the voyage was illegal without condemnation; and that, although the freighters afterwards accepted and exported the cargo according to the terms of the order, the master was precluded from recovering freight. *Blanch v. Solly*, 1 Moore, 531; Holt, 554.

Completion of Voyage.]—Freight cannot be recovered on a charterparty, unless the stipulated voyage has been actually performed; and there is no implied promise to pay a compensation for carrying goods a part of the voyage, unless they are voluntarily accepted at a place short of the port of destination. *Osgood v. Groning*, 2 Camp. 466.

Freight is earned by the carriage and arrival of the goods ready to be delivered to the merchant. *Cargo ex Argos, Gaudet v. Brown*, 5 L. R., P. C. 134; 28 L. T. 745; 21 W. R. 707.

The master is entitled to recover his freight, if he has either carried his cargo to its destination, or if he has been precluded from carrying it by the act or default of the owner. *Cleary v. McAndrew, Cargo ex Galam*, B. & L. 167; 2 Moore, P. C. C., N. S. 216; 33 L. J., Adm. 97; 10 Jur., N. S. 477; 9 L. T. 550; 12 W. R. 495.

The whole freight is payable if the owner of the cargo prevents the master of the ship from forwarding the goods from an intermediate port to their destination. *The Sobolmstein*, 3 L. R., Adm. 293; 36 L. J., Adm. 5; 15 L. T. 393; 15 W. R. 591; *S. P., Christy v. Row*, 1 Taunt. 300.

Although freight should be made payable by the shipper on the shipment of the goods, it is not merely on that account earned without a performance of the voyage. *Mashiter v. Buller*, 1 Camp. 84; *S. P., Clark v. Druisina*, 1 Marsh. 123.

The freight upon a charterparty is not earned until the unloading and delivery of the whole cargo has been completed. *Brown v. Tanner*, 3 L. R., Ch. 597; 37 L. J., Ch. 923; 18 L. T. 624; 16 W. R. 882. See also *Metcalfe v. Britannia Ironworks Company*, post, col. 1434.

b. On Transhipment of Cargo.

Whole Freight Payable.]—The freighter of

goods on which freight was to be paid on delivery at the port of destination, is bound to pay the whole freight originally contracted for, where transshipment has been found necessary, and the goods have been delivered at the port of destination, although the master consigned the goods under fresh bills of lading in the second vessel to his own agent, and the freight was at a much lower rate than that originally contracted for. *Shipton v. Thornton*, 1 P. & D. 216; 9 A. & E. 314.

If a vessel during her voyage is injured, and is compelled to put into a port of refuge, then, by English law, the master is not bound to tranship. He is allowed a reasonable time, either to repair and carry on or to tranship. If he declines to do either, he may be called upon to deliver without payment of freight; but before a reasonable time has elapsed he cannot be required to deliver, except on payment of full freight and waiver thereof. *The Bahia*, B. & L. 292; 11 Jur., N. S. 90; 12 L. T. 145.

Where a vessel is disabled at an intermediate port, the master is allowed a reasonable time to reship and tranship so as to earn his freight. *The Soblomstein*, 1 L. R., Adm. 293; 36 L. J., Adm. 5; 15 L. T. 393; 15 W. R. 591.

German Law—Vessel Liable to Capture.—By German law, if a vessel is liable to risk of capture, either party may withdraw from the contract of affreightment, but the master is not obliged to part with the cargo or to tranship it, unless distance freight, as well as all other claims of the shipowner and the contributions due from the cargo for general average, have been paid or secured:—Held, that a demand upon the master to tranship at his own risk and expense was not such a compliance with the German law as obliged him to tranship. *The Express*, 3 L. R., Adm. 597; 41 L. J., Adm. 79; 26 L. T. 956.

Fraudulent Contract by Master.—Merchants in London chartered the Planter to bring a cargo of guano to this country at a freight of 70s. a ton. Advances to a considerable amount on account of freight were made by the agents of the charterers to the captain of the Planter in South America. After the guano had been shipped, the Planter, in consequence of sea damage, became incapable of proceeding on her voyage; and the agents of the charterers declining to take upon themselves the transshipment of the cargo to any other vessel for the purpose of its being conveyed to its destination, C., the master of the Planter, chartered the Alarm for that purpose in his own name, and took a bill of lading from the plaintiff, who was the captain, which was made out to him as the shipper, the charterers being named therein as the consignees to whom the guano was to be delivered in this country. In that charterparty C. agreed to pay the same amount of freight as his owners had stipulated for in the original charterparty; but, by a private agreement between himself and the plaintiff, he stipulated, that while the 70s. per ton should be required of the consignees on the delivery of the cargo, the plaintiff was to keep only 40s. per ton as the rate of freight as between him and C., and was to hand the difference over to C. The guano having arrived in the Alarm, the charterers demanded to have the cargo, offering to pay the difference between the amount of freight at the rate which they had contracted to pay by the original

charterparty, and the advances which their agents in South America had made to the captain of the Planter. The plaintiff insisted on the payment of the full freight, viz., 70s. per ton. After some discussion, the guano was delivered to the charterers, without prejudice to the lien of the plaintiff, if any, for freight:—Held, first, that the contract made by C. when he chartered the Alarm must be considered as a contract entered into by him on behalf of his owners, and not on behalf of the charterers. *Mattheus v. Gibbs*, 30 L. J., Q. B. 55; 7 Jur., N. S. 186; 3 L. T. 551; 9 W. R. 200.

Held, secondly, that if the contract was entered into by C. as agent of the charterers, it was bad on two grounds; first, as being fraudulent, and fraudulent to the knowledge of the plaintiff; and, secondly, as being beyond the limits of any authority which C. could exercise in the position in which he was placed, and therefore the charterers were not bound by it. *Id.*

c. Pro ratâ itineris.

Goods Accepted at Intermediate Port.—A shipowner has no claim to freight pro ratâ itineris peracti, except there is an acceptance of the goods by the shipper at the shorter destination, such that the law will imply a new agreement for freight pro ratâ. *The Newport*, Swabey, 335. And see *Osgood v. Groning*, ante, col. 1430.

No freight is payable if the owner of the cargo is compelled against his will to take the cargo at an intermediate port. *The Soblomstein*, 1 L. R., Adm. 293; 36 L. J., Adm. 5; 15 L. T. 393; 15 W. R. 591.

To sustain a claim for pro ratâ freight, there must be such a voluntary acceptance of the goods by their owner at an intermediate port, as to raise a fair inference that further carriage of the goods was dispensed with. *Id.*

In an action on a charterparty, in which the defendant covenanted to pay so much for freight for "goods delivered at A.," freight cannot be recovered pro ratâ itineris if the ship is wrecked at B. before her arrival at A., though the defendant accepted his goods at B. *Cook v. Jennings*, 7 T. R. 381.

Goods Sold at Intermediate Port.—Freight was payable by the terms of a charterparty upon delivery of cargo at the port of destination. The ship meeting with sea damage from heavy weather, the captain at an intermediate port justifiably sold part of the cargo shipped by the charterer, in order to raise funds for the necessary repairs. The cargo so sold realized more than it would have done if carried to the port of destination. The ship, having completed her repairs, proceeded to the port of destination with the remainder of the cargo. A general average statement was afterwards made up, under which the charterer received from the shipowner the amount realized by the cargo sold at the intermediate port. The shipowner claimed from the charterer freight pro ratâ itineris on the cargo so sold:—Held, that he was not entitled to such freight. *Hopper v. Burness*, 1 C. P. D. 137; 45 L. J., C. P. 377; 34 L. T. 528; 24 W. R. 612.

Where goods damaged on the voyage are landed at an intermediate port and sold without the assent of their owner, the shipowners are not entitled to freight pro ratâ itineris. *Acatos v.*

Burns, 3 Ex. D. 282; 47 L. J., Ex. 566; 26 W. R. 624—C. A.

To entitle a shipowner, in the absence of a special contract, to demand pro ratâ freight, where the goods have been sold at an intermediate port (being so much damaged as not to be worth forwarding), it must be shewn that the owner of the goods had an option of having them sent on or of accepting them at such intermediate port. *Hill v. Wilson*, 4 C. P. D. 329; 48 L. J., C. P. 764; 41 L. T. 412.

A cargo of rice, shipped at Batavia, was by the bill of lading to be delivered at Rotterdam to the plaintiff, he paying freight for the same. The vessel, having encountered a hurricane, was compelled to put into the Mauritius, where the rice, having been found to be damaged and in a state of rapid putrefaction, was, of necessity, sold by the master, who acted bonâ fide, but without the knowledge of either the shipper or shipowner:—Held, that no freight was due, either for the whole voyage or pro ratâ itineris. *Vlierboom v. Chapman*, 13 M. & W. 230; 13 L. J., Ex. 384; 8 Jur. 811.

Where freight was to be paid at so much per ton, on a right and true delivery of the homeward-bound cargo, from Honduras Bay to London, and the ship and cargo, after capture and re-capture, having been wrecked at St. Kitt's, into which they were carried by the re-captors, a sale of the cargo was directed by the vice-admiralty courts there, on the application of the master, acting bonâ fide for the benefit of all concerned, but without orders from any; and the proceeds of the sale were remitted to the shipowners:—Held, that the freighter might recover such proceeds in an action for money had and received, without allowing freight pro ratâ itineris; for such form of action is only a waiver of any claim for damages for the tortious act, taking the actual proceeds of the sale as the value of the goods (subject to the legal consequences of considering the demand as a debt, which admits of a set-off), but does not recognize the right of the vendor so to convert the goods. And here, the act of conversion (for such it must be taken to be) being made by the master, who is the general agent of the shipowners (and not, as in *Buillie v. Modigliani*, 6 T. R. 421, by the act of a court of competent jurisdiction), was unlawful, and discharged the claim of the shipowners for freight pro ratâ itineris. *Hunter v. Prinsep*, 10 East, 378. And see *Morris v. Robinson*, 5 D. & R. 35; 3 B. & C. 196.

Delivery at Port as near as Ship could safely get.—A cargo of railway bars was shipped under a charterparty to be carried from a port in England to Taganrog, in the Sea of Azof, or so near thereto as the ship could safely get, freight to be paid in London against certificate of right delivery of cargo. On the arrival of the ship, on the 17th of December, at Kertch, which was as near as she could then get to Taganrog, the captain found the sea blocked with ice till the ensuing spring; and he proceeded to discharge the cargo, notwithstanding the opposition of the charterers' agent. By the bill of lading the cargo was deliverable at Taganrog to a Russian railway company, "freight and other conditions as per charterparty." As no bill of lading was produced at Kertch, the captain placed the cargo in charge of the custom-house authorities; and they on the 27th of December delivered it to the

agent of the railway company on his producing a written authority from the company, together with copies of the charterparty and bill of lading, notwithstanding the captain's claim to retain it until the claim was paid. The agent of the company gave a written acknowledgment that he had received the cargo on the power of the charterparty and bill of lading passed to him by the railway company. The ship then sailed from Kertch. The shipowner having sued the charterers for freight:—Held, first, that he was not entitled to full freight, as the delivery at Kertch was not a delivery within the charterparty. *Metcalfe v. Britannia Ironworks Company*, 2 Q. B. D. 423; 46 L. J., Q. B. 443; 36 L. T. 451; 25 W. R. 720—C. A.

Held, secondly, that he was not entitled to freight pro ratâ, as no new contract for such freight had been made. *Id.*

See also cases under next sub-heads.

d. Capture.

Right of Owners.—A ship bound for London, after taking in her cargo, but before breaking ground, was cut out of her port of lading in Jamaica by a French privateer; but was afterwards recaptured and carried into another port in the same island, where the cargo was sold by order of the Court of Admiralty, for the benefit of the freighters:—Held, that the owners of the ship were not entitled to any part of the freight, though by the usage of the trade the ship was loaded at their expense. *Curling v. Long*, 1 B. & P. 634.

Covenant by charterparty made between the master of the ship and the freighter, upon a voyage from Liverpool to Maranhão, and thence back to L., that the freighter should pay for the freight from L. to M. 120*l.*, and from M. to L. at the rate of 2½*d.* per lb. for cotton, which should be delivered at L., such freight to be paid as follows, viz. 120*l.* for freight of the outward cargo to M., and as much cash as might be found necessary for the vessel's disbursements in M., to be advanced by the freighter, his agents or assigns, to the master when required, free from interest and commission, at the current exchange of the place, and the residue of such freight to be paid on delivery of the cargo in L. The ship arrived at M., where the 120*l.* outward freight, and also 192*l.* for the necessary disbursements of the ship, were paid or advanced by the freighter to the master; and the ship received her homeward cargo and sailed for L., but was lost by capture:—Held, that the freighter was not entitled to recover back the 192*l.* *De Silvale v. Kendall*, 4 M. & S. 37.

e. Restraint of Princes and Prohibition.

Restraint.—If a ship freighted to H. is prevented by restraint of princes from arriving, and the consignees direct the master to deliver the cargo at G., and accept it there, he may maintain an action upon an implied contract to pay freight pro ratâ itineris. *Christy v. Row*, 1 Taunt. 300.

And if the master is prevented by the default of the consignees, or restraints of princes, from delivering the whole cargo there, he will be entitled to freight pro ratâ for the part delivered. *Id.*

— **Delay—Safe Port.**—A charterparty made between English merchants at Valparaiso, and the owners of a Prussian ship, provided that the ship should proceed and deliver cargo at a port to be named by the charterers in Great Britain, or on the continent between Havre and Hamburg. The charterer named Dunkirk. On the arrival of the ship off Dunkirk, the master was informed by a pilot that war had commenced between Prussia and France. The master thereupon took the ship into Dover, and refused to deliver the cargo without payment of full freight. War was not in fact declared until three days afterwards:—Held, that as the port named by the charterer was an unsafe port, and Dover being a port which might have been named within the terms of the charterparty, the owners were entitled to full freight. *Duncan v. Koster, The Teutonia*, 4 L. R., P. C. 171; 41 L. J., Adm. 57; 26 L. T. 48; 20 W. R. 421; 8 Moore, P. C. C., N. S. 411.

Detention.—A ship let to freight by the month, in attempting to enter a blockaded port by order of the freighters, was seized, and her cargo condemned; but, being afterwards released, took in other goods, and delivered them to the freighters, according to the charterparty:—Held, that there was no suspension of the freight during the detention of the ship. *Moorsom v. Greaves*, 2 Camp. 627.

Recalling and Sale.—Under an agreement in the nature of a charterparty, whereby the plaintiff let his ship to freight to the defendant on a voyage from Shields to Lisbon, with convoy, the freight to be paid on right delivery of the cargo; the ship having sailed from Shields with her cargo, and joined convoy at Portsmouth; and, after being detained near a month off Lymington, her sailing orders being recalled by the convoy, in consequence of the occupation of Portugal by the enemy; and the defendant having refused to accept the cargo at Portsmouth, to which the ship returned, it was unloaded by the plaintiff, after notice to the defendant, and then was sold by consent of both parties, without prejudice:—Held, that he could not recover freight pro rata, or demurrage. *Liddard v. Lopes*, 10 East, 526.

Embargo taken off—Continuing Voyage.—If a British merchant charters a Swedish ship on a voyage to St. Michael's for a cargo of fruit, and the charterparty contains the usual exception against the restraint of princes, and the ship is prevented from reaching St. Michael's within the fruit season by an embargo laid on Swedish vessels by the British government, the Swedish owner cannot, by proceeding on the voyage after the embargo is taken off, entitle himself to recover the freight against the British merchant. *Touteng v. Hubbard*, 3 B. & P. 291.

Position of Blockading Squadron.—A blockading squadron may lawfully be at any distance convenient for shutting up the port blockaded, provided it does not obstruct any other; and a ship will be considered as guilty of a wilful breach of the blockade which actually comes within reach of capture by the squadron, if the circumstances were such that a prudent man would have inquired whether that were the

blockading squadron, although the captain was actually ignorant of its being so, not having inquired. *Naylor v. Taylor*, M. & M. 205.

Prohibition.—A ship was let to freight for a voyage, to take out a small cargo of lead, and to bring home a return cargo, for which freight was to be paid at eleven guineas per ton for the whole ship's admeasurement. If, from political circumstances, she should be unable to discharge her cargo, and consequently to obtain a return cargo, the freighters agreed to pay a gross sum, less than the amount of the freight per ton; the ship being prevented from discharging, and the freighter supplying no homeward cargo, the master took in goods on freight, and brought them home together with the lead:—Held, that he was entitled to receive the gross sum stipulated, and also to retain the freight which the ship had earned. *Bell v. Fuller*, 2 Taunt. 285; 12 East, 496, n.

Upon a contract to fetch a cargo of corn from a particular place, where, on arriving, it is found that the government has prohibited the exportation of corn, freight is payable though the ship returns in ballast, after staying out her days of demurrage. *Blight v. Page*, 3 B. & P. 295, n.

— **Knowledge of.**—Where the plaintiff by charterparty, dated the 1st March, let to the defendant a ship to freight, and by its terms the plaintiff was to carry an outward-bound cargo of goods (not prohibited by restraint of princes) from Liverpool to Carolina in America, and to bring back a cargo of rice for the defendant, he paying freight for the same; and the plaintiff cleared out on the 22nd March from Liverpool with a cargo of salt, and on the 22nd May following arrived at Carolina, where the importation of British goods was prohibited by an order issued on the 1st March, the day the charterparty was dated; and also a further order prohibiting the exportation of goods to England, so that the plaintiff could not unload the salt nor bring back a cargo of rice:—Held, that the plaintiff could not recover for freight homewards, if it could be established that he knew of the prohibition at the time of the ship's clearance from Liverpool. *Henlop v. Jones*, 2 Chit. 550.

— **Back Freight.**—A ship with a general cargo sailed from London for Havre with some petroleum on board. Under the bill of lading the shipowner was to deliver the petroleum at Havre, and it was to be taken out by the defendant within twenty-four hours after arriving at Havre, or ten guineas a day was to be paid for demurrage. On the ship's arriving at Havre, the authorities of the port made the captain take her away in consequence of the petroleum being on board. Thereupon he went to neighbouring ports, but was not allowed to stay there. Returning to Havre, he discharged his general cargo, and no bill of lading having been presented to him, and no application having been made to him for the delivery of the petroleum, he brought it back to London. On the shipowner claiming freight, back freight, demurrage and expenses:—Held, that he was entitled to freight, back freight and expenses. Freight is earned by the carriage and arrival of the goods ready to be delivered to the merchant. And although the petroleum could not be landed at Havre, it was

in the port a reasonable time, during which the owner might have received it; and the freight was accordingly earned. *Cargo ex Argos, Gaudet v. Brown*, 5 L. R., P. C. 134; 28 L. T. 745; 21 W. R. 707. Affirming 42 L. J., Adm. 49.

Where no application for delivery is made, the captain may land and warehouse the cargo at the expense of the merchant; and where that is forbidden by the authorities of the port, he is not justified in destroying the cargo; but, in the absence of advice, he may take it to such a place as in his judgment is most convenient for the merchant, and may charge to the merchant all expenses properly incurred; consequently, here the shipowner was entitled to back freight and expenses. The demurrage and the expenses incurred in the ineffectual attempt to land at the neighbouring ports were not allowed, but were looked on as part of the expenses of the voyage. *Ib.*

f. Injury to Goods or Short Delivery.

Consignee Accepting.—If the consignee of goods accepts any benefit by the carriage, he cannot defend himself from the payment of freight, on the ground that the goods have been damaged by the master in carrying them, though the damage exceeds the amount of the freight. *Shields v. Davis*, 6 Taunt. 65; 4 Camp. 119.

Effect of, in Action for Freight by Shipowner.—Freight is recoverable as upon a right and true delivery of the cargo agreeably to the bills of lading, upon proof of having delivered the entire number of chests, for which bills of lading had been signed; though it appeared that the contents of the chests were damaged by the negligence of the master and crew on board, in not ventilating them sufficiently; the party injured having his counter-remedy by action for such negligence. *Davidson v. Gwynne*, 12 East, 381.

Where the master and freighter of a vessel of 400 tons mutually agreed in writing, that the ship, being every way fitted for the voyage, should with all convenient speed proceed to St. Petersburg, and there load from the freighter's factors a complete cargo of hemp and iron, and proceed therewith to London, and deliver the same on being paid freight for hemp 5*l.* per ton, for iron 5*s.* a ton, one-half to be paid on right delivery, the other at three months:—Held, that the delivery of a complete cargo was not a condition precedent; and that the master might recover freight for a short cargo at the stipulated rates per ton, the freighter having his remedy in damages for such short delivery. *Ritchie v. Atkinson*, 10 East, 295.

If a shipper of goods sustains a loss by reason of the misconduct or negligence of the shipowner or his agents, his remedy is by action, and he cannot resist payment of freight on the ground that the goods were unfit for use when they arrived at the port of destination. *Garrett v. Melhuish*, 4 Jur., N. S. 943.

In cases of short delivery under a bill of lading, a deduction may be made from the freight of such proportion of the freight as would have been payable if the goods had been delivered, and this, even though the freight is lump freight; but the value of the goods not brought to destination may not be deducted from freight, but must, if necessary, be the sub-

ject of a separate action. *The Norway*, 12 L. T. 57; 13 W. R. 296.

A consignee of goods under a bill of lading has no right to deduct from the freight payable on delivery of goods the value of articles which, though mentioned in the bill of lading, turn out not to have been put on board. *Meyer v. Dresser*, 16 C. B., N. S. 646; 33 L. J., C. P. 289; 10 L. T. 612; 12 W. R. 983.

The whole freight named in a bill of lading is payable to the shipowner carrying under it, although a less quantity of goods than the quantity named in the bill of lading is delivered, if the quantity delivered is no less than the quantity received by the shipowner. *Blanchet v. Powell's Llantwit Collieries Company*, 9 L. R., Ex. 74; 43 L. J., Ex. 50; 30 L. T. 28; 22 W. R. 490.

— **Custom.**—This being the general law, it cannot be altered by a universal practice of merchants, which is not confined to any particular place or trade, to have the value of such goods deducted from the freight. *Meyer v. Dresser*, *supra*.

— **Foreign Law.**—By French law, the whole freight is payable whether the whole quantity named in the bill of lading is carried or not, and therefore, in the case of a bill of lading executed in France, it is immaterial whether or not the shipowner received the whole quantity named in the bill of lading. *Blanchet v. Powell's Llantwit Collieries Company*, *supra*.

The law of a foreign country, entitling a consignee to reduce the claim against him for freight by the value of goods put on board and lost, but which amounts to an allowance by way of set-off, and not to an extinguishment of the claim for freight, is matter of procedure only, and therefore does not apply to an action for freight brought in this country against the consignee. *Meyer v. Dresser*, *supra*.

— **Charterer cannot Abandon Goods when Damaged.**—A charterer, whose cargo has been damaged by the fault of the master and crew, so as, upon arrival at the port of discharge, to be worth less than the freight, is not entitled to excuse himself from payment of freight by abandoning the cargo to the shipowner. *Dakin v. Oxley*, 15 C. B., N. S. 646; 33 L. J., C. P. 115; 10 Jur., N. S. 655; 10 L. T. 268; 12 W. R. 557.

Lump Freight—Part of Cargo Lost by Perils of Sea.—A charterparty from Riga to London provided that the ship should load a full and complete cargo of lath-wood, and deliver the same on being paid freight as follows: a lump sum of 315*l.* There was the usual exception of sea risks, and the freight was to be paid half on arrival and the remainder on unloading and right delivery of cargo. Part of the cargo, loaded in accordance with the charterparty, was lost by perils of the sea, without any default of the master or crew:—Held, that the shipowner was, on delivery of the remainder of the cargo, entitled to the full sum. *Robinson v. Knights or Knight*, 8 L. R., C. P. 465; 42 L. J., C. P. 211; 28 L. T. 820; 21 W. R. 683.

— **Loss by Fire.**—By a charterparty a ship was to load at Colombo or Cochin, from the charterers' agents, a full and complete lading, and proceed to London, and discharge there,

fire and other dangers of the sea excepted, a lump sum freight of 5,000*l.*, to be paid after entire discharge and right delivery of the cargo in cash two months after the date of the ship's report inwards at the custom-house. Part of the cargo loaded in accordance with the charterparty was lost by fire, without any default of the master or crew, and the remainder was delivered in London:—Held, that the shipowner was entitled under the charterparty to the full sum of 5,000*l.* *Merchant Shipping Company v. Armitage*, 9 L. R., Q. B. 99; 43 L. J., Q. B. 24; 29 L. T. 809—Ex. Ch. Affirming 29 L. T. 97; 22 W. R. 11.

Loss of Cargo before Delivery.—Cement was shipped under a bill of lading which stipulated that freight should be paid "within three days after arrival of ship, and before delivery of any portion of the goods." The ship arrived in port with the cement on board, but was within the three days, in consequence of an accidental fire, scuttled with a view to the saving of ship and cargo; and on her being raised the cement was found to be useless, having ceased to exist as cement, and the consignees refused to accept it or to pay freight:—Held, that the shipowners, not being ready to perform their part of the contract, were not entitled to sue for freight. *Duthie v. Hilton*, 4 L. R., C. P. 138; 38 L. J., C. P. 93; 19 L. T. 285; 17 W. R. 55.

When Payable Pro ratâ.—In case of a loss at sea, freight must be paid only in proportion to the goods saved, and the part of the voyage which has been performed. *Luke v. Lyde*, 2 Burr. 882; 1 W. B. L. 190.

—Memorandum of Charter—Consideration.

—A., owner of a vessel, took in a cargo at Calcutta, to be carried thence to St. Petersburg, which was purchased by his supercargo on his account; but B. & Co. advanced 26,000*l.* towards such purchase, and bills of lading were made out by the captain, stating the cargo to be shipped by B. & Co. on account of A., to be delivered at St. Petersburg to B. & Co.'s order, or their assigns. The words, "he or they paying freight," were struck out of the bills of lading, which were indorsed by B. & Co. and transmitted to the defendants, their correspondents in London. Before the ship sailed, a memorandum for charter was entered into at Calcutta, between A.'s supercargo and the captain, whereby it was agreed that the ship should be despatched with a cargo for St. Petersburg, to be there delivered to the order of the freighter, on being paid freight at a certain rate therein stipulated. The ship, in proceeding on the voyage, was lost, but part of the cargo was saved, and sold with the consent of the captain for 13,000*l.* The defendants, as indorsees of the bills of lading, applied for the proceeds of the salvage, which had been previously claimed by the plaintiffs, as agents on the part of A.; and the captain also claimed a lien thereon for pro ratâ freight; on which the defendants agreed by letter (if the plaintiffs would cause the claims of A. and the captain to be withdrawn) to be accountable to them, as the agents of A., for whatever might appear to be due for the pro ratâ freight the ship was entitled to, agreeably to the charterparty entered into by A.'s supercargo and the captain. In pursuance of

this agreement these claims were withdrawn, and the defendants received the amount of the salvage, and then refused to pay the pro ratâ freight, as the instrument entered into at Calcutta was merely a memorandum for charter; and insisted that there was no consideration for the defendants' promise. But, in an action for non-payment of the pro ratâ freight under the agreement:—Held, that the plaintiffs were entitled to recover, as the defendants were aware of the circumstances which had happened before the agreement was entered into. *Thornton v. Fairlie*, 2 Moore, 397; 8 Taunt. 354.

—**Reloading and Continuing Voyage.**—A ship was chartered from London to B., there to deliver her cargo, reload, and proceed to a port between G. & A.; freight for voyage out and home, 1,300*l.*, if delivered at G., in S., London or Liverpool; 200*l.* to be paid in London on the vessel's departure, the remainder on final delivery of the homeward cargo. The ship proceeded to B., delivered her cargo there, and sailed again with a cargo of hides, which the charterers consigned to G. At F., the ship and about one-third of the hides were lost. The vice-consul of F., acting on behalf of the charterers, at the request of the captain of the ship, transmitted the residue of the hides, by another vessel, to the consignees of the charterers at G., where they were accepted, and the freight from F. to G. paid by the charterers:—Held, that the plaintiff was not entitled to the 1,300*l.* freight; that he was not entitled pro ratâ itineris for freight to B., or from F. to G., but that he was entitled to freight, pro ratâ, from B. to F. *Mitchell v. Darthez*, 2 Scott, 771; 2 Bing. N. C. 555; 1 Hodges, 418.

g. Abandonment and Loss of Ship.

Loss of Ship—Freight Payable at fixed Periods.—A ship employed by a charterparty on both an outward and a homeward voyage at so much per month, and which was lost in the homeward voyage, was held to have earned the freight due for the outward voyage. *Mackrell v. Simond*, 2 Chit. 666.

The freight, being reserved at so much per month, was earned at the end of each month, although the stipulated time of payment was from four months to four months, and the ship was lost at the end of fourteen months. *Harrlock v. Geddes*, 10 East, 555.

By a charterparty the freighter covenanted to pay to the owner freight at and after the rate of so much per ton per month, for the term of six months at least, and so in proportion for less than a month, or for such further time than six months as the ship might be detained in the service of the freighter, until her final discharge, or until the day of her being lost, captured, or last seen or heard of; such freight to be paid to the commander of the ship in manner following, viz., so much as might be earned at the time of the arrival of the ship at her first destined port abroad, to be paid within ten days next after her arrival there, and the remainder of the freight at specified periods:—Held, that this constituted one entire covenant, and that the arrival of the ship at her first destined port abroad was a condition precedent to the owner's right to recover any freight; and that the ship having been lost on her outward voyage, the

owner was not entitled to recover freight at so much per calendar month to the day of the loss. *Gibbon v. Mendez*, 2 B. & A. 17.

Abandonment—Effect of on Freight.—By the abandonment of a ship by its crew during a voyage, without any intention to retake possession, a right is given to the owner of cargo on board to treat the contract of affreightment as at an end. A ship with a cargo of resin in barrels, on a voyage from America to Rotterdam, was, owing to the perils of the sea, abandoned by her crew off the American coast. She was afterwards saved by another vessel, and brought with her cargo by the salvors, into a port in England, and there arrested in an action for salvage by her salvors. Before the shipowner had released the ship or cargo, the owners of the cargo applied for and obtained from the Admiralty Court an order for the release of the cargo to them without payment of any freight, upon their giving bail to the salvors:—Held, that the cargo owners were entitled to treat the contract of affreightment as at an end, and that therefore the order of the Admiralty Court was rightly made. *The Cito*, 7 Adm. D. 5; 51 L. J., Adm. 1; 45 L. T. 663; 30 W. R. 836; 4 Asp. M. C. 468—C. A.

—Cargo Rescued by Salvors.—A barque bound from Charleston with a cargo of cotton, shipped under bills of lading for Bremen, the dangers of the seas excepted, was abandoned in the English Channel in consequence of damage received in a collision, and was taken possession of as a derelict by salvors, who towed her into an English port, and there placed her in safety. To recover salvage reward for their services the salvors promoted causes of salvage in the High Court of Admiralty against the barque, her cargo, and freight, and caused her and her cargo to be arrested at the port to which they had so towed her. Under an order of unelivery obtained in one of these causes the cargo was unladen and found to be much damaged by sea water, and on the application of some of the salvors, and with the consent of the cargo owners, but contrary to the wishes of the owners of the ship, who offered to give bail and carry the cargo on to Bremen, the court, considering that a sale would be for the benefit of all interested, decreed that the cargo should be sold, but reserved all questions of freight. Pleadings as to freight were afterwards entered into, and the shipowners claimed to be paid, out of the proceeds of the cargo in the registry, the full amount of the freight stipulated to be paid on delivery of the cargo at Bremen:—Held, that under the circumstances the shipowners were not entitled to any freight. *The Kathleen*, 4 L. R., Adm. 269; 43 L. J., Adm. 39; 31 L. T. 204; 23 W. R. 350.

—Right of Underwriters.—When on the abandonment of a ship on the voyage, the cargo is taken to its destination in another vessel hired by the captain, the underwriters of the ship are not entitled to the freight due on the delivery of the cargo. *Hickie v. Rodocanachi*, 4 H. & N. 455; 28 L. J., Ex. 273; 5 Jur., N. S. 550; 7 W. R. 545.

A shipowner loaded his ship, which was bound for Liverpool, with goods on his own account, and he insured the ship and the freight of the

goods by distinct insurances. The ship was stranded at S., on the English coast, twenty miles from Liverpool. The shipowner abandoned the ship to the insurers on the ship. After the abandonment the shipowner, at his own expense, had a part of his goods taken out and conveyed by lighters to Liverpool, and he, at his own expense, procured assistance, by which the ship, with the remainder of his goods on board, was brought to Liverpool. Afterwards the insurers accepted the abandonment. On the assured claiming for the loss of the ship from the insurer, the insurer claimed credit for the freight of the goods of the shipowner:—Held, that nothing in the nature of freight for the carriage of the shipowner's goods to S. passed to the abandonees; but that they were entitled to an allowance for the carriage of the part of the goods from S. to Liverpool in the ship, after the abandonment, to be estimated at the current rate of freight, as if brought from Liverpool by another ship. *Miller v. Woodfall*, 8 El. & Bl. 493; 27 L. J., Q. B. 120; 4 Jur., N. S. 302.

Contract with Several Companies.—The plaintiffs shipped goods at Liverpool on board the defendants' ship, to be carried, as stated by the bill of lading, "via Colon (Aspinwall) and Panama to San Francisco; that is to say, by arrangement between the West India and Pacific Steamship Company, the Panama Railway Company, and the Pacific Mail Steamship Company, to be carried to Colon (Aspinwall) by the packets of the West India and Pacific Steamship Company, from Colon (Aspinwall) to Panama by the Panama Railroad Company, and thence to the port of destination, by the Pacific Mail Steamship Company . . . freight and primage to be considered as earned, ship lost or not lost;" the freight being 14l. 5s. per ton, payable in Liverpool. The whole freight at the aforesaid rate was paid to the defendants' agent at Liverpool, and the bill of lading was signed by him "for the service from London to Colon (Aspinwall)," and by the agent of the two other companies "for the service from Colon (Aspinwall) to San Francisco." The private arrangement entered into between the three companies for the division of the freight between themselves was set forth in the case, to which was added also a copy of the handbook published by the defendants containing the rates of freight charged for the carriage of goods from Liverpool to Colon (Aspinwall), to Panama, and to San Francisco, but not the charges for conveyance from one to another of the three last-mentioned places. The ship having sailed from Liverpool, was lost with all her cargo, before reaching Colon (Aspinwall), and the defendants, after receiving notice of the loss, paid over to the two other companies their proportion of the freight, which had been paid by the plaintiffs. The plaintiffs having brought an action against the defendants for money had and received to recover the proportion of freight so paid over to the two other companies, viz., for the carriage of the goods from Colon (Aspinwall) to Panama, and from Panama to San Francisco:—Held, that the bill of lading formed one contract between the plaintiffs and the defendants, for the conveyance of the goods from Liverpool to San Francisco, for one entire consideration, viz., the amount of freight paid, and not several contracts between the plaintiffs and

each of the companies; and therefore as the consideration for which the freight was paid had not wholly failed, the plaintiffs could not maintain the action against the defendants. *Greeves v. West India and Pacific Steamship Company*, 22 L. T. 615—Ex. Ch.

Charterers absolved from Loading—Insurance.]

—By a charterparty, which contained the exceptions of dangers and accidents of navigation, the vessel was to proceed with all convenient speed from Liverpool to Newport, and there load a cargo of iron rails for San Francisco, and the freight was to be paid on right delivery of the cargo. The vessel duly proceeded on her voyage from Liverpool to Newport, but before arriving there she took the rocks at Carnarvon Bay. She was ultimately got off the rocks, and though the damage she sustained was not such as to constitute a total loss, either actual or constructive, the time necessary for getting her off and repairing her so as to be a cargo-carrying ship, was so long as to put an end, in a commercial sense, to the commercial speculation entered upon by the shipowner and the charterers, and the latter accordingly abandoned the contract and hired another vessel, by which they forwarded the rails to San Francisco:—Held, by a majority of the court, that under these circumstances there was a total loss of chartered freight by perils of the sea within the meaning of a policy of insurance on chartered freight on the voyage. *Jackson v. Union Marine Insurance Company*, 8 L. R., C. P. 572; 42 L. J., C. P. 284; 22 W. R. 79.

3. PAYMENT.

a. To whom.

i. In General.

Master.]—The master has a special property in the vessel, and may declare for the freight of goods as carried in his vessel, though he is not owner. *Shields v. Davis*, 6 Taunt. 65.

A captain with whom a contract is made in his own name may sue for freight under it. *Seeger v. Duthrie*, 8 C. B., N. S. 45; 29 L. J., C. P. 253; 6 Jur., N. S. 1095. Affirmed, 8 C. B., N. S. 72; 30 L. J., C. P. 65; 7 Jur., N. S. 239; 9 W. R. 166—Ex. Ch.

Where the master covenanted to proceed with goods from London to Tangiers, "there to apply to the correspondents, factors, or agents of the charterer for orders, whether he was to proceed to St. Lucar or Cadiz; and that, pursuant to the orders, he would make a right and true delivery to the correspondents, factors, or agents of the charterer agreeably to bills of lading; and the charterer covenanted that he would pay to the master immediately on a right and true delivery of the cargo, in full for the freight of the ship, at a certain rate in sterling money; and afterwards bills of lading were signed and delivered, making the cargo deliverable at Tangiers and St. Lucar, to P. (the charterer's agent at Tangiers), or his assigns, he or they paying freight for the goods so much in sterling money, at the current exchange at Cadiz on London; and the master was ordered by P. at Tangiers to deliver the cargo at Cadiz (by which it was averred that the master was prevented from delivering the same to any of the correspondents, factors, or agents of the charterer at Tangiers or St. Lucar agree-

ably to the bills of lading), and did deliver it at Cadiz, to the agent of the defendant in that behalf, according to the charterparty; the master, who had received the freight from the agent, on delivery of the cargo to him, was held entitled to recover it from the charterer. *Shepherd v. De Bernales*, 13 East, 565.

Obligee of Bottomry Bond.]—The receipt of freight by the obligee of a bottomry bond is, in law, a receipt of it by the shipowner, whose master has given that bond in discharge of expenses incurred in the necessary repairs of the ship. *Benson v. Chapman*, 2 H. L. Cas. 696; 8 C. B. 950; 13 Jur. 969.

Master or Shipowner.]—Where a master entered into a contract of affreightment, not under seal, and the shipper agreed to pay the freight at the end of the voyage by a bill at two months, without saying to whom:—Held, that the owner was entitled to receive the freight, without the intervention of the master, and that the freighter was not liable to the captain upon the contract, after he had paid the owner. *Atkinson v. Cotesworth*, 5 D. & R. 552; 3 B. & C. 647; 1 C. & P. 339.

Agent of Ship's Husband.]—Freight to be earned by a ship on a homeward voyage belongs to the shipowner, so that an agent employed by a ship's husband to obtain a charterparty, has no authority to cause it to be paid to himself, for the purpose of setting it off against a debt due to him from the ship's husband. *Walshe v. Provan*, 8 Ex. 843; 1 C. L. R. 823; 22 L. J., Ex. 355.

Third Party.]—Where the bill of lading provides that freight shall be payable to a third party, M., and not to the shipowner, payment for freight to the master or shipowner affords no answer to an action by M. in the name of the shipowner for non-payment of freight. *Kirchner v. Venus*, 12 Moore, P. C. C. 361; 5 Jur., N. S. 395; 7 W. R. 455.

Agreement as to Joint Adventure—Assignment.]—The plaintiffs, who were shipowners, having offered their vessel for hire to the defendants, the latter objected to take it, on the ground of its being too large, whereupon the plaintiffs offered to take half the ship, as adventurers, in partnership with the defendants. It was then arranged that a charterparty should be executed by the plaintiffs and the defendants, and that an agreement as to the adventure should be signed by A., the plaintiffs' clerk, as their agent, and a memorandum of guarantee should be signed by the plaintiffs, the same to be one transaction. The agreement stated that the trading cargo should be upon the joint account and risk of the defendants and A., and that, after payment or deduction of the freight, the profit or loss should be borne and received, or paid by the parties in equal moieties. The plaintiffs, by the memorandum of guarantee, guaranteed A. from all losses and expenses happening in the course of such trading. The plaintiffs being indebted to D. & Co., subsequently deposited the charterparty with them as a security, with an indorsement upon it directed to the defendants, and requiring them to pay the amount of what was due to D. & Co. Notice

of this was afterwards given to the defendants. The action was brought by D. & Co. to recover the freight due under the charterparty:—Held, that the defendants were bound to pay freight to the shipowners, and that the parties were then to bear and receive equally the loss and profit of the adventure. *Boyd v. Mangles*, 3 Ex. 387; 18 L. J., Ex. 273. See *Mangles v. Dixon*, 3 H. L. Ca. 702.

Privity of Contract.—Messrs. G., who were merchants in Spain, entered into a charterparty with the master and captain of a vessel, being, at that time, at a port in Spain, and, by the terms of the charterparty, it was agreed that the vessel should load a complete cargo of flour, the captain to sign bills of lading at more or less freight without prejudice to the agreement; and the vessel was to proceed with her cargo to Liverpool, and deliver the same on payment of the freight in a lump sum of 100*l*. Messrs. G. loaded the vessel with 1,350 sacks of flour, and consigned the same to L. de B., in England. P. put on board 500 sacks, for which the master gave a bill of lading, in which it was stated that he would deliver the same in the name of P. to the defendants, "paying him freight according to contract with Messrs. G." These 500 sacks were shipped on the joint account of P. and the defendants, and the latter, whilst the flour was in the course of transit, became the sole owners thereof, by purchase from P. of his interest therein. P. sent the bill of lading to the defendants, inclosed in a letter, in which he stated that the bill of lading did not express the freight, but that he had given a letter or order in favour of Messrs. G., that, on good delivery, the defendants would pay Messrs. G. the freight on the 500 sacks. The amount of freight mentioned in this letter exceeded that specified in the charterparty. In this letter or order there was a request to the defendants to deliver the amount of the freight to L. de B. On the delivery of the cargo L. de B. paid the whole amount of the freight to the master, and afterwards applied to the defendants for payment of the freight of the 500 sacks, but they refused to pay the full amount of the freight claimed, on the ground that the flour had been damaged in the carriage. In an action by the master against the defendants for the freight of the 500 sacks of flour:—Held, that there was no evidence of any contract between the defendants and the master, with respect to this portion of the cargo; but that the defendants, if liable, were only liable to Messrs. G., upon a subcontract with them. *Zwischenbart v. Henderson*, 9 Ex. 722; 23 L. J., Ex. 234.

Owners or Charterers—Exceptions.—By a charterparty it was "agreed that (the cabin and state rooms, and sufficient room, ship's stores, provisions, water, and crew throughout this charterparty being excepted, reserving, however, every such room only for that purpose as the owners would, were the ship to be loaded for their exclusive benefit) the vessel shall immediately be ready, and take on board from the charterers (who were to have the full reach of the vessel's hold from bulkhead to bulkhead, including the deck) a full and complete cargo," and thereupon proceed to Halifax:—Held, that the owners of the vessel, and not the charterers, were entitled to the freight for goods loaded on

the deck of the vessel. *Neill v. Ridley*, 9 Ex. 677; 2 C. L. R. 1018.

— Authority of Master.—By a charterparty between the captain, for the owners of a ship, and the charterers, the charterers agreed to pay a lump sum of freight, part to be received by the captain abroad, and the balance to be paid by the charterer's acceptance, payable in London at three months' date from the day of sailing. The charterers were to have the option of naming the lumpers and stevedores and such goods only as they might direct were to be received on board. It was also agreed that the master should, at the charterers' request, sign bills of lading in the usual manner, and at any rate of freight that might be filled in, and made payable in any manner the charterers might choose, without prejudice to the charter. The vessel was loaded by the charterers as a general ship, and the master signed bills of lading presented by the charterers, at such rates and payable in such manner as they requested. The bills of lading did not specify to whom the freight was to be paid:—Held, that the master signed the bills of lading as agent of the charterers, and therefore the shipowner was not entitled to claim from the shippers the freight which remained due from them when the charterers stopped payment. *Marquand v. Banner*, 6 El. & Bl. 232; 25 L. J., Q. B. 313; 2 Jur., N. S. 708.

Under Bill of Lading.—A defendant shipped at Liverpool on board the plaintiffs' vessel goods, and the master signed a bill of lading which stated that the goods were shipped by the defendant "as agent," and were to be delivered at the port of Colombo, "unto order or assigns, he or they paying freight for the goods." Before the shipment, the plaintiffs advanced to E., on whose account the goods were shipped, 400*l*., upon an undertaking by him that he would indorse to them, as a security, a bill of lading of the goods, wherein the freight should be payable by E. in this country. The defendant indorsed the bill of lading to E., who indorsed it to the plaintiffs as a security for the advance, and a further advance made upon an estimate between the plaintiffs and E., of the value of the goods, freight free. E. not having paid the freight:—Held, that the defendant was liable under the bill of lading to pay the freight to the plaintiffs. *Fox v. Nott*, 6 H. & N. 630; 30 L. J., Ex. 260; 7 Jur., N. S. 663.

ii. On Assignment.

Of Ship.—If the owner of a ship, having chartered her for a voyage, assigns her before its completion, and afterwards assigns the charterparty to another, if she earns freight, the assignee of the ship is entitled to the freight as incident to the ship. *Morrison v. Parsons*, 2 Taunt. 407.

But he cannot sue on the charterparty otherwise than in the name of the assignor. *Ib*.

A covenant in a charterparty to pay freight to the owner for the hire of the vessel is not transferred to the vendee by a bill of sale of the ship made during the voyage; and such owner afterwards becoming bankrupt, his assignees, and not the vendee of the ship, have the legal right to receive the freight and demurrage due from the

freighter upon the charterparty. *Splidt v. Bowles*, 10 East, 279.

Re-Transfer of Ship by way of Security—Possession.—A re-transfer of a ship to a vendor, absolute in terms, but intended as a security for the payment of the purchase-money, the ship then being on a voyage, and the transfer not mentioning freight, does not pass the freight to the transferee until, at all events, he has claimed it, and done some act tantamount to taking possession. *Gardner v. Cazenove*, 1 H. & N. 423; 26 L. J., Ex. 17.

Where Agreement for Partnership.—The plaintiffs, who were shipowners, offered their vessel for hire to the defendants, and the latter objected to take it, on the ground that it was too large, whereupon an arrangement was entered into for a partnership adventure in the vessel. The plaintiffs being indebted to D. & Co., subsequently deposited the charterparty with them as a security with an indorsement upon it, directed to the defendants, requiring them to pay the amount of what was due to D. & Co., and notice was given to the defendants. In an action by D. & Co. to recover the freight due under the charterparty:—Held, that the transaction amounted to an absolute assignment to D. & Co. *Hoyd v. Mangles*, 3 Ex. 387; 18 L. J., Ex. 273.

Of Freight—After Vessel Sold.—The right to freight is incidental to the ownership of the vessel which earns it, and therefore a transfer of a share in a ship passes the corresponding share in the freight, under an existing charterparty, without the mention of the word "freight." *Lindsay v. Gibbs*, 22 Beav. 522; 2 Jur., N. S. 1039.

A ship was chartered by her owner. Afterwards, in June, 1854, he sold twenty-four shares of the ship to A., and the remaining forty shares to B., and in December he assigned the freight to C. A. registered before, and B. after C.'s assignment; but C. gave the first notice to the charterers:—Held, that C.'s right to the freight had priority over B., but not over A. *Ib.*

To be Earned.—An assignment by the owners of a ship, of freight to be earned, is good. *Douglas v. Russell*, 4 Sim. 524. Affirmed, 1 Mylne & K. 488.

A., a shipowner, assigned to B. the freight earned and to be earned by one of his ships, and afterwards chartered her to C. for a voyage to S. The outward freight was paid before the ship sailed. The charterparty afterwards was delivered to B. by A.'s direction, and B. gave notice of the assignment to C. Afterwards, but before the ship returned, A. became bankrupt:—Held, that the homeward freight was not in A.'s order and disposition at his bankruptcy, and therefore, that B. was entitled to it. *Ib.*

An assignment of the freight and profits of a ship does not extend to profits not in existence, actual or potential, at the time of the assignment; therefore, where C. assigned by deed to S. the freight, earnings, and profits of a ship, which ship afterwards, in a voyage to the South Seas, obtained a quantity of oil, the produce of whales taken in the said voyage:—Held, that this oil did not pass to S. by the assignment, for the assignor had no property, actual or potential, in the oil at the time of assignment, and the voyage

was not then contemplated. *Robinson v. Macdonnell*, 5 M. & S. 228.

An assignment to a third party of freight, or a fixed sum out of freight, passes, as between part owners, only net freight, but a mortgagee, not in possession when the freight was received, has no locus standi afterwards to insist on such a construction. *The Edmond*, Lush. 58.

A., in consideration of money advanced and to be advanced by B. & Co., assigned all the freight to arise from a ship, under any existing or future charterparty, or other contract, for or in respect of her intended voyage to India and back to England. After the freight had been earned and ascertained, A. became bankrupt:—Held, that such assignment was good, and that his assignees were not entitled to sue for the freight. *Leslie v. Guthrie*, 1 Scott, 683; 1 Bing., N. C. 697.

Notice of Assignment given before Payment.—Action upon a charterparty for freight. Plea, discharge. Replication, on equitable grounds, that before the discharge the plaintiff assigned his interest in the charterparty to S., of which the defendant had notice, and that the discharge was given in fraud of S., and that the action was brought by S. in the name of the plaintiff for the sole benefit of S.:—Held, a good replication. *De Pothonier v. De Mattos*, El., Bl. & El. 461; 27 L. J., Q. B. 260; 4 Jur., N. S. 1034.

Set-off—Notice of Assignment.—In an action for freight the defendant pleaded a set-off, to which the plaintiff replied, on equitable grounds, that while the freight was in the course of being earned, he assigned it for value to A., of which the defendant, before the debt became due, and before the action was brought, had notice; and that the plaintiff was suing only as trustee for A.:—Held, no answer to the plea. *Wilson v. Gabriel*, 4 B. & S. 243; 8 L. T. 502; 11 W. R. 803.

By Holders of Bill of Lading.—The holders of a bill of lading cannot, as against the assignees of the freight, set off a debt due to them from the original owner of the goods who was also the assignor of the freight. *Weguelin v. Collier*, 6 L. R., H. L. 286; 42 L. J., Adm. 758; 22 W. R. 26.

iii. On Mortgage.

Extent of Right of Mortgagees.—A mortgagee of a ship does not, ordinarily speaking, obtain by the mortgage alone a transfer, by way of contract or assignment, of the right to freight. The mortgagor remains dominus of the ship, with regard to everything relating to its employment, or non-employment, or to any rate of freight to be earned by its employment, until the mortgagee takes possession. The mortgagee on taking possession becomes the owner, and it is by virtue of that ownership, and not by virtue of any antecedent contract or right, that he is entitled to receive the freight which, by contract or otherwise, is lawfully payable. *Keith v. Burrows*, 2 App. Cas. 636; 46 L. J., C. P. 801; 37 L. T. 291; 25 W. R. 831.

A mortgage of a vessel carries with it the freight, and the mortgagee intervening by taking possession, or by an act equivalent to taking possession, before the freight becomes payable,

is entitled as against the mortgagor, or his assignees in bankruptcy, to receive it. *Rusden v. Pope*, 3 L. R., Ex. 269; 37 L. J., Ex. 137; 18 L. T. 651; 16 W. R. 1122.

By the mortgage of a ship, accruing freight passes to the mortgagee as incident to the ship, notwithstanding 6 Geo. 4, c. 110, s. 45, which enacted that the mortgagee should not be deemed owner, except for the purpose of making a transfer. *Dean v. M'Ghee*, 4 Bing. 45; 2 C. & P. 387; 12 Moore, 185; *S. P., Kerswell v. Bishop*, 2 C. & J. 529; 2 Tyr. 602.

Freight Already Paid to Mortgagor.—The mortgage of a ship carries with it the right to receive the freight earned by the ship; and although the mortgagee cannot recover back from the mortgagor freight which he has allowed the mortgagor to receive, yet he may at any time intercept the freight by giving notice to the mortgagor, consignee, or charterer, that he intends to exercise his right of property, and to require the freight to be paid to him. *Wilson v. Wilson*, 14 L. R., Eq. 32; 41 L. J., Ch. 423; 20 L. T. 346; 20 W. R. 436.

A mere mortgage of a ship does not give a mortgagee a right to the earnings of a ship received by the mortgagor after the execution of the mortgage but before the mortgagee takes possession. *Willis v. Palmer*, 7 C. B., N. S. 340; 29 L. J., C. P. 194; 6 Jur., N. S. 732; 8 W. R. 295.

At what Time Right Accrues.—When an entire ship is in mortgage, in order to defeat the right of the mortgagor to receive the freight, the mortgagee must take possession of her before the completion of the voyage; but where the mortgagor of certain shares is ship's husband, if the mortgagees join with the owners of the other shares in the appointment of a new ship's husband before the completion of the voyage, the mortgagor loses all right as ship's husband to receive the freight. *Beynon v. Godden*, 3 Ex. D. 263; 39 L. T. 82; 26 W. R. 672—C. A.

Deductions—Advances by Charterers.—By the terms of a charterparty it was provided that the charterers should advance necessary funds for the ship's disbursements, not exceeding a specified amount at the port of lading. Previously to entering into the charterparty the owner had mortgaged the ship and freight. The charterers made advances for the ship's disbursements, considerably in excess of the amount specified in the charterparty. Before the freight became due the mortgagee took possession of the ship, and stopped the cargo for freight:—Held, that the charterers were not entitled to deduct from the amount due for freight the advances made by them in excess of the sum provided by the charterparty. *Tanner v. Phillips*, 42 L. J., Ch. 125; 27 L. T. 717; 21 W. R. 68.

—Payment of Wages.—If the brokers of the mortgagee of a ship, who has taken possession, receive the freight, it is not recoverable from them by the assignees of the mortgagor (he having become bankrupt), if a sum equal in amount has been applied by the mortgagee to the payment of the seamen's wages. *Dean v. M'Ghee* 2 C. & P. 387.

Priorities—Claim for Necessaries.—A claim-

ant for necessaries has no maritime lien and no equity to precede the mortgagee. *The Two Ellens*, 4 L. R., P. C. 161; 41 L. J., Adm. 33; 26 L. T. 1; 20 W. R. 592; 8 Moore, P. C. C., N. S. 398.

—Between Mortgagees.—The first registered mortgagee of a ship, by taking possession of her before the freight is completely earned, obtains a legal right to receive the freight, and to retain thereout not only what is due on his first mortgage, but also the amount of any subsequent charge which he may have acquired on the freight, in priority to every equitable charge of which he had no notice; and it makes no difference that a subsequent incumbrancer was the first to give notice to the charterers of his charge on the freight. *Liverpool Marine Credit Company v. Wilson*, 7 L. R., Ch. 507; 41 L. J., Ch. 798; 26 L. T. 717; 20 W. R. 665.

—Mortgagee and Assignee of Freight.—A vessel was chartered to proceed to A., there take in a cargo to be shipped by the charterers, and return direct to London. After the ship's arrival in the port of London, and whilst the cargo was in course of delivery, a mortgagee, under an ordinary statutory mortgage made prior to the date of the charterparty, took possession:—Held, that he thereby acquired a right to the freight in priority to an assignee of the freight by a deed executed subsequently to the charterparty, notice of which had been given to the charterers. *Brown v. Tanner*, 3 L. R., Ch. 567; 37 L. J., Ch. 923; 18 L. T. 624; 16 W. R. 882.

Mortgagee Suing in his own Name.—It was formerly held that the mortgagee of a ship could not sue in his own name for the freight accruing after the mortgage, and before he took possession. *Chinnery v. Blackman*, 3 Dougl. 391; *S. C.*, nom. *Chinnery v. Blackburne*, 1 H. Bl. 117, n. And see *Briggs v. Wilkinson*, 9 D. & R. 871; 7 B. & C. 30.

Title to Goods.—S. & F., owners of a ship, mortgaged her to the plaintiff, and also assigned to him all the freight to be earned by the ship. S. & F. retained possession of the ship, and sent her to Cuba, expecting to find there a return cargo; but none was ready. The captain, therefore, determined to buy for his owners a return cargo for an English port, and he obtained a cargo of wood from T. & Co., who supplied it to him, and took a bill of lading for the wood from the captain, who, by the bill of lading, bound himself "to deliver it in the like good order in the said port, or in such other my manifest may appoint, to order—, who, on faithful delivery being shewn, shall pay me— for freight and conveyance." A black line was drawn through the space in the bill of lading usually filled up with the amount of the freight. T. & Co. sent to M. & Co., of Havannah, the bill of lading and the invoice of the goods, stating them to be "shipped by order of M. & Co., of Havannah, and for account of risk of whom it may concern." M. & Co. paid T. & Co. for the goods, and drew bills for the price on an English merchant, who refused to accept them. The defendant thereupon accepted the bills for the honour of the drawer, and paid them when due. He also received the bills of lading indorsed in blank to T. & Co. S. & F. became bankrupt.

The plaintiff took possession of the ship on its arrival in England, and claimed freight for the cargo:—Held, that he was so entitled, as the goods remained the property of T. & Co. under the bill of lading. *Gunn v. Tyrie*, 4 B. & S. 680; 33 L. J., Q. B. 97. Affirmed, 6 B. & S. 299; 34 L. J., Q. B. 124—Ex. Ch.

b. By whom Payable.

i. Consignors or Consignees.

Goods Deliverable to Order under Bill of Lading—Assignment of Freight.—Though freight may not be payable in respect of a man's own goods conveyed in his own ship, it becomes so if he makes third persons, who have advanced him money, the consignees of those goods, and the goods are by the bill of lading deliverable to their order. *Weguelin v. Cellier*, 6 L. R., H. L. 286; 42 L. J., Ch. 758; 22 W. R. 26.

T. & Co., who acted as the London bankers for Holm of Stockholm, consented to open a credit in his favour with merchants at Akyab for the purchase of "rice for the English market shipped by vessels of my own, the Java, &c., at, &c., f. o. b." The rice was purchased and shipped on board the Java, and made deliverable to the order of T. & Co., who accepted bills to cover the purchase. The bill of lading was indorsed to them; it described the goods "to be delivered in like good order, &c. unto T. & Co. or their assigns; freight for the goods 4l. 5s. per ton of 20 cwt. net, delivered with primage and average accustomed." While the Java was on its voyage, Holm obtained advances from C. & Co., to whom he assigned the freight as security:—Held, that, under these circumstances, C. & Co. were entitled to the freight, and T. & Co. were, like all other consignees of a cargo, liable to pay it under the terms of the bill of lading, although the cargo was in fact brought to England in Holm's own vessel, the Java. *Id.*

Implied Contract.—On a bill of lading of goods "shipped by A. to be delivered to B. or his assigns, he or they paying freight," if the goods are delivered without receiving the freight, the shipper is not liable for the freight, there being no charterparty. *Drew v. Bird*, M. & M. 156.

Unless he has made a subsequent promise to pay such freight. *Id.*

A charterparty was entered into in London on the 17th of June, 1872, between the master of a ship lying at London, and L., a shipbroker, to carry 407 tons of iron from H. to G., at freight of 7s. 3d. per ton. Freight to be paid in London on signing bills of lading, the owner or master to have an absolute lien for freight. On the following day L. chartered the ship to the defendant at 8s. per ton for the same amount of iron. The charter contained similar clauses as to freight and lien, and the following clause at the end: "The brokerage of 5 per cent. is due on the execution of this charter to L., by whom the vessel is to be entered and cleared at the port of loading." Though the defendant thought he was treating with L. as broker for the ship, L. had no authority in fact to act as broker for the plaintiff, or to receive the freight; and neither the plaintiff nor the defendant knew of the charter entered into by the other. The cargo having been put on board by the defendant, the master signed bills of lading making it

deliverable to consignees or assigns, "they paying freight for the goods as per charterparty." The plaintiff did not demand the freight on signing the bills of lading. The cargo was duly delivered at the port of discharge, and in the meantime L. obtained payment of the freight of 8s. per ton from the defendant and afterwards stopped payment, leaving the 7s. 3d. per ton unpaid to the plaintiff. The plaintiff having sued the defendant for the 7s. 3d. per ton for the carriage of the iron:—Held, that he could not recover, for that he and the defendant never were ad idem, and consequently there was no express contract between them; and that, under the circumstances, no contract to pay reasonable freight for the carriage could be implied on the shipment of the goods. *Smith or Schmidt v. Tiden*, 9 L. R., Q. B. 446; 43 L. J., Q. B. 199; 30 L. T. 891; 22 W. R. 913.

Goods were laden in Jamaica on board a ship, according to a bill of lading, which stated them to have been shipped by J., on a vessel bound for London, on account of the defendant, and that they were to be delivered in London to the consignees, paying freight for the same at the rate therein mentioned: the goods so shipped were the property of the defendant. The captain having delivered the goods to the consignees without receiving the freight:—Held, that the defendant was liable by law to pay the freight to the shipowners, independently of any express contract by charterparty. *Donnett v. Beckford*, 5 B. & Ad. 521; 2 N. & M. 374.

Where the master, as agent for his owners, entered into a charterparty with a partner in the house of M. & Co., for the delivery of goods upon a stipulated freight, and the goods were delivered to M. & Co., who were the consignees named in the bill of lading:—Held, that the owners could not maintain an action against that partner for the freight. *Schack v. Anthony*, 1 M. & S. 573.

Rights against Both.—If the master signs a bill of lading, expressing that upon the delivery of the cargo freight is to be paid by the consignees, he does not thereby renounce his claim for freight against the consignor. *Christy v. Row*, 1 Taunt. 300.

Entry of Name at Custom House—Custom to Charge.—Where goods are shipped to the orders of the shipper, the custom of charging the person in whose name the goods are entered at the custom-house with freight, can only exist where the same person is consignee, or where the consignee is unknown. *Artaza v. Smallpiece*, 1 Esp. 23.

Evidence to Charge Consignee.—The consignee of goods, where there is no bill of lading, is not in general liable for the freight; but prior dealings with him, and payments by him of the freight on former occasions of the same kind, are evidence to shew that in the particular case he contracted on the receipt of the goods to pay the freight. *Coleman v. Lambert*, 5 M. & W. 502.

Effect of Clause "He or they Paying Freight."—The usual clause in a bill of lading, engaging the master of the ship to deliver the goods to the consignee or his assigns, "he or they paying freight for the said goods," is introduced for the benefit of the master only, and not for the benefit

of the consignor; and therefore the master is not bound to the consignor to withhold the delivery of the goods, unless the consignee or his assigns pay the freight. Nor does it vary the case that the consignor was also the charterer of the ship. *Sheppard v. De Bernales*, 13 East, 565.

What Deductions.]—A. consigns goods to B., with directions to pay over the net proceeds to C.; B. employs D. to dispose of them. In an action by C. to recover the proceeds from D., D. is entitled to make the same deductions for freight as B. (who was the owner of the ship in which the goods were brought) might have made. *Blackburn v. Kymer*, 1 Marsh. 223, 278; 5 Taunt. 584, 672.

Expenses to which charterers have been subjected by the master's refusal for a time to receive parts of the cargo on board could not be set off against a claim for freight by the shipowner, nor deducted from damages. *Leeger v. Dutchie*, 8 C. B., N. S. 45; 29 L. J., C. P. 253; 6 Jur., N. S. 1095. Affirmed on appeal, 8 C. B., N. S. 72; 30 L. J., C. P. 65; 7 Jur., N. S. 239; 9 W. R. 166—Ex. Ch.

ii. Agents, Factors, or Brokers.

Liability of—Payment Unauthorized.]—The brokers employed by the assignees of a bill of lading sold the goods, but, when called upon for delivery, found them to be stopped for freight, which, to obtain possession of the property, they paid, although their principals had formerly directed them not to do so, as the freight had been paid in Bengal:—Held, that this advance by the brokers was made in their own wrong, though the freight had not in fact been paid in Bengal, as the principals supposed. *Howard v. Tucker*, 1 B. & Ad. 712.

Receipt of Cargo—Practice.]—Where the consignees of a West India cargo, deliverable by bill of lading to them or their assigns, he or they paying the freight for the same, indorsed it on their brokers, for advances made by them, and the cargo on its arrival was landed at the West India Docks in the names of the consignees, but was entered at the Custom-house by the brokers in their own names, and afterwards they obtained delivery from the West India Docks under an order from the consignees for that purpose, and not under the bill of lading:—Held, that the receipt of the cargo by the brokers under the order of the consignees was not a sufficient ground to raise an implied assumpsit on their part to pay the freight, and the entry at the Custom-house made no difference; but as it appeared from previous dealings that they had been in the habit of receiving goods in the same manner, and paying the freight for them, that was considered sufficient to raise such an implied promise. *Wilson v. Kymer*, 1 M. & S. 157.

Acceptance.]—A. and B., merchants abroad, shipped tobacco for Liverpool, consigned to A. himself there, to whose order the bills of lading were made; one of these bills was sent inclosed in a letter from the shippers to C. at Liverpool, advising him of such consignment to A., and that A. intended to proceed to Liverpool, but in case he should not arrive in time, desiring C. to do the best for them. The tobacco having

arrived in a damaged state before A., was required to be landed, and was deposited in the king's warehouse pursuant to the statute, and afterwards C., acting as agent for A. within the knowledge of the captain, made an entry of it in his own name in the Custom-house to avoid seizure:—Held, that this was not such an acceptance of the cargo by C. as would make him liable to the captain for the freight. *Ward v. Felton*, 1 East, 507.

Signing as Agent.]—A party received on board his ship coals from the Burnt Island Company, to be carried to London; and the captain signed a bill of lading, by which the coals were made deliverable unto "N. T. for the London Gas Company, or to his assigns, he or they paying freight for the goods 10s. per ton in cash of true delivery." On the arrival of the ship in London N. T. produced the bill of lading and received the goods under it, and afterwards offered to pay the freight by a bill at two months:—Held, that he was not personally liable, inasmuch as on the face of the bill of lading he was a mere agent to receive the goods for the company, the property vesting in the company. *Amos v. Temperley*, 8 M. & W. 798.

Where the consignee and agent of a vessel chartered for a specific voyage, entered into an agreement with the captain, describing himself as "consignee and agent of the brig and cargo on behalf of H., merchant of L.," the agreement stating that "it was witnessed that the parties agreed that the vessel should go to another port, there discharge the remainder of her cargo, and receive a full and complete homeward cargo at the same freight as she would have got had she proceeded on the voyage stipulated in the charter-party," and the consignee signed the agreement in his own name, without describing himself as agent:—Held, that he thereby made himself personally liable to pay the amount of the freight of the homeward voyage. *Kennedy v. Gouveia*, 3 D. & R. 503.

Evidence of Usage.]—A manager of a stone quarry signed a shipping note, expressing that stone was shipped on board the plaintiff's vessel to be carried for the owner of the quarry, who however never appeared. In reality it was shipped for the purchaser of the stone, the real consignee. In an action for freight and demurrage, evidence of usage that the quarry owner never paid freight or demurrage, was admitted, and the question whether the stone was shipped for the manager of the quarry was left to the jury upon all the circumstances. *Dickenson v. Lano*, 2 F. & F. 188.

Indorsing Bills of Lading.]—See *infra*.

iii. Assignees, Appointees, or Indorsees.

Effect of Indorsing Bills of Lading.]—Goods shipped at Bombay, on board a ship, were, by the bill of lading, to be delivered unto order or to his and their assigns, on paying freight for the same. The shipper indorsed the bill of lading and forwarded it to East India agents in London, who indorsed it in blank to their factors in Liverpool. On the arrival of the goods at Liverpool the factors presented the bill of lading to the shipowner and received the goods, and he debited them with the freight. The factors, without

having paid the freight, became bankrupt, and thereupon the shipowner claimed from them and took possession of the goods:—Held, that the East India agents were not liable for the freight. *Tubin v. Crawford*, 5 M. & W. 235. Affirmed (in error), 9 M. & W. 716; 12 L. J., Ex. 490—Ex. Ch.

Goods were consigned to I. C. & Co. or their assigns, "he or they paying freight for the same;" I. C. & Co. indorsed the bill of lading to K., their broker, and then became bankrupt; the shipowners, in ignorance of the circumstances, applied to I. C. & Co. for the freight, and then sued K. for it:—Held, that he was liable. *Dougal v. Kramble*, 11 Moore, 251; 3 Bing. 383.

The indorsee of a bill of lading, which directs the goods to be delivered to order or to assigns, paying freight, is liable for the freight, though he is only acting as broker for the consignee; and though twelve months have elapsed since the landing of the goods without any demand of freight, he is bound not to deliver the goods till he knows that freight has been paid. *Bell v. Kymer*, 1 Marsh. 146; 5 Taunt. 477; 3 Camp. 545.

But an indorsee of a bill of lading, who has indorsed the same over before the arrival of the vessel and delivery of the cargo, does not, under 18 & 19 Vict. c. 111, s. 1, remain liable for the freight. *Smurthwaite v. Wilkins*, 11 C. B., N. S. 842; 31 L. J., C. P. 214; 5 L. T. 842; 7 L. T. 65; 10 W. R. 386.

Receiving Goods—Evidence of Promise to Pay.—The master having contracted by the bill of lading with the shippers to deliver goods to certain persons or their assigns, he or they paying freight for the same, the demanding and taking of such goods from the master by a purchaser and assignee of the bill of lading, without the freight having been paid, is evidence of a new contract and promise on the part of such purchaser, as the ultimate appointee of the shippers for the purpose of delivery, to pay the freight. *Cock v. Taylor*, 13 East, 399; 2 Camp. 587.

Where a ship was chartered on a voyage out and home for a specified time, at a certain rate of payment on the homeward cargo, in full for the hire of the ship for the time, to be paid in part by an advance on the ship's clearing for the outward voyage, and the rest on her return, by bills payable at a future day; and, on the loading the homeward cargo, a bill of lading was signed to deliver the goods to the charterers or their assigns, he or they paying freight for the goods, as per charterparty:—Held, that the indorsees of the bill of lading for valuable consideration were not liable to the shipowner upon an implied assumpsit to pay the freight arising out of the receipt of the goods under the bill of lading. *Moorsom v. Kymer*, 2 M. & S. 303; 3 Camp. 549, n.

Goods being shipped in India for London on account of a person there, the bill of lading was forwarded to him, and he indorsed it over for value. The bill of lading, signed by the captain, stated the freight to have been paid in Bengal, but it was found after the above transfer that the freight never had been paid, through default of the shipper:—Held, that the shipowners, who detained the goods, could not claim payment of the freight from the assignees of the bill of lading. *Howard v. Tucker*, 1 B. & Ad. 712.

An implied assumpsit for freight, upon the delivery of goods without first receiving the freight, will not lie against three persons for whose use the cargo was purchased, but who are not the consignees, or holders of the bills of lading, and who have assigned all their effects to a trustee for the benefit of their creditors and themselves, two of them only, without the third, receiving the goods as agents for that trustee. *Pinder v. Wilks*, 5 Taunt. 612; 1 Marsh. 248.

Under Spanish Bill of Lading—"Assigns."—An indorsee of a Spanish bill of lading, to whom the goods have been delivered under it, is liable for the freight, although the bill of lading is for delivery to the consignees, without saying "or their assigns," such bills of lading appearing by evidence to be usually passed by indorsement. *Renteria v. Ruding*, M. & M. 511.

Evidence of New Contract.—A special verdict was found, in an action for the recovery of freight, that, by a memorandum of charterparty, the ship was chartered for a voyage from a foreign port to London, to load at the foreign port a cargo, and to deliver the same at London, on payment of a specified freight; that the ship received on board a cargo under a bill of lading, by which the goods were deliverable to the shipper or his assigns, he or they paying freight for the same as per charterparty:—Held, first, that, from an acceptance of the goods by an assignee of the bill of lading, the law could not imply a contract by him to pay freight; and that no such contract could have been implied, even if the bill of lading had made no reference to the charterparty, but had merely specified a sum to be paid for freight, though, in the latter case, at all events, the facts might be evidence from which a jury might find such a contract. *Sanders v. Vanzeller*, 3 G. & D. 580; 4 Q. B. 260; 2 G. & D. 244; 11 L. J., Q. B. 497—Ex. Ch.

Held, secondly, that the court could not infer a contract by the defendant to pay freight. *Ib.*

Where an indorsee of a bill of lading, or a consignee, other than the original charterer, becomes liable for freight, such liability results not from the original contract of affreightment, but from a new contract, the consideration for which is the delivery of the goods. *Kemp v. Clark*, 12 Q. B. 647; 17 L. J., Q. B. 305; 12 Jur. 676.

No contract to accept the cargo, or any part of it, within a reasonable time, and to pay the freight, can be inferred from the mere fact of the assignee of the bill of lading presenting it to the captain and demanding the delivery of the cargo. *Moller v. Young*, 5 El. & Bl. 755; 25 L. J., Q. B. 94; 2 Jur., N. S. 393—Ex. Ch.

Where, after such a demand by the assignee of a bill of lading, the captain delivered a portion of the cargo, and then refused to deliver the remainder until paid freight for the portion already delivered, and the assignee then refused to pay any freight until the whole cargo should be delivered:—Held, that there was not evidence from which a jury might infer a promise on the part of the assignee to pay at once for the portion of the cargo delivered. *Ib.*

An assignee of a bill of lading, who claims and receives goods under it, is bound by the terms of the bill of lading, not only as to the amount

of freight, but also for demurrage, if he does not unload the ship within the time limited by the bill of lading, according to its terms, and there is a sufficient consideration arising on the claim of the goods by the consignee, from which the law will infer a promise by the consignee to pay such demurrage as well as the freight. *Stindt v. Roberts*, 5 D. & L. 460; 2 B. C. Rep. 212; 17 L. J., Q. B. 166; 12 Jur. 518.

As against Mortgagee.—S., a partner in a firm at Liverpool, and sole owner of a ship *Ellen*, entered into an arrangement, by which she was, in 1850 and 1851, consigned, during several voyages, to H., a partner in the firm of H. & C. H., at New Orleans, with general instructions to do the best he could, either in loading the vessel on freight, or shipping cotton, on the joint account of S. & H. On those occasions, as is usual when cotton is shipped on account of the shipowner, a nominal freight, or "no freight, being owners' property," was inserted in the bills of lading; but in stating the partnership accounts in respect of the sale of the cotton, the current rate of freight was charged in favour of S., and to the debit of the joint adventure. On the 4th of April, 1851, S. wrote to H. in these terms:—"We hope you have brought cotton, and that the *Ellen* has arrived. What you do we will confirm." Again, on the 26th of April, "Whatever you do for the *Ellen* will be confirmed by us." On the 8th of May, 1851, H. & C. H. shipped on board the *Ellen* 447 bales of cotton, and the master signed a bill of lading, by which the cotton was "to be delivered unto order or to assigns, he or they paying freight for the said cotton 1s. per bale, being owners' property, when draft against same is paid, say 3,590l. 9s. 8d., with primage and average accustomed." On the 15th of May, H. & C. H. again shipped 381 bales of cotton, and a similar bill of lading was signed by the master. The draft for 3,590l. 9s. 8d., dated 8th of May, 1851, was for the invoice price of the cotton, and was on the firm of which S. was a partner, and was purchased, on the day of its date, by the plaintiffs, merchants at New Orleans, who took, at the same time, from the shippers, an indorsement in blank of the first bill of lading, as a security for the due payment of the draft. A bill of exchange, dated 15th of May, 1851, for 3,169l. 19s. 8d., was in like manner drawn for the price of the cotton in the second bill of lading; and that bill of exchange was also purchased by the plaintiffs, the second bill of lading being also indorsed to them. In both cases the cotton was purchased of third parties, and not of the plaintiffs. These bills, when due, were dishonoured by S., and taken up by the plaintiffs. On the 10th of May, 1851, S., being indebted to the defendants, assigned to them the *Ellen* by way of mortgage, with all her freight and earnings, with power of sale and authority to receive freight. The *Ellen* arrived at Liverpool on the 28th July, 1851, when the defendants took possession of her and her cargo, and claimed from the plaintiffs, as indorsees of the bills of lading, payment of the current rate of freight. The plaintiffs tendered the amount of freight reserved by the bills of lading, which being refused, they paid the amount claimed under protest, and brought an action for money received to their use.—Held, that the plaintiffs were entitled to recover, since the circumstances shewed a clear authority from S. to H. to ship the cotton upon the terms of the bills

of lading; and although the second of these bills was signed after the mortgage, yet it did not invalidate the transaction as against the plaintiffs, who took the bills *bonâ fide*, and without notice. *Brown v. North*, 8 Ex. 1; 22 L. J., Ex. 49.

Custom as to Discount.—A bill of lading expressed that goods shipped at Newcastle were deliverable at Liverpool to order or assigns, "he or they paying freight for the goods five-eighths of a penny sterling per pound, with five per cent. primage and average accustomed." By the usual custom of the trade at Liverpool, three months' interest or discount is deducted from freights payable under bills of lading on goods coming from certain ports including Newcastle. An assignee of a bill of lading having received the goods, the shipowner claimed the freight without any deduction, contending that the custom was not binding in law, as contradicting the written contract. The assignee paid the freight, less the discount:—Held, that the custom was binding, and explained the bill of lading. *Brown v. Byrne*, 3 El. & Bl. 703; 2 C. L. R. 1599; 23 L. J., Q. B. 313; 18 Jur. 700.

Assignee of Freight or Consignee of Goods.—Where, by a bill of lading, goods were to be delivered "to A., net proceeds paid to T. or to his assigns, he or they paying freight for the goods as per charterparty":—Held, that the freight was to be paid by A., and that the net proceeds to be paid to T. were what remained after such freight and other charges had been satisfied. *Thomson v. Adam*, 5 Moore, 280; 2 B. & B. 450.

c. Time.

Freight Payable in London.—The words "freight payable in London" in a bill of lading define the place only, not the time, of payment. *Krall v. Burnett*, 25 W. R. 305.

Goods were put on board a ship consigned for Calcutta, at 39s. per ton, "payable in London":—Held, that it was for the jury to say from the surrounding circumstances whether the contract was a contract for freight, contingently on the ship's arrival at her destination, or for a sum payable on the receipt of the goods on board of her. *Lidgett v. Perrin*, 11 C. B., N. S. 362; 2 F. & F. 763.

Delivery of Cargo and Payment—Concurrent Acts.—By the terms of a bill of lading, freight was to be paid "one-third in cash on arrival at B., and two-thirds on right delivery of the cargo, by good and approved bills payable in London at four months, or cash, deducting usual interest, at the option of the shippers." The vessel arrived at B. The one-third freight was paid, and the consignee of the cargo declared his election to pay the remaining two-thirds in cash, less interest:—Held, that the delivery of the cargo and payment of the balance of the freight were to be concurrent acts, and that the master was not bound to deliver the cargo unless the consignee paid or was ready and willing at the same time to pay the balance of the freight. *Paynter v. James*, 2 L. R., C. P. 348; 16 L. T. 660; 15 W. R. 493. Affirmed, 18 L. T. 449; 16 W. R. 768.—Ex. Ch.

Delivery of Bill of Lading.—A declaration stated that, in consideration that the plaintiff had taken the defendant's goods on board his ship to be carried to A., he promised to pay the money due for freight and carriage of the same on the delivery of the bill of lading, and that the bill of lading was delivered, by reason whereof he became liable to pay a large sum for freight and carriage of the goods:—Held, bad, because it did not appear that anything became due for freight on the delivery of the bill of lading. *Blakey v. Dixon*, 2 B. & P. 321.

Unloading or Right Delivery of Cargo.—A charterparty provided that freights should become payable on the unloading or right delivery of a cargo, one-third in cash and the remainder by approved acceptances at three months, or cash equal thereto, but under certain circumstances the vessel was to be taken on hire at a certain rate, payment to be made in cash on account of three months' hire and the balance on the ship's return. The ship having loaded a cargo of guano at Saldanha Bay, proceeded therewith to England, and, under the charterer's instructions, went to Southampton to discharge her cargo. The charterers wrote to the captain there, stating that without prejudice to the charterparty, or any dispute connected with the ship, their wishes were that it should be landed and warehoused in the Southampton Docks in bulk, which was accordingly done:—Held, that, upon such landing of the cargo, the balance of the freight became payable. *Fenwick v. Boyd*, 15 M. & W. 632.

Final Loading.—The term "final loading of a vessel from the port of loading," stated in a charterparty as the period for payment of freight or a part of it, means the final departure from the port, and being at sea ready to proceed on her voyage, and not merely having the clearances on board and being ready to sail. *Roelandts v. Harrison*, 9 Ex. 441; 2 C. L. R. 995; 23 L. J., Ex. 169.

Months.—Where a ship is freighted by the month, the months are calendar, not lunar ones. *Jolly v. Young*, 1 Esp. 186.

d. Manner.

i. Advance of Freight.

Condition precedent—Failure of Voyage—Repayment.—A ship was chartered for a homeward voyage from Calcutta, with an option to the charterers to send her on an intermediate voyage, "freight to be paid as follows: 1,200*l.* to be advanced to the master, and to be deducted, together with 1½ per cent. commission on the amount advanced and cost of insurance, from freight and settlement thereof, and the remainder on right delivery at port of discharge." The master was also "to sign bills of lading at any current rate of freight required, without prejudice to the charterparty, but not under the chartered rates, unless the difference be paid in cash." The charterers elected to send the vessel on an intermediate voyage, and paid the 1,200*l.*, and required the master to sign bills of lading below the chartered rates. The difference, amounting to 737*l.*, was demanded from them by the master, but they refused to pay it, claiming to set off against it the advances made on ac-

count of the vessel. The vessel was lost on her way to the intermediate port:—Held, that a payment in advance on account of freight cannot be recovered, even though the voyage fails; and that according to the terms of the charterparty the payment of the difference was to be a payment in the nature of freight, so that if the charterers had paid the difference in advance, they would not have been entitled to recover it; and that therefore the shipowner was entitled to recover the amount from them, notwithstanding the failure of the voyage. *Byrne v. Schiller*, 6 L. R., Ex. 20; 40 L. J., Ex. 40; 23 L. T. 741; 19 W. R. 161. Affirmed, 6 L. R., Ex. 319; 40 L. J., Ex. 177; 25 L. T. 211; 19 W. R. 1114—Ex. Ch. See *Watson v. Shankland*, *infra*.

— Freight or Loan.—A charterparty for a voyage to B., to load there a cargo of rice, and proceed therewith to London, contained the following stipulations:—"Cash for ship's disbursements to be advanced to the extent of 300*l.*, free of interest, but subject to insurance and commission; the freight to be paid on unloading and right delivery of the cargo." Whilst the ship was at B., the charterer's agent advanced to the captain cash for the ship's disbursements, and the captain drew a bill of exchange for the amount upon the owners. On her voyage homeward the ship was lost, and the owners refused to accept the bill. In an action by the charterer against the shipowners to recover the amount:—Held, that the advance was in part payment of freight, and not a loan, and therefore not recoverable. *Hicks v. Shield*, 7 El. & Bl. 633; 26 L. J., Q. B. 205; 3 Jur., N. S. 715.

The question whether the freight is to be paid in advance or not, will depend upon the terms of the contract; and where it is apparent that the prepayment is an advance of freight and not a loan, there is no implied undertaking to return the money if the voyage fails. *Saunders v. Drew*, 3 B. & Ad. 445.

— Loading and Sailing.—A debtor gave to his creditors the following order, addressed to B.:—"Please to pay H. & P. (on the Royal Oak being loaded and sailed), out of the advance, 73*l.*;" and B. signed it, "We agree to the above, B. & Co." The ship having loaded, crossed the bar of Sunderland harbour, when the captain left her and went ashore to get the ship's papers and sign the bills of lading; the ship in the meantime stood off and on under easy sail, waiting for the captain's return:—Held, first, that the loading and sailing of the ship were conditions precedent to the payment of the money. *Hudson v. Bilton*, 6 El. & Bl. 555; 26 L. J., Q. B. 27; 2 Jur., N. S. 784.

Held, secondly, that the ship had not sailed. *Id.*

— Seaworthiness.—A declaration for freight on a charterparty, whereby the ship, being tight and every way fitted for the voyage, should, at Sunderland, load a cargo of coals, and proceed to Constantinople, being paid freight on the quantity delivered, "one-fourth of the freight to be advanced to the owners' agent in London, on the ship having sailed, less five per cent. thereon for assurance, interest and commission," averred that the defendant caused the ship to be loaded with a cargo of coals, and that she, being so loaded, sailed for C., pursuant to the charter-

party. Plea, that the ship was not, at the commencement of the voyage, tight, and every way fitted for the voyage, and that by reason thereof the ship and cargo were lost:—Held, that the plea was not a good plea in avoidance of circuitry of action, as the damage sustained by the defendant was not necessarily identical in amount with the sum claimed by the plaintiff; but that it was a bar to the action, on the ground that the advance of the freight had never become payable. *Thompson v. Gillespy*, 5 El. & Bl. 209; 24 L. J., Q. B. 340; 1 Jur., N. S. 779.

— **Readiness of Ship—Captain's Attendance.**—A charterparty contained stipulations, that the captain should attend daily at the brokers' office to sign bills of lading; that the ship should take on board all such lawful goods as the charterers might require; and then proceeded—"In consideration whereof the charterers agree to pay freight for the use and hire of the ship 1,400*l.*, with a gratuity of 25 guineas to the master, payable before leaving London." Then followed this clause—"The owner agrees, that the ship shall be ready to sail at the expiration of the laying days, or sooner if required by the charterers. If the ship is not ready, either on the owner's or the charterer's part, at the above-named dates, then demurrage to be paid by the party in default at the rate of 7*l.* per diem. The ship to be ready on or before the 10th November, or the charterers to have the option of cancelling this agreement." The freight was stipulated to be paid, partly by bills of lading, at the port of destination, to the extent of 800*l.*, and balance of 600*l.* in cash, less seventy days' discount from the day of clearing from London:—Held, that the stipulations, on the part of the owner, were not conditions precedent to his right to sue for the 600*l.* as soon as the ship should have cleared from London. *Seeger v. Duthie*, 8 C. B., N. S. 45; 29 L. J., C. P. 253; 6 Jur., N. S. 1095. Affirmed, 8 C. B., N. S. 72; 30 L. J., C. P. 65; 7 Jur., N. S. 239; 9 W. R. 166—Ex. Ch.

Insurance of Balance of Freight by Shipowner.—Shipowner and charterer may agree, by the terms of a charterparty, that a portion of the stipulated freight shall be prepaid; and such prepayment will not affect its legal character of freight; the remainder may be the subject of insurance by the shipowner. *Allison v. Bristol Marine Insurance Company*, 1 App. Cas. 209; 34 L. T. 809; 24 W. R. 1039.

A ship was chartered to sail from Greenock to Bombay, to carry a cargo of coals. Freight was to be paid on unloading and right delivery of the cargo at and after the rate of 42*s.* per ton of 20 cwts. on the quantity delivered. It was provided that "such freight is to be paid, say one-half in cash on signing bills of lading less four months' interest at Bank rate, but not less than 5 per cent. per annum, 5 per cent. for insurance, and 2½ per cent. on gross amount of freight in lieu of consignment at Bombay, and the remainder on right delivery of the cargo, less cost of coals short delivered, in cash, at current rates of exchange for bills on London at six months' sight." Half of the estimated amount of the freight was paid in London. The shipowner effected two insurances, one for 500*l.* on freight valued at 2,000*l.*, the other for 700*l.* on freight payable abroad valued at 2,000*l.* The ship was

lost before entering Bombay harbour, but one-half of the cargo was saved and delivered. The master, in the belief that the prepayment had satisfied the freight on this half so delivered, made no demand on the charterer. The shipowner claimed on his policies as for a total loss of the other half of the freight:—Held, that on the proper construction of the policy the whole sum agreed upon constituted freight; that half of the whole sum of that freight had been paid in England; that it was not a prepayment of half the rate of freight calculated as distributed over the whole cargo, but of half the whole gross freight; that half of the whole remained to be paid abroad on right delivery of the cargo; that that half had been lost through perils of the sea; and that the shipowner was entitled on his policies on freight to recover as for the total loss of that half. *Ib.*

A ship was chartered to load a full cargo "on being paid freight, payable by charterer's acceptance on ship clearing the custom-house, subject to insurance." The ship having sailed, was lost, being at that time uninsured. In an action by the shipowner for non-payment of the agreed freight:—Held, that it was no defence that the shipowner had not insured the freight. *Jackson v. Isaacs*, 3 H. & N. 405; 27 L. J., Ex. 392.

— **Repayment of Freight.**—When the charterers of a ship stipulate that they shall be entitled to insure their advances "against freight," at the owner's expense, and they fail to insure, they have, in the event of the ship perishing, no claim against the owners for repayment. *Watson v. Shankland*, 2 L. R., H. L. (Sc.) 304; 29 L. T. 349.

By a charterparty made at Bombay, a ship belonging to Merchants at Greenock, was to proceed from Bombay to Calcutta, and there load a cargo to be conveyed to the United Kingdom. A clause in the charterparty was as follows:—"Sufficient cash for ship's ordinary disbursements to be advanced the master against freight; subject to interest, insurance, and two-and-a-half per cent. commission; and the master to indorse the amount so advanced upon his bills of lading." While the ship was at Calcutta preparing for the voyage, various advances for the ship's ordinary disbursements were made by the indorsees of the charterparty, and the master gave them on account of such advances a bill drawn on the shipowners. They refused to accept the bill, on the ground that the master had no power to give it, and that under the charterparty the indorsees should have effected an insurance on freight to the amount of their advances. No such insurance was, however effected, though they had time to insure after notice of the refusal to accept the bill. The ship having been lost on the voyage to the United Kingdom, the indorsees brought an action to recover the amount of their advances:—Held, that under the charterparty the shipowners had a right to rely on an insurance upon the advances being made by the indorsees, who had stipulated for and received the right to charge the premium; and that they having chosen not to insure must bear the loss. *Ib.*

ii. Bills of Exchange.

Not Honoured—No Discharge.—Where there is a charterparty covenanting for payment of

freight on a right and true delivery of the goods at a foreign port, the freighter is not discharged by the master there taking from the freighter's agent, who was furnished with funds to pay him the freight, a bill of exchange upon a third person, by whom it is accepted, if the bill is not duly honoured, although the agent fails with the amount of the freight in his hands, unless the master had the offer of a cash payment, and preferred the bill for his own convenience. *Marsh v. Pedder*, 4 Camp. 257.

A., wishing to send goods to B. at X., employed C. to carry and deliver them to B. and engaged to pay C. for the freight: C., on delivering them according to the order, took a bill of exchange from B., drawn on A., which bill was never paid:—Held, that A. was liable to pay the amount of the freight to C., notwithstanding the bill of exchange. *Tapley v. Martens*, 8 T. R. 451.

— **Taken instead of Money—Otherwise.**—If, in a case where there is no charterparty, the captain of a ship delivers a cargo, and, as the best thing he can do for all parties under existing circumstances, takes a bill of the agent of the persons to whom the cargo on board belongs for the amount of the freight, this does not discharge the owners of the cargo, but they are liable for freight if the bill is dishonoured: but if it appears from the other side that he might have had his money of the agent, and chose to take the bill, it is otherwise. *Strong v. Hart*, 6 B. & C. 160; 9 D. & R. 189; 2 C. & P. 55. See also *Marsh v. Pedder*, *supra*.

To Master.—A., a broker in London, offered the master of a ship (who was half owner) a cheque for the balance due to the owners for freight received for them by A. This the master refused, but at his request A. opened a credit for part of the amount in favour of H. with a bank in New Brunswick. H. received the money, and drew a bill for the amount in favour of the bank upon A., who paid it at its maturity:—Held, that this was such a payment of freight, pro tanto, by A. to the master as bound the other owners. *Anderson v. Hillies*, 12 C. B. 499; 21 L. J., C. P. 150; 16 Jur. 819.

iii. Other Cases.

According to Bill of Lading or Charterparty.—A charterparty stipulated that the ship should load a cargo of coal at Cardiff and proceed to Pernambuco, and there deliver the same, and afterwards receive a full cargo of sugar and other merchandize, and therewith proceed to a safe port in the United Kingdom, and deliver the same on being paid freight at the rate of 60s. per ton of twenty cwt. net for sugar, and for other produce at a rate proportionate thereto, being in full for the round. "The freight to be paid in the following manner: 150*l.* on signing bills of lading at Cardiff, cash for the disbursements abroad at the current rate of exchange, and the remainder on the delivery of the cargo. The master to sign bills for each cargo at any rate of freight that might be tendered. The owners to have a lien on the homeward cargo for all freight and demurrage that might accrue thereon, to the extent of the bill of lading freight, but the difference, if any, to be paid at the port of loading by captain's draft on char-

terers, at usance, which they agree to accept and pay on consignee at loading port agreeing to the amount:—Held, that the two clauses were not inconsistent, their meaning being, that if the bill of lading freight was less than the charter freight, the difference was to be paid at the port of loading by the captain's draft on the charterers, at usance, if the consignee settled the amount, otherwise at the port of delivery. *Santos v. Brice*, 6 H. & N. 290; 30 L. J., Ex. 108.

By a charterparty between the defendant and H., a ship was chartered to proceed to Madras, and load a cargo there from the agents of H., and being so loaded, proceed to London and deliver the same on being paid freight, at 3*l.* 15*s.* a ton, the captain to sign bills of lading for his cargo for any rate of freight required; without prejudice to this charterparty. S., who acted as agent to H. at Madras, in respect of the charterparty, by his directions purchased sugars and loaded them on board, and the captain, at the request of S., signed a bill of lading, deliverable to the order of S., at 1*l.* per ton freight. H. stopped payment, and never paid for the sugar. The sugar having arrived in London:—Held, that S. or the parties in London who represented him were entitled to the sugar on payment of the bill of lading freight. *Shand v. Sanderson*, 4 H. & N. 381; 28 L. J., Ex. 278.

Into Registry of Admiralty Court.—In an action by a shipowner against the charterers for freight, they pleaded, that after the freight had been earned, and after the commencement of the action, the obligee of a bottomry bond, by which the ship and freight were hypothecated, instituted in the Court of Admiralty a suit against the ship and freight, wherein a monition issued, commanding the plaintiff to bring into court the proceeds of the wreck and stores of the ship, and the defendants to bring into court the money due for freight, to abide the judgment of the court, and that they had done so:—Held, that, as the Court of Admiralty has jurisdiction to decide all questions as to freight in such a case, the plea was a good plea in bar of the action. *Place v. Potts*, 8 Ex. 705; 22 L. J., Ex. 269. Affirmed in Dom. Proc., 5 H. L. Cas. 383; 24 L. J., Ex. 225.

e. Rate and Amount.

According to what Rates.—A charterer was to load at Archangel a full and complete cargo of oats or other lawful merchandize, which the ship-owners were to deliver "on being paid freight at the rate of 4*s.* 6*d.* per 320 lbs. for oats, and if any other cargo be shipped in full and fair proportion thereto, according to the London Baltic printed rates." The cargo shipped consisted of flax and other light articles (all mentioned in the London Baltic rates), as much as the ship could safely carry, which rendered the shipment of 120 tons of ballast necessary:—Held, that the cargo shipped was a full and complete cargo of articles constituting lawful merchandize within the meaning of the charterparty, and that the charterer was not liable to pay freight as on a full cargo of oats or of other merchandize ejusdem generis. *Southampton Steam Colliery Company v. Clarke*, 4 L. R., Ex. 73; 38 L. J., Ex. 54; 19 L. T. 651; 17 W. R. 653; and on appeal, 6 L. R., Ex. 53; 40 L. J., Ex. 8; 19 W. R. 214—Ex. Ch.

By the terms of a charterparty a ship was to proceed to Port Philip, and there load a full and complete cargo of wool, tallow, bark or other legal merchandize, the bark not to exceed 180 tons, the tallow and hides not to exceed 80 tons, and being so loaded, to proceed therewith to London, and deliver the same on being paid freight as follows: for wool pressed, twelve-eighths of a penny per pound; unpressed, thirteen-eighths of a penny per pound; tallow, 3*l.* per ton; bark, 4*l.* per ton; hides, 2*l.* per ton; one-third to be paid in cash on unloading the remainder by bills at two months. The ship took on board a few goods at Port Philip, and obtained leave, without prejudice to the charter, to go to Sydney, where she was loaded full, and returned to London with 61 tons of wool only, and a large quantity of dead weight. In an action for not loading at Port Philip, according to the tenor of the charter:—Held, that the terms of the charterparty meant that the ship-owners should be paid freight for a full homeward cargo, consisting of 180 tons of bark, tallow and hides, and the residue of wool, and that damages were to be calculated on that basis. *Cockburn v. Alexander*, 6 C. B. 791; 18 L. J., C. P. 74.

Held, also, that under the words "other legal merchandize," the charterer was at liberty to ship any lawful articles he pleased, due regard being paid to the safety of the vessel, but was bound to pay the same amount of freight as the vessel would have earned if loaded within the terms of the charterparty. *Id.*

Where a ship is chartered to bring home a cargo of enumerated articles, at rates of freight specified, and such articles are not provided by the charter, the freight must be paid upon average quantities of such articles; and this, whether the ship returns empty or laden with a cargo of articles of a different nature and quality from those enumerated in the charter. *Capper v. Forster*, 3 Bing. N. C. 938; 3 Scott, 129; 3 Hodges, 177.

Alternative Rate.—A. undertook to smuggle goods belonging to B. into Russia; a regular bill of lading was made out of the goods, in which the freight charged was the usual freight according to the bulk of the goods; but a second contract was made between the parties, by which B. undertook to pay A. a larger sum of money if the goods should be safely landed in the foreign port. The goods were landed, B. paid the freight under the bill of lading, and likewise part of the money under the agreement, but refused to pay the remainder:—Held, that, notwithstanding the bill of lading, he was liable to pay the residue, as extra freight. *Hedley v. Lapage*, Holt, 392.

The plaintiffs agreed with the defendants to convey a cargo to O., and if the river was in possession of an enemy, to unload at F., outside the harbour. The freight was to be 47*5l.*, or if the vessel could enter O., discharge and reload there, 300*l.* only; twenty-five days were allowed for unloading. The plaintiffs arrived at F. June the 2nd, and, an enemy being in possession of the river, commenced unloading there. The vessel was detained at F., partly for the convenience of the defendants, and partly by bad weather, till August 25th, and by that time had discharged seven-eighths of her cargo. The enemy then having quitted the river, she entered O.,

where she discharged the remaining eighth of her cargo. In July the defendants' agent at O. gave the plaintiff a bill for the larger freight. In September, the vessel obtained, at O., a full cargo for England:—Held, that the plaintiffs were entitled to the larger freight, and to demurrage from the 28th of June. *Gibbens v. Buisson*, 1 Bing. N. C. 283; 1 Scott, 133.

A charterparty provided that a ship should sail to any safe island or islands on the south-west coast of Africa, agreeably to instructions which were to be given to the captain in due time by the charterers or their agents, and there load from the factors of the charterers a full cargo of guano or other lawful produce, which the charterers bound themselves to provide, and being so loaded, to proceed therewith to a safe port in the United Kingdom, and deliver the same, on being paid freight at 3*l.* 18*s.* per ton, the freight to be paid on unloading and right delivery of the cargo, one-third in cash on arrival at port of destination, and the remainder by approved acceptances of three months, or cash equal thereto. And it was also agreed, that in case the charterers' agents should be unable to furnish a cargo of guano at the ports or places therein provided, they should have power to send the ship to any other safe port or ports, place or places, for obtaining a cargo of guano in the manner aforesaid, or of other goods, in which case they were to pay for such service as hire for the ship after the rate of 15*s.* 6*d.* per ton per month, such pay or hire to commence from the day of the ship's clearing outwards at the Custom-house, London, and to terminate upon the ship's return to her port of delivery as thereinbefore provided for, and the discharge of the cargo. If the freighters' agents intended so to employ the ship, they were to give the master written notice of such their intention, on production whereof the freighters engaged to pay the owner in cash on account three months' pay for the hire of the ship, and the balance to be paid on the ship's return. The charterers instructed their agent on the south-west coast of Africa that the ship should proceed according to his instructions, and that in case she could not find a cargo, she should proceed where he deemed it likely to procure one. The ship sailed pursuant to the charterers' directions to an island on the south-west coast of Africa, where the agent met her, and informed the captain that there was no guano to be had there, and that she must procure a cargo in Saldanha Bay (another place on the same coast), and must proceed to the Cape for a licence to load a cargo there. The ship accordingly sailed for the Cape, but being there required to enter into an engagement to sign and hand over bills of lading for the cargo as a security for the charges of the licence; the captain refused to do so unless the agent would make the freight payable according to the time employed, instead of according to the weight of the cargo, and the latter accordingly gave the captain notice that he engaged him upon time, according to the latter clause of the charterparty:—Held, that this clause had come into operation, and that the time freight was recoverable. *Fenwick v. Boyd*, 15 M. & W. 632.

Sub-charter at higher Rate.—The plaintiff by charterparty, agreed with G. to convey corn at 4*s.* 6*d.* a quarter: G. made a sub-charter with

S., who consigned corn to the defendants under bills of lading, by which they were to pay 6s. a quarter freight, and gave them notice to retain 1s. 6d. a quarter for him. The plaintiff having sued for freight at 6s. per quarter:—Held, that he was entitled to recover only 4s. 6d. *Michen-son v. Begby*, 6 Bing. 190; 3 M. & P. 442.

Alteration.]—A ship was chartered from London to Bombay, addressed to G. & Co., the charterer's agents at the latter place; and it was stipulated by another charterparty of the same date, that the ship should discharge her cargo at Bombay, and then take in a homeward cargo, the charterer agreeing to pay freight, as to one-half of the cargo at 3l. per ton, and as to the rest, at the current rate of freight when the ship should be loading. It was also agreed, that the master of the ship, and the agents at Bombay should be at liberty to make such alterations in the charterparty as they might mutually think proper, without prejudice to the agreement. Shortly after the arrival of the ship at Bombay, G. & Co. agreed, by a memorandum indorsed on the charterparty, that, before loading her homeward cargo, the ship might proceed to Aden with government coals and stores, and return to Bombay with all possible dispatch. The plaintiff accordingly entered into a charterparty with the East India Company, and the ship proceeded to Aden, and returned thence, having earned freight, which was paid to the plaintiff:—Held, that G. & Co. had authority to permit the voyage to Aden, and that the charterer was bound by the alteration in the charterparty; and, therefore, that he was bound to pay the charter-rate of 3l. per ton for half the cargo, although that exceeded the current rate of freight at the time of loading, and although the alteration might be prejudicial to him; and that he was not entitled to bring into the account the freight earned by the owners on the Aden voyage. *Wiggins v. Johnston*, 14 M. & W. 609; 15 L. J., Ex. 202.

Goods not Specified—Vacant Space.]—A ship was chartered to bring home a full cargo of produce, and to deliver the same on being paid freight "at and after the rate of 5s. 6d. per barrel of flour, meal and naval stores, and 11s. per quarter of 480 lbs. for Indian corn or other grain." The cargo was not to consist of less than 3,000 barrels of flour, meal or naval stores. The ship returned with a short cargo, consisting of only three barrels of flour, and the rest oats, tobacco, bran and staves. Indian corn or wheat weighs 480 lbs. and oats only 272 lbs. per quarter, and the latter were not a usual import from the port of lading:—Held, first, that the charterparty was intended to regulate the amount of freight to be paid on all produce that might be shipped; and that for produce not specified, and for vacant space, freight was to be calculated at a rate to be deduced from the two rates mentioned. *Warren v. Peabody*, 8 C. B. 800; 19 L. J., C. P. 43; 14 Jur. 150.

— "Other grain."—Held, secondly, that the words "other grain" meant such grain as would weigh about 480 lbs. per quarter, and therefore did not include oats, which were to be treated as produce not specified, and freight to be paid for them accordingly. *Id.*

"In full for the Voyage"—Subordinate

Cargoes.]—By a charterparty it was agreed that a ship should proceed to Pernambuco, and there load from the factors of the freighters—having first discharged her cargo, if any—any legal merchandize, to the extent of a full cargo, that the freighters might have for shipment, and should proceed therewith to Valparaiso, a legal port between Valparaiso and Guayaquil, and Guayaquil, all or any, and there discharge the cargo laden on board at Pernambuco, and at the port between Valparaiso and Guayaquil (and Guayaquil) inclusive; also, discharge any goods taken on board at Valparaiso for that purpose, and at any and all the aforesaid ports should receive and take on board a full and complete cargo of legal merchandize, and therewith proceed to Cork or Falmouth for orders to discharge, and deliver the same agreeably to bills of lading, on being paid freight at and after the rate of 5l. 5s. per ton, such freight to be paid in full for the voyage, the cargo from Pernambuco being freight free, as well as those goods shipped at Valparaiso, if any, for the ports at which the vessel should load her homeward cargo. The ship took in cargo at Pernambuco, which was discharged at Valparaiso. At Valparaiso she took on board goods belonging to the freighters, and also to other merchants, for Païta (a port between Valparaiso and Guayaquil) and Guayaquil, part of which was to be discharged there and the rest to be carried to England. No part of the homeward cargo was put on board at Païta:—Held, that the stipulated freight of 5l. 5s. covered the whole voyage, the general words of the charterparty "in full for the voyage" not being controlled by the clause following, and that the owner was not entitled to freight for the goods carried from Valparaiso to Païta, although no part of the homeward cargo was loaded at the last-mentioned place. *Sweeting v. Darthez*, 14 C. B. 538; 23 L. J., C. P. 131; 18 Jur. 958.

Passengers taken instead of Goods.]—A., a shipbroker, engaged with B., a shipowner, to have a full cargo for the ship, the rates of freight for which would average 40s. per ton, and at least nine cabin passengers, passage-money to average 75l. The contract was fulfilled as to the passengers, but the average rate of freight for goods put on board by A. amounted to 32s. only per ton. He shipped on board, however, steerage passengers for the voyage, the passage-money paid by whom, after deducting the expenses of their diet, &c., when added to the freight of the cargo properly so called, made the average earnings of the whole ship per ton amount to more than 40s.:—Held, that this was not a performance of the stipulations of the contract, "cargo" and "freight" being terms applicable to goods only. *Lewis v. Marshall*, 7 M. & G. 729; 8 Scott, N. R. 729; 13 L. J., C. P. 193; 8 Jur. 848.

"The Highest Freight Paid" on same Voyage.]

—By a charterparty for a voyage from Sandswall to Southampton, it was stipulated that the owner should receive "the highest freight which he could (or prove by evidence), to have been paid for ships on the same voyage or passage by water, when the vessel passed Elsinore, but not less than 90s. per St. Petersburg standard hundred:"—Held, that the charterparty did not contemplate strict legal proof of the actual agreement

of the higher rate of freight, but reasonable evidence that such higher freight had been paid or contracted to be paid; and that the owner could not entitle himself to a higher rate of freight than 90s., by proving that other vessels had been chartered at such higher rate for a voyage to London, that not being within the fair intention of the charterparty for the same voyage. *Gether v. Capper*, 15 C. B. 696; 24 L. J., C. P. 69; 1 Jur., N. S. 332. Affirmed, 18 C. B. 866; 25 L. J., C. P. 260; 2 Jur., N. S. 789—Ex. Ch.

On Goods Shipped or Delivered—Authority of Captain.—The *Oriente*, a vessel from the Chincha Islands, having on board a cargo of guano, chartered to the plaintiffs in London, put into Valparaiso in a disabled state, and discharged the cargo into a hulk, and it became necessary to tranship and forward the cargo to its destination by another vessel; and the captain, on behalf of the owners of the cargo, accordingly entered into a charterparty with the master of the defendant's ship "to take on board from the hulk the cargo put on board of her, forming the cargo brought to Valparaiso by the *Oriente*, being 470 tons of guano, more or less," and proceed with the same to its destination, agreeing to pay 5l. 2s. 6d. freight for every ton delivered. A dispute arose as to the quantity of guano put on board, the defendant's master alleging it was much less than 470 tons, and the captain of the disabled ship saying it was that quantity. Ultimately the latter signed a bill of lading, describing the guano shipped as part of the original cargo, the consignees "paying freight for the guano on 470 tons as per charterparty." It turned out that only 344 tons of guano had been shipped.—Held, that the captain had no authority to bind the owners of the cargo to pay freight for more than the quantity of guano actually shipped, and consequently that the indorsees of the bill of lading were entitled to have the cargo delivered on payment of the freight of 344 tons. *Gibbs v. Gray*, 2 H. & N. 22; 26 L. J., Ex. 286; 3 Jur., N. S. 543.

—Measurement.—By a charterparty it was agreed that a ship should sail to Bombay and there load a full cargo of cotton, and proceed with it to Liverpool and deliver the same on being paid freight at the rate of "75s. per ton of fifty cubic feet delivered." The ship received at Bombay, and carried to Liverpool, a full cargo of cotton; the cargo was packed at Bombay, as is customary, in compressed bales, and expanded greatly on being unloaded at Liverpool.—Held, that the freight was payable on the measurement of the goods when shipped, and not when delivered. *Buckle v. Knoop*, 2 L. R., Ex. 333; 36 L. J., Ex. 223; 16 L. T. 571; 15 W. R. 999—Ex. Ch.

By a charterparty it was agreed that "a ship should load a cargo and proceed to a port in Great Britain, and deliver the same on being paid freight at and after the rate of 35s. per 180 cubic feet (English) taken on board, as per Gothenburg custom."—Held, that the freight was to be ascertained by measuring the cargo, according to the method used at Gothenburg, and not according to the method used at the port of discharge. *The Skandinav*, 51 L. J., P. 93—C. A. Reversing 50 L. J., P. 46.

By a charterparty made at Liverpool for a voyage from Liverpool to Sydney, the charterer

agreed to pay for the hire and use of the ship in respect of the voyage, 1,550l. in full, on condition of her taking a cargo of not less than 1,000 tons weight and measurement.—Held, that 1,000 tons of weight and measurement meant 1,000 tons of a cargo of goods in the ordinary proportion of the port of lading, viz., one-third weight and two-thirds measurement, and not as for the Sydney market, in which the proportion is two-thirds weight and one-third measurement. *Pust v. Dowie*, 32 L. J., Q. B. 179; 8 L. T. 244. Affirmed, 34 L. J., Q. B. 127; 13 W. R. 459—Ex. Ch.

The bill of lading of a cargo, shipped at Dantzic on board a Prussian vessel, expressed it to be 100 lasts in 2,092 bags. The consignee had purchased it for that quantity, English measure, but it did not amount to that quantity by the Dantzic measure, which is larger.—Held, that the master was entitled to freight according to the measure in the bill of lading, although exceeding the freight computed by Dantzic measure. *Moller v. Living*, 4 Taunt. 102.

Goods shipped from abroad, and consigned to a merchant in this country, are to be paid for (upon a demand for freight) according to their net weight, as ascertained at the king's landing scales, and not according to the weights expressed in the bill of lading, unless there is a special contract so to pay for them. *Geraldes v. Donison*, Holt, 346.

Upon a charterparty engaging to pay 4l. 15s. per ton for goods shipped at Bombay for London, cotton to be calculated at 50 cubic feet per ton.—Held, that evidence was admissible of a usage to pay according to the measurement taken at Bombay before the goods were loaded; also, that the plaintiff was entitled to shew in reply, that his captain objected to receive the goods at the Bombay measurement, measured them when on board, and delivered an account of that measurement to the shippers. *Bottomley v. Forbes*, 5 Bing. N. C. 121; 6 Scott, 866.

— "Quantity and Quality Unknown."—A vessel was chartered to carry a cargo of corn from Odessa to Gloucester, for freight payable at a certain rate per quarter. 2,664 quarters were shipped at Odessa, and the master signed bills of lading in the usual form, and which contained a memorandum, "quantity and quality unknown." The vessel arrived at Gloucester with the cargo of corn, when it was measured at the Queen's beam, and found to contain 2,785½ quarters, being an increase of 121 quarters. In the course of the voyage a portion of the corn, from some unknown cause, had become heated and damaged, whereby its bulk was increased.—Held, that freight was payable on the quantity of corn shipped, and not on its measurement at the port of discharge. *Gibson v. Sturge*, 10 Ex. 622; 3 C. L. R. 421; 24 L. J., Ex. 121; 1 Jur., N. S. 259.

A charterparty, under which a ship was chartered for a grain cargo from the Danube to the United Kingdom for freight "per imperial quarter delivered," contained a provision that in the event of the cargo, or any part, being delivered in a damaged or heated condition, the freight should be payable on the invoice quantity taken on board, as per bill of lading, or half-freight upon the damaged or heated portion, at the captain's option. The bill of lading stated that 1,021 kilos were shipped on board; but the master added at the end of the bill of lading,

before signing it, the words "quantity and quality unknown." The cargo having become heated on the voyage, the master claimed to exercise his option, and to be paid freight upon the invoice quantity, as per bill of lading:—Held, that the addition of the words "quantity and quality unknown" to the bill of lading by the master did not take away his right to be paid freight upon the invoice quantity in the bill of lading, and that the object and effect of that memorandum were merely to protect the captain against any mistake that might occur in the invoice quantity in the bill of lading, in case of alleged short delivery or deterioration not caused by his default. *Tully v. Terry*, 8 L. R., C. P. 679; 42 L. J., C. P. 240; 29 L. T. 36.

— **Mistake and Misdescription.**—In an action for freight, the master is at liberty, notwithstanding the terms of the 18 & 19 Vict. c. 111, s. 3 (the Bills of Lading Act), to shew that the cargo actually received by him differs in weight from that signed in the bill of lading; at all events where the weight mentioned in the bill of lading is a mere matter of measurement. *Blanchet v. Powell's Llantwit Collieries Company*, 9 L. R., Ex. 74; 43 L. J., Ex. 50; 30 L. T. 28; 22 W. R. 490.

A shipowner is not estopped by the signature of the bill of lading by the master from shewing that the goods or some of them were never actually put on board. *Brown v. Powell Duffryn Steam Coal Company*, 10 L. R., C. P. 562; 44 L. J., C. P. 289; 32 L. T. 621; 23 W. R. 549.

Bills of lading signed by the master are *prima facie* evidence that the quantities named therein were received by him; the onus of rebutting this presumption, and of shewing that a less quantity than that specified was received, lies on the shipowner. *McLean v. Fleming*, 2 H. L. (Sc. App.) 128; 25 L. T. 317.

Freight Payable "on Intake Measure of Quantity Delivered."—A cargo of deals and battens consigned to the defendants was shipped on board the plaintiff's vessel under a charterparty by which freight was to be paid on deals, battens, &c., at the rate of 3l. 5s. per St. Petersburg standard hundred of 1,980 superficial feet and on deal ends at the rate of 2l. 1s. 1d. per the like hundred, eight feet and under. "Freight payable on deals and sawn lumber on the intake measure of quantity delivered." A bill of lading was signed for a specified number of pieces, deals, battens, and scantling, making freight payable "as per charterparty." The various pieces were, in the ordinary course of business, measured by the shipper at the port of shipment and their dimensions entered in a specification; the figures representing such dimensions being, before shipment, chalked on each piece respectively. During the voyage a number of the pieces were lost. The remainder was delivered at the port of destination, but the measurement figures put on some of the pieces delivered had become obliterated. The dimensions of the pieces lost were unknown; but there was some evidence that they were of average size compared with the rest of the cargo:—Held, that under the charterparty, freight was payable on the measurement figures as ascertained at the port of shipment, and not on the quantity delivered measured at the port of discharge, accord-

ing to the intake mode of measurement; and that, having regard to the particular circumstances, the amount might be calculated by assuming that the pieces lost were of average size as compared with the remainder, and making a proportionate reduction from the sum total of the measurements in the specification. *Spaight v. Farnworth*, 5 Q. B. D. 115; 49 L. J., Q. B. 346; 42 L. T. 296; 28 W. R. 508.

Dead Freight.—Dead freight means not freight, but an unliquidated compensation for the loss of freight recoverable in the absence and place of freight. *McLean v. Fleming*, 2 L. R., H. L. (Sc.) 128; 25 L. T. 317.

The shipowner therefore is entitled to be paid for a deficiency of cargo, not at the rate assigned per ton in the charterparty for actual cargo, but a reasonable sum, deductions being made for charges saved to the shipowner in consequence of the deficiency. *Id.*

Deductions.—The stipulation in a charterparty that freight shall be paid "subject to insurance," means, freight is to be paid subject to deductions for premiums upon insurance. *Jackson v. Isaacson*, 3 H. & N. 405; 27 L. J., Ex. 392.

Disbursements charged against the freight of a vessel, but not expressed in the charterparty, are mere loans and cannot properly be deducted. *Tanner v. Phillips*, 27 L. T. 480; 21 W. R. 68.

f. Recovery of Over Payment.

In What Cases.—If the consignee, to get his goods delivered to him, pays more than the net weight amounts to, he may recover back the surplus. *Geraldes v. Donison*, Holt, 346.

When the charterers of a ship stipulate that they shall be entitled to insure their advances "against freight," at the owner's expense, and they fail to insure, they have, in the event of the ship perishing, no claim against the owners for repayment. *Watson v. Shankland*, 2 L. R., H. L. (Sc.) 304; 29 L. T. 349.

Advance Freight.—*See ante*, col. 1459.

g. Tender.

What is.—The custom of the Caen stone trade being to pay freight half in cash and half by a bill at two months, the agent of the owners of Caen stone, which was brought by a vessel to an English port, verbally offered the captain of a vessel which brought it half the amount of the freight in cash; and also offered to give the captain per procuration, the acceptance of the principal for the other half, if the captain would draw a bill. This the captain refused:—Held, a sufficient tender of the freight, as it was the duty of the captain to draw the bill. *Luard v. Butcher*, 2 C. & K. 29.

Waiver of.—In an action for non-delivery of a cargo, it was proved that a larger sum was demanded for freight by the master than was due, and that the demand was so made as to amount to an announcement by the master that it was useless to tender a smaller sum, as it would be refused:—Held, that these facts amounted to a dispensation of a tender. *The Norway*, B & L. 404; 3 Moore, P. C. C., N. S. 245; 11 Jur., N. S.

892; 13 L. T. 50; 13 W. R. 1085. See also *S. C.*, 13 W. R. 296.

h. Payment Guaranteed.

The defendants guaranteed to the plaintiff's vessel a sum of 900*l.* gross freight, on the understanding that the vessel should be placed at once on the most profitable charter or trade procurable, and that the vessel would carry 300 tons of whatever cargo it might take on board, or should it not take 300 tons, that a proportionate reduction of the guarantee should be made for any proper quantity of cargo it might take. The plaintiff was not able to procure a gross freight of 900*l.*:—Held, that the breach accrued at the place of loading, and that the plaintiff was entitled to recover on the guarantee, though the vessel was lost on the voyage. *Curr v. Wallachian Petroleum Company*, 2 L. R., C. P. 468; 36 L. J., C. P. 236; 16 L. T. 460; 15 W. R. 874—Ex. Ch.

i. Pleadings in Actions.

A declaration stated that "the defendants are indebted to the plaintiff for freight, for the conveyance by the plaintiff for the defendants, at their request, of goods in a ship":—Held, that the declaration was bad for omitting the words "for money payable by the defendant to the plaintiff," and for not shewing any debt due in presenti. *Place v. Potts*, 8 Ex. 705; 22 L. J., Ex. 269.

So where a declaration since 15 & 16 Vict. c. 76, stated that "the plaintiff sues the defendant for freight, for the conveyance by the plaintiff for the defendant, at his request, of goods in ships":—Held, bad on demurrer, for not shewing a debt in presenti, but that the defect was cured by pleading over. *Wilkinson v. Sharland*, 10 Ex. 724; 3 C. L. R. 619; 24 L. J., Ex. 116; 1 Jur., N. S. 144.

Or might be amended after error brought, on payment of costs. *S. C.*, 3 C. L. R. 619; 1 Jur., N. S. 405.

Where a ship was let to freight by a charterparty, a clause in the deed, that "it was covenanted and agreed by and between the parties, that forty days should be allowed for unloading and loading again":—Held, to raise an implied covenant on the part of the freighter not to detain the ship for loading and unloading beyond the forty days; and if he detains her for any longer time, the owner's remedy is covenant and not assumpsit, as upon an implied new contract. *Randall v. Lynch*, 12 East, 179.

4. LIEN ON CARGO.

a. Creation of.

By Contract.—Where parties, instead of trusting to the general rule of law with respect to freight, make a special contract for a payment which is not freight, it must depend upon the terms of that contract whether a lien does or does not exist. When the contract made gives no lien, a court of law will not supply one by implication. *Kirchner v. Venus*, 12 Moore, P. C. C. 361; 5 Jur., N. S. 395; 7 W. R. 455.

D. & Co., of Liverpool, shipped goods for Sydney. The bill of lading stated the goods to be to the shipper's order or assigns, "he or they paying freight for the goods here as per margin."

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In the margin it was stipulated as follows: "Freight payable in Liverpool to M., one month after sailing, vessel lost or not lost." The bill of lading passed into the hands of K. & Co., as indorsees for value. On the ship's arrival at Sydney, the port of delivery, the master was advised by the shipowner that the sum agreed to be paid as freight at Liverpool had not been paid; and he refused to deliver the goods to K. & Co., the assignees of the bill of lading, unless freight was paid, claiming a lien on the goods for the unpaid freight:—Held, first, that the amount agreed to be paid by the shippers at the port of shipment, one month after sailing of the ship, did not acquire the legal incidents of freight, though described under that name in the bill of lading, it being merely money to be paid for taking goods on board and undertaking to carry, and not for carrying the goods; and that there was no right of lien on the goods by the shipowner in respect of such sum of money being unpaid. *Id.*

No consideration of inconvenience can prevent a right of lien where a charterparty has expressly created that right. *McLean v. Fleming*, 2 L. R., H. L. (Sc.) 128; 25 L. T. 317.

Dead Freight.—By a charterparty it was agreed between a shipowner and a merchant that his ship should proceed to Sulina, . . . and there load as customary from the factors of the . . . freighter a full and complete cargo of staves, &c., "which the . . . merchant bound himself to ship, . . . and . . . therewith proceed to London, and deliver the same on being paid freight at specified rates. . . . The freight to be paid in cash on . . . right delivery of cargo. . . . Fifty running days . . . to be allowed for loading . . . and ten days on demurrage, over and above the laying days . . . at 8*l.* per day. . . . The owners to have an absolute lien on the cargo for all freight, dead freight, demurrage, and average; and the charterer's responsibilities to cease on shipment of the cargo, provided it be of sufficient value to cover the freight and charges on arrival at port of discharge. . . ." The ship proceeded to Sulina and, after a delay of eighteen days beyond the ten demurrage days, loaded a short cargo. A printed bill of lading was then signed by the captain for 283,682 staves, to be delivered "at the port of discharge, as per charterparty, unto order or . . . assigns, he or they paying freight and all other conditions (these words being inserted in writing) or demurrage (if any should be incurred) for the said goods as per charterparty." Upon the arrival of the ship in London the shipowner claimed from the consignees of the bill of lading, a lien on the goods mentioned in the bill of lading for cargo short shipped (claimed as dead freight), for demurrage proper, in respect of the ship being detained ten days at the port of loading, and for damages in the nature of demurrage for a detention beyond the demurrage days. The consignees had no notice, until the arrival of the ship in London, of this claim, but they had received a copy of the charterparty with the bill of lading:—Held, that the shipowner had no lien for "dead freight," as the claim was not "dead freight" within the meaning of the charterparty and bill of lading. *Gray v. Carr*, 6 L. R., Q. B. 522; 40 L. J., Q. B. 257; 25 L. T. 215; 19 W. R. 1173—Ex. Ch. See also *Birley v. Gladstone*, post, col. 1479.

Where the freighter of a ship covenanted, that, if she should not be fully laden, he would not only pay for the goods on board, but also for so much in addition as the ship would have carried, for which he had before stipulated to pay freight according to different rates for three descriptions of goods:—Held, that the shipowner had no lien upon the goods actually on board for the amount of dead freight; in other words, for the compensation in damages which he was entitled to for the freighter's breach of contract in not putting a full loading on board, which damages were unliquidated; there being no lien in such a case, either by usage of trade or the express contract of the parties. *Phillips v. Rodie*, 15 East, 547.

Unpaid Vendor—Amount.—The plaintiff, being the owner of a ship called the K., loaded her with wheat at P.; as the cargo was taken on the ship's account, freight at the nominal rate of 1s. per ton was inserted in the bill of lading, which contained the usual exceptions of perils of the seas. He sold the cargo whilst afloat to H. upon the terms that "freight" should be paid at the rate of 60s. per ton. H. sold his interest in the cargo, and it ultimately vested in the defendant, who bought the cargo on the same terms on which it had been sold to H. The K. on her arrival was ordered to Y., where she commenced to discharge her cargo; the defendant received it and paid large sums on account. The quantity delivered was less than that mentioned in the bill of lading by about seventy quarters. The plaintiff claimed "freight" at the rate of 60s. per ton upon all the cargo delivered; the defendant claimed to deduct 193l. on account of short delivery. At the trial the jury were of opinion that the short delivery arose from the excepted perils, and found for the plaintiff for the total sum claimed by him:—Held, that although the plaintiff might not have a lien as shipowner, the cargo being taken on ship's account, nevertheless he had a lien as unpaid vendor; that from the defendant's conduct a contract by him might be implied to pay freight at the rate of 60s. per ton upon all cargo delivered, and that the finding of the jury for the plaintiff was right. *Swan v. Barber*, 5 Ex. D. 130; 49 L. J., Ex. 253; 42 L. T. 490; 28 W. R. 563—C.A.

Non-performance of Voyage.—It was provided by a charterparty that 250l. part of the freight, should be advanced in cash on signing bills of lading and clearing at the custom-house, and that for the security and payment of all freight, dead freight, demurrage and other charges, the master or owners should have an absolute lien and charge on the cargo. The ship was loaded and cleared at the custom-house, but the 250l. was not paid, and consequently the captain did not sign bills of lading, and the ship never started on her voyage. The charterer having become insolvent, his trustee in liquidation gave notice to the owner that he disclaimed all interest under the charterparty. The owner claimed a lien on the cargo for the 250l. as freight:—Held, the ship never having earned or commenced to earn freight, no lien arose. *Nyholm, Ex parte, Child, In re*, 43 L. J., Bk. 21; 29 L. T. 634; 22 W. R. 174.

— **When Ship Lost.**—When money for the

carriage of goods by sea is payable at the port of destination, "ship lost or not lost," and the ship is wrecked upon the voyage, the shipowner has no lien upon the goods, although the money to be paid for the carriage is described as freight in the bills of lading. *Nelson v. Association for Protection of Wrecked Property*, 43 L. J., C. P. 218.

On Transhipment.—Where a vessel had been sea damaged, and the agents of the charterers refused to undertake the transhipment, the master entered into a fraudulent contract with a shipowner for the transhipment and conveyance of the cargo. By the contract, while the same freight was reserved as had been payable on the original voyage, it was agreed between the master and the owner that a very large portion should be paid over to the master:—Held, that the contract must be taken to have been made on behalf of the owners, and that they had not a lien which they could transfer to the owner of the second vessel so as to entitle him to withhold the goods until the whole freight was paid. *Matthews v. Gibbs*, 30 L. J., Q. B. 55; 7 Jur., N. S. 186; 3 L. T. 551; 9 W. R. 200.

Unnecessary Detention—Ascertainment of General Average.—When, by a charterparty and bill of lading, freight is "to be paid on unloading and right delivery of the cargo," the master having a lien by common law for freight and general average, and a lien by contract for demurrage, the payment of the freight and the delivery of the goods are concurrent acts in which all that is required from the owner of the cargo is readiness and willingness to pay at the time of delivery; and before paying any sum for general average, the owner of cargo is entitled to be satisfied that the amount claimed is the result of a proper adjustment; and if the owner of cargo on arrival of the ship in port, and before discharge, refuses to pay the amount claimed for freight and general average before the amount due is finally ascertained, but offers to pay a large proportion of the freight, and, there being no doubt as to his solvency, to sign an average bond for the payment of the general average when ascertained, but the master, nevertheless, insists upon retaining the cargo on board ship until his lien for freight and general average is satisfied, detention by the master is not wrongful. *Miedbrodt v. Fitzimon, The Energic*, 6 L. R., P. C. 306; 44 L. J., Adm. 25; 32 L. T. 579; 23 W. R. 932.

— **Discharge against Payments.**—By a charterparty it was provided that freight should be paid at the rate therein specified, the cargo to be taken alongside and to be taken from the ship's tackle at the port of discharge, free of risk and expense to the ship. Disputes having arisen during the delivery of the cargo, the master required payment of the freight for the amount of cargo delivered each day over the ship's side into the consignee's boats, and refused to deliver any more cargo, on the consignees refusing to pay on delivery as required:—Held, that by the terms of the charterparty, it was clear that the intention of these parties was, that the master should, on the arrival at the port of destination, deliver, and the consignees receive, at the ship's side; and that as on such delivery and receipt the master ceased to be responsible and to have any

lien on the goods, he was justified in refusing to discharge the cargo without payment at the ship's side of the freight each day, on the quantity delivered, for his lien would be given up by delivery of the goods. *Black v. Rose*, 2 Moore, P. O. C., N. S. 277; 10 Jur., N. S. 1009; 11 L. T. 31; 12 W. R. 1123.

What Merchandise.]—A master may detain any part of the merchandise for the freight of all that is consigned to the same person. *Soldergreen v. Flight*, 6 East, 622, n. And see *Ward v. Felton*, 1 East, 512.

Though some part has been removed into a lighter alongside of the ship which was sent by the consignee. *Ib.*

Wharfage.]—But the master has no right to detain goods for wharfage, if the consignee tenders the freight, and requires them to be delivered over the ship's side. *Bishop v. Ware*, 3 Camp. 360.

Damages for Detention of Ship at Port of Loading.]—By a charterparty it was agreed that the ship should go to a certain port and there load from the charterer a cargo "in the customary manner," and proceed with the same to another port and deliver "The cargo to be discharged in ten working days, commencing from the day after the ship has got into her proper discharging berth. Demurrage at 2l. per 100 tons register per day. The ship to have an absolute lien on cargo for freight and demurrage, the charterer's liability to any clauses in the charter ceasing when he has delivered the cargo alongside ship:"—Held, that the demurrage and the lien and exemption clauses did not apply to damages for undue detention of the vessel at the port of loading. *Lockhart v. Falk*, 10 L. R., Ex. 132; 44 L. J., Ex. 105; 33 L. T. 96; 23 W. R. 753. *S. P., Gray v. Curr*, 6 L. R., Q. B. 522; 40 L. J., Q. B. 257; 19 W. R. 1173—Ex. Ch.

Port Charges.]—In a charterparty the freighters promised to pay and defray two-thirds of the port charges; the owner having paid the whole:—Held, that he had no lien on the goods shipped for those charges. *Faith v. East India Company*, 4 B. & A. 430.

Evidence of Custom of English Port against Foreign Indorsees.]—Evidence was admitted of a custom in Liverpool, that a lien on goods for a sum agreed to be paid there as freight continued:—Held, that, as the assignees of the bill of lading were resident in Sydney, in New South Wales, and there was no evidence that they were acquainted with the local usage in Liverpool, such evidence of custom was not admissible for the purpose of explaining the effect of the memorandum in the bill of lading, or of shewing the terms on which the goods were shipped, in the construction of such bill of lading. *Kirchner v. Venus*, 12 Moore, P. C. C. 361; 5 Jur., N. S. 395; 7 W. R. 455.

Payment at Two Months after Inward Report.]—A charterparty stipulated that a ship should proceed from London to Bombay, and being there loaded, should proceed to London, and discharge in any dock the freighters might appoint, and deliver her cargo, on being paid freight, at and

after the rate of 4l. per ton. By a subsequent clause it was stipulated that the freight was to be paid on unloading and right delivery of the cargo in cash two months after the ship's inward report at the Custom-house:—Held, that, upon construction of these stipulations taken together, the freight was not payable until two months after the inward report, and the shipowner had not, after the cargo was discharged, pursuant to the charterparty, any lien thereon for the freight. *Alsager v. St. Katharine's Dock Company*, 14 M. & W. 794; 15 L. J., Ex. 34.

Where a charterparty provided for payment of part of the freight, and for "the remainder in cash, two months after the vessel's report inwards:"—Held, that no lien was created in respect of the remainder. *Foster v. Colby*, 3 H. & N. 705; 28 L. J., Ex. 81.

b. Against Charterers or Agents with Notice.

Express Stipulations.]—A shipowner may expressly stipulate to retain his lien by the charterparty, and this will be effective between him and the charterer or his agent with notice. *Kern v. Deslandes*, 19 C. B., N. S. 205.

A lien on the lading of a ship having been expressly reserved to the owner by a charterparty, held that goods which the charterer purchased and put on board, and then transferred with a stipulation to convey them to their destination for a certain amount of freight, were, even against an indorsee of the bill of lading, subject not only to that freight, but to the shipowner's lien for a balance due to him under the charterparty, whether possession of the ship was by the charterparty completely out of the shipowner and vested in the charterer or not. *Small v. Moates*, 9 Bing. 579; 2 M. & Scott, 674.

Notice to Agents—Bill of Lading Differing from Charterparty.]—A shipowner having agreed with G. by charterparty to convey a cargo to Calcutta, and to deliver a return cargo at the East India Docks in London, for a freight of 14l. a ton on the ship's tonnage, the last payment to be made by bills at four months, on the arrival of the ship in the Thames. G. by his agents put goods on board at Calcutta, and consigned them to the defendants, who were aware of the existence of the charterparty: the captain signed a bill of lading, according to which freight for these goods was expressed to have been paid by bills in London:—Held, that, notwithstanding this bill of lading, the shipowner had, even as against the defendants, a lien on these goods for the hire of the ship due under the charterparty. *Campion v. Colvin*, 3 Bing. N. C. 17; 3 Scott, 338; 2 Hodges, 116.

Failure of Charterers—New Contract.]—The agents of M. & Co., of Porto Rico, chartered a ship for a voyage for the round from Glasgow to Porto Rico, and back to the United Kingdom; freight 4l. 10s. per ton upon homeward cargo. The charterer, on the vessel's arrival at San Juan, directed the captain to proceed to P., where L. & Co., their agents there, would provide him with homeward cargo, and they accordingly supplied 498 hogshheads of sugar towards the cargo, and for which a bill of lading was given by the captain; but having heard of M. & Co.'s failure, they refused to provide the remainder,

and demanded either a return of the goods already on board, or that the captain should enter into a new charter. The captain, under protest, entered into a new contract at 30s. a ton, for a voyage from P. to Falmouth, and 180 hogsheads were put on board in addition, and a bill of lading was signed for the whole quantity at that rate:—Held, that the 498 hogsheads were virtually shipped by the charterers themselves, and that the captain had no authority to vary the contract as to the goods actually on board when the failure of the charterers was heard of, and that the shipowner was therefore entitled to a lien on those goods for freight at the rate of 4l. 10s. per ton; but that with respect to the 180 hogsheads afterwards shipped, the captain was entitled to enter into the new contract, the agents of the charterers having refused to complete the loading on the original charterparty, and for these goods the owners were entitled to a lien at the rate of 30s. *Pearson v. Götschen*, 17 C. B., N. S. 352; 33 L. J., C. P. 265; 10 Jur., N. S. 903; 10 L. T. 758; 12 W. R. 1116.

Where Goods Relanded.]—Where by a charterparty the shipowners covenanted to receive a full cargo and the freighter to load the same, and to pay so much for every ton of flax which should be delivered at the king's beams at L., and so much per diem for demurrage, and the parties mutually bound themselves, especially the shipowners, the ship, her tackle, and appurtenances, and the freighter, the goods to be laden and put on board, in a penal sum, for the performance of every article contained in the charterparty:—Held, that the shipowners had not a lien upon the goods actually brought home to L. for a sum of money claimed to be due in respect of goods which were put on board at the loading port, but afterwards relanded, and restored to the agent of the freighter, under process of the law at the loading port; nor for a sum claimed for dead freight; nor for a sum claimed for demurrage. *Birley v. Gladstone*, 3 M. & S. 205.

Bills of Exchange—Dishonour of.]—By a memorandum of charter, made at Liverpool, it was agreed that a ship should load a cargo there, and proceed to China, and there deliver the same agreeably to bills of lading, and afterwards load a full cargo of tea or other lawful merchandise for Liverpool or London, and deliver the same to the charterers or their assigns, they paying freight for the same at the rate of 7l. 10s. per ton of fifty cubic feet for tea delivered, for the round out and home; other goods, if shipped, to pay in customary proportion; in consideration whereof the outward cargo to be carried freight free; payment to become due and to be made as follows: 800l. on sailing, by charterers' acceptance at three months' date, and the balance on the unloading and delivering of the cargo, by approved bills on London at two months' date, or cash; "the master to sign bills of lading at such rates of freight as may be required by the agents of the charterers, without prejudice to this charterparty; and the owners to have an absolute lien upon the cargo for the recovery of all freight, dead freight, demurrage, &c., due to the ship under this charterparty." By another memorandum, indorsed on the above, Singapore was substituted for China; and it was agreed that, on delivery of the cargo in Singapore, the freighters' agent

there should have the option of loading the ship for London or Liverpool, or for China; that, in the event of the vessel returning from Singapore, the freight for the round should be 3,375l. in full; that should the vessel proceed to China, the freighters should pay an additional freight of 31s. per ton on the homeward cargo from thence, for the privilege of carrying intermediate freight from Singapore to China, and an acceptance at three months for 900l., on the ship's sailing from Liverpool, was substituted for 800l. The ship was laden by the charterers chiefly as a general ship, but they shipped on their own account goods for which the master signed bills of lading, making the goods deliverable at Singapore to M. & Co., or assigns, paying freight as per margin. In the margin, the freight (in the aggregate 196l. 12s.) was declared to be "payable in Liverpool one month after sailing of vessel lost or not lost." The vessel sailed from Liverpool on the 21st of February, 1856, and the charterers gave their acceptance at three months for 900l., which became due on the 23rd of May, and was dishonoured:—Held, that the owners had a lien upon the goods so shipped by the charterers, for the amount of the bill of lading freight, as against the consignees (M. & Co.), who had advanced money to the consignors upon the shipment, but not for the 900l. *Gilkinson v. Middleton*, 2 C. B., N. S. 134; 26 L. J., C. P. 209.

By a charterparty between De M. and the shipowner, coals were shipped from a home port to Alexandria, and made deliverable to order or assigns; and it was stipulated that the freight should be paid "on loading and right delivery of the cargo, less advances in cash at current rates of exchange; one-half of the freight to be advanced by freighter's acceptance at three months, on signing bills of lading; owner to insure the amount, and deposit with the charterer the club policy, and to guarantee the same." The acceptance having been given, the shipowner's agent indorsed the bill of lading thus: "Received on account of the within freight, 301l. 17s. 6d., as per charterparty." On the ship's arrival at Alexandria, the purchaser of the coal, and to whom De M. had indorsed the bills of lading, intimated that he was prepared to pay the balance of the freight remaining unpaid after deducting 301l. 17s. 6d., and applied for delivery of the cargo; but the master having heard that De M. had suspended payment, refused. The demand was made on the 6th of January, 1864, but the bill was not due till the 3rd of February:—Held, that the shipowner had no lien on the cargo in respect of the amount represented by the bill of exchange; and that the damages were the amount of the bills, and such further sum as represented the loss sustained by the detention of the goods. *Tamaco v. Simpson*, 1 L. R., C. P. 363; 35 L. J., C. P. 196; 14 L. T. 893; 14 W. R. 376; 1 H. & R. 374—Ex. Ch.

Approval.]—A shipowner having a lien on goods until the delivery of approved bills for freight, took a bill of exchange in payment, and objected to it at the time, but afterwards negotiated it:—Held, that such negotiation amounted to an approval of the bill, and that he thereby lost his lien on the goods. *Horncastle v. Fuotran*, 3 B. & A. 497; 2 Stark. 590.

Until Delivery of.]—Where the owner of a ship covenanted to let her to freight, and de-

liver the cargo in good order and condition, and the freighters covenanted to pay freight on safe delivery of the cargo, one-third in cash, and the remaining two-thirds by approved bills of exchange, at four months' date:—Held, that the delivery of the cargo and payment of freight were concomitant acts, and that the owner had a lien on the cargo till he was satisfied for the amount of freight remaining due. *Yates v. Railston*; 2 Moore, 294.

And where the owner covenanted to deliver the cargo agreeably to bills of lading, and the freighters covenanted to pay one-third in cash on arrival, and the remainder on delivery of the cargo, by good bills of exchange, at four months' date; and the captain landed the goods in his own name, and offered them to the freighter at one delivery, on receiving the stipulated freight:—Held, that the owner had a lien on them, until such bills of exchange were produced by the freighter. *Yates v. Menell*, 2 Moore, 297.

A., as owner of a ship, covenanted with B., the freighter, for a voyage from London to Bahia, there to receive a full cargo, and to proceed to the first port in the English channel, where, on her arrival, notice should be given to the freighters, from whom orders should be received, at what port the cargo should be delivered, according to bills of lading. B. covenanted to put a full cargo on board, and to pay freight at certain rates per ton, viz. 300*l.* in cash on the day the vessel should be reported inward at the Custom-house, and the remainder by good bills, payable in London, at two months after date, from the day on which the delivery should be completed. A. bound the vessel and freight, and B. the merchandize to be taken on board her, for due performance. The vessel shipped a cargo for the freighter at Bahia, together with other merchandize consigned to other persons in London. By the bill of lading, the freighter's goods were to be delivered, on his paying freight for the same, as per charterparty. The vessel having arrived in London, the owner delivered the goods to the different consignees, on their paying freight reserved by bills of lading, at a less rate than that stipulated by the charterparty. The owner refused to deliver the freighter's cargo, without payment of the freight due under the charterparty:—Held, that he was entitled to detain it for the hire of the vessel, as the delivery of the goods and the payment of freight were concomitant acts; and that if the master unshipped the whole of the cargo, the delivery would be complete, and that the freighter should then pay for and deliver bills for the amount of the freight, as stipulated by the charterparty. *Tute v. Meek*, 2 Moore, 278.

When Holders of Bills of Lading are Charterers' Correspondents.—By a charterparty it was stipulated that the ship should proceed to Penang, and there load a full and complete cargo of legal merchandize from the charterer's factors, and proceed therewith to London, and there deliver the same on being paid freight, "lump sum of 2,800*l.*, in full of all charges." At the end of the charterparty was the following clause:—"The captain to sign bills of lading at any rate of freight, without prejudice to this charter. In the event of a less freight, the bills of lading of part of the cargo to be filled up for loss, if any." Under this charterparty, the charterers shipped at Penang goods of their own, for

which the captain signed bills of lading at a certain specified rate of freight. The goods so shipped were consigned for sale to the correspondent of the charterers in London, who was under a general engagement to honour bills drawn upon him by the charterers, upon the faith of consignments to be made to meet them, and who were largely in advance at the time of the shipment:—Held, that the owners had a lien upon the goods for the entire lump freight. *Gledstanes v. Allen*, 12 C. B. 202.

c. Against Indorsees or Assignees of Bills of Lading.

Time of Payment.—Where freight is made payable by a bill of lading, according to the terms of a charterparty, which stipulates for payment of freight ten days after delivery of the cargo, the owner has no lien on the cargo for the freight. *Lucas v. Nockells*, 4 Bing. 729; 2 Y. & J. 304; 1 M. & P. 783—Ex. Ch.

Reference to Charterparty—Effect of.—In a bill of lading, where freight is made payable "as per charterparty," this reference incorporates into the bill of lading all the clauses in the charterparty which relate to the amount of freight, but only for the purpose of computing the amount of freight, not for the purpose of transferring to the holder of the bill of lading the benefit of covenants found in the same clauses of the charterparty, but not affecting the amount of freight. *The Norway*, B. & L. 226.

Where a charterparty stipulated for lump freight, "the master guaranteeing the ship to carry 3,000 tons on a draft of twenty-six feet water, or to forfeit freight in proportion to the deficiency," and the ship could not, and, in fact, did not, carry a cargo of 3,000 tons:—Held, that an assignee of a bill of lading for such cargo making freight payable as "per charterparty," had no cause of action against the ship in respect of the master fraudulently guaranteeing, &c. *Id.*

By the terms of a charterparty the cargo was made deliverable on freight being paid as follows:—"The ship to have a lien on cargo for freight; 3*l.* 10*s.* per ton of fifty cubic feet to be paid to captain or his agents on right and true delivery at port of discharge." The charterer shipped a portion of the cargo under a bill of lading, which stated freight to be payable as per charterparty:—Held, that the rate of freight only was, and not the terms as to the lien mentioned in the charterparty were, incorporated in the bill of lading, and that, therefore, the shipowner had no lien as against a bona fide indorsee for value of such bill of lading for the whole chartered freight, but only for the freight due on the goods mentioned in the bill of lading. *Fry v. Chartered Mercantile Bank of India, London, and China*, 1 L. R., C. P. 689; 35 L. J., C. P. 306; 14 L. T. 709; 14 W. R. 920.

Notice of Terms of Charterparty.—Where freight was agreed to be paid for the use or hire of the ship, at a certain rate per ton for a voyage out and home, in manner following, viz., a certain sum in advance on the ship's clearing outwards, and the residue, half in cash, and half in approved bills, upon the delivery of the homeward cargo; and the owner appointed a

master at the request of the charterer, who executed a bond, conditioned for the faithful performance of the master's duty; and also instructed the master to be careful to sign all bills of lading with the clause "freight payable as by charterparty;" and the ship was consigned to C. & Co. in Calcutta, by whom she was put up for her homeward voyage as a general ship, and different merchants shipped goods by her; C. & Co. taking for homeward freight bills payable sixty days after the delivery of the cargo, and, a new master having been appointed by them, in conjunction with the former master, signed bills of lading with the clause "paying freight agreeably to freight bill;" and the freight bills were made payable in London to B. & Co., to whom the charterer was indebted for advances on the outward cargo, and who, as well as C. & Co., were cognizant of the terms of the charterparty:—Held, that the owner of the ship had a lien on these goods to the extent of the homeward freight. *Faith v. East India Company*, 4 B. & A. 630.

C. & Co. also put on board the ship goods purchased by them on account of the charterer; but he being indebted to them and B. & Co., their agents, those goods were, by the bill of lading, consigned to B. & Co.:—Held, that, as between the owner of the ship and B. & Co., the goods were to be considered as the goods of the charterer, and liable to the owner's lien on them for the freight due by the charterparty. *Ib.*

Where indorsees of a bill of lading are also the charterers of a ship, they are bound by a stipulation as to lien in the charterparty. *M'Lean v. Fleming*, 2 L. R., H. L. (Sc.) 128; 25 L. T. 317.

The goods of a shipper in a general ship are not affected by a clause in a charterparty of which he has no notice or knowledge, giving the shipowner lien on all cargo and freight for arrears of hire due under the charterparty. *The Stornoway*, 51 L. J., Adm. 27; 40 L. T. 773.

By a charterparty which was negotiated by A., as agent of B., the charterer (B.) engaged to pay a lump freight of 735*l.* for a voyage to the coast of Africa and back to London, in cash, on the correct delivery on the return cargo, and the charterparty contained the following clause: "The master to sign bills of lading at any rate of freight, without prejudice to the charter." B. shipped oil on his own account for London, for which the master signed a bill of lading making the oil deliverable to A., or assigns, "he or they paying freight for the goods as usual." This bill of lading B. indorsed to A. in part payment of advances made by him on the purchase of the outward cargo:—Held, that A. having notice of the terms of the charterparty, the owner was entitled to a lien on the oil for the entire charter freight. *Kern v. Deslandes*, 10 C. B., N. S. 205; 30 L. J., C. P. 297; 8 Jur., N. S. 194; 5 L. T. 349.

No Notice of Terms of Charterparty—Bill of Lading Freight.—As against assignees or consignees, who have purchased or made advances on the faith of the bill of lading without notice, the shipowner can only retain for the freight mentioned in the bill of lading. *Gilkinson v. Middleton*, 2 C. B., N. S. 134; 26 L. J., C. P. 209.

A ship was chartered for a particular voyage for a gross sum, by way of freight. The captain signed bills of lading for the cargo (which was the property of and consigned to a third person),

specifying a rate of freight amounting to a less sum than that mentioned in the charterparty:—Held, that the shipowner had no lien on the cargo beyond the freight specified in the bills of lading. *Mitchell v. Seafie*, 4 Camp. 298.

S. and W. chartered a ship from Liverpool to Calcutta and home for 7,000*l.* "The freight to be paid 1,250*l.* on vessel clearing from Liverpool, and 1,000*l.* on delivery of the outward cargo at Calcutta, the remainder in cash, two months from the vessel's report inwards, and after right delivery of the cargo, or under discount at five per cent. per annum at freighter's option. The master to sign bills of lading at any rate of freight required without prejudice to this charterparty. The owners of the ship to have an absolute lien on the cargo for all freight, dead freight and demurrage." There were provisions for payment of the freight in cash on delivery of the cargo, if the cargo was delivered abroad. S. and C., who were the charterer's agents at Calcutta, having made advances to disburse the vessel, shipped a quantity of linseed, for which the captain signed bills of lading deliverable to their order or assigns on payment of freight at 5*s.* per ton, the current rate being 5*l.* 10*s.* Against this shipment S. & C. drew a bill of exchange, and indorsed and delivered it together with the bill of lading for value:—Held, that, assuming the charterparty to have created a lien for the charterparty freight as against the charterer, a bonâ fide indorsee of the bill of lading, without notice of the charterparty, was entitled to the linseed on payment of the bill of lading freight. *Foster v. Colby*, 3 H. & N. 705; 28 L. J., Ex. 81.

Freight Payable One Month after Sailing.—Goods were shipped by S. & Co. from Glasgow to Lima, under a bill of lading, by which freight was to be paid by the shippers "one month after sailing, ship lost or not lost." The goods were consigned by S. & Co. to the defendant for sale, and the bill of lading was handed by S. & Co. to him for value. S. & Co. made default in paying the freight, and the master, under instructions from the shipowners, refused to deliver up the goods to the agents of the defendant at Lima without payment of the freight, claiming a lien upon them:—Held, that the shipowners had a lien upon the goods for the freight payable by the bill of lading as against the defendant. *Neish v. Graham*, 8 El. & Bl. 505; 27 L. J., Q. B. 15; 4 Jur., N. S. 49.

Custom—Payment at Port of Shipment.—Goods were shipped at Liverpool for Sydney. By a bill of lading the goods were made deliverable to the shipper's order or assigns, "he or they paying freight for the goods here, as per margin;" and in the margin the stated amount for freight was made payable in Liverpool to M. (who was not the shipowner) one month after the sailing of the vessel:—Held, that, as against an indorsee for value of the bill of lading, the master could not detain the goods at the port of delivery on the ground of non-payment of the freight, although the jury found that, by the usage of Liverpool, the shipowner does not lose his lien for the freight by making it payable at the port of shipment. *Kirchner v. Venus*, 12 Moore, P. C. C. 361; 5 Jur., N. S. 395; 7 W. R. 455.

Such a local usage cannot bind a bonâ fide holder for value without notice. *Ib.*

d. Waived, Suspended, or Lost.

Delivery—Landing.]—Where consignees do not appear to claim goods at the port of discharge and there is no suitable warehouse:—Semble, that the master may still land the cargo without losing his possession and control over it (placing the goods in a warehouse belonging to, or hired for, his owners), and so preserve his lien. *Mors-le-Blanch v. Wilson*, 8 L. R., C. P. 227; 42 L. J., C. P. 70; 28 L. T. 415.

Contract at Variance with.]—A shipowner has a lien upon a cargo for freight (i. e., for the carriage, conveyance, and delivery of goods), but such lien is destroyed by his entering into a contract at variance with that lien; as where he, by contract, agrees to be paid after delivery of the cargo, and not at the time of delivery. *Walker v. Kirchner*, 11 Moore, P. C. C. 21.

A bill of lading contained this form, "Freight for the same goods to be paid by the shippers;" and in the margin of the bill, "Freight payable one month after sailing, ship lost or not lost." The owner of the ship, on her arrival at her destination, claimed a lien on the goods for the freight, and refused to deliver the goods to the consignees until the freight had been paid:—Held, that the shipowner had no lien on the goods consigned, as the sum claimed was not freight, properly so called, and was concluded by the contract which stipulated for a payment to be made in lieu of freight, and to be made at a fixed period, having no reference to the delivery of the goods. *Ib.* See also cases ante, col. 1478.

Part Taken on Part Payment.]—The lien of a shipholder for freight being entire, is not lost or waived by allowing part of the goods to be taken away on payment of a portion only of the freight, without some express contract with the express or implied authority of the shipowner. *Perez v. Alsop*, 3 F. & F. 188.

Complete Delivery.]—Where several goods belonging to one owner are carried the same voyage, a delivery of part does not defeat the lien upon the remainder for the whole freight. But if there are two contracts to carry with different termini to the voyage in each contract, no lien attaches for freight under the one contract upon goods shipped under the other, and improperly detained on board by the carrier. Goods are divested of a lien by a complete delivery. *Bernal v. Pim*, 1 Gale, 17.

Taking Bills of Exchange.]—See cases ante, col. 1463.

XVI. DEMURRAGE.**1. Liability under Contract.**

a. Charterer, 1486.

b. Consignees and Indorsees of Bills of Lading, 1488.

c. Other Cases, 1490.

2. Notice of Arrival, 1492.**3. Time and Calculation of Days, 1493.****4. Place, 1496.****5. Loading and Discharging According to Rules of Port, 1501.****6. Causes of Delay.**

a. Weather, 1505.

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7. Rate of Payment, 1512.**8. Lien for, 1513.****9. Practice.**

a. Jurisdiction, 1514.

b. Pleading, 1514.

1. LIABILITY UNDER CONTRACT.**a. Charterer.**

Delay in Loading.]—It was agreed by a charterparty that the ship should load a full cargo at Liverpool in fifteen working days and when loaded proceed to Genoa, there "to be discharged, weather permitting, at the rate of not less than 35 tons per working day from the time of her being ready to unload. And ten days on demurrage over and above her said laying days at 8*l.* per day. Charterer's liability to cease when the ship is loaded, the captain having a lien upon the cargo for freight and demurrage." The charterer having occupied more than twenty-five days in loading, the shipowner, after a full cargo had been loaded, sued the charterer for the demurrage in respect of some of the ten days:—Held, that the charterer was protected by the last clause of the charterparty. *Francesco v. Massry*, 8 L. R., Ex. 101; 42 L. J., Ex. 75; 21 W. R. 440.

By a charterparty it was agreed that a ship should, with all convenient speed, proceed to Sunderland, and that the charterer should there load the ship in regular turn with a full cargo of coals, and the ship should proceed with it to Kiel, and deliver to freighter or assigns, on payment of freight; "and, that the charter being concluded by the charterer on behalf of another party resident abroad, all his liability should cease as soon as he had shipped the cargo:—" Held, that this clause only exempted the charterer from liability accruing after the loading of the cargo; and that he, therefore, remained liable for delay in loading, although he had ultimately loaded a full cargo. *Christofferson v. Hansen*, 7 L. R., Q. B. 509; 41 L. J., Q. B. 217; 26 L. T. 547; 20 W. R. 626.

By a charterparty cargo was to be loaded in thirteen working days, and to be discharged at not less than 30 tons per working day. Ten days' demurrage to be allowed above the said days. The charterer's liability to cease when ship is loaded, the captain or owner having a lien on cargo for freight and demurrage:—Held, that the charterer upon loading the cargo was discharged from liability for demurrage incurred at the port of loading. *Kish v. Cory*, 10 L. R., Q. B. 553; 44 L. J., Q. B. 205; 32 L. T. 670; 23 W. R. 880.—Ex. Ch.

By a charterparty it was agreed that the ship should go to a certain port and there load from the charterer a cargo "in the customary manner," and proceed therewith to another port and deliver the same. . . . "The cargo to be discharged in ten working days, commencing from the day after the ship had got into her proper discharging berth. Demurrage at 2*l.* per 100 tons register per day. . . . The ship to have an absolute lien on cargo for freight and demurrage, the charterer's liability to any clauses in the charter ceasing when he has delivered the cargo alongside ship:—"Held, that the demurrage and the lien and exemption clauses did not apply to damages by undue detention of the vessel at the port of loading. *Lockhart v. Falk*, 10 L. R., Ex.

132; 44 L. J., Ex. 105; 33 L. T. 96; 23 W. R. 753.

"Loading Excepted."—A charterparty contained the following clause:—"This charter being concluded by the charterers on behalf of another party, it is agreed that all liability of the former shall cease as soon as the cargo is shipped, loading excepted, the owners and master of the vessel agreeing to rest solely on their lien on the cargo for freight, demurrage and all other claims, and which lien it is hereby agreed that they shall have:"—Held, that "loading excepted" extended to delay in loading, and was not confined to the loading a full and complete cargo; and the charterers, therefore, remained liable for the delay, though they had shipped a complete cargo. *Lis'er v. Van Haansberg*, 1 Q. B. D. 269; 45 L. J., Q. B. 495; 24 W. R. 395.

No Orders given as to Port of Discharge—Not safe Port.—By a charterparty the ship was, after loading a full cargo, to proceed to a port of call for orders, to be forwarded within forty-eight hours after notice of arrival given to the charterers, to discharge at a good and safe port. Twelve working lay days to be allowed the freighters for loading the ship at the port of loading, and waiting for orders at the port of call, and fifteen days over and above the laying days at 4*l.* per ton per day. Charterers' liability to cease when the ship was loaded, the owners of the ship to have an absolute lien on the cargo for all freight, dead freight, and demurrage. In an action by the shipowners against the charterers for not giving orders as to the port of discharge, and for giving orders that the ship should proceed and discharge at a port which was not a safe port within the meaning of the charterparty:—Held, that inasmuch as delay at the port of call was provided for by the stipulation in respect of demurrage, the charterers were discharged, whether the actual damages claimed were covered by the owners' lien or not. *French v. Gerber*, 2 C. P. D. 247; 46 L. J., C. P. 320; 36 L. T. 350; 25 W. R. 355—C. A.

Reading Bill of Lading and Charterparty Together.—A vessel was chartered to carry a cargo of coals from Cardiff to Rouen. The charterparty provided that the liability of the charterers should cease "when the ship is loaded and advance of freight with demurrage at Cardiff paid." "Ship to have a lien on cargo for freight, dead freight, and demurrage." The bill of lading contained no restriction on the liability of the charterers. In an action for balance of freight:—Held, that the charterparty and bill of lading must be read together, and construed according to the plain meaning on the face of them, and that the charterers' liability ceased on performance of the conditions in the charterparty. *Barwick v. Burnyeat*, 36 L. T. 250; 25 W. R. 395.

"All Liability of Charterer to Cease as soon as Cargo on Board."—A vessel was chartered to carry a cargo of coals to Callao, to be delivered to the order of the charterer's agent. The charterparty provided that the ship should be loaded at the rate of 75 tons per clear working day, "stiffening coal, to be, if required, supplied at the expense of the ship, and at the rate of 40 tons per clear working day, . . . but all days on

which stiffening coal is to be taken on board, or the ship is detained for the same, are to be excluded from the computation of the working days allowed for loading; the vessel to be discharged at the rate of 40 tons per clear working day. . . . Demurrage to be paid for each day beyond the days allowed for loading and discharging respectively at the rate of 3*d.* per registered ton per day. The master to have a lien upon the cargo for all freight, dead freight, and demurrage. All liability of the charterer under this agreement shall cease as soon as the cargo is on board. . . . All questions, whether of short delivery, demurrage or otherwise, are to be settled by the charterer's agent at the port of destination." The vessel arrived at Callao, where the captain, at the request of the charterer's agent, delivered the cargo to him without insisting on his lien for freight and demurrage. In an action on the charterparty for undue detention of the vessel in putting stiffening coal on board:—Held, that the shipowner had no cause of action on the charterparty; the clause providing for the cesser of the charterer's liability operating as an absolute discharge, notwithstanding that the charterer and consignee were the same person. *Sanguinetti v. Pacific Steam Navigation Company*, 2 Q. B. D. 238; 46 L. J., Q. B. 105; 35 L. T. 658; 25 W. R. 150—C. A.

Held, also, that the demurrage clause extended to detention of the vessel in putting stiffening coal on board, and that damages for such detention were covered by the owner's lien. *Id.*

Securing Berth.—Where the charterer refused to name a substituted dock where the ship could lie in safety afloat according to the terms of the charterparty, and delay ensued in discharging the cargo:—Held, that he became liable to demurrage and charges for unloading. *Dahl v. Donkin or Nelson*, 6 App. Cas. 38; 50 L. J., Ch. 411; 44 L. T. 381; 29 W. R. 543—H. L. (E.).

b. Consignees and Indorsees of Bills of Lading.

Consignees—Memorandum on Bill of Lading.]—If a consignee accepts goods under a bill of lading, at the bottom of which is a memorandum that the ship is to be cleared in sixteen days, and 8*l.* demurrage to be paid after that time, the master upon delivery of the goods may recover demurrage against the consignee. *Josson v. Solly*, 4 Taunt. 52.

Implied Contract.—The master who by a bill of lading has undertaken to deliver goods to the consignee on payment of freight, cannot maintain an action against the consignee on an implied contract to pay demurrage. *Ecans v. Forster*, 1 B. & Ad. 118.

"Paying for Goods as per Charterparty"—**Effect of.]**—The consignee of a bill of lading which makes the goods deliverable to him or assigns, "paying for the goods as per charterparty," does not, by taking the goods at the destination, make himself liable to pay for demurrage in the port of loading according to the rate stipulated in the charterparty, though there is an express stipulation for a lien on the goods for such demurrage. *Smith v. Sieneking*, 5 El. & Bl. 589; 2 Jur., N. S. 1135—Ex. Ch.

Consideration.]—Where in an action on an agreement for payment of demurrage on delivery of a cargo of coals the defendant pleaded that the plaintiff had previously contracted with another party for the delivery of the coals to the defendant by the plaintiff, and that there was no consideration for the promise of the defendant to the plaintiff:—Held, that the plea was bad, and that the performance of an existing contract by one of the parties thereto may be a good consideration for a promise to him by a third party. *Scotson v. Pegg*, 6 H. & N. 295; 30 L. J., Ex. 225; 3 L. T. 753; 9 W. R. 280.

Indorsees—Express Stipulation.]—Where a bill of lading stipulates on the face of it for payment of demurrage, an indorsee taking goods under it is liable for demurrage. *Stindt v. Roberts*, 5 D. & L. 460; 2 B. C. Rep. 212; 17 L. J., Q. B. 166; 12 Jur. 518.

The acceptance of a cargo by the indorsee of a bill of lading, whereby the goods were deliverable to order against payment of the agreed freight and other conditions, as per charterparty, is a circumstance from which a jury may imply a contract on his part to pay demurrage stipulated for by the charterparty, notwithstanding his refusal at the time of receiving the goods to pay the demurrage. *Wegener v. Smith*, 15 C. B. 285; 24 L. J., C. P. 25.

An assignee of a bill of lading, by the terms of which he is to receive a cargo from a ship, paying freight according to the charterparty, is not liable for demurrage, although that is stipulated for in the charterparty, and although in the margin of the bill there is written, "There are eight working days for unloading in London," there being no stipulation in the bill for the payment of demurrage. *Chappell v. Comfort*, 10 C. B., N. S. 802; 31 L. J., C. P. 58; 8 Jur., N. S. 177; 4 L. T. 448; 9 W. R. 694.

Holder by Way of Security.]—Liability for demurrage under a bill of lading imposed, by way of security only, on the holder who presented the bill and demanded the delivery. *Allen v. C'oltart*, 11 Q. B. D. 782; 52 L. J., Q. B. 686; 48 L. T. 944; 31 W. R. 841.

Undertaking to Pay for Unreasonable Delay by Receivers of Cargo.]—A charterparty stipulated that the agreed freight should be paid on right and true delivery of cargo, and that the discharge at the port of delivery should be made in accordance with the usage of the discharging port. The defendants were indorsees of the bills of lading, which were expressed to be subject to the conditions of the charterparty, and contained the following clause:—"The goods to be taken from the ship by the consignee immediately they come to hand in discharging the ship, otherwise they will be landed or put into craft by the master or ship's agent (at the merchant's risk and expense), and either or both to have a lien on such goods until the payment of all costs and charges so incurred." In an action by the plaintiff for damages for detention of the ship by default of the defendants, the jury found that the ship was detained for two days beyond a reasonable time for unloading, and that 30*l.* a day was a fair charge for the detention, and that the defendants held themselves out to the plaintiff as receivers of the cargo under the bill of lading, so as to lead the plaintiff to look to them

as such. There was evidence that the defendants told the plaintiff's agent, before the ship arrived, that they had the cargo, and would pay the freight; and that during the unloading the plaintiff's agent complained daily to the defendants of their delay, telling them that there would be a claim for demurrage, without a repudiation by them of liability:—Held, that there was evidence that the defendants undertook to pay for any unreasonable delay, and that they took delivery under the provisions of the bill of lading. *Palmer v. Zarifi*, 37 L. T. 790.

And see BILL OF LADING, *supra*.

c. Other Cases.

Receivers of Goods.]—If a person receives goods from on board ship, which are shipped to the shipper's order or his assignees, paying freight, with a certain allowance for demurrage, he makes himself, by acceptance of the goods, liable to all the terms of the bill of lading, and of course to demurrage. *Dobbin v. Tobin*, 6 Esp. 16. And see preceding case.

Liability of Consignor.]—A bill of lading contained these words: "The vessel to take her regular turn in unloading:—Held, that the consignor was liable for her detention beyond her regular turn, although there was no express contract for demurrage in the bill of lading. *Cawthron v. Trickett*, 15 C. B., N. S. 754; 33 L. J., C. P. 182; 9 L. T. 609; 12 W. R. 311.

A party hired sacks from a railway company for the conveyance of grain on their railway subject to certain regulations, amongst which were the following:—"2. The charges for the use of sacks will be a halfpenny per sack per journey when discharged at any of the company's stations on the company's line, or at their warehouses, or at warehouses or mills connected by rail with the company's line, and 1*d.* per sack when sent to foreign stations. 3. Demurrage of a halfpenny per sack per week will be charged after the expiration of fourteen days, the time to commence from the time the sacks leave the station to be filled; the time allowed for filling and returning to the station to be seven days. 10. None of the company's sacks containing grain will be allowed to leave any station, local or foreign, unless a guarantee is first obtained by the clerk in charge from the consignee, that the grain will be immediately discharged, and the sacks returned the same day, and to the station:—Held, that the company's claim for demurrage arose at the expiration of fourteen days from the hire of the sacks, and that the only person with whom there was any contract for demurrage was the consignor, by virtue of the third regulation; but that by the operation of the tenth regulation his liability ceased upon the company's permitting the sacks to get into the hands of the consignee, whether with or without a guarantee. *Great Northern Railway Company v. Wyles*, 2 C. B., N. S. 344.

Agent—Consideration.]—The agent of the consignees of a cargo wrote to the owner, agreeing to pay freight, demurrage, &c., and to place himself in every respect in the place of the charterer. The ship was detained beyond the time allowed by the charterparty in loading and unloading, and the demurrage days and several days besides elapsed after the date

of the agent's agreement:—Held, that he was liable for the detention beyond the demurrage days, as well as for the demurrage on his agreement, as there was a sufficient consideration moving from the owner to the agent, since he could not sell the cargo without the owner's consent. *Benson v. Hippius*, 4 Bing. 455; 1 M. & P. 246; 3 C. & P. 186.

Where Partnership Exists in Part of Agreement between Charterer and Freighter.—A. having chartered a steamer, agreed with B. to take out some engines in her to Barcelona, it being known to both parties that the engines could not be shipped unless some alterations were made in her hatchways. The agreement contained the following conditions:—First, that A. should lay the steamer on her berth at Liverpool for Barcelona. Secondly, that she should not be required to lie on her berth longer than ten days. Thirdly, that she should make the voyage from there to Barcelona for the lump sum of 650*l.*, A. to pay all charges. Fourthly, that B. should load in the steamer two engines and tenders complete, for 240*l.*; freight to be paid at Liverpool on delivery of bills of lading, without any deduction for interest or insurance. Fifthly, that such of these goods as weighed above 20 cwt. should be put in the steamer, stowed, taken out, and landed at shipper's risk and expense. Sixthly, that the goods should be taken out of the steamer as soon as the captain was ready to deliver them, in five days, Sunday excepted; and 20*l.* demurrage to be paid by the shipper or receiver of the goods, for every day that she was detained over and above five days. Seventhly, that the steamer should be entered in the joint names of A. and B., so that the latter might assist to get cargo. Eighthly, that any surplus of freight above 650*l.* should be divided between them, and also any loss which might result. Ninthly, that the steamer should guarantee to carry 480 tons dead weight, besides 40 tons of coal in the bunkers. Tenthly, that bills of lading for the whole cargo of the steamer should be signed at the office of A. And eleventhly, that the steamer should be consigned at Barcelona to the friends of B., paying 2*l.* commission on the above freight. The steamer was put on her berth at Liverpool, and, by consent of her owner, the beams in her hatchways were removed, for the stowage of the engines, at the joint expense of A. and B. The engines, which exceeded 20 cwt. in weight, were then brought alongside, and it was found, before ten days had expired, that they would not go down the hatchways, notwithstanding the removal of the beams. The consent of the shipowner to the further widening of the hatchways was thereupon obtained, on condition that the ship should, before sailing, be made right, to the satisfaction of Lloyd's surveyor. In consequence of the necessary delay for widening the hatchways and making the ship thus right, she lay on her berth thirteen days beyond the stipulated ten. A. having brought an action on the second clause of the agreement, for the demurrage in respect of the detention of the ship on her berth beyond ten days:—Held, that B. was liable on that clause, it being collateral to, and independent of, any partnership in the freight; assuming that the agreement constituted a partnership to some extent between the parties in that respect. *Blech v. Balleras*, 3 El. & El. 203; 29 L. J., Q. B. 261; 6 Jur., N. S. 1243.

Contract to Pay—Undertaking to Captain Personally to Load in Limited Time.—B., W. & Co., who had contracted with a colliery company for 10,000 tons of coal to be delivered over a period of three months at a spout on the Tyne, "the turn to be mutually agreed upon," proposed to charter a foreign ship for the conveyance of 29 keels to Elsinore, and tendered to the captain a charterparty which stipulated for demurrage in unloading the ship, but made no provision for detention in loading her. The captain declined to sign such a charter, without an assurance that there should be no undue detention of his ship; and thereupon B., W. & Co. obtained from the defendant (who was a clerk employed by several colliery companies to arrange the turns for loading) the following undertaking,—"I undertake to load the ship *Der Versuch*, 29 keels, with Bebside coals in ten colliery working days. On account of Bebside Colliery, W. S. Hoggett." This memorandum (which made no mention of the person contracted with) was communicated by the charterers to the captain of the *Der Versuch*, who thereupon accepted the charter. The vessel being detained in loading beyond the stipulated ten days, the captain called upon the defendant to pay him 45*l.* for demurrage. The defendant repudiated all liability, but ultimately offered to pay the captain 20*l.* The defendant had no notice of the charter. In an action by the captain to recover 45*l.* for demurrage from the defendant:—Held, that, upon these facts, a jury was warranted in finding that the undertaking to load within ten days was a contract between the captain and the defendant; that there was a sufficient consideration for it; and that the contract was with the defendant personally, and not as agent. *Weidner v. Hoggett*, 1 C. P. D. 533; 35 L. T. 368.

Right of Master.—The master cannot maintain an action in his own name upon an implied promise to pay demurrage. *Brouncker v. Scott*, 4 Taunt. 1.

Mutual Obligation of Charterer and Shipowner.—Where a charterparty contained the following clause: "The owner agrees, that the ship shall be ready to sail at the expiration of the laying days, or sooner if required by the charterers. If the ship is not ready either on the owner's or the charterers' part at the above-named dates, then demurrage to be paid by the party in default at the rate of 7*l.* per diem:"—Held, that the effect of this stipulation was to make the owner liable for demurrage, at 7*l.* a day, for delay caused by any unreadiness of the ship to sail, due to him; and the charterers were liable in like manner, for delay caused by unreadiness of the ship, due to their backwardness as to the cargo, though that might have been occasioned by the previous default of the owner. *Seeger v. Duthie*, 8 C. B., N. S. 72; 30 L. J., C. P. 65; 7 Jur., N. S. 239; 9 W. R. 166—Ex. Ch.

2. NOTICE OF ARRIVAL.

Not Necessary.—Although by a bill of lading the goods are deliverable to merchants in London, whose residence is well known, no notice to them of the ship's arrival is necessary to render them liable for demurrage. *Harman v. Mant*, 4 Camp. 161.

When a bill of lading of goods by a general ship deliverable to order contains a stipulation that the goods are to be taken out in a certain number of days after arrival, or to pay demurrage, the indorsee of the bill of lading who takes out the goods is liable for demurrage, from the expiration of the days calculated from the arrival of the ship, without receiving any notice of that event. *Harman v. Clarke*, 4 Camp. 159.

Inaccuracy in Entry of Name at Custom House.—Where there is such a bill of lading, if there is any inaccuracy in the entry of the ship's name at the Custom-house, whereby the owner of the goods, notwithstanding proper inquiries for that purpose, was deprived of the usual means of being informed of the ship's arrival, demurrage cannot be recovered. *Ib.*

Unless Special Contract or Custom.—Apart from custom or special contract, a shipowner is not bound to give notice to the consignee of the arrival of the ship, but the consignee is bound, within a reasonable time after the arrival, to be ready to remove and receive his goods, and in default of his so doing the shipowner may land them, and demand wharfrage or other proper charges for landing. *Houlder v. General Steam Navigation Company*, 3 F. & F. 170.

When a ship is by the charter to be addressed, at the port of discharge, to the charterer's agents, the charterer is entitled to recover from the shipowner excess of freight received by other agents, to whom he has addressed the ship; and if it appears that the charterer's broker, if allowed to have the ship, would have sent to the consignees to come and take their goods, and thus have prevented delay, the shipowner cannot claim demurrage for delay caused by the absence of such notice to the consignees. *Bradley v. Goddard*, 3 F. & F. 638.

3. TIME AND CALCULATION OF DAYS.

Working or Running.—Where there is a clause in a bill of lading that the cargo shall be taken out in a certain number of days, or to pay demurrage, it means working days, not running days. *Cockran v. Retberg*, 3 Esp. 121.

Four persons agreed to purchase a cargo of coals in certain proportions, to be severally taken and received out of the ship by them at the rate of forty chaldrons per day, and to settle their turns among themselves; and in case of any loss or demurrage, by not fixing on their respective turns, or by subsequent detention in working out the cargo, to hold themselves severally and respectively liable for their several and respective defaults. Had there been no default, the whole cargo would have been cleared in nine days; but, in consequence of one of the days being wet, only five chaldrons were taken out on that day, and on the tenth day some coals remained on board belonging to one of the parties:—Held, that working days only were meant by the contract, and that as one day was wet, he was bound to pay demurrage for the tenth day. *Harper v. McCarthy*, 2 N. R. 258.

By a charterparty, fifteen days were to be allowed to the freighter of a ship for discharging at her destined port. The freighter ordered the ship to Hull. She was got into the Hull docks on the 1st of February, and was on that day put in the charge of the docks' officers, but from the

crowded state of the docks she was not put in her berth, and did not begin discharging till the 4th:—Held, that the fifteen days were to be computed from the first. *Brown v. Johnson*, Car. & M. 440; 10 M. & W. 331.

In such a case the days count from the time of the vessel's arriving in the dock, and being put under the management of the dock company's officers. *Ib.*

Meaning of "Days"—Sundays.—In reckoning the "fifteen days," the days are to be reckoned consecutively, and the Sundays not deducted, unless there is a custom to that effect; and in the absence of any custom, the word "days," and the words "running days," mean consecutive days. *Ib.*

A charterparty contained the following clause: "The vessel to be loaded in Liverpool in fourteen days, and to be discharged, weather permitting, at not less than twenty-five tons per working day (holidays excepted), the days to commence on the ship being in turn, and ready to deliver; all days above the said days to be paid demurrage at the rate of 5l. sterling per day." The cargo was to be delivered at Constantinople:—Held, that Sundays were to be included in the calculation of the lay days allowed for loading. *Niemann v. Moss*, 29 L. J., Q. B. 206; 6 Jur., N. S. 775.

Under a charterparty from Riga to London the charterers were to "load and discharge as fast as the ship can work, but a minimum of seven days to be allowed merchants, and ten days on demurrage over and above the said laying days at 25l. per day":—Held, that the laying days from the context meant "working" and not "running" days, and consequently that Sunday was not to be counted. *Commercial Steam Ship Company v. Boulton*, 10 L. R., Q. B. 346; 44 L. J., Q. B. 219; 33 L. T. 707; 23 W. R. 854.

Fractions of Day count as a Day.—When by a charterparty, a specified sum is to be paid for each day over and above the laying days, that sum is payable in respect of a fraction of a day during which the ship is detained. *Ib.*

A ship got into dock in London on a Tuesday evening at 5 p.m. She could not get to her berth till 8 a.m. on the Wednesday, when she began unloading, and continued till 8 p.m. She began again at 4 a.m. on Thursday, and finished at 8 a.m. All the lay days had been consumed at the port of loading:—Held, that in the case of demurrage a fraction of a day counted as a day, and consequently that the charterers were liable for two days' demurrage. *Ib.*

Despatch Money—Calculation of Time.—A charterparty contained the following clause:—"Demurrage, if any, at the rate of 20s. per hour, except in case of any hands striking work, frosts or floods, revolution or wars, which may hinder the loading or discharge of the vessel. Despatch money 10s. per hour on any time saved in loading or discharging." Four days were saved in loading and five days in discharging cargo, making together nine days, which if calculated at twenty-four hours a day would make 216 hours, or at twelve hours a day 108 hours:—Held, that "despatch money" was payable under the charterparty at the rate of 10s. per hour per day of twenty-four hours. *Laing v. Hollway*, 3 Q. B. D. 437; 47 L. J., Q. B. 512; 26 W. R. 769—C. A.

Construction—"At Expiration of," equivalent to "within a reasonable Time after."—A declaration was for money due in respect of the demurrage of a ship. The defendant pleaded that the charterparty contained the following stipulation: "That the said merchants (meaning the defendant) are to be allowed (a certain number) of clear working days for loading and discharging the vessel each voyage, and in the event of that number being exceeded, a statement shall be furnished to the merchants at the expiration of this charter, in which they shall be credited with the above number of clear working days for each voyage performed by the vessel, and debited with those actually occupied in loading and discharging as aforesaid, and all the days so occupied in excess (if any) shall be paid for by the merchants at the rate of 2l. per clear working day as demurrage," and that no statement was furnished to the defendant at the expiration of the charter as required by its terms. The plaintiff replied that a statement was furnished to the defendant in accordance with the charter within a reasonable time in that behalf and before the commencement of this suit. To this replication the defendant demurred on the ground that the replication alleged a performance in terms other than those of the contract set out in the plea.—Held, that the replication was good, for that the words "at the expiration of" were synonymous with the words "a reasonable time after." *Beard v. Rhodes*, 28 L. T. 168.

What Days—Right to include whole Time occupied in Loading and Unloading.—By charterparty between the plaintiff and the defendants it was agreed that the plaintiff's ship should proceed to Bilbao and there load a full and complete, or part, cargo of iron ore, and deliver the same at Middlesborough. "400/500 tons per working day (Sundays and holidays excepted) to be allowed the charterers for loading, and 300 discharging, all demurrage over and above the said days at the rate of 2s. per hour for every 100 tons cargo. The lay days to commence day after arrival, and being ready to load or discharge respectively. The captain to have a lien on the cargo for freight or demurrage." "If the ship is loaded at other than Portugalette or Lucana shipping staithes, the loading and discharging to be at the rate of 300 tons per working day." The vessel having loaded at a place other than those last mentioned at a rate less than 300 tons per working day, proceeded to Middlesborough, where she discharged her cargo at a higher rate per day.—Held, that, in calculating the demurrage, the days for loading and unloading must be kept separate, and that the charterers had no right to add together the whole number of days occupied in loading and unloading for the purpose of ascertaining the average amount of work done on each day. *Marshall v. Bolckow*, 6 Q. B. D. 231; 29 W. R. 792.

Where no Time Expressed.—When a charterparty is silent as to the time within which the cargo is to be unloaded at the port of destination, the law implies that reasonable despatch shall be used by both merchant and shipowner. *Ford v. Coteworth*, 5 L. R., Q. B. 544; 39 L. J., Q. B. 188; 23 L. T. 165; 18 W. R. 1169; 10 B. & S. 991—Ex. Ch. And see *Sweeting v. Darthez*, *post*, col. 1500.

If, by a bill of lading of a cargo of brandy

brought into the London Docks, no time is stipulated within which it shall be unloaded, the implied contract on the part of the consignee is to discharge the ship in the usual and customary time for unloading such cargo, which is the time within which the brandies can be unloaded in the docks into the bonded warehouses. *Burmester v. Hodgson*, 2 Camp. 488.

If there is no fixed time, the law implies an agreement, on the part of the charterer, to discharge the cargo within a reasonable time. *Postlethwaite v. Freeland*, 5 App. Cas. 599; 49 L. J., Ex. 630; 42 L. T. 845; 28 W. R. 833—H. L. (E.).

Fixed Time.—If, by the terms of the charterparty, the charterer has agreed to discharge the ship within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it. *Ib.*

4. PLACE.

Entering Docks.—A charterparty for a ship to sail to "London, Surrey Commercial Docks," is not satisfied by the ship arriving at the gate of the docks, but not entering the docks. *Dahl v. Donkin or Nelson*, 6 App. Cas. 38; 50 L. J., Ch. 411; 44 L. T. 381; 29 W. R. 543—H. L. (E.).

Commencement of Entry into Dock—Turn to Load.—By a charterparty it was agreed that the vessel should "proceed direct to any Liverpool or Birkenhead dock as ordered by charterers, and there load in the usual and customary manner a full and complete cargo of coals;" that the vessel should be "loaded at the rate of 100 tons per working day," and that loading should not commence before the 1st of July. On the 3rd of July, the vessel was ready to go to the Wellington Dock, which was the Liverpool dock ordered by the charterers, but she was not admitted into such dock until the 11th of July, because the coal agent employed by the charterers to supply the cargo had then three vessels in that dock and two others booked to come in, and the dock regulations did not allow a coal supplier to have more than three vessels in dock at the same time. Coal agents were usually employed to supply cargoes, and it did not appear that the charterers had made an unreasonable selection of the coal agent they so employed. The vessel entered the dock on the 11th of July, but her turn to go to the spout to receive the coals did not arrive sooner than the 23rd of July, and her loading was not begun until after that day. It was the usual practice to load coal at the spout, but it was also not unusual to load from lighters.—Held, that the lay days did not begin until the vessel had entered the dock to which she had been so ordered by the charterers, but that they began at that time, and were not postponed until the vessel's turn had arrived to go to the spout. *Tapscott v. Balfour*, 8 L. R., C. P. 46; 42 L. J., C. P. 16; 27 L. T. 710; 21 W. R. 245.

Arrival at Port of Discharge—Port used in Legal, not Geographical sense.—A charterparty provided for payment of demurrage by the charterer for every day's detention of the vessel by his default, and that she should be ordered to a port where she could discharge always afloat; by

the bill of lading she was ordered to the port of Newry; from the weight of the cargo, the depth of water, and the draught of the vessel, it was necessary to discharge part of her cargo at the Pool in Carlingford Roads, about ten miles from Newry:—Held, that the Pool being within the port of Newry for custom-house purposes, and taking the port of Newry in its legal sense, and not as a geographical expression, the lay-days began to run from the date of the commencement of the discharge at the Pool. *Cuffarini v. Walker*, 10 Ir. R., C. L. 250—Ex. Ch.

Arrival at Place of Discharge.—The computation of the time during which lay-days are to run begins, in the absence of anything to the contrary in the contract, with the arrival of the ship at the usual or designated place of discharge in the port of destination. *McIntosh v. Sinclair*, 11 Ir. R., C. L. 456.

Usage as to Place of Discharge.—When the place of the removal of the cargo is within the ambit of the port, and that removal is so common as to be the foundation of a binding usage to put out at that place and there deliver into the custody of the merchant so considerable a quantity of the cargo of a particular ship as upwards of two-thirds of the whole, a jury may, notwithstanding an attempt by merchants to establish an inconsistent usage as to lay-days, hold that the operation is in substance a part discharge, and that the place where that operation is usual, is a usual place for the commencement of the discharge. *Id.*

Mooring of Vessel—Custom of the Port.—Timber was consigned, under a charterparty made at Riga, to the Canada Dock in the port of Liverpool, a given number of days being allowed for unloading there:—Held, that, by the general law, the lay-days commenced from the time the ship arrived in the dock; but that it was competent to the consignee to shew, notwithstanding the shipowner was a foreigner, that there was a custom in the port of Liverpool, that, in the case of timber ships, the lay-days commenced only from the mooring of the vessel at the quay where by the regulations of the dock she was alone allowed to discharge. *Steamship Company "Norden" v. Dempsey*, 1 C. P. D. 654; 45 L. J., C. P. 764; 24 W. R. 984.

The lay days allowed by a charterparty for discharging a cargo are to be reckoned from the time of the ship's arrival at the usual place of discharge, and not at the entrance of the port to which she is chartered, and this although part of the cargo was taken out for the purpose of lightening the vessel after she had entered the port, and before her arrival at the quay, which, by the custom of the port, was the usual place of delivery. *Brereton v. Chapman*, 5 M. & P. 526; 7 Bing. 559.

At or Alongside Wharf.—On a charterparty, by which a ship was to unload "at a certain wharf, or as near thereto as she can safely get," the ship not being able for some days to get there, owing to the state of the tides:—Held, that "at" meant "alongside," and that the charterer was not liable to demurrage for the delay, though it was not usual in the particular port for ships to be unloaded into lighters.

Bastifell v. Lloyd, 1 H. & C. 388; 31 L. J., Ex. 413; 10 W. R. 721.

Agreement to Alter Place.—Under a charterparty to load coals and iron at C., and proceed with them to A., the running days to commence on the 16th December, 1834, the plaintiff having, with the defendant's consent, laden coals at P. in ten days ensuing the 16th December, and not having sailed from C. till the 27th:—Held, that the running days were still to be reckoned from the 16th December, and that no proof of the defendant's consent satisfied an allegation in the declaration, that the coals had been laden at P. at his request. *Jackson v. Gallwey*, 5 Bing. N. C. 71; 6 Scott, 786.

Naming Port.—By a charterparty a ship was to proceed "to Plymouth, not higher than S. or N., or as near thereunto as she can safely get and deliver" her cargo, with certain lay days and demurrage days. The port of Plymouth is a tidal estuary. On the ship's arrival in Plymouth, the consignee ordered her to discharge at B., an ordinary landing-place in the port of Plymouth, lower down than S. or N. At this time the tides were neap; the vessel went as near B. as she could in that state of the tide, and lay on the sand for some days, till the tides being higher, she got to B.:—Held, that the consignee had the option of naming any ordinary loading place in the port of Plymouth, within the limits assigned, and that the lay days did not commence till the vessel reached the place so named, the delay in getting to it being occasioned only in the ordinary course of navigation in a tidal harbour. *Parker v. Winlow*, or *Winlo*, 7 El. & Bl. 942; 27 L. J., Q. B. 49; 4 Jur., N. S. 84.

Refusal of Freight to Name.—A ship was chartered to deliver coals "at a good and safe wharf" at London, at a certain freight. She came into collision in the Thames and was sunk with the cargo on board, but was afterwards got up, and arrived at a pier at Wapping. Notice of her arrival was given on the same day to the agents of the freighter, and they were required to name a wharf; but they declined to do so. Next day the ship and freight were arrested by process out of the Admiralty Court in a suit instituted by the owners of the vessel with whom she had been in collision:—Held, that the shipowner was entitled to recover, as damages for the refusal to name a wharf, the amount which he would have received as freight if the cargo had been duly delivered, there having been a complete breach before the arrest; but that he was not entitled to demurrage. *Stewart v. Rogerson*, 6 L. R., C. P. 424.

Ship Admitted into Dock as Special Favour.—By a charterparty it was agreed that the plaintiff should at L. load on the defendant's vessel, the P., a cargo of coal, and that she should proceed therewith to D., "the vessel to be loaded and discharged in nineteen running days, or if longer detained, to pay 4*l.* per day demurrage." At the foot of the charterparty was a memorandum, "Vessel to load in B. M. dock or W. dock, high level." On the day following the execution of the charterparty, the P. was, as a matter of favour, admitted into the W. dock, and was then ready to receive her cargo, but owing to the regulations of the dock authorities

she did not begin to load until about a fortnight later. Upon her arrival at D. disputes arose between her captain and the plaintiff as to the form of the bill of lading, and in consequence thereof her cargo was not unloaded until twenty days had elapsed after the expiration of the nineteen running days, if calculated from the time of her admission into the W. dock. In order to obtain delivery of the cargo, the plaintiff was obliged to pay 80*l.* claimed as demurrage in respect of the twenty days, which he now sued to recover back:—Held, that the nineteen running days were to be calculated from the time when the P. was admitted into the W. dock, that the plaintiff was liable for demurrage, and that the action would not lie. *Davies v. McVeagh*, 4 Ex. D. 265; 48 L. J., Ex. 686; 28 W. R. 143—C. A.

At what Ports—Loading and Discharge.—By charterparty between the plaintiff and the defendants it was agreed that the plaintiff's ship should proceed to Bilbao, and there load a full and complete, or part, cargo of iron ore, and deliver the same at Middlesborough. "400/500 tons per working day (Sundays and holidays excepted) to be allowed the charterers for loading, and 300 discharging, all demurrage over and above the said days at the rate of 2*s.* per hour for every 100 tons of cargo. The lay days to commence day after arrival, and being ready to load or discharge respectively. The captain to have a lien for freight or demurrage." "If the ship is loaded at other than Portugalette or Lucana shipping staithes, the loading and discharging to be at the rate of 300 tons per working day." The vessel having loaded at a place other than those last mentioned at a rate less than 300 tons per working day, proceeded to Middlesborough, where she discharged her cargo at a higher rate per day:—Held, that, in calculating the demurrage, the days for loading and unloading must be kept separate, and that the charterers had no right to add together the whole number of days occupied in loading and unloading for the purpose of ascertaining the amount of work done on each day. *Marshall v. Bolekwe*, 6 Q. B. D. 231; 29 W. R. 792.

Upon the following clause in a charterparty, "the vessel to lie her regular time for loading her cargo, and one day per keel running days, demurrage 3*l.* per day for every working day's detention, over and above the days allowed as aforesaid," demurrage can be claimed only in respect of loading, and not of the time spent in the delivery of the cargo. *Alcock v. Taylor*, 2 H. & W. 58; 6 N. & M. 296.

— Intermediate Port.—In an action for demurrage on a charterparty, given "while waiting at Portsmouth for convoy, and discharging her cargo at Barcelona," the plaintiff can only claim demurrage at those two places, not for any delays at any other intervening places. *Marshall v. De la Torre*, 1 Esp. 367.

By a charterparty under seal, the freighter was at liberty "to keep the ship on demurrage, at her loading and delivery ports, ten days each, besides a certain number of days limited for her stay at the same, or as many of them as need should require." The ship having been compelled to put into an intermediate port between her ports of loading and discharge, and the freighter having detained the vessel ten days

there, and also fourteen days more than ten days at the port of delivery:—Held, that the master could not recover on this covenant for more than the ten days' demurrage at 5*l.* per day, at the port of discharge, the covenant not extending to the payment of demurrage beyond ten days at each of the ports of loading and discharge. *Stevenson v. York*, 2 Chit. 570.

— Not at Port of Discharge—Reasonable Time.—By a charterparty it was agreed that a ship should proceed to Pernambuco and there load from the factors of the freighter, having first discharged her cargo, if any, a full cargo that the freighter might have for shipment, and proceed therewith to Valparaiso, a legal port between Valparaiso and Guayaquil, and Guayaquil, all or any, and there discharge the cargo laden on board at Pernambuco, and at the port between Valparaiso and Guayaquil (and Guayaquil) inclusive, also discharging goods taken on board at Valparaiso for that purpose, and at any and all the aforesaid ports, should receive and take on board a full cargo, and therewith proceed to England for orders to discharge. Seventy running days were to be allowed the merchant, if the ship was not sooner despatched, for loading, discharging and reloading the ship at the several ports she should proceed to for that purpose, to be commenced and computed from the several periods of the vessel being clear and ready for those purposes. She took in cargo at Pernambuco, and discharged at Valparaiso. At Valparaiso, she took in goods belonging to the freighter and also to other merchants for Paita (a port between Valparaiso and Guayaquil) and Guayaquil, part of which was to be discharged there and the rest to be carried to England. The seventy running days were all consumed at Pernambuco, Valparaiso, Paita, and Guayaquil: viz., thirteen at Pernambuco, thirty-nine at Valparaiso, eight at Paita, and the rest at Guayaquil,—plus three days, for which demurrage was paid to the master:—Held, that the seventy running days "for loading, discharging, and reloading," only applied to the ports of loading, intermediate discharge and reloading, such lay days not applying to the ultimate discharge at the end of the voyage, and, consequently, that the charterers were entitled to a reasonable time for unloading the homeward cargo in London, without paying demurrage. *Sweeting v. Darthez*, 14 C. B. 538; 2 C. L. R. 1375; 23 L. J., C. P. 131; 18 Jur. 958.

During Voyage.—By a charterparty it was agreed that a ship then lying at Genoa should sail on or before the 30th July, 1859, to Monte Video and Lima (with goods for third parties), and thence proceed with all convenient despatch to Callao, where the master was to report his arrival to the agents of the charterers, by whom he was to be sent to the Chincha Islands for a cargo of guano, for a port in the United Kingdom. Thirty days were to be allowed to the charterers for loading the ship and to the owners for taking in certain specified light freight, and thirty days over and above the lay-days, at 7*l.* per day; and then came the following provision: "Should the vessel be unnecessarily detained at any other period of the voyage, such detention to be paid for by the party delinquent to the party observant, at the above-named rate of demurrage or compensation." The vessel did not

leave Genoa until the 8th of September :—Held, that this was not a detention during the voyage within the meaning of the penalty clause. *Valente v. Gibbs*, 6 C. B., N. S. 270; 28 L. J., C. P. 229; 5 Jur., N. S. 1213.

Discharge in Separate Parcels.—As soon as the period arrives at which the owner of the cargo is bound to accept part delivery, the voyage is at an end, and so, where, by the usage of a port, a cargo is to be discharged within the port in two separate parcels at two different places, both places taken together constitute the usual place of discharge, and the lay-days commence to run from arrival at the first. *McIntosh v. Sinclair*, 11 Ir R., C. L. 456.

5. LOADING AND DISCHARGING ACCORDING TO RULES OF PORT.

Contract to Load with usual Despatch—Delay caused by Rule of Port.—By a charterparty the master of a vessel, the D., engaged to receive on board and load a cargo of coal at the port of Liverpool, "to be loaded with the usual despatch of the port, or if longer detained to be paid 40s. per day demurrage," and the defendants engaged to load upon the above terms. The loading was to take place at the Bramley Moore docks, and by one of the regulations of the docks no coal agent was to be allowed to have more than three vessels in those docks loading and to load at the cranes at one time. The defendants acted as their own coal agents, and when the charterparty was entered into they had three ships loading in the docks, and ten other charters in their books having priority over the plaintiff. In consequence of these engagements the D. was not allowed to go into the docks until thirty days after she was ready to do so :—Held, that the contract by the defendants was absolute to load with the usual despatch of the port of Liverpool; that the D. had not been so loaded; and that the defendants were therefore liable to pay for the delay. *Ashcroft v. Crow Orchard Colliery Company*, 9 L. R., Q. B. 540; 43 L. J., Q. B. 194; 31 L. T. 266; 22 W. R. 825.

Ship to Load in Turn—Charterer's Default.—A ship was chartered upon the terms that she should go to a foreign port for a cargo, and "there, in the usual and accustomed manner, load in her regular turn." The ship went to the port, but owing to the charterer's default was not ready when her turn came, and was consequently detained eleven days. When her turn came round again, she was ready, but the wind coming on to blow, and the harbour being crowded, the harbour-master refused to allow the ship to go up to load, and she was consequently detained three days. The shipowner having sued on the charterparty claiming damages for the detention :—Held, that the detention for the three days was the legal and natural consequence of the charterer's default in not having the ship ready for the first turn, and that the shipowner was entitled to damages in respect of the three days as well as the eleven days. *Jones v. Adamson*, 1 Ex. D. 60; 45 L. J., Ex. 64; 35 L. T. 287.

Shipowner Ignorant of Custom.—The plaintiffs' sailing vessel was chartered by the defendant to proceed to Whitehaven for a cargo of

coals. The charterparty provided that "regular turn" should be allowed for loading. By the custom of the Port of Whitehaven, steam vessels, though they arrive in port after sailing vessels, are loaded with coals before the sailing vessels; but as between sailing vessels themselves sailing vessels are loaded in the order of their arrival in port. The plaintiffs were ignorant that this was the usage of the port. The plaintiffs' vessel, though she arrived before several steam vessels, was delayed until they were first loaded, but she was loaded in the order of her arrival as regarded the other sailing vessels in harbour. The plaintiffs claimed demurrage :—Held, that the expression "regular turn" in the charterparty should, in the absence of exclusive words, be constructed as "regular turn" according to the usage of the Port of Whitehaven; that it was not material that the plaintiffs were ignorant of such usage, and that, accordingly, the plaintiffs could not recover. *King v. Hinde*, 12 L. R., Ir. 113.

Port Crowded—Lighters Engaged.—The defendants chartered the plaintiff's vessel, the C., for a voyage to the port of L. The charterparty provided that the cargo was to be brought to and taken alongside free of expense and risk to the ship; but it contained no other clause as to discharging the cargo. The number of lighters at L. was small, and when the C. arrived the port was crowded with vessels, about half of which belonged to the defendants or had been consigned to them. Seventy-two days elapsed after the arrival of the C. before her discharge was completed by the defendants' agents; but the number of days upon which the cargo was unloaded was only thirty-four. The delay arose from the lighters being engaged in discharging other vessels lying at the port :—Held, that in determining whether the terms of the charterparty had been broken by the defendants, the delay occasioned by the lighters being engaged in discharging other vessels was not to be taken into account. *Wright v. New Zealand Shipping Company*, 4 Ex. D. 165; 40 L. T. 413—C. A.

"Cargo to be Discharged with all Despatch according to Custom of the Port."—The defendants chartered the plaintiff's vessel, the C., to carry a cargo of rails to the port of L. The charterparty provided that the cargo should be "discharged with all despatch according to the custom of the port." By the custom of L. vessels were discharged by lighters worked along a warp, and upon the arrival of a vessel she was reported at the port office, and in her turn, with respect to the vessels that had arrived previously, one lighter was sent to her every working day until she was discharged. Upon the arrival of the C. at L., in consequence of the scarcity of lighters, and the number of vessels lying there, the defendants were unable to begin to discharge until twenty-four working days had elapsed. In an action to recover damages for detention, the judge directed the jury that there was no obligation upon the defendants to provide one lighter for unloading the cargo of the C. for every working day after she was ready to unload, and that if the defendants used the existing appliances at L. with due despatch, according to the custom of the port, the jury ought to find for them :—Held, that the direction was correct. *Postlethwaite v. Freeland*, 4 Ex. D. 155; 48 L. J., Ex. 353; 40 L. T. 601; 27 W. R. 568—C. A.

Affirmed in H. L., 5 App. Cas. 599; 49 L. J., Ex. 630; 42 L. T. 845; 28 W. R. 833.

Obligation where no Custom.]—By a charterparty entered into between the plaintiff and G., it was agreed that the plaintiff's vessel should at the port of discharge be unloaded as fast as the custom of the port would allow. By the bill of lading, signed by the master, the cargo was stated to have been shipped by G., and was to be delivered to the defendant or his assigns, he or they paying freight for the goods as per charterparty. No time for the discharge of the cargo was mentioned in the bill of lading. At the port of discharge there was no custom as to unloading vessels, but a delay occurred in unloading the ship:—Held, in an action for not discharging within a reasonable time, that, as there was no custom of the port of discharge as to unloading vessels, the charterparty did not by its terms vary the implied contract contained in the bill of lading to deliver the cargo within a reasonable time. *Fowler v. Knap*, 4 Q. B. D. 229; 48 L. J., Q. B. 338; 40 L. T. 180; 27 W. R. 299—C. A.

Wrongful Interference with Turn.]—Goods were consigned under a bill of lading by which it was stipulated that the vessel should take her regular turn in unloading. The vessel having been prevented from unloading within a reasonable time, in consequence of not being allowed to take her regular turn in unloading:—Held, that the master could sue the consignor for damages for such detention, the above stipulation in the bill of lading amounting to a contract by the consignor with the master that the vessel should take her regular turn in unloading. *Cauthron v. Trickett*, 15 C. B., N. S. 754; 33 L. J., C. P. 182; 9 L. T. 609; 12 W. R. 311.

Meaning of "Regular Turn."]—By charterparty it was agreed between the plaintiff, owner of a ship, and the defendant, that the ship should proceed to a certain dock and there load in the customary manner a cargo of Marley Hill coke, "to be loaded in regular turn." The Marley Hill Company kept a book in which they entered ships to be loaded, and it was their practice to enter ships, not only before they were ready to load, but before their arrival at the dock, or even at the port; and if a ship was not ready to load when her turn came, the ship next in turn was loaded, and the other took its turn, when ready, before others which had been ready before it. On the 29th November the plaintiff's ship arrived at the dock, and on the 8th December his agent told the manager that he was ready to load, but several ships which had not arrived, and were not ready until after the plaintiff's ship, were loaded before it, in consequence of the order in which they were entered in the book; and the loading of the ship did not commence until the 23rd of January. The judge left it to the jury to say what was the meaning of "regular turn," and they found that the ship was loaded according to the practice of the Marley Hill Colliery, but that it was not an established or a known custom, and that "regular turn" was the order of readiness, not the order of entry in the book:—Held, that the defendant was liable for demurrage. *Lawson v. Burness*, 1 H. & C. 396; 10 W. R. 733; *N. C.*, at Nisi Prius. 2 F. & F. 793.

Evidence—Regulations of Foreign Government.]—By the terms of a charterparty the charterers agreed to unload the vessel at a certain rate per diem; and payment for any detention beyond that time was "to reckon from the time of the vessel being ready to unload, and in turn to deliver." At the port to which the vessel was bound regulations of the French Government were in force, by which vessels arriving to discharge their cargo might have to wait a certain number of days before their turn to deliver arrived. In an action brought upon the charterparty for demurrage:—Held, that evidence was receivable to show what was the general understood meaning of the words "in turn to deliver" amongst shipowners and merchants entering into charterparties, with respect to the commerce and business under investigation. *Robertson v. Jackson*, 2 C. B. 412; 15 L. J., C. P. 28; 10 Jur. 98.

Held, also, that the regulation as to the unloading for the French marine department, was to be considered one of the regulations of the port, binding upon all vessels entering the port. *Ib.*

"Turn-paper"—Evidence as to Place.]—The defendants having purchased a cargo of coals on board a ship in the Thames belonging to the plaintiff, signed and sent to a coalmeter a document called a "turn-paper," which, after reciting that they had bought the cargo of coals, to be worked at the rate of forty-nine tons per working day, required him to work the same. The paper mentioned that the coals were to be unloaded at Dudman's Dock, in the Thames. The plaintiff took his ship to the moorings off Dudman's Dock, but a delay of six days occurred before the vessel could begin to unload at the dock, owing to the turns of other vessels for unloading coming first:—Held, that if the turn-paper was evidence of any contract between the plaintiff and the defendant, it was evidence only of a contract to unload after the vessel had got into the dock at the place for unloading; consequently that the plaintiff was not entitled to damages in the nature of demurrage for the six days' delay from the time the ship was off the dock ready to unload. *Shadforth v. Cory*, 32 L. J., Q. B. 379; 8 L. T. 736; 11 W. R. 918—Ex. Ch.

Different Order—Metage.]—A ship was to take in a cargo of coals for Newcastle, and proceed therewith to London, or as near thereto as she could safely get, and deliver the same to the freighters, or their assigns, to be delivered in five working days; demurrage over and above the laying days 2l. per day. The ship arrived in the port of London off Gravesend, on the 9th March, and on the 10th the cargo was sold, and the vessel entered by the freighters for a meter. On the 20th she received an order from the harbour-master to proceed to the Pool. On Monday, the 22nd, she commenced working out her cargo, and was cleared on the 27th. It appeared that, in consequence of the factor's certificate that she was a metered vessel, the harbour-master had detained her at Gravesend till the 20th, when her turn arrived for her to proceed to the Pool and discharge her cargo; that, if she had not been on the meter's list, this regulation would not have applied, and she might have proceeded to the Pool at once; and

that it was occasionally the practice for factors not to enter such vessel in the meter's list, but that it was desirable that the cargo should be sold, subject to metage, by a sworn meter:—Held, that the ship was not to be considered as having arrived at her place of discharge until the 20th, and therefore that the laying days did not begin to count till then, and the owner was not entitled to demurrage. *Kell v. Anderson*, 10 M. & W. 498; 12 L. J., Ex. 101.

Customary Time.—If a freighter of a ship employed to bring a cargo of wine into the port of London covenants to unload her in the usual and customary time at her port of discharge, he is not liable for the detention of the ship in the London Docks, if she is there unloaded in her turn. *Rodgers v. Forresters*, 2 Camp. 483.

Express Time.—But if, by reason of the crowded state of the London Docks, a ship is detained there before she can be unloaded a longer time than is allowed for that purpose by the terms of the charterparty, the freighter is liable for this detention to the owner of the ship. *Randall v. Lynch*, 2 Camp. 352.

6. CAUSES OF DELAY.

a. Weather.

Preventing Departure of Ship.—After a ship has finished her loading, the freighter is not liable for any delay that may arise in dispatching her, occasioned by the accidental impossibility of her obtaining clearance. *Barret v. Dutton, infra*.

A charterer, for the conveyance of a cargo from a foreign port, is not liable to the owner for the unavoidable detention of the ship by the frost after the completion of the loading. *Pringle v. Mollett*, 6 M. & W. 80.

Preventing Conveyance of Cargo to Ship.—The exception in a charterparty, whereby a certain number of laying days is allowed to the charterer, but detention by ice is not to be reckoned as such, applies where the ice not only renders access to the ship impracticable in the port itself, but blocks up a river by means of which alone the intended cargo can be conveyed to the port. *Hudson v. Ede*, 3 L. R., Q. B. 412; 37 L. J., Q. B. 166; 18 L. T. 764; 16 W. R. 940; 8 B. & S. 640—Ex. Ch.

Where there is a stipulation in a charterparty, that a certain number of running days shall be allowed for loading the ship, the freighter is liable for her subsequent detention for that purpose, although the loading of her within the specified time was rendered impossible by ice in the river where she lay. *Barret v. Dutton*, 4 Camp. 333.

A. by charterparty engaged to load on board B.'s ships a cargo of coals, "with due dispatch;" the goods had to be brought by A. along a canal to the dock, and frost prevented the completion of the loading:—Held, that A. was responsible for the delay consequent thereon. *Kearon v. Pearson*, 7 H. & N. 386; 31 L. J., Ex. 1; 10 W. R. 12.

By the terms of the charterparty the ship was to proceed to the port of loading and there load a cargo of iron in the customary manner from the agents of the freighters. Cargo to be supplied as fast as steamer can receive. Time to

commence from the vessel being ready to load, and ten days on demurrage over and above the said lay days at 40l. per day. ("Except in case of hands striking work, or frosts or floods, or any other unavoidable accidents preventing the loading; in which case owners to have the option of employing the steamer in some short-voyage trade until receipt of written notice from charterers that they are ready to resume employment without delay to the ship.") On the ship's arrival the loading was commenced, but shortly afterwards was wholly stopped for five days through frost:—Held, that the exception in the charterparty as to frost did not relieve the charterers from liability for demurrage, inasmuch as the detention of the cargo by ice occurred in the canals before the cargo reached the dock where the vessel was lying. *Coverdale v. Grant*, 11 Q. B. D. 543; 48 L. T. 701; 5 Asp., M. C. 74—C. A. Reversing 8 Q. B. D. 600; 46 L. T. 632.

Customary Manner of Loading.—By the terms of the charterparty the ship was to proceed to Cardiff, East Bute Dock, and there load in the customary manner from the agents of the freighters a cargo of rail iron; the cargo to be loaded as fast as steamer could take on board and stow within the customary working hours of the port, commencing when the steamer was in berth and ready to load; and if longer detained merchants to pay 80l. per day demurrage. "Detention by frost, floods, &c., not to be reckoned as lay days." The shipowner, when the charterparty was made, did not know who were the freighters' agents at Cardiff. There were about six shippers of rail iron there, all of them (with the exception of the freighters' agents) having wharves in the West or East Bute Dock. The agents' wharf was at a distance from the docks upon a canal communicating with the West Bute Dock, and their rail iron was loaded on ships berthed in the East Bute Dock by means of lighters passing down this canal through the West Bute Dock, and from thence down a smaller canal connecting the two docks. The other shippers loaded in the East Bute Dock, either from the quay or by lighters coming alongside the ship from the wharves in the East Bute Dock, or by lighters from West Bute Dock, passing down the connecting canal. The ship, on arrival, was berthed in the East Bute Dock, and the loading was commenced, but shortly afterwards was stopped for sixteen days by frost, which covered the canal from the agents' wharf to the West Bute Dock with ice and prevented the passage of the lighters, though the water in the docks was not frozen:—Held, that the exception in the charterparty with respect to detention by frost did not apply to relieve the freighters from liability to demurrage. *Kay v. Field*, 52 L. J., Q. B. 17; 47 L. T. 423—C. A. Reversing 8 Q. B. D. 594; 46 L. T. 630.

Snowstorm—"Accident."—A charterer agreed to load a ship with coal, in regular and customary turn, "except in cases of riots, strikes, or any other accidents beyond his control" which might prevent or delay her loading. To an action for breach of the above covenant in the charterparty, he pleaded that he was prevented loading the vessel by a snowstorm, which rendered it impossible to bring the cargo to the agreed place of shipment:—Held, that a snowstorm was not an "accident" within the mean-

ing of the exception, and that the plea was bad. *Penwick v. Schmalz*, 3 L. R., C. P. 313; 37 L. J., C. P. 78; 18 L. T. 27; 16 W. R. 481.

No Implied Exemption for Bad Weather.]

—By a charterparty for a voyage with a cargo of timber from Pensacola to a safe port in the United Kingdom, "sixteen working days were to be allowed the merchants for loading the ship at Pensacola, and to be discharged at such wharf or dock as the charterers may direct, always afloat, in fourteen like days, and ten days on demurrage over and above the laying days at 10*l.* per day." The ship was ordered to Middlesbrough, and arrived at the usual place of discharge in the river and began unloading. It was the duty of the master to put the timber over the ship's side, and form it into rafts, and the charterer was to send tugs and take the rafts away. During the unloading bad weather came on, and though the ship did not leave her anchorage, the rafts could not be formed, and the charterer therefore could not do his part in taking the timber away. The bad weather caused a delay of four days in discharging the ship. An action having been brought by the shipowner against the charterer for the four days' demurrage:—Held, that, where a given number of days is allowed to the charterer for unloading, a contract is implied on his part that, from the time when the ship is at the usual place of discharge, he will take the risk of any ordinary vicissitudes which may occur to prevent his releasing the ship at the expiration of the lay days; and the charterer, therefore, was liable for the four days' demurrage. *Thiss, Tiis, or Thiess v. Byers*, 1 Q. B. D. 244; 45 L. J., Q. B. 511; 34 L. T. 526; 24 W. R. 611.

b. Not Producing Bill of Lading.

Although as a general rule the master has no right to detain the cargo until the bill of lading is produced, yet if the holder of the bill of lading does not claim the cargo in a reasonable time after notice of the arrival of the vessel, and the charterer offers to unload on behalf of whom it may concern, and to pay the freight, and the captain refuses, the shipowner cannot claim demurrage from the charterers if the cargo might have been unshipped within the laying days. *Erichsen v. Barkworth*, 3 H. & N. 601; 27 L. J., Ex. 472.

Merchants at Hull chartered a ship to sail to Bactouche, and there load a cargo of timber, and being so loaded to proceed to Gloucester and deliver the same on being paid freight, thirty-five running days to be allowed for loading and discharging the cargo, and ten days on demurrage above the laying days at 5*l.* per day. The ship arrived at Bactouche, and the loading was completed at the expiration of twenty-seven of the running days. The master signed bills of lading by which the cargo was deliverable "unto order or to assigns, he or they paying freight for the goods as per charterparty." The invoice of the cargo and bills of lading, together with a bill drawn by the shipper on the charterers for the price of the cargo, was presented to them by the shipper's agent in London, but they refused to accept the bill or receive the cargo, on the ground that the shipment was not according to the contract. The charterers wrote to the shipper's

agent, and also to the master of the ship, offering to land the cargo and take care of it on their premises for whom it might concern. The shipper's agent gave notice to the master not to part with the cargo without production of the bill of lading. The vessel was ready to discharge her cargo, according to the charterparty, on the 5th September. The lay days expired on the 13th September. The vessel might have been discharged in five days. The bill of lading was not produced to the master until the 22nd September, and the delivery was completed on the 30th:—Held, that the charterers were liable for demurrage and detention of the vessel. *S. C.*, on appeal, 3 H. & N. 894; 28 L. J., Ex. 95; 5 Jur., N. S. 517—Ex. Ch.

c. Other Cases.

No Time Mentioned—Unavoidable Delay.]

When a charterparty is silent as to the time within which the cargo is to be unloaded at the port of destination, the law implies that the merchant and the shipowner shall each use reasonable dispatch in performing his part of the contract; and where the landing of the cargo by the merchant is rendered impossible by a cause over which he has no control, he is not liable to pay damages for the delay. *Ford v. Cotesworth*, 5 L. R., Q. B. 544; 39 L. J., Q. B. 188; 23 L. T. 165; 18 W. R. 1169; 10 B. & S. 991—Ex. Ch.

—Refusal of Authorities to allow Unloading.]—A ship sailing under a charterparty, which was silent as to the number of days to be allowed for unloading, arrived at a foreign port, and was detained beyond the usual time, owing to the refusal of the authorities to allow the cargo to be landed:—Held, that the merchant was not liable to pay damages for the delay, as he had not contracted that there should be none, and it had happened without fault on his part. *Id.*

Contract not made with Intention to Violate Law.]

—By a charterparty made by the charterer's agent in France, a ship was chartered, and it was stipulated that the ship should load a cargo of pressed hay at Trouville, in France, and proceed direct to London; and all cargo was to be brought and taken from ship alongside. The agent verbally told the master that the consignees would require the hay to be delivered at a particular wharf in the port of London, to which the master assented. On arriving in that port the master was unable to land the hay at the wharf by reason of an Order in Council under the Contagious Diseases (Animals) Act, 1869, forbidding hay from a French port to be landed in the United Kingdom. The order had been made before the charterparty was entered into, but neither party knew of it. After some delay the charterer received the hay from alongside the ship into another vessel, and exported it. There was no legal obstacle to doing this, but eighteen days were allowed by the charterer to elapse beyond the lay days. The shipowner having brought an action for this detention of his ship, the charterer contended that the contract was for an illegal purpose, and therefore void:—Held, that although it was the intention of the parties when the charterparty was entered into, to land the hay at London, yet as the contract was not

made knowingly with the intention to violate the law, and as it could be carried out (as it ultimately was) without violating the law, it was not void; and the charterer was, therefore liable for the demurrage. *Waugh v. Morris*, 8 L. R., Q. B. 202; 42 L. J., Q. B. 57; 28 L. T. 265; 21 W. R. 438.

Petroleum.]—A ship with a general cargo sailed from London for Havre with some petroleum on board. Under the bill of lading the shipowner was to deliver the petroleum at Havre, and it was to be taken out by the defendant within twenty-four hours after arriving at Havre, or ten guineas a day was to be paid for demurrage. On the ship's arriving at Havre, the authorities of the port made the captain take her away in consequence of the petroleum being on board. Thereupon he went to neighbouring ports, but was not allowed to stay. Returning to Havre, he discharged his general cargo, and no bill of lading having been presented to him and no application having been made to him for the delivery of the petroleum, he brought it back to London:—Held, that the shipowner was entitled to freight, back freight and expenses. The demurrage and the expenses incurred in the ineffectual attempt to land at the neighbouring ports were not allowed, but were looked on as part of the expenses of the voyage. *Cargo ex Argos, Gaudet v. Brown*, 5 L. R., P. C. 134; 28 L. T. 745; 21 W. R. 707. Affirming 42 L. J., Adm. 49.

Exportation not Permitted.]—Where there was a contract to fetch corn, and demurrage allowed, and upon the ship's arrival it was found that the government had prohibited the exportation of corn, which fact the captain knew before he entered the port, but still did so, and having stayed his demurrage days, returned in ballast:—Held, that no demurrage was payable. *Blight v. Page*, 3 B. & P. 295, n.

Unlawful Seizure.]—It is no defence to an action for demurrage, that the delay in unloading the ship arose from the act of custom-house officers in unlawfully seizing a part of the cargo. *Bessy v. Evans*, 4 Camp. 131.

Wrongful Detention by Owner.]—The plaintiffs, owners of a ship, agreed by charterparty, that the ship should have eighty-five running days for loading and unloading her cargo: and that the freighter might keep her on demurrage, for fourteen additional running days, at a stipulated rate per diem. The ship arrived in port, with five running days due to her. On her arrival, and subsequently, on another occasion, the plaintiffs refused to permit her to be unloaded. Afterwards, but not till after the expiration of the running days, she was permitted to unload, but the cargo was not discharged until after the expiration of fourteen days beyond the running days. In an action against the freighter on the charterparty, the declaration charged a detention on demurrage for fourteen days, and a general detention beyond. Plea, that he did not keep or detain the ship, and that, at the time she was unloading, the plaintiffs wrongfully stopped the unloading, and prevented the defendant from unloading. The jury found, that the plaintiffs' refusal was wrongful:—Held, that the

plea, denying the detention of the ship, was sufficiently made out by the finding of the jury; and that the plaintiffs could not, under this declaration of the charterparty, recover for the use of the ship during so much of the actual unloading as exceeded five days. *Benson v. Blunt*, 1 G. & D. 449; 1 Q. B. 870.

But held, that the last plea was bad, as such an interference by the plaintiffs, to prevent an unloading, as was stated in the general terms of the allegations of that plea, would not put an end to the obligation of the charterparty. *Id.*

Insufficient Supply of Cargo.]—A charterparty provided that the ship should proceed to a port, and there load from the factors of the charterers a cargo of "coal, taking her turn with other steamers," and receive "prompt dispatch in loading." The charterers employed the persons at the port of loading who were employed to load other ships, and the ship was loaded in her turn, but, by reason of an insufficient supply of coal, the ship was delayed:—Held, that the charterers were responsible for the delay. *Elliott v. Lord*, 5 Asp. M. C. 63; 52 L. J., P. C. 23; 48 L. T. 542—P. C.

Procuring Necessary Papers.]—The consignee of a particular parcel of goods by a general ship is liable to the owner for not taking them from the ship in a reasonable time, although the delay arose from the necessity for an order from the Treasury to land these goods, which the consignee used the utmost diligence to obtain. *Hill v. Idle*, 4 Camp. 327.

It is no defence to an action by the owner of a ship for demurrage, that the owner has omitted to procure the necessary papers for the discharge of the cargo, if he omitted to do so at the request of the defendant. *Farnell v. Thomas*, 5 Bing. 188; *S. C.*, nom. *Palmer v. Thomas*, 2 M. & P. 296. And see *Barret v. Dutton*, 4 Camp. 333.

Position of Goods in Ship.]—A charterparty entered into between the plaintiffs and B. & Co. for the conveyance of grain from C. to L., stipulated that fourteen working days were to be allowed for loading and unloading at the port of discharge, and ten days on demurrage at 35*l.* a day. The vessel having been loaded, one of the bills of lading was indorsed to the defendants. The defendants' grain was stowed at the bottom of the mainhold, and that of the other shippers on the top of it. The bill of lading, indorsed to the defendants, contained the words "paying freight for the same goods and all other conditions as per charterparty." Owing to the consignees, whose grain was placed on the top of the defendants', having failed to take away their goods within the lay days, the defendants were unable to obtain delivery of their grain, and three days' demurrage was incurred:—Held, that the defendants were liable for the demurrage, although they were prevented from getting their goods by the delay of other consignees. *Porteus v. Watney*, 3 Q. B. D. 534; 47 L. J., Q. B. 643; 39 L. T. 195; 27 W. R. 30—C. A.

The defendant was indorsee of one of eight bills of lading, covering a cargo of wheat, in each of which the following clause occurred:—"Three working days to discharge the whole cargo, or 30*l.* sterling per day demurrage." The portion

of the cargo consigned to the defendant was loaded in the bottom of the ship, and owing to delay in unloading, on the part of the other consignees, and from no default of the defendant, who was ready and willing to receive his portion, as was the master to discharge it, as soon as it could be reached, two days' demurrage was incurred:—Held, that the defendant was liable for demurrage, for that by the stipulation in the bill of lading he contracted to run the risk of incurring demurrage through the default of his fellow-consignees. *Straker v. Kidd*, 3 Q. B. D. 223; 47 L. J., Q. B. 365; 26 W. R. 511.

If A. has goods consigned to him, and there is on board the same ship goods consigned to other consignees, and those goods are so placed on board that A., after the ship arrives, cannot obtain his goods within the time limited by the bill of lading, he is not liable for demurrage. *Dobson v. Droop*, 4 C. & P. 112; M. & M. 441.

If a freighter is to discharge within twelve running days after the vessel's arrival, and he is prevented from discharging at first by reason of other goods being placed above his, he must, when that obstruction is removed, discharge with all reasonable diligence; and he is not, as matter of right, entitled to the whole original number of days from the time when he is able to commence discharging. *Rogers v. Hunter*, 2 C. & P. 601.

A general ship took brandies on board under bills of lading, which allowed twenty lay days for delivery of the goods in London, and stipulated for 4l. per day demurrage: afterwards, certain of the consignees choosing to have their goods bonded, the vessel could not make her delivery at the London Docks until forty-six days after the twenty days; and some of the goods which were undermost could not, though demanded, be taken out till the upper tiers were cleared:—Held, that each of these consignees was liable to pay the 4l. per day for the forty-six days. *Leer v. Yates*, 3 Taunt. 387.

A general ship took some silk on board to carry from Rotterdam to London, on the defendant's account. On the margin of the bill of lading was written, "The consignee to clear the goods in fourteen running days after her arrival in port, or to pay 4l. per diem for demurrage." The vessel was ready to deliver on the 3rd of October. The defendant applied for and was ready to receive his goods within the running days; but, being undermost in the vessel, delivery could not be made until the 22nd:—Held, that the plaintiff was entitled to recover the demurrage, though he did not deliver the goods within the time allowed, being prevented by other goods, belonging to other consignees, which overlaid them. *Harman v. Gandolph*, Holt, 35.

State of Tides.—By charterparty, B. and L. agreed that B.'s ship Bebec should proceed to Llanely and take on board a cargo of culm, and, being so loaded, should "therewith proceed with all convenient speed to Cole's Wharf, Rochester, or as near thereto as she might safely get, and deliver the same on being paid freight. The regular turn to be allowed for loading, and fifty tons per working day, if required, for delivery at Rochester, and demurrage over and above the said days at the rate of 4l. per day." The ship arrived with her cargo at Rochester on the 24th October, and was moored at the Buoys, about 500 yards from and opposite to Cole's Wharf.

On the 25th October, the master gave L.'s agent notice that the vessel was ready to discharge her cargo, and he desired the master to come alongside Cole's Wharf. At that time there was not sufficient water for the vessel to come alongside the wharf, and the agent refused to send lighters to receive part of the cargo, so as to lighten the vessel and enable her to come alongside the wharf. The state of the tide did not allow the vessel to be removed to Cole's Wharf until the 4th November, and on the following day she commenced discharging her cargo:—Held, that the master was bound to take the vessel alongside Cole's Wharf, unless prevented by some impediment which endangered her safety; and as the inability to bring the vessel alongside the wharf was occasioned by the ordinary course of navigation, the lay days did not commence until the vessel had arrived there. *Bastifell v. Lloyd*, 1 H. & C. 388; 31 L. J., Ex. 413; 10 W. R. 721.

Discharge of Cargo.—By the terms of a charterparty, a steam vessel was to proceed to H., to be there ready to load by a given day, or so near thereunto as she might safely get, and there load from the factors of the merchant such quantity of oxen, sheep, and (or) other lawful produce which the merchant might find it convenient to ship, not exceeding what she could reasonably stow and carry over and above her tackle, &c., and, being so loaded, was to proceed therewith to London, and deliver the same on being paid freight a lump sum of 450l. Two working days were allowed for loading and discharging, and three days on demurrage. The cargo to be taken to and from alongside at the merchant's risk and expense. Arrived at H., the vessel went alongside the jetty, and received on board a number of barrels of hams and 300 head of live stock, for which the captain signed bills of lading. Being thus laden, the vessel was found to draw too much water to get over the bar, and the captain was consequently obliged to take out all the stock. He then proposed to the charterer's agent to stow on board so many of the cattle as would enable him to pass over the bar, and to remain outside, and there take in the remainder at the charterer's expense and risk. The agent declined to accede to this, and refused to put any of the cattle again on board, unless the captain would take all. Being unable to come to terms, the captain proceeded on his voyage with only the hams on board:—Held, that the owners were not entitled either to the stipulated freight or to damages for the refusal to ship the cargo; for that, although the captain was not obliged to go within the bar at all, yet, having chosen to do so, and having received the cargo on board, and signed bills of lading, he was bound to find his way to his destination. *General Steam Navigation Company v. Slipper*, 11 C. B., N. S. 493; 31 L. J., C. P. 185; 8 Jur., N. S. 821; 5 L. T. 641; 10 W. R. 316.

Whether a partial putting out of the cargo is a part discharge or a mere lightening, is to be determined in each case by the jury, having regard to the terms of the contract and the usage of the port. *McIntosh v. Sinclair*, 11 Ir. R., C. L. 456.

7. RATE OF PAYMENT.

Stipulated Sum—Deductions.—If a ship is

detained beyond the days of demurrage allowed by the charterparty, the stipulated demurrage is *prima facie* the measure of compensation for the further time, but it is competent to the owner or the freighter to shew that this would be more or less than a fair compensation for the detention. *Moorson v. Bell*, 2 Camp. 616.

In fixing the amount of demurrage to be paid for detention of a vessel during repairs, a deduction must be made from the gross freight of so much as would in ordinary cases be disbursed on account of the ship's expenses in the earning of the freight. *The Gazelle*, 2 Rob. Adm. 279.

8. LIEN FOR.

What Delays.]—By a charterparty cargo was to be loaded in thirteen working days, and to be discharged at not less than thirty tons per working day. Ten days' demurrage to be allowed above the said days. The charterer's liability to cease when ship is loaded, the captain or owner having a lien on cargo for freight and demurrage:—Held, that the charterer upon loading the cargo was discharged from liability for demurrage incurred at the port of loading. *Kish v. Cory*, 10 L. R., Q. B. 553; 44 L. J., Q. B. 205; 32 L. T. 670; 23 W. R. 880—Ex. Ch.

By a charterparty it was agreed that the ship should go to a certain port and there load from the charterer a cargo "in the customary manner," and proceed therewith to another port and deliver the same. . . . "The cargo to be discharged in ten working days, commencing from the day after the ship has got into her proper discharging berth. Demurrage at 2l. per 100 tons register per day. . . . The ship to have an absolute lien on cargo for freight and demurrage, the charterer's liability to any clauses in the charter ceasing when he has delivered the cargo alongside ship:—Held, that the demurrage and the lien and exemption clauses did not apply to damages by undue detention of the vessel at the port of loading. *Lockhart v. Fulk*, 10 L. R., Ex. 132; 44 L. J., Ex. 105; 33 L. T. 96; 23 W. R. 753.

The shipowner has a lien for demurrage proper where the lien is given by the charterparty and incorporated in the bill of lading, but not for damages in the nature of demurrage. *Gray v. Carr*, 1 L. R., Q. B., 522; 40 L. J., Q. B. 257; 25 L. T. 215; 19 W. R. 1173—Ex. Ch.

Where the charterparty gave the master a lien on the cargo for all freight, dead freight and demurrage:—Held, that the clause extended to detention of the vessel in putting stiffening coal on board and that damages for such detention were covered by the owner's lien. *Sanguinetti v. Pacific Steam Navigation Company*, 2 Q. B. D. 238; 40 L. J., Q. B. 105; 35 L. T. 658; 25 W. R. 150—C. A.

Under a charterparty containing this clause: "Charterer's liability to cease when the ship is loaded," the captain having a lien on the cargo for freight and demurrage:—Held, that the lien extended to demurrage at the port of lading. *Francesco v. Massey*, 8 L. R., Ex. 101; 42 L. J., Ex. 75; 21 W. R. 440.

Where by a charterparty the freighters covenanted to pay a certain sum for demurrage, and bound themselves in a penal sum for the due performance of the charterparty, a claim for a lien for demurrage was not allowed. *Birley v. Gladstone*, 3 M. & S. 205.

9. PRACTICE.

a. Jurisdiction.

Of Admiralty Court.]—The Court of Admiralty may, by transfer from a county court, acquire jurisdiction in a cause upon a question of demurrage, as to which the court has no original jurisdiction. *The Swan*, 3 L. R., Adm. 314; 40 L. J., Adm. 8; 23 L. T. 633; 19 W. R. 424.

Superior Court.]—If in an action in a superior court, on a charterparty, for freight or demurrage, the plaintiff claims and recovers a sum greater than 20l. and less than 300l. he is entitled to costs; for over such causes 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51, s. 2, confer no jurisdiction on a county court appointed to have admiralty jurisdiction. *Gunnsted v. Price*, and *Fulmore v. Wait*, 10 L. R., Ex. 65; 44 L. J., Ex. 44; 32 L. T. 499; 23 W. R. 470. Disapproving of *Gaudet v. Brown*, *infra*.

County Court.]—Held, by the Privy Council, that by 32 & 33 Vict. c. 51, s. 2, the county courts have jurisdiction in cases of claims arising out of charterparties or other agreements for the use or hire of ships, although the Court of Admiralty may have no jurisdiction in such cases. *Gaudet v. Brown*, *Cargo ex Argos*, 5 L. R., P. C. 134; 42 L. J., Adm. 1; 28 L. T. 77; 21 W. R. 420.

This case followed and *Gunnsted v. Price* disapproved in *The Alina*, 5 Ex. D. 227; 49 L. J., P. 40; 42 L. T. 517; 29 W. R. 94—C. A.

b. Pleading.

A count on a charterparty for demurrage and detention of a ship, and a count for demurrage, ought not to be allowed. *Matthewson v. Ray*, 16 M. & W. 329; 16 L. J., Ex. 288; *S. P., Temperley v. Brown*, 1 D., N. S. 310; 6 Jur. 150.

Where a charterparty stipulates for seventy-five running days and twenty days on demurrage, if the ship is detained for extra days, the remedy is not by a count for demurrage, but by action on the charterparty. *Cropton v. Pickernell*, 16 M. & W. 829.

On a count for demurrage generally, the plaintiff cannot recover when the demurrage or detention has arisen *ex delicto*. *Harrison v. Wilson*, 2 Esp. 709.

If there is no contract as to demurrage, a shipowner cannot, on a common count for demurrage, recover for the detaining of the ship for an unreasonable time in loading and unloading, but must declare specially. *Horn v. Ben-susan*, 9 C. & P. 709; 2 M. & Rob. 326.

If a contract of freight and demurrage is entered into by deed, the plaintiff ought to declare upon the deed. *Atty v. Parish*, 1 N. R. 104.

XVII. PILOTS AND PILOTAGE.

1. *Licences and Certificates*, 1515.
2. *Duty and Liability of Pilot*, 1516.
3. *Penalties for not Employing*, 1517.
4. *Exemptions from Employing*.
 - a. In General, 1519.
 - b. In Particular Cases, 1519.
5. *Local Rights and Liabilities*, 1521.
6. *Liabilities of Foreign Vessels*, 1523.

7. *Exemption of Owners from Liability.*
 - a. Compulsory Employment, 1524.
 - b. Conditions of Exemption, 1530.
 - c. In Foreign and Colonial Waters, 1532.
 - d. Costs of Defence of Compulsory Pilotage, 1533.
8. *Pilotage Charges*, 1534.

1. LICENCES AND CERTIFICATES.

Licences—Renewal.]—By 17 & 18 Vict. c. 104, s. 374, no licence granted by the Trinity House shall continue in force beyond the 31st January next ensuing the date of such licence, but the same may, upon the application of the pilot holding such licence, be renewed on such 31st January in every year, or any subsequent day; and a pilot's licence renewed on the 20th January is within the intention of this provision, so as to be in operation and effect on the 6th May following. *The Beta*, 3 Moore, P. C. C., N. S. 23; 34 L. J., Adm. 76; 12 L. T. 1.

—Refusal to Deliver up.]—Under 17 & 18 Vict. c. 104, s. 352, a qualified pilot refusing to deliver up his licence when required to do so by the pilotage authority, is liable to a penalty, and cannot defend himself on the ground that the pilotage authority has acted capriciously in requiring the delivery. *Henry v. Newcastle Trinity House Board*, 8 El. & Bl. 723; 27 L. J., M. C. 57; 4 Jur., N. S. 685.

—Limits.]—The Trinity House of Leith has not power to grant licences to pilots within the jurisdiction of the Trinity House of London, and therefore a pilot to whom a licence has been granted by the Trinity House of Leith to navigate a ship along the east coast of England to Orfordness, thence to the Nore, and vice versa, is subject to a penalty, under 5 Geo. 2, c. 20, s. 1. *Hosack v. Gray*, 6 B. & S. 598; 34 L. J., M. C. 209; 11 Jur., N. S. 996; 12 L. T. 701; 13 W. R. 859.

—Districts—Evidence of Authority to Licence.]—By a charter of Elizabeth the corporation of the Trinity House of Hull was authorized to take certain duties "in the port of the town of Kingston-upon-Hull, and in all places within the limits and liberties thereof, that is to say, in all havens, creeks, and other places where our customer of Hull by virtue of his office hath any authority to take any custom;" and they were also empowered to exercise jurisdiction over certain disputes arising within the same limits and liberties; and, moreover, to forbid any mariner of the port of Hull to take charge as pilot of any ship to cross the seas, except such as should be first examined by them, whom, if they should consider him sufficient, they should receive into their guild, and give him a writing, signifying the countries, coasts, and places for which he should be so found sufficient; and they were authorized to punish any person who should take charge upon him as pilot to cross the seas without their allowance. The limits in question extended many miles up the Humber and River Ouse. Goole, a place within those limits, situate on the Ouse, and where the customer of Hull had formerly exercised jurisdiction, was constituted a port in 1828. Till after that time the Trinity House had never licensed pilots to take charge of vessels upon the Ouse, or the Humber, above

Hull roads, and the members of the corporation had, on one or two occasions, refused to interfere with the pilotage of those parts; but they had exercised the other powers given by the charter, both on the Humber and on the Ouse beyond Goole. Before the erection of that port scarcely any foreign trade was carried on with places above Hull roads:—Held, that the power given by the charter to licence in all places where the customer of Hull had authority to take custom, extended over all the limits within which the customer might so act at the time when the charter was granted, and was not confined to the jurisdiction of the customer for the time being; consequently, that Goole, though now an independent port as to customs, was still subject to the charter, in respect to the licensing of pilots: Held, also, that, under the above circumstances, the forbearance of the corporation in former times to licence pilots above Hull Roads could not affect their right to enforce the charter on this head, when it became necessary. *Beilby v. Raper*, 3 B. & Ad. 284.

Held, also, that it was not requisite, by the terms of the charter, that every licence should be for crossing the seas; but that the corporation might grant a more limited licence, as from Goole to Hull Roads. *Id.*

Evidence by a clerk from the Trinity House that the Trinity House has from a period prior to the Merchant Shipping Act, 1854, been in the habit of licensing pilots for the district in question, is *prima facie* proof of their authority. *The Juno*, 1 Adm. D. 135; 45 L. J., Adm. 105; 34 L. T. 741; 24 W. R. 902.

Certificates—Grant of.]—The master of a vessel applied for a certificate, purporting to enable him to pilot his vessel within certain waters, and submitted to the required examination. The certificate was signed and sealed by the pilotage authority, and was lying in the office to be called for by the master, but he had not applied for it, and was ignorant that it was ready and would be given him on application:—Held, that the certificate was not granted to the master, nor possessed by him, within 17 & 18 Vict. c. 104, ss. 340, 353, so as to enable him to pilot his vessel in the specified waters. *The Kilmarney*, Lush. 202; 30 L. J., Adm. 41; 5 L. T. 21.

Under 17 & 18 Vict. c. 104, s. 355, the Board of Trade can issue certificates to masters or mates of ships described in s. 354, and of such ships only. *The Earl of Auckland*, Lush. 164; 30 L. J., Adm. 121.

A pilotage certificate issued to a master describing a ship as the property of a person, who was not the owner either at the time of the granting of the certificate, or at the time of a collision subsequently occurring, is invalid at the time of that collision. *Id.*

2. DUTY AND LIABILITY OF PILOT.

Generally.]—The duty of the pilot is to attend to the navigation of the ship, and the master and crew to keep a good look-out. *The Iona*, 1 L. R., P. C. 426; 4 Moore, P. C. C., N. S. 336; 16 L. T. 158.

When Ship is at Anchor.]—When a ship in charge of a licensed pilot is anchored in pilotage waters, the length of cable at which the ship rides is a matter entirely within the province of

the pilot, and it is his duty when the ship swings to the tide, to superintend that manœuvre, and to regulate the helm, and it is negligence on his part to go below before the ship is fully swung, leaving the helm amidships without orders as to its regulation; and if, through want of length of cable and of regulation of the helm, the ship sheers and so parts from her anchor in swinging during his absence, the pilot will be alone responsible, provided that the watch on deck takes the right manœuvre to counteract the sheering. *The City of Cambridge or Wood v. Smith*, 5 L. R., P. O. 451; 43 L. J., Adm. 11; 30 L. T. 439; 22 W. R. 578. And see *The Woburn Abbey*, post, col. 1532.

When a ship at anchor in pilotage waters and in charge of a licensed pilot parts her cable, the necessity for letting go another anchor is a matter within the discretion of the pilot, and the manœuvre should be directed by him; and if the pilot is below at the time, the officer of the watch will be justified before giving any orders to bring up the ship in calling the pilot on deck to take charge, provided that there is no immediate necessity for action, as for instance to prevent a collision which is imminent. *Ib.*

On Board of Ship in Tow.—Semble, where a pilot is in charge of a ship in tow in a crowded river, it is not necessarily incumbent upon him to direct every movement of the tug. *The Siquasi*, 5 Adm. D. 241; 50 L. J., Adm. 5; 43 L. T. 768. And see cases post, col. 1529.

Distinction between Salvage and Pilotage.—The test is whether the risk attending the services to the vessel was such, that the pilot could not be reasonably expected to perform them for the ordinary pilot fees, or even for extraordinary pilotage reward. *Akerbloom v. Price*, 7 Q. B. D. 129; 50 L. J., Q. B. 629; 44 L. T. 837; 29 W. R. 797; 4 Asp. M. C. 441—C. A.

Suit against Pilot, Jurisdiction of Court of Passage to Entertain.—A ship, by compulsion of law, in charge of a duly licensed pilot in the River Mersey, came into collision with and occasioned damage to another vessel. The owners of the damaged vessel instituted an Admiralty suit in the Court of Passage against the pilot:—Held, that the Court of Passage had not jurisdiction to entertain the suit, as an Admiralty suit. *The Alexandria*, 3 L. R., Adm. 574; 41 L. J., Adm. 94; 27 L. T. 565.

— **Of Court of Admiralty.**—Semble, that the Court of Admiralty has not jurisdiction to entertain such a suit. *Ib.*

There is no Admiralty jurisdiction to entertain a suit against a pilot who in navigating a ship has caused a collision between that ship and another. *Ib.*

— **Of County Court.**—An action against a pilot for collision and damage caused to a barque by a vessel under his charge, is not an "Admiralty cause" within 31 & 32 Vict. c. 71 and 32 & 33 Vict. c. 51, which confer Admiralty jurisdiction upon county courts. *Flower v. Bradley*, 44 L. J., Ex. 1; 31 L. T. 702; 23 W. R. 74.

3. PENALTIES FOR NOT EMPLOYING.

Production of Licence.—The master of a

ship was not liable to the penalty imposed by 6 Geo. 4, c. 125, s. 58, for refusing to employ a pilot, unless the pilot produced his licence as required by s. 66, although it was demanded. *Hammond v. Blake*, 10 B. & C. 424; 5 M. & R. 361.

Offer by Pilot.—A conviction under 6 Geo. 4, c. 125, s. 70, for continuing in charge of a ship after a duly licensed pilot had offered to take charge of it, was bad, if it did not shew that the offer was made to or in the presence of the party in charge of the vessel, or that it otherwise came to his knowledge. *Chaney v. Payne*, 1 G. & D. 348; 1 Q. B. 712.

In an action against a master of a vessel for penalties under 52 Geo. 3, c. 39, s. 34, the declaration must have alleged that a licensed pilot offered to the master to take charge of the vessel, or made such offer in his presence or hearing; and it was not sufficient merely to follow the general words of the act. *Peake v. Carrington*, 5 Moore, 176; 2 B. & B. 399.

Vessels in Thames.—The 5 Geo. 2, c. 20, which inflicted a penalty on persons piloting ships down the Thames, only extended to vessels sailing on foreign voyages, and not to those which, having performed their voyages, were steered from one wharf to another on the river, for the purpose of unloading their cargoes. *Rees v. Lambe*, 5 T. R. 76; *S. P.*, *Rees v. Neale*, 8 T. R. 241.

Charge or Conduct of Vessel under 6 Geo. 4, c. 125, s. 70.—Where a person selects the course of a ship, and takes the management of her for the purpose of directing her in that course, he is in the charge or conduct of the vessel within 6 Geo. 4, c. 125, s. 70. The master was not, however, precluded by that section from employing any moving power, as for instance, steam or other power, bona fide used as a moving power, if upon the party applying such power necessarily devolved the selection of the ship's course, and the charge or conduct of her in that course. *Beilby v. Scott*, 7 M. & W. 93.

The master of a vessel navigating it himself as pilot, after a duly licensed pilot offered himself, was not liable to the penalty imposed by 6 Geo. 4, c. 125, s. 70, although he was liable to double the amount of the pilotage of the vessel, within s. 58. *Beilby v. Shepherd*, 3 Ex. 40; 18 L. J., Ex. 73.

Change of Pilots.—Where a master of a vessel discharged a Cinque-port pilot in Standgate-creek, and dropped a mile down the port of Rochester, with a signal flying for a Trinity House pilot, who came on board at Sheerness:—Held, that he was liable to a penalty under 52 Geo. 3, c. 39. *Thornton v. Boland*, 9 Moore, 403; 2 Bing. 219.

Vessel Proceeding to Sea—What is.—By the Liverpool Pilot Act (6 Geo. 4, c. lxxiii.), s. 37, in case the master of any ship outward bound shall proceed to sea, and shall refuse to take on board a pilot, he shall pay the pilot who shall first offer his service at a certain rate as if the pilot had piloted the vessel. On the 2nd of December a vessel left the Liverpool Docks with a pilot on board; on the 3rd, the boat of the

plaintiff, who was then employed by the owners in raising the vessel's anchor, was lost, through the carelessness of those on board the ship; at this time the master was not on board, and the vessel being employed by the post-office, was not to sail till the 4th of December, and her rigging was being completed:—Held, assuming an outward-bound vessel to be liable when proceeding to sea to take a pilot on board, still that this vessel was not proceeding to sea. *Rodrigues v. Melhuish*, 10 Ex. 110; 24 L. J., Ex. 26.

Suing for.—The penalty imposed by 6 Geo. 4, c. 125, s. 70, might be sued for by a common informer. *Beilby v. Scott*, 7 M. & W. 93.

Calculation of.—The penalties imposed by 52 Geo. 3, c. 39, s. 11, on ships neglecting to take in a pilot on arriving off Dungeness, were to be calculated on ships bound for the river, not on the pilotage due from Dungeness to the Downs, but on that which would be due on the ship's arrival at her ultimate place of destination in the river. *Mackie v. Landon*, 1 Marsh. 583; 6 Taunt. 256. *And see now* 17 & 18 Vict. c. 104, s. 353.

4. EXEMPTIONS FROM EMPLOYING.

a. In General.

Existing under 17 & 18 Vict. c. 104, s. 353.]

—By this provision, which continues all exemptions from compulsory pilotage existing immediately before the time when that act came into operation, the exemptions contained in 6 Geo. 4, c. 125, are continued, notwithstanding ss. 376, 379, and notwithstanding that 6 Geo. 4, c. 125, is repealed by 17 & 18 Vict. c. 120. *Reg. v. Stanton or Stanton v. Banks*, 8 El. & Bl. 445; 27 L. J., M. C. 105; 4 Jur., N. S. 10, 332.

The 17 & 18 Vict. c. 104, s. 354, making pilotage compulsory upon certain vessels, is not to be restricted by the provisions of s. 353, that all existing exemptions from compulsory pilotage should continue in force. *The Temora*, Lush. 17.

The exemptions from compulsory pilotage, given by 6 Geo. 4, c. 125, s. 59 (supplemented by the Order in Council, 18th February, 1854), are maintained by 17 & 18 Vict. c. 104, s. 353, and qualify ss. 376, 379. *The Earl of Auckland*, Lush. 387; 15 Moore, P. C. C. 304; 5 L. T. 558; 10 W. R. 124.

b. In Particular Cases.

"Navigating within."—The words "navigating within," in 17 & 18 Vict. c. 104, s. 379, mean being within, and therefore a vessel belonging to the port of London, and coming from a foreign port, is exempt from the employment of a licensed pilot on the Thames. *The Scetlin*, B. & L. 199; 31 L. J., Adm. 208; 6 L. T. 613—P. C.

"Loading," what is.—The word "loading" in 25 & 26 Vict. c. 63, s. 41, does not refer to the taking on board of cargo only. Therefore when a steamer anchored in Dartmouth Harbour, and took on board twenty tons of coal for the purposes of the voyage, and was bound from a place out of the outport district to a destination also out of it:—Held, that she was not exempt from

the obligation to employ a pilot. *The Winston*, 8 Adm. D. 176; 52 L. J., Adm. 72; 49 L. T. 403; 31 W. R. 892. Affirmed, 9 Adm. D. 85—C. A.

Coasting Vessels.—An Irish vessel with a general cargo, trading between Belfast and London, and not laden with corn or grain, as specified in 46 Geo. 3, c. 97, s. 2, was not exempted under 52 Geo. 3, c. 39, s. 2, from taking a pilot on board, as such vessel could not be considered as a coasting vessel, or an Irish trader, using the navigation of the River Thames as a coaster. *Davison v. McKibben*, 6 Moore, 387; 3 B. & B. 112.

The only reason why coasting vessels are exempted from the obligation of taking a pilot, is, that, from their frequent egress and ingress to the particular port, their masters must be presumed to be perfectly acquainted with the locality. *The Agricola*, 2 Rob. Adm. Rep. 10; 7 Jur. 157.

A vessel ordinarily occupied in the foreign trade, going from Liverpool to London in order to sail from London under advertisement for foreign parts, not carrying passengers, but having on board a cargo shipped at Liverpool and deliverable at London, is not a ship employed in the coasting trade of the United Kingdom within 17 & 18 Vict. c. 104, s. 379; and is compellable by s. 376 to take a pilot in the London district of the Trinity House. *The Lloyd's or Sea Queen*, B. & L. 359; 32 L. J., Adm. 197; 9 L. T. 236.

Passenger Vessels.—At the time of a collision a man was on board the vessel in fault, to whom the master had agreed to give a free passage, and who messed with him and also assisted in working the ship:—Held, that the vessel was not carrying passengers so as to render it compulsory to take a pilot. *The Hanna*, 1 L. R., Adm. 283; 36 L. J., Adm. 1; 15 L. T. 334; 15 W. R. 263.

In 17 & 18 Vict. c. 108, s. 379, the description, "ships trading to any place in Europe north of Boulogne," extends to vessels coming from a place north of Boulogne to the port of London. *The Wesley*, Lush. 268.

A vessel, not carrying passengers, on a voyage from Cronstadt to London, is exempted from compulsory pilotage in the Thames. *Id.*

A British ship coming from a port north of Boulogne, and carrying passengers, is not bound to employ a licensed pilot in the River Thames. *The Earl of Auckland*, Lush. 387; 15 Moore, P. C. C. 304; 5 L. T. 558; 10 W. R. 124.

An Irish trader (as described by 6 Geo. 4, c. 125, s. 59), carrying passengers, is compelled to employ a licensed pilot in the Thames. *The Temora*, Lush. 17.

It is not compulsory on a passenger ship to take a licensed pilot on board when she is not carrying passengers, and the owners are responsible for the negligence of the pilot, where they were not compellable to put him in charge of their vessel. *The Lion*, 2 L. R., P. C. 525; 38 L. J., Adm. 51; 21 L. T. 41; 17 W. R. 993; 6 Moore, P. C. C., N. S. 163.

The payment of a fare is necessary to constitute a passenger within the meaning of the compulsory pilotage sections of the Merchant Shipping Act (17 & 18 Vict. c. 104). *Id.*

Where, therefore, the wife and father-in-law of the captain were on board a vessel (usually

carrying passengers, but not on a passage voyage (at the time), by invitation from the captain, without the privity of the owners, and they had neither paid, nor agreed to pay, any fare, before a collision took place, such persons were held not to be passengers within the meaning of the act, so as to exonerate the owners from damage occasioned by the pilot's default. *Id.*

Thames Steamship carrying Passengers and Cargo.—A steamship carrying cargo and passengers from Boulogne to London is not bound, under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), to employ a pilot whilst navigating the River Thames, the general exemption continued from 6 Geo. 4, c. 125, s. 59, and the order in council of 18th February, 1854, by the Merchant Shipping Act, 1854, s. 353, not being overridden by s. 379, relating to Trinity House pilotage, and exempting such a ship only when not carrying passengers. *The Moselle*, 32 L. T. 570.

5. LOCAL RIGHTS AND LIABILITIES.

Cinque Ports.—By 6 Geo. 4, c. 125, s. 62, the master or mate of a vessel, being owner or part owner, and residing at Dover, Deal, or the Isle of Thanet, was exempt from a penalty for piloting his own ship from any of the places aforesaid up or down the Rivers Thames or Medway, or into or out of any port within the jurisdiction of the Cinque Ports:—Held, that the clause limited the exemption to vessels navigated from Dover, Deal, or the Isle of Thanet. *Peake v. Screech*, 7 Q. B. 603; 14 L. J., Q. B. 317; *S. P., Williams v. Newton*, 14 M. & W. 747; 15 L. J., Ex. 11.

Tyne.—The provisions of the 6 Geo. 4, c. 125, s. 55, do not extend to British vessels in the Tyne, and therefore the owner of a British vessel in that river in charge of a qualified pilot appointed by the Trinity House of Newcastle-upon-Tyne, under the local act of 41 Geo. 3, c. lxxxvi., is not protected from liability for damage occasioned by the negligence of the pilot. *Tyne Improvement Commissioners v. General Steam Navigation Company*, 2 L. R., Q. B. 65; 36 L. J., Q. B. 22; 15 L. T. 487; 15 W. R. 178; 8 B. & S. 66—Ex. Ch. *S. P., Dodds v. Embleton*, 9 D. & R. 27.

Humber.—The employment of a Humber pilot is not compulsory upon a vessel which is being towed from one dock to another in the port of Hull, as a vessel is not, in such circumstances, either passing into or out of the port, within the terms of s. 22 of the Hull Pilot Act, or bound to or from the port, within the terms of s. 89. *The Maria*, 1 L. R., Adm. 358; 16 L. T. 717; 15 W. R. 1113.

Cork.—Where the judgment of the court was, that the collision was occasioned by the mismanagement and incompetency of the pilot in charge of the vessel proceeded against, such pilot being duly appointed under the Cork Pilot Act:—Held, that the owners were not protected from their liability in respect of the injury occasioned by the act of the pilot, the employment of such pilot not being compulsory upon them by that act, and 6 Geo. 4, c. 125, not extending to the local act. *The Eden*, 2 Rob. Adm. Rep. 442; 10 Jur. 296.

Goole.—The employment of a licensed Goole pilot is generally compulsory upon vessels inward bound to Goole, including vessels belonging to that port; not, however, by the Hull Pilot Act, but by 6 Geo. 4, c. 125, ss. 58, 59, and 17 & 18 Vict. c. 104, s. 353. *The Killarney*, Lush. 427; 6 L. T. 908.

Ipswich.—By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 353, the employment of pilots shall continue compulsory in all districts where it is compulsory at the time the act passed. By s. 379, ships employed in the coasting trade of the United Kingdom, when not carrying passengers, shall be exempted from compulsory pilotage in the Trinity House outport districts, which, by s. 370, comprise any pilotage district for the appointment of pilots within which no particular provision is made by any act of parliament or charter. By the Ipswich Dock Act, 1852 (15 Vict. c. cxvi. s. 3), a former act, by which special provision was made for the appointment of pilots in the port of Ipswich, is repealed, and s. 91 enacts, as to the appointment of sub-commissioners for examining pilots, &c., in the words of s. 5 of 6 Geo. 4, c. 125, except that they are described as persons "resident within" the port of Ipswich, instead of "at:"—Held, that s. 91 was not a "particular provision;" and that Ipswich was therefore a Trinity House outport district, and a coasting vessel not carrying passengers navigating that port was exempt from compulsory pilotage. *Hadgraft v. Hewith*, 10 L. R., Q. B. 350; 44 L. J., M. C. 140; 32 L. T. 720; 23 W. R. 911.

Falmouth.—Pilotage is compulsory within the Falmouth district. *The Juno*, 1 Adm. D. 135; 45 L. J., Adm. 105; 34 L. T. 741; 24 W. R. 902.

Mersey.—When a ship ready and about to proceed to sea leaves one of the Mersey docks at night in charge of a licensed pilot, and casts anchor in the river so as to be ready to cross the bar at the mouth of the river on the next morning's tide at an earlier hour than she could if she left the dock in the morning, the going into and casting anchor in the river is a step in the "proceeding to sea," within the meaning of the Mersey Docks and Harbour Board Act, 1858 (21 & 22 Vict. c. xcii. s. 139), and the employment of the pilot is compulsory under that section from the time of leaving dock, and if the ship breaks away from her moorings, and damages another vessel through the pilot's sole default, the owners will not be responsible. *The City of Cambridge or Wood v. Smith*, 5 L. R., P. C. 451; 43 L. J., Adm. 11; 30 L. T. 439; 22 W. R. 578.

When a vessel leaves a dock in the Mersey on her voyage to sea, and receives slight injuries to a yard-arm, necessitating repairs, and in consequence is anchored under the directions of the pilot in the river, intending to go to sea on the next day, the pilot remaining in charge, but on the next morning, before resuming her voyage and whilst still at anchor, she gets into collision, and does damage to another vessel, she is not "proceeding to sea" within the meaning of the 139th section of the Mersey Docks Act Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), and the pilot is not in charge by compulsion of law. *The Cachapool*, 7 Adm. D. 217; 46 L. T. 171; 4 Asp. M. C. 502.

Dublin.—A steam-tug, carrying passengers between Kingstown Harbour and the North Wall, Dublin (both of which places are under the provisions of the Dublin Port and Docks Act, 1869, within the limits of the port of Dublin), is within the meaning of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 354, and obliged to carry a pilot. *Dublin Port and Docks Board v. Shannon*, 7 Ir. R., C. L. 116.

London.—The master of a vessel belonging to the port of London and bound up the Thames, on a voyage from Australia to London with passengers on board, is required by law to employ a licensed pilot within the limits of the port of London. *The Hankow*, 4 Adm. D. 197; 48 L. J., Adm. 29; 40 L. T. 335.

A's vessel, belonging to the port of London, having taken on board a pilot from Dungeness to Gravesend, came in collision, through the pilot's negligence, with B's vessel, at a spot in the River Thames between Yantlett Creek and Gravesend:—Held, that, for pilotage purposes, Gravesend is the eastern limit of the port of London, and that the spot where the collision took place is therefore within the district where pilotage is compulsory; that A. was not liable to answer for the damage which B. sustained; and that the relation of master and servant did not exist between A. and the pilot. *General Steam Navigation Company v. British Colonial Navigation Company*, 4 L. R., Ex. 238; 38 L. J., Ex. 97; 20 L. T. 581; 17 W. R. 741—Ex. Ch.

A steamship carrying cargo and passengers from Boulogne to London is not bound, under the Merchant Shipping Act, 1854, to employ a pilot while navigating the river Thames. *The Moselle*, 32 L. T. 570.

6. LIABILITIES OF FOREIGN VESSELS.

On the High Seas.—The legislature has no authority over foreign vessels on the high seas out of British jurisdiction, but may impose any conditions on foreign vessels entering a British port, and consequently an obligation on foreign ships inward bound to take a pilot at a convenient station beyond three miles from the British shore. *The Annapolis*; *The Johanna Stoll*, Lush. 295; 30 L. J., Adm. 201; 4 L. T. 417.

A statute imposing in general terms on all inward-bound vessels the obligation to take a pilot at a convenient station beyond three miles from the British shore is binding on foreign vessels, such construction being justified on grounds of public policy. *Id.*

In British Waters.—A foreign vessel bound for Liverpool took a pilot off Point Lynas, was brought to anchor in the Mersey, and there lay two or three days, waiting for want of water to dock. She was then conducted by the same pilot into dock. In proceeding towards the dock, a collision was occasioned by the pilot's default:—Held, that the vessel was not liable for the damage. *Id.*

A French vessel upon the Thames took on board a pilot, and, as her crew did not understand English, a waterman to take the wheel. The waterman put her helm up, instead of luffing, as the pilot ordered, whereby a barge was run into and damaged. The French owner claimed exemption under 17 & 18 Vict. c. 104, s. 389:—Held, that the pilot was not answerable for the

waterman's incapacity or fault, and that s. 388, inasmuch as it deprives parties injured of a remedy they would otherwise have, should be construed strictly. *The General De Caen*, Swabey, 9.

Coaster.—A foreign-going vessel casually employed in taking a cargo from Liverpool to London is not a "ship employed in the coasting trade of the United Kingdom," within 17 & 18 Vict. c. 104, s. 379, and therefore, while so employed, is compellable to take a pilot. *The Lloyd's*, otherwise *Sea Queen*, B. & L. 359; 32 L. J., Adm. 197; 9 L. T. 236.

7. EXEMPTION OF OWNERS FROM LIABILITY.

a. Compulsory Employment.

Rule of Exemption.—Apart from any statute, an owner is not responsible in proceedings in rem for damage done to his ship, occasioned solely by default of a licensed pilot employed by compulsion of law. *The Annapolis*; *The Johanna Stoll*, Lush. 295; 30 L. J., Adm. 201; 4 L. T. 417.

Where Liability for Collision.—A British vessel carrying goods and passengers between Rotterdam and London, having a licensed pilot on board, ran down a ship. The collision took place in the Thames, within the Trinity House district, and was duly occasioned by the fault of the pilot:—Held, that the exemption from compulsory pilotage given by 6 Geo. 4, c. 125, s. 59, and 17 & 18 Vict. c. 104, s. 353, applied, and that the fact of the vessel having a licensed pilot on board, whose act alone occasioned the damage, did not exempt the owners from liability. *The Earl of Auckland*, Lush. 387; 15 Moore, P. C. C. 304; 5 L. T. 558; 10 W. R. 124.

The fifth exemption from compulsory pilotage in 17 & 18 Vict. c. 104, applies to vessels confining their voyages within the limits of the port to which they belong. As, however, all the exemptions under 6 Geo. 4, c. 125, were continued by 17 & 18 Vict. c. 104, the more extensive words used in the former act must be held to exempt from the necessity of taking a pilot any master of a ship so long as his vessel is within the limits of her port. In such case, therefore, if a collision occurs, the presence of a pilot gives no immunity to the owners. *The Stettin*, B. & L. 199; 31 L. J., Adm. 208; 6 L. T. 613—P. C.

The owner of a vessel navigating the Thames is not responsible for damage done by her to property belonging to the conservators through the fault of a pilot compulsorily in charge of her; for, though the words of s. 96 of the Thames Conservancy Act, 1857, (20 & 21 Vict. c. cxlvii.), are general, they are not to be read as including pilots, and do not by implication repeal the provisions as to pilotage in 17 & 18 Vict. c. 104. *Thames Conservators v. Hall*, 3 L. R., C. P. 415; 37 L. J., C. P. 163; 18 L. T. 361; 16 W. R. 97L.

A Norwegian vessel, the *Hanna*, bound from Sweden to London, and in charge of a duly licensed pilot, came wrongfully into collision with another vessel, off the Nore Lightship:—Held, that there was no compulsion to take the pilot, and that therefore the owners of the *Hanna* were responsible for the damage. *The Hanna*, 1 L. R., Adm. 283; 36 L. J., Adm. 1; 15 L. T. 334; 15 W. R. 263.

—**No Blame to Crew.**—In a case of damage by collision occasioned by a vessel while in tow of a steam-tug, having a licensed pilot on board, in pursuance of 17 & 18 Vict. c. 104, s. 388, and no blame attached to the master or crew:—Held, that the owners of such vessel were not liable, being protected by s. 388. *Marshall v. Moran, The Ocean Wave*, 3 L. R., P. C. 205; 6 Moore, P. C. C., N. S. 492; 23 L. T. 218.

A collision took place between two vessels, and the defendants admitted that their vessel was to blame, but alleged by way of defence that they had a pilot on board by compulsion of law, and that they were therefore exempt from liability:—Held, that as there was no evidence of contributory negligence on the part of the defendant owners they were exempt from liability. *The Dario*, 47 L. J., Adm. 1; 37 L. T. 137—C. A.

A duly-qualified Liverpool pilot having been employed to pilot a ship from sea into the Mersey and take her into dock, piloted her over the bar, but owing to the state of the tide being unable to dock her that day, anchored her in a clear berth in the river. The pilot remained in charge of the ship, and the next day the state of the weather being such as to render it unadvisable to take her into dock that day, she remained at anchor. In the course of that day, and whilst the pilot was in charge, the ship dragged her anchor and came into collision with a barque. In an action instituted by the owner of the barque against the ship, the court decided that the collision was caused solely by the negligence of the pilot in charge of the ship:—Held, that the owners of the ship were not answerable for the damage, for it was occasioned by the fault of a pilot acting in charge of the ship within a district where the employment of such pilot was compulsory by law. *The Princeton*, 3 Adm. D. 90; 47 L. J., Adm. 33; 38 L. T. 260.

A collision occurred in the Humber Dock, Hull, between a fly-boat and a foreign schooner bound to the Prince's Dock. The schooner was in charge of a duly licensed Humber pilot, who had taken over the charge of the schooner while she was moored at a pier in the Humber from the pilot who had brought her in from sea. One sum was paid for the services of the two pilots:—Held, that the schooner was in charge of a pilot whose employment was compulsory by law. *The Rigborgs Minde*, 8 Adm. D. 132; 52 L. J., Adm. 74; 49 L. T. 232—C. A.

The damage was done by the fluke of the schooner's anchor piercing the side of the fly-boat. The court found that there was no want of care in the crew in lowering the anchor. The other allegations against the schooner were that the anchor was improperly slung; that she came too fast up the dock and without a check rope:—Held, that the damage was caused by the fault of the pilot in the course of his duty. *Id.*

In order to entitle the owner of a ship, having, by compulsion of law, a pilot on board, to the benefit of the exemption from liability for damage by default of the pilot, it is not enough to prove that there was fault or negligence on the pilot's part, but the owner must shew that there was no default on the part of the master and crew, which might have in any degree been conducive to the damage. *The Iona*, 1 L. R., P. C. 426; 16 L. T. 158; 4 Moore, P. C. C., N. S. 336.

A defendant, relying upon the statutory defence (17 & 18 Vict. c. 104, s. 388), that the ac-

cident was occasioned by the default of a pilot acting in charge of the ship, and employed by compulsion of law, is bound to give strict proof that the collision was occasioned by the pilot's default, and by that only. *The Carrier Dove*, B. & L. 113; 2 Moore, P. C. C., N. S. 261.

In a cause of collision occasioned by a vessel under compulsory pilotage, where no contributory negligence on the part of the master and crew is proved, the pilot in charge is solely responsible, and the owners are exempt from the consequences of his neglect or default. *The Calabar*, 2 L. R., P. C. 238; 19 L. T. 768.

It is the province of the pilot, in giving directions for the navigation of a steam vessel of which he is in charge, to determine the rate of speed at which she should proceed. *Id.*

Master on Board not Liable.—The master of a passenger vessel within a district where pilotage is compulsory was summoned for not navigating his vessel in a careful and proper manner. There was a pilot in charge of the vessel:—Held, that the summons was properly dismissed, since the pilot, who was compulsorily on board, must be assumed to have been in charge of the vessel. *Oakley v. Spredy*, 40 L. T. 881.

Contributory Negligence of Pilot in charge of injured Vessel.—Effect of.—Count to recover damages for injuries sustained by the plaintiffs' ship through the negligence of the defendants; plea, contributory negligence; replication, that the contributory negligence was that of a pilot licensed by the defendants, and compulsorily employed by the plaintiffs; rejoinder that the pilot was not the servant of the defendants; demurrer to the rejoinder allowed. *Dudman v. Dublin Port and Docks Board*, 7 Ir. R., C. L. 518.

Count to recover damages for injuries sustained by the plaintiffs' ship through the negligence of the defendants' servant, viz., a pilot licensed by the defendants, and compulsorily employed by the plaintiffs:—Held, bad on demurrer. *Id.*

Neglect to Render Assistance.—Under 25 & 26 Vict. c. 63, s. 33, it was declared to be, in case of collision between two ships, the duty of the person in charge of each ship to render assistance to the other, and in case he failed to do so without reasonable excuse, the collision, in absence of proof to the contrary, was to be deemed to have been caused by his wrongful act. Two steamships, the Queen and the Lord John Russell, each under the charge of a compulsory pilot, came into collision in the Thames. The Queen was solely to blame, and after the collision she rendered no assistance to the other vessel, and shewed no excuse for having failed to do so:—Held, that the mere fact of her having a pilot on board did not exempt her owners from liability. *The Queen*, 2 L. R., Adm. 354; 38 L. J., Adm. 39; 20 L. T. 855.

Semble, that if the collision had been caused solely by the neglect of the pilot on board the Queen, the subsequent misconduct of the master in not rendering assistance would not have made her owners liable for the collision. *Id.*

Under 6 Geo. 4, c. 125.—The 6 Geo. 4, c. 125, s. 55, did not exempt the owners and masters of vessels having a licensed pilot on board fr-

liability in respect of damages done by their vessels, unless the damage was solely caused by the neglect, default, incompetency, or incapacity of the pilot. *Stuart v. Isenmenger*, 4 Moore, P. C. C. 11; 6 Jur. 157.

— **Pilot in Permanent Employ of Owners.**—In a cause of collision, the mischief was found to have arisen from the fault of a duly licensed pilot in charge of the vessel doing the damage. The pilot had been in the permanent employ of the owners, and engaged in navigating the ship for many years:—Held, that, notwithstanding such permanent employ, the owners were exonerated. *The Batavier*, 2 Rob. Adm. Rep. 407; 10 Jur. 19.

— **Solely through Fault of Pilot.**—By the Liverpool Pilot Act, the master of every vessel inward bound is compellable to take a licensed pilot, unless the vessel be in ballast and in the coasting trade; but there is not, as in 6 Geo. 4, c. 125, s. 55, any express exemption of the liability of owners of a vessel for damage done by such vessel whilst in charge of a licensed pilot:—Held, that the 55th section of the 6 Geo. 4, c. 125, was merely declaratory of the common law, and did not confer any independent exemption from legal responsibility; and that, as by the common law no person is responsible for the negligent acts of a party in the performance of any work, when by law he is compelled to employ that party to do such work, the owners of a vessel entering the port of Liverpool, and in obedience to the local act taking a licensed pilot on board, were not responsible for mischief done by their vessel, but occasioned by the sole neglect of the pilot. *The Agricola*, 2 Rob. Adm. Rep. 10; 7 Jur. 157.

A ship under sail, and in charge of a licensed pilot, in running through the Downs on a dark night, came into collision with a ship at anchor:—Held, that where a pilot is taken on board, it is his duty, and not that of the master, to determine where and whether or not, the ship shall be brought up. *The Lochlibo*, 3 Rob. Adm. Rep. 310; 14 Jur. 1074.

The owners of a vessel, having a duly licensed pilot on board, were protected by 6 Geo. 4, c. 125, s. 55, from liability for damage occasioned by the fault of the pilot. *Pollok v. McAlpin*, 7 Moore, P. C. C. 427.

Aliter, if the blame was mutually imputable to the pilot and master and the crew. *Ib.*

Where a collision was occasioned by the improper sailing and steering of a vessel, the exclusive act of the pilot:—Held, that the owners of the vessel were entitled to the exemption provided by 6 Geo. 4, c. 125, s. 55. *Ib.*

Where there was joint blame in the master and crew and the pilot, the owners were not exempted from liability for damage by 6 Geo. 4, c. 125, s. 55, by reason of having a licensed pilot on board. *Netherlands Steamboat Company v. Styles*, 9 Moore, P. C. C. 286.

— **Stranding.**—Where a ship, being under the conduct of a pilot, in her course up the river to Liverpool, was, against the advice of the master, fastened at the pier of the dock basin, by a rope to the shore, and left there, and she took to the ground, and when the tide left her, fell over on her side and bilged, in consequence of which, when the tide rose, she filled

with water, and the goods were wetted and damaged:—Held, that this was a stranding, to entitle the assured to recover for an average loss upon the goods. *Carruthers v. Sydebotham*, 4 M. & S. 77.

— **Change of Mooring.**—A vessel had to deliver part of her cargo at the London Docks, and part at a wharf higher up the river. She went to the docks, under the charge of a pilot, who left her there, where she remained some time without discharging any of her cargo, as the part to be left at the wharf was uppermost. She then went under the charge of another pilot up the river to the wharf, and by the neglect of the pilot ran down a barge:—Held, that, under 6 Geo. 4, c. 125, s. 55, the pilot alone was answerable, and not the owners, as they were bound to have a pilot on board at the time, and that it was not a mere chance of mooring. *McIntosh v. Slade*, 6 B. & C. 657; 9 D. & R. 738.

— **Pilot not Servant of Shipowner.**—Action against an owner of a vessel, for an injury done by her in running foul of a barge. Plea, that, at the time of the injury, the vessel was being conducted, and was navigating the river Thames, under the conduct of a licensed pilot in charge of the vessel, under and in pursuance of the provisions of 6 Geo. 4, c. 125; and that the damage happened to the plaintiff by the default, incompetency, and incapacity of such pilot:—Held, that, inasmuch as under s. 72 the pilot could not lawfully refuse to go on board and take charge of any vessel wanting a pilot when required by the owner to do so, he must be considered, when so required and employed, as acting under some of the provisions of the act, and not as the private servant of the owner; and, therefore, that the owner was protected by s. 55 from his *prima facie* liability in respect of the injury occasioned by the act of the pilot, whilst he was so employed by the owner. *Lucy v. Ingram*, 6 M. & W. 302.

Under the 6 Geo. 4, c. 125, s. 55, if a ship was within a district to which the act applied, the statutory protection existed not only in those cases in which it was compulsory to take a pilot on board, but also where a pilot had been taken on board and was forced to serve if called upon, but the master was not bound to employ him. *The Fama*, 2 Wm. Rob. 184. See *General Steam Navigation Company v. British Colonial Navigation Company*, *ante*, col. 1523.

— **Pilot not Fellow-servant of Crew—Liability of Owners.**—There is no implied contract between the owners of a ship and a pilot whom they are compelled to employ, that the pilot shall take upon himself the risk of injury from the negligence of the shipowners' servants; and an action will lie by the pilot against the shipowners for injuries caused to him whilst acting as pilot on board their vessel, by the negligence of their servants. *Smith v. Steele*, 10 L. R., Q. B. 125; 44 L. J., Q. B. 60; 32 L. T. 195; 23 W. R. 388.

And where a pilot went on board a vessel in the course of his duty, in a district in which pilotage is compulsory, and while he was on board, a boat, which had been negligently slung by servants of the shipowners, fell on and killed him:—Held, that his widow could recover in an action against the shipowners brought by her, as executrix, under Lord Campbell's Act. *Ib.*

Collision with Pier.]—The 74th section of the Harbours Piers and Clauses Act, 1847, which act is incorporated with the New Brighton Pier Act, 1864, save and so far as any of the clauses and provisions of the two acts are inconsistent, declares that the owner of every vessel shall be answerable to the undertakers of every pier to which the Harbours Docks and Piers Clauses Act, 1847, is applied, for any damage done to such pier, but provides that nothing therein contained shall extend to impose any liability for such damage upon the owner of any vessel where such vessel shall at the time when such damage is caused be in charge of a duly-licensed pilot whom such owner or master is bound by law to employ. By the 39th section of the New Brighton Pier Act, 1864, it is enacted that if any person having the care of any ship shall wilfully or carelessly cause, permit, or suffer any damage or injury to be done to the New Brighton pier, then and in every such case the owners of every such ship shall be answerable, and liable to make satisfaction to the New Brighton Pier Company for all such damage or injury. A steamship came into collision with and did damage to the New Brighton pier, and to recover for the damage so done the New Brighton Pier Company brought an action against the steamship. The owners of the steamship alleged in their statement of defence that at the time the damage was done the steamship was in charge of a pilot employed by compulsion of law; that the collision was not caused or contributed to by the negligence of the defendants or any other persons than the pilot of the steamship, and that the damage was not permitted or suffered by any persons having the care of the steamship within the meaning of the New Brighton Pier Act, 1864. The plaintiffs demurred to these allegations in the statement of defence:—Held, that the provisions of the New Brighton Pier Act, 1864, did not preclude the defendants from setting up the defence of compulsory pilotage, and that the demurrer must be overruled. *The Clan Gordon*, 7 Adm. D. 190; 4 Asp., M. C. 513; 46 L. T. 490; 30 W. R. 691.

Power of Selection of Pilot by Master.]—The Canadian statutes, 27 & 28 Vict. c. 13, and 27 & 28 Vict. c. 58, are to be read and construed together as being in *pari materia*; and, therefore, the owner of a Canadian ship, navigated in Canadian waters, under the directions of a pilot taken on board in compliance with the provisions of these statutes, is expressly exonerated from all liability for damage caused by obedience to such directions: and this is not affected by the fact that the pilot is one selected by the master, if selected only out of a particular qualified class. *Redpath v. Allan, The Hibernian*, 4 L. R., P. C. 511; 42 L. J., Adm. 8; 27 L. T. 725; 21 W. R. 276; 9 Moore, P. C. C., N. S. 340.

When Steam-tug engaged to tow Vessel in charge of Pilot.]—When a steam-tug is engaged to tow a vessel which is in charge of a pilot, the tug is bound to obey the orders of the pilot, and the pilot is bound to give the tug proper directions and to superintend her navigation. *The Energy*, 3 L. R., Adm. 48; 39 L. J., Adm. 25; 23 L. T. 601; 18 W. R. 1009.

A barque, in charge of a pilot who was on board her, was being towed by a steam-tug in waters where the employment of a pilot was

compulsory. The tug ported her helm, and passed across the bows of a brig under way, there was no room for the barque to follow in her wake, and the barque came into collision with the brig. The pilot gave no orders to the tug before or after she ported; if he had given proper orders, even after the tug had ported, the collision might have been avoided:—Held, that the tug was to blame for attempting to tow the barque across the bows of the brig; but that the owners of the barque could not, on account of the neglect of the pilot to give proper orders, recover against the tug damages in respect of the collision. *Id.*

Where a steam-tug towing a vessel under a towage contract is so negligently navigated as to come into collision with a vessel belonging to third parties, the owners of the steam-tug are liable for the damage done, even if at the time of the collision the vessel in tow was in charge of a duly-licensed pilot by compulsion of law whose default solely occasioned the collision. *The Mary*, 5 Adm. D. 14; 48 L. J., Adm. 66; 41 L. T. 351; 28 W. R. 95.

A steam-tug, though the moving power, is under the control of the pilot on board the ship in tow, and is not liable for his negligence where his employment is compulsory. *Smith v. St. Lawrence Tow-boat Company*, 5 L. R., P. C. 308; 28 L. T. 885; 21 W. R. 569.

Where a ship in charge of a pilot, whose employment is compulsory, is being towed by a steam-tug, and the steam-tug, without waiting for orders from the pilot, suddenly adopts a wrong manœuvre, and so causes the ship to come into collision, the owners of the ship are responsible. *The Singuasi*, 5 Adm. D. 241; 50 L. J., Adm. 5; 43 L. T. 768.

—Duty of Tug.]—Where a vessel is under the charge of a licensed pilot, the employment of whom is compulsory, and is, at the same time, in tow of a steam tug, the latter is bound to obey the orders of the pilot. *Spaight v. Tedcastle*, 6 App. Cas. 217; 44 L. T. 589; 29 W. R. 761; 4 Asp. M. C. 406—H. L. (E.). *S. P., The Minnehaha*, Lush. 335; 15 Moore, P. C. C. 133; 30 L. J., Adm. 211; 7 Jur., N. S. 1257; 4 L. T. 810; 9 W. R. 925.

b. Conditions of Exemption.

Proof of Compulsion.]—Owners are not exonerated from responsibility for the default of a pilot whom they have selected and placed in charge when there was no obligation imposed on them to take such pilot and put him in charge. *The Lion*, 2 L. R., P. C. 525; 38 L. J., Adm. 51; 21 L. T. 41; 17 W. R. 993; 6 Moore, P. C. C., N. S. 163—P. C.

When there is no proof that the pilotage was compulsory, no exemption can be claimed by the owners, on the ground of the vessel having been in charge of a pilot. *The Peerless*, Lush. 103; 13 Moore, P. C. C. 444; 30 L. J., Adm. 89.

Ous of Proof of Negligence of Pilot.]—If a licensed pilot is on board a vessel, in order to exempt the owner from liability for damage occasioned by collision, the onus probandi lies upon the owner to establish that the collision was occasioned solely by the negligence of the pilot, and it is the duty of the owner relying upon such a defence to call the pilot as a wit-

ness. *The Carrier Dove*, 2 Moore, P. C. C., N. S. 261; B. & L. 113.

When a collision is caused by a vessel in charge of a licensed pilot, the owners, in order to exonerate themselves from liability, must prove not merely that the crew was under the pilot's orders at the time, but that the order which caused the damage was actually given by the pilot, the onus probandi being on them. *The Schwalbe*, 14 Moore, P. C. C. 241; Lush. 239; 4 L. T. 160.

To entitle the owners of a ship under the compulsory charge of a licensed pilot to the benefit of the provisions of a statute which exempts them from liability, when a collision has occurred by the fault of the pilot, it lies on them to prove that it was occasioned solely by the pilot. *The Velasquez*, 1 L. R., P. C. 494; 36 L. J., Adm. 19; 16 L. T. 777; 16 W. R. 89; 4 Moore, P. C. C., N. S. 426.

If the master and crew have contributed to the accident by not keeping a sufficient lookout, so as to give the pilot the earliest possible information of an approaching vessel, although the pilot is also to blame, the owners are not exempted from liability. *Id.*

Where, by the mismanagement of a vessel which is proceeding to sea, damage is done, the owners will not be exonerated, unless they shew that the damage was occasioned exclusively by the fault of the pilot. *Rodrigues v. Melhuish*, 10 Ex. 110; 24 L. T., Ex. 26.

Duty of Owner—Non-disclosure to Pilot of Defects.—The owner of a trawler having instituted a cause of damage against a steamer in respect of a collision between the vessels within a district where the employment of a pilot was compulsory, the defendants, in their answer, while pleading contributory negligence on the part of the plaintiff, relied mainly on their having had a pilot on board at the time, and claimed consequent exemption from liability under 17 & 18 Vict. c. 104, s. 388, to all of which the plaintiff replied by a formal traverse by way of conclusion. On the *vivâ voce* examination of the defendants' witnesses, evidence was given of the steamer having been inadequately manned and out of trim on the occasion of the collision, and that the pilot, who had only come on board a short time before, had not been told of these latent defects. The judge, who was assisted by two nautical assessors, holding that it was not open to the plaintiff on his pleadings to rely on such defects, and that their existence had not been in fact proved, dismissed the petition, whereupon the plaintiff having appealed:—Held, that the plaintiff was entitled to rely on such defects, though he had neither pleaded them originally nor by special replication; that they had been actually proved, and that their non-disclosure to the pilot invalidated the defendants' plea of compulsory pilotage, but that both vessels were to blame for the collision, and that, consequently, the plaintiff could only recover half the amount of his loss. *The Meteor*, 9 Ir. R., Eq. 567.

Where a master employs a pilot, behind whose responsibility he means to shelter himself and his owners from the consequences of whatever may happen, he owes to that pilot, and through him to the public, the duty of *uberrima fides*; and if he knows of anything whatever in the state of his vessel or her crew which would, or which might, injuriously affect her behaviour at

a moment of emergency, he must disclose it to the pilot, and, if he does not, he will forfeit the impunity upon which he is reckoning. *Id.*

Proof of defective Steering Power of Vessel in charge of Pilot—Onus.—In a cause of damage by collision, where the defence relied upon is compulsory pilotage only, and the defendants prove that the vessel was in charge of a licensed pilot by compulsion of law, and that he gave orders for the purpose of avoiding the collision, and that these orders were obeyed, and the plaintiffs seek to shew that the collision was due to the defective steering power of the defendants' vessel, it lies upon the plaintiffs to prove such defective steering power by substantive evidence. *The Livra*, 25 L. T. 887.

Relevant Allegation of Negligence, must be Rebutted.—When a ship is under the compulsory charge of a licensed pilot the owners are not responsible for damage occasioned by his fault or incapacity, although they must meet and rebut any relevant allegation of negligence on their own part. *Clyde Navigation Company v. Barclay*, 1 App. Cas. 790; 36 L. T. 379.

Under the Merchant Shipping Act, 1854, when shipowners have proved fault on the part of the pilot sufficient to cause, and in fact causing, the calamity, they must be held to have satisfied the condition on which their exemption from liability depends, and they are not to be called upon to adduce proof of a negative character to exclude the mere possibility of contributory fault. But if, in the course of the evidence, certain acts or omissions on the part of the crew come out, it will then be incumbent on the owners to shew satisfactorily that those acts or omissions in no degree contributed to the damage. *Id.*

Vessel at Anchor.—The W. A., in charge of a pilot, came to anchor in the Mersey, and gave the B. T. a foul berth. Various remonstrances were from time to time made by those on board the B. T., and after a few days the vessels in swinging to the tide came into collision:—Held, that the owners of the W. A. were responsible for the damage, first, because, while the vessel was at anchor, the employment of the pilot was not compulsory; and secondly, because, even if the pilot had not properly moored the W. A., her master was not relieved from responsibility, and therefore her owners were liable for the damage. *The Woburn Abbey*, 38 L. J., Adm. 28; 20 L. T. 621. And see *The City of Cambridge*, 5 L. R., P. C. 461; 43 L. J., Adm. 11; 30 L. T. 439.

c. In Foreign and Colonial Waters.

Collision in Suez Canal solely caused by Negligence of Suez Canal Company's Pilot.—Where a collision in the Suez Canal has been caused by the negligence of a Suez Canal Company's pilot, compulsorily taken on board the wrongdoing ship, the owner of such ship is not exempt from liability for the damage arising out of the collision. The effect of the regulations for the navigation of the Suez Canal is to constitute a pilot taken on board a ship traversing the canal the adviser of the master, and to leave the control of the navigation of the ship solely with the master. *The Guy Mannering*, 7 Adm. D. 132; 51 L. J., Adm. 57; 46 L. T. 905; 30 W. R. 835; 4 Asp. M. C. 553—C. A.

Under Belgian Law.]—In a cause of collision promoted by the owners of a Norwegian barque, against a British steamer, in the Court of Admiralty in England, for damage done in Belgian waters, alleged to have been occasioned by the negligent and improper navigation of the steam vessel, the owners of the steam ship pleaded, that the vessel was in charge of a pilot whom they were compelled by the Belgian law to employ. The owners of the barque replied that by the Belgian law it is provided that the owners of a ship which has done damage to another by collision are liable for the damage notwithstanding the vessel was in charge of a compulsory pilot, and although the damage was occasioned by his negligence or want of skill:—Held, that the claim being founded on a tort committed in the territory of a foreign state, the party claiming reparation in a British court was not entitled to the benefit of the foreign law against the admitted provisions of the statute law of England and the practice of the Court of Admiralty in respect of compulsory pilotage, by which no such liability as provided by the Belgian law existed, as it is contrary to principle and authority to hold that an English court will enforce a foreign municipal law, and give a remedy in the shape of damage, in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed. *The Halley*, 2 L. R., P. C. 193; 37 L. J., Adm. 33; 18 L. T. 879; 16 W. R. 998; 5 Moore, P. C. C., N. S. 263.

Under Canadian Statutes—Power of Selection.]—The Canadian statutes, 27 & 28 Vict. c. 13, and 27 & 28 Vict. c. 58, are to be read together as being in pari materia; and, therefore, the owner of a Canadian ship, navigated in Canadian waters, under the direction of a pilot taken on board in compliance with the provisions of these statutes, is expressly exonerated from all liability for damage caused by obedience to such directions; and this is not affected by the fact that the pilot is one selected by the master, if selected only out of a particular qualified class. *Redpath v. Allan, The Hibernian*, 4 L. R., P. C. 511; 42 L. J., Adm. 8; 27 L. T. 725; 21 W. R. 276; 9 Moore, P. C. C., N. S. 340.

In Indian Rivers.]—A collision took place in the Cowcolly Roads, one of the channels in the Hooghly river, near Calcutta. By an act of the Indian legislature, it is made compulsory upon the master to take a pilot on board in every port subject to the provisions of that act:—Held, first, that the Cowcolly Roads, the place of the collision, was not a port within the meaning of the act. *The Peerless*, Lush. 103; 13 Moore, P. C. C. 484; 30 L. J., Adm. 89.

Held, secondly, that in consequence the owners were not exempted for the damage occasioned by the collision, by reason of having a pilot on board, although the collision was occasioned by the sole fault of the pilot. *Ib.*

4. Costs of Defence of Compulsory Pilotage.

Practice as to.]—Defendants in a cause of damage, who rely at the hearing upon the defence of compulsory pilotage only, and succeed in this point, but whose pleadings raise other issues which are not proved, are not entitled to their costs. *The Livia*, 25 L. T. 887.

Defendants in a collision suit, by their answer, denied that their vessel was to blame, and also set up the defence of compulsory pilotage. The court decided that their vessel was to blame, but dismissed the suit upon the ground that the defence of compulsory pilotage was established:—Held, that the plaintiff was not entitled to any portion of the costs of the suit. *The Schwan, The Robert Morrison*, 4 L. R., Adm. 187; 43 L. J., Adm. 18; 30 L. T. 537; 22 W. R. 743.

In an action of damage, if the only defence is that the collision was caused by the negligence of a pilot taken by compulsion of law, the defendants, if successful in establishing this defence, are entitled to costs. *The Juno*, 1 Adm. D. 135; 45 L. J., Adm. 105; 34 L. T. 741; 24 W. R. 902.

In an action for damages arising out of a collision of two ships, the defendant succeeded on the ground alone of compulsory pilotage:—Held, not a sufficient reason for depriving the defendant of costs. *General Steam Navigation Company v. London and Edinburgh Shipping Company*, 2 Ex. D. 467; 47 L. J., Ex. 77; 36 L. T. 743; 25 W. R. 694.

The rule of the Court of Admiralty, that, where the defendants succeed on a plea of compulsory pilotage, no costs are to be given, also holds good in the Court of Appeal. *The Daiwo*, 47 L. J., Adm. 1; 37 L. T. 137—C. A.

The Admiralty Division will adhere to the practice of the High Court of Admiralty as to costs in cases of compulsory pilotage. *The Princeton*, 3 Adm. D. 90; 47 L. J., Adm. 33; 38 L. T. 260.

Where the defendants in a collision suit raise a defence on the merits, and also set up a plea of compulsory pilotage, and the court dismisses the suit on the ground that the plea of compulsory pilotage is established, each party to the suit will, in accordance with the practice prevailing in the Court of Admiralty before the Judicature Acts, be left to bear his own costs. *The Matthew Cay*, 5 Adm. D. 49; 49 L. J., Adm. 47; 41 L. T. 759; 28 W. R. 262.

The only defence was, that the collision was caused by the fault of a pilot whom the defendants were compelled to take. They having proved their case:—Held, that plaintiffs must be condemned in costs. *The Royal Charter*, 2 L. R., Adm. 362; 38 L. J., Adm. 36; 20 L. T. 1019; 18 W. R. 49.

See also PRACTICE and COLLISION.

8. PILOTAGE CHARGES.

No Apportionment.]—Upon an agreement to pay certain pilotage and port charges for an entire voyage, though a part only of the cargo is delivered, there will be no apportionment of the pilotage and port charges, but the whole must be paid. *Christy v. Row*, 1 Taunt. 300.

Liability of Shipbrokers for Allowance to Pilot carried beyond Limits of his Licence.]—The ten shillings and sixpence per day to which a licensed pilot, taken, without his consent, to sea, or beyond the limits of his pilotage district, in any ship, is entitled by 17 & 18 Vict. c. 104 (The Merchant Shipping Act, 1854), s. 357, are not "pilotage dues" for which the shipbrokers are liable under s. 363. *Mortco v. Julian*, 4 C. P. D. 216; 48 L. J., M. C. 126; 41 L. T. 71.

Compulsory Pilotage on Thames for Foreign Ships—Differential Due.]—Pilotage is compulsory on a foreign ship carrying passengers and trading between London and ports between Boulogne and the Baltic. The order in council of the 18th Feb. 1854, extending the exemptions from compulsory pilotage, applies only to British vessels. A charge for compulsory pilotage on a foreign ship is not a differential due within the meaning of the Harbours and Passing Tolls Act, 1861, and is therefore not abolished by that act. *The Vesta*, 7 Adm. D. 240; 4 Asp. M. C. 515; 51 L. J., Adm. 25; 46 L. T. 492; 30 W. R. 705.

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1. GENERAL PRINCIPLES.

Contributory Negligence.]—In an action for running down a ship, neither party can recover when both are in the wrong; but the plaintiff may recover, although he might have prevented the collision, provided that he was in no degree

in fault in not endeavouring to prevent it. *Vennall v. Garner*, 1 C. & M. 21; 3 Tyr. 85.

A plaintiff cannot recover, unless the injury is attributable entirely to the fault of the defendant; if he was partly in fault, but the plaintiff might, with care, have prevented the accident, he cannot maintain his action. *Vanderplank v. Miller*, M. & M. 169.

The question, in what is called a running down case, is, whether the plaintiff, by his negligence or improper conduct, substantially contributed to the occurrence of the injury of which he complains; not to the amount of it, but to its occurrence. *Sills v. Brown*, 9 C. & P. 601; *S. P.*, *The Lady Anne*, 15 Jur. 18.

Wrongful Act of other Vessel.]—A vessel which, having performed her own duty, is thrown into immediate danger of collision by the wrongful act of another, is not to be held liable if at that moment she adopts a wrong manœuvre. *The Nor*, 30 L. T. 576—P. C.

Before a plaintiff in a collision cause can be deprived of his right of recovery against a negligent defendant by reason of an act done by the plaintiff, without which the collision would not have occurred, it must be shewn that such an act of the plaintiff was negligent. *The Sisters*, 1 Adm. D. 117; 45 L. J., Adm. 39; 34 L. T. 338; 24 W. R. 412—C. A.

When one ship is by the improper navigation of a second ship compelled to alter her course, and so does damage to a third ship, the ship which compelled the alteration of course is liable for the damage; and that liability remains if the damaged ship was not actually negligent, even though by taking another course she might have avoided the collision. *Id.*

A steamship meeting three barges was compelled by the negligent management of the foremost barge to take a course which brought her into collision with the other two barges:—Held, that the owners of the first barge were liable to those of the other two barges for the damage done by the collision. *Id.*

It is wrong to port the helm when a collision is apprehended and the other ship is on the star-board bow. But where one ship has by wrong manœuvres placed another ship in a position of extreme danger, that other ship will not be held to blame if she has done something wrong, and has not been manœuvred with perfect skill and presence of mind. *The Bywell Castle*, 4 Adm. D. 219; 41 L. T. 747; 28 W. R. 293—C. A.

Remoteness of Plaintiff's Negligence.]—A plaintiff cannot recover for mischief done to his ship by its being struck by the defendant's ship in consequence of the latter being improperly managed, if it appears that the plaintiff's ship was improperly managed, and that such improper management directly contributed in any degree to the accident, however much the defendant may also be in fault; though, if there is negligence on the part of the plaintiff only remotely connected with the accident, the question is, whether the defendant, by ordinary care and skill, might have avoided the accident. *Dowell v. General Steam Navigation Company*, 5 El. & Bl. 195; 26 L. J., Q. B. 59; 1 Jur., N. S. 800.

One who sustains an injury from a collision with a vessel cannot maintain an action against the owners of such vessel, if negligence either on his own part, or on the part of those having

the guidance of the vessel in which he is a passenger, conduced to the accident, and such injury might have been avoided by the exercise of reasonable care on his part or their part. *Thorogood v. Bryan*, 8 C. B. 115; 18 L. J., C. P. 336.

— **Overloading—Swell from Steamer.**—In an action against the captain of a steam vessel for swamping a loaded wherry on the river, by a swell produced by a too rapid rate of passage, the jury, to find for the plaintiff, must be satisfied that the mischief was occasioned by the swell alone; and if they think it doubtful whether it was or not, or think that the plaintiff contributed to the injury he sustained by his own improper conduct, either in mismanaging or overloading the boat, they must find their verdict for the defendant. *Luxford v. Large*, 5 C. & P. 421. See also *Netherlands Steamboat Company v. Styles*, post, col. 1563.

— **Question for Jury.**—In an action to recover damages for an injury occasioned by a collision between two vessels, the proper question for the jury is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened; in the first case, the plaintiff would be entitled to recover; in the latter not, as, but for his own fault, the misfortune could not have happened. *Tuff v. Warman*, 2 C. B., N. S. 740; 26 L. J., C. P. 263. Affirmed, 5 C. B., N. S. 573; 27 L. J., C. P. 322; 5 Jur., N. S. 222—Ex. Ch.

— **Vessel Disabled by Prior Collision.**—When a ship seeks to excuse her failure to comply with the sailing regulations and with a seamanlike precaution, by shewing that such a failure was in consequence of her being disabled in a prior collision, it is material to inquire whether the prior collision was due to her default, or was the result of inevitable accident. *The Kjobenhavn*, 30 L. T. 136—P. C.

Semble, that if the prior collision was due to the default of the ship so seeking excuse, and if her subsequent failure to comply as aforesaid contribute to the collision proceeded for, she will be to blame. *Id.*

The owners of a disabled vessel are answerable for damage done by its accidentally drifting, when so disabled, against another vessel. *Scoombe v. Wood*, 2 M. & Rob. 290.

When it is the duty of a ship to keep out of the way of another, but she is unable to do so by reason of being disabled in a former collision, and the other ship being unaware of her disabled condition, continues her course, a collision ensuing is the result of inevitable accident. *The Aim*, 29 L. T. 118; 21 W. R. 707—P. C.

— **Evidence of Negligence.**—If a vessel is damaged by another running foul of it, and the jury finds a verdict for the plaintiff, the court will not send the case for a new trial, because there may be some ground to believe that the plaintiff was negligent in navigating his vessel, as well as the defendant. *Collinson v. Larkins*, 3 Taunt. 1.

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A vessel, whilst being towed into a harbour by a steam-tug, got aground, and the defendant's vessel, which was being towed in at the same time by the same tug, astern of the plaintiff's vessel, without any active default on the defendant's part, struck and damaged the plaintiff's vessel:—Held, no evidence of negligence for which the defendant was liable. *Harris v. Anderson*, 14 C. B., N. S. 499.

— **Dangerous Situation of Injured Vessel.**

—If, in an action for the negligence of the defendant's servants in managing a barge, so that the plaintiff's barge was run down, it appears that the accident happened from circumstances which persons of competent skill could not guard against, the plaintiff will not be entitled to recover; nor will he, if his men had put his barge in such a place that persons using ordinary care would run against it; nor if the accident could have been avoided, but for the negligence of the plaintiff's own men, in not being aboard his barge at the time when it was lying in a dangerous place. *Luck v. Seward*, 4 C. & P. 106.

— **Construction of Dolphin.**—A steamship was about to make fast alongside a pier when she came in contact with, and overturned, a mooring dolphin placed near the pier. The owners of the dolphin instituted a cause of damage against the steamship. At the hearing of the cause it was proved that the speed of the vessel did not contribute to the destruction of the dolphin, and that the dolphin ought to have been capable of sustaining the amount of pressure on contact which she received:—Held, that the steamship must be dismissed from the suit with costs. *The Albert Edward*, 44 L. J., Adm. 49; 24 W. R. 179.

— **Trial Trip—Crew not Regular Hands.**—A new steamer, not yet out of the builders' hands, was sent on a trial trip, manned by a sufficient number of men to work the ship, but they were not regularly constituted officers and crew:—Held, not to amount to contributory negligence. *Clyde Navigation Company v. Barclay*, 1 App. Cas. 790; 36 L. T. 379.

— **What Amounts to Negligence of Master.**—

When the master of a ship takes all such precautions as a man of ordinary prudence and skill, exercising reasonable foresight, would use to avert danger, his owners are not held responsible because he may have omitted some possible precaution which the event suggests that he might have resorted to. *Doward v. Lindsay*, *The William Lindsay*, 5 L. R., P. C. 338; 29 L. T. 355; 22 W. R. 6.

The master of a ship is bound to take all such precautions as a man of ordinary prudence and skill, exercising a reasonable foresight, would use to avert danger in the circumstances in which he may happen to be placed. *Id.*

Where a ship, having been moored to a buoy, under the sanction of the authorities in the port where she was, broke loose in consequence of a latent defect in the buoy, and, being prevented by an inevitable accident from letting go her anchor, came into collision with another ship:—Held, that no negligence could be imputed to the master. *Id.*

When the captain of a steamer, upon a vessel

being reported lying ahead, immediately gives orders to stop and reverse, but is unable to stop the way of his ship in time to prevent a collision, he is not proved to have been guilty of negligence because he did not take the further precaution of immediately dropping his anchor. *Tyne Steam Shipping Company v. Smith, The C. M. Palmer and Larnar*, 29 L. T. 120; 21 W. R. 702—P. C.

— **Government Transport.**—No action is maintainable against an owner of a transport vessel employed by the government for damage done in the execution of positive orders of an officer of the royal navy under whose command she was. *Hodgkinson v. Fernie*, 2 C. B., N. S. 415; 26 L. J., C. P. 217; 3 Jur., N. S. 818.

This immunity does not depend upon martial law, but on the ground that persons acting under such orders cannot be said to be guilty of negligence. *Ib.*

Where a vessel of the royal navy, towing two transports, anchored by the order of the admiral, and the captain ordered the vessels in tow to hold on by their warps, and afterwards a breeze sprang up, and one of the transports, swinging to it, came into collision with another transport in another column; and the captain stated, that after the order to hold on by the warps, it would have been proper for the master of the transport to let go his anchor if anything occurred which would have made it dangerous to his own ship if he did not do so:—Held, that in an action against the owner of the transport for damage done by the collision, the judge was right in leaving it to the jury to say whether the master was not guilty of negligent seamanship in not dropping his anchor on the wind changing. *Ib.*

2. ADMIRALTY AND STATUTORY RULES.

a. Effect of.

37 & 38 Vict. c. 52.—The 37 & 38 Vict. c. 52, prescribing additional regulations to be observed in a particular place or channel to those contained in the "Regulations for Preventing Collisions at Sea," is, though passed subsequently, to be read as a part of those regulations, and a breach of it will be visited by the penalties prescribed by s. 17 of the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85). *The Lady Downshire*, 4 Adm. D. 26; 48 L. J., Adm. 41; 39 L. T. 236; 27 W. R. 648.

"**Deemed to be in fault.**"—A vessel, though infringing the Regulations for Preventing Collisions at Sea, will not be "deemed to be in fault" within the meaning of s. 17 of the Merchant Shipping Act, 1873, for a collision caused exclusively by the negligence of the other colliding vessel, if the infringement of the regulations could not, under the circumstances of the case, have contributed to the collision. *The Englishman*, 47 L. J., Adm. 9; 37 L. T. 412.

A French trawler and a schooner came into collision in the English Channel in the morning before sunrise. The trawler was proceeding at a speed of from two to three knots an hour. She had her trawl on deck and was about to let it go. A white light was exhibited at her masthead, but no side-lights were exhibited. At the hearing of an action of damage to recover for the damages sustained in the collision, the court

found that the collision was caused by the absence of any look-out on board the schooner. It was then submitted that the trawler had infringed the Regulations for Preventing Collisions at Sea by not exhibiting the regulation side-lights, and by reason of such infringement was in fault, within s. 17 of the Merchant Shipping Act Amendment Act, 1873 (36 & 37 Vict. c. 85):—Held, that the trawler had infringed the regulations by not exhibiting the regulation side-lights. *Ib.*

Held, also, that, as in the absence of a look-out on the part of the schooner, the neglect of the trawler to observe the regulations as to lights could not by any possibility have contributed to the collision, the section had no application, and the schooner was alone to blame for the collision. *Ib.*

Although a ship must be deemed to be in fault for an infringement of the regulations preceding but not occasioning the collision under the Merchant Shipping Act, 1873, s. 17, she is not necessarily wholly in fault; but if the other ship has been guilty of negligence or a breach of the regulations, the latter will also be held to blame and the damages divided between them. *The Hibernia*, 31 L. T. 803; 24 W. R. 60—P. C.

The presumption created by s. 17 of the Merchant Shipping Act, 1873, may be rebutted by proof that such infringement could not by any possibility have contributed to the collision. *The Funny M. Carvill*, 2 Asp. M. C. 569; 44 L. J., Adm. 34; 32 L. T. 646; 24 W. R. 62—P. C. Approved, *The Hochung*, 7 App. Cas. 512; 51 L. J., P. C. 92; 47 L. T. 485; 31 W. R. 303.

Non-Observance of, contributing to Collision.]

—If two ships have come into collision through the non-observance of provisions in the steering and sailing rules by one of them, the other will not be held to have contributed to the collision because she took an unusual course, knowing it would intersect the course of the former that was a usual and proper course. *The Franconia*, 2 Adm. D. 8; 35 L. T. 721; 25 W. R. 197—C. A.

Effect of Neglecting.—The "Regulations for Preventing Collisions at Sea," made under the authority of the Merchant Shipping Acts, 1854 to 1873, must under the 17th section of the 36 & 37 Vict. c. 85, be strictly followed. Actual necessity, not consideration of discretion and expediency, even though skilfully acted on, can alone excuse their non-observance. *Stoomvaart Maatschappij Nederland v. Peninsular and Oriental Steam Navigation Company*, 5 App. Cas. 876; 52 L. J., Adm. 1; 43 L. T. 610; 29 W. R. 173—H. L. (E).

Where there has been a breach of the Admiralty regulations, and a collision ensues, the *prima facie* presumption is that it was occasioned thereby; and where there has been such default on the part of the party proceeding, it lies on him to shew that it did not in fact occasion the ensuing damage. *The Palestine*, 13 W. R. 111.

b. Applicable to what Ships.

Royal Navy.—The regulations do not apply to her Majesty's ships. The orders which may be made by the Commissioners of the Admiralty under 54 Geo. 3, c. 159, s. 2, are confined to mooring and docking vessels. *Her Majesty's Ship Topaze*, 10 L. T. 659; 12 W. R. 923.

Though her Majesty's vessels are exempt from compliance with the sailing regulations, yet, by order of the Board of Admiralty, instructions precisely in accordance with such regulations are issued to persons in charge of her Majesty's vessels. *Her Majesty's Ship Supply*, 12 L. T. 799.

Seagoing Ships.—The word "ship" in 25 & 26 Vict. c. 63, s. 33, applies to a vessel which substantially goes to sea and only uses oars as an auxiliary power, and when a collision took place between a steamship and a fishing coble of ten tons burthen, twenty-four feet in length, decked forward only, with two movable masts, and a sail for each; and which was accustomed to go twenty miles out to sea, and to remain out for hours, and was usually under sail, but was sometimes propelled by oars when convenient:—Held, to be a collision between two ships within that section. *Hutchinson or Ferguson, Ex parte*, 6 L. R., Q. B. 280; 40 L. J., Q. B. 105; 24 L. T. 96; 19 W. R. 746.

A river lighter of 60 tons is not a seagoing ship. *The C. S. Butler*, 4 L. R., Adm. 238; 31 L. T. 549; 23 W. R. 113.

Foreign Ships.—A French ship, under sail, following a British ship in tow on entering a harbour, came into collision with her whilst crossing the bar:—Held, that the collision so occurring was occasioned by the negligence of the French ship in not attending to the rule of the road as laid down in the 17th Admiralty regulation, and that the French ship was liable for the loss caused by such collision. *The Wheat-sheaf v. The Intrepide*, 13 L. T. 612.

Before 25 & 26 Vict. c. 63, ss. 57, 58, a foreigner could not set up against a British vessel, with which she had been in collision, the British vessel's violation of British statute law on the high seas, for the foreigner could not herself be bound by it, as it was beyond the power of the legislature to make rules applicable to foreign vessels beyond British waters. *The Zollverein*, Swabey, 96; 2 Jur., N. S. 429.

Where one of the vessels is foreign, the municipal law of Great Britain cannot apply, but the case must be decided by the general maritime law which is common to all nations. *The Dumfries*, Swabey, 63.

Collision in the Atlantic Ocean between a British and a foreign vessel:—Held, that the 17 & 18 Vict. c. 104, did not apply, and that the case was governed by the rule of the sea. *The Chancellor*, 14 Moore, P. C. C. 202; 4 L. T. 627. See 25 & 26 Vict. c. 63, ss. 57, 58.

A foreign steamer met at night, in the River Thames, two brigs advancing in parallel courses from fifty to sixty fathoms apart from each other. The steamer, instead of porting her helm, attempted to pass between them, and thereby caused a collision, by which one of the brigs was lost. The steamer held to blame. *The Schwalbe*, 14 Moore, P. C. C. 241; Lush. 239; 4 L. T. 160.

A foreign vessel, close-hauled on the starboard tack, approaching another vessel at night, is bound to keep her course, and will be held to blame for porting her helm, if porting was an injudicious manoeuvre, and but for such manoeuvre the collision would probably not have happened. *The Cleadon*, Lush. 158; 14 Moore, P. C. C. 92; 4 L. T. 167.

c. As to Lights.

Position and Exhibition.—A barque's side-lights were so placed in the mizen rigging that the centre of the lights did not project beyond the gunwale. They were two feet six inches within the broadest part of the vessel, and at a distance of more than 350 feet with the masts in line, they could not be seen from a window forty feet above the deck of another vessel:—Held, not to be a sufficient compliance with the regulations as to lights. *The Germania*, 37 L. J., Adm. 59; 19 L. T. 20. Affirmed on appeal, 21 L. T. 44—P. C.

The law does not appoint any particular place at which the lights should be fixed, but they ought to be placed so as to be properly visible. *Beal v. Marchais, The Bougainville and The James C. Stevenson*, 5 L. R., P. C. 316; 28 L. T. 822; 21 W. R. 653.

Lamps duly screened and fixed on stands secured to the paul-bits of the windlass, are not placed in a proper position, as required by the regulations of 1863, respecting lights. *The Gustav; The New Ed*, 9 L. T. 547.

Loss of by Tempestuous Weather.—A British vessel losing her Admiralty lights by tempestuous weather is bound to obtain new lights on the first opportunity. *The Aurora*, Lush. 327.

Sailing Vessel Towing Another.—A brigantine with a cutter towing astern came into collision with another brigantine in the Bristol Channel after dark. Both brigantines had the regulation side-lights exhibited, but the cutter had only a white light exhibited at her masthead, and the brigantine towing the cutter was sailing close-hauled on the starboard tack whilst the brigantine which came into collision with her was going free:—Held, that the "Regulations for Preventing Collisions at Sea" had been infringed by the cutter, and that the vessel towing her was to be deemed in fault for the collision by virtue of the provisions of the 17th section of the Merchant Shipping Act, 1873. *The Mary Hounsell*, 4 Adm. D. 204; 48 L. J., Adm. 54; 40 L. T. 368.

Lights Obscured—Effect of—Duty of Vessels.]

—A steamship seeing a sailing vessel at a distance of two or three miles ought not, even if the lights of the sailing vessel are not visible, to take a course which will carry her across the bows of the sailing vessel. *Beal v. Marchais, The Bougainville and The James C. Stevenson*, 5 L. R., P. C. 316; 28 L. T. 822; 21 W. R. 653.

Even if the light of one vessel was invisible, the vessel will not on that account be held to have contributed to the collision, where the other vessel has pursued a course which of itself would suffice to produce the collision. *Id.*

A manoeuvre made too late to affect the collision, does not make the ship liable as having contributed to the collision, even if the manoeuvre was erroneous. *Id.*

When a steamship is approaching a sailing ship, and does not know what course the other ship is pursuing, it is her duty (whether the lights of the other vessel are visible or not) to take no decisive movement until she can ascertain it. *Id.*

Seemingly, the fact that the lights of one ship are

invisible to the other does not make the former ship contributory when the course pursued by the latter is not in itself prudent and judicious. *Ib.*

When a steamer sights a sailing vessel in the night-time at a distance of three miles, but, owing to the fact that the sailing vessel's lights are not visible, cannot ascertain the course of the sailing vessel, it is the duty of the steamer to slacken speed and wait to ascertain that course before adopting any decided manœuvre for the purpose of avoiding the sailing vessel. If the steamer immediately on sighting the sailing vessel adopts such a manœuvre, as by porting, and a collision ensues without fault on the part of the sailing vessel, the steamer is alone to blame. *Ib.*

When a steamship is approaching another, whose exact course cannot be at once ascertained by reason of her lights being obscured by her own smoke, it is the duty of the former to slacken speed and to wait till that course is ascertained before taking any decided step to avoid the other vessel; if, before having ascertained the exact course of the other, she, without slackening speed, executes a manœuvre, which although appearing to be right at the time, contributes to the collision, she will be to blame. *The Rona, The Ara*, 29 L. T. 781—P. C.

It is negligence on the part of a steamer to go at full speed under steam and sail before the wind whilst her smoke is blown over her bows so as to obscure her lights, and to prevent her from seeing and from being seen by other ships approaching from an opposite direction. *Ib.*

A steamer seeing lights close ahead of her, carried by some ship, and being unable to make out those lights, or the course of the ship carrying them, should slacken speed until she is able to ascertain the meaning of the lights, and so be able to avoid the vessel carrying them. *The Funny M. Carcill and The Peru, infra.*

Lights Shifted—Tempestuous Weather—Partially Obscured.]—A brig of 239 tons, beating to windward on the starboard tack at night, encountered such rough weather as to render it justifiable in the opinion of the court that her side-lights should be removed from the place where they were usually carried in the fore-part of the vessel to the after-part near the taffrail, and the lights were so removed. In this latter position the lights were so placed as to be obscured to the extent of a point, or a point and a half, on either bow. The brig came into collision with a barque on the opposite tack:—Held, that the circumstances of the case, while justifying the shifting of the lights, did not justify the absence of proper places for them whereby they were obscured as above mentioned, and that the brig must be deemed to be in default under the 17th section of the Merchant Shipping Act, 1873. *The Tirzah*, 4 Adm. D. 33; 48 L. J., Adm. D. 15; 39 L. T. 547; 27 W. R. 584.

Effect of Non-Exhibition of Lights.]—In a cause of collision between a steamship and a sailing vessel, occasioned by the fault of the steamship, it was proved that the sailing vessel had failed to comply with the Admiralty regulations regarding lights, having either shewn no lights, as she was bound, or if she had any lights, that the lights could not be seen till the collision was too imminent for prevention:—Held, that a collision might have been avoided if the sail-

ing vessel had obeyed the Admiralty regulations, and that though the omission to exhibit proper lights might be immaterial where it is clearly shewn that the absence of such lights was not the cause of the collision, and did not conduce to it, yet where it is proved that a vessel has not shewn proper lights the onus lies on such vessel to shew that the non-compliance with the regulations was not the cause of the collision, which the sailing vessel failed to do; the general rule being, that a vessel must not only obey the Admiralty regulations as regards lights, but must obey them in time to prevent an impending collision. *The Fenham*, 3 L. R., P. C. 212; 23 L. T. 329; 6 Moore, P. C. C., N. S. 501.

—Rule as to imputing Blame.]—When a collision occurs at night, and the lights of one of the ships are not burning at the time when the vessels come in sight, and the court is not satisfied that the want of those lights is occasioned by circumstances over which the crew of the ship had no control, she must, even if the want of the lights did not contribute to the collision, be held to blame under the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), s. 17, which provides that—"If in any case of collision it is proved to the court before which the case is tried that any of the regulations for preventing collisions, contained in and made under the Merchant Shipping Acts, 1854 to 1873, have been infringed, the ship by which such regulations shall be infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the court that the circumstances of the case made a departure from the regulations necessary." *The Hibernia*, 31 L. T. 805; 24 W. R. 60—P. C.

The Merchant Shipping Act, 1873, s. 17, renders it necessary for the court, in every cause of collision, to inquire whether there has been an infringement of a regulation, and, if so, whether the circumstances rendered a departure from the regulations necessary. *Ib.*

Although a ship must be deemed in fault for an infringement of the regulations preceding but not occasioning the collision, under the Merchant Shipping Act, 1873, s. 17, she is not necessarily wholly in fault; but if the other ship has been guilty of negligence or a breach of the regulations, the latter will also be held to blame, and the damages divided between them. *Ib.*

Inconsistent Evidence—Good Look-out not Kept.]—The *Sarpedon* and *Julia David* came into collision. On behalf of the *Sarpedon* it was alleged that the red and white lights of the *Julia David* were seen on the port bow, and that the *Sarpedon* was ported, but that the *Julia David* was starboarded:—Held, that the story on behalf of the *Sarpedon* was inconsistent, that the evidence shewed that there was not a good look-out on board of her, and that therefore she was alone to blame. *The Julia David*, 46 L. J., Adm. 54.

Rebutting Presumption of Negligence.]—The Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), s. 17, provides that if, in case of collision, it is proved to the court before which the case is tried that any of the regulations for preventing collisions contained in the Merchant Shipping Acts, 1854 to 1873, have been infringed, the ship by which such regulations have been infringed shall be deemed to be in fault, unless it is shewn

to the satisfaction of the court that the circumstances of the case made departure from the regulations necessary:—Held, that although it is not incumbent on a plaintiff, since the passing of the statute, to prove that an infringement of a regulation by a defendant in fact contributed to a collision, yet that the infringement charged must be one having some connexion with the collision. *The Funny M. Curvill and The Peru*, 2 Asp. M. C. 569; 44 L. J., Adm. 34; 32 L. T. 646; 24 W. R. 62—P. C. Affirming 4 L. R., Adm. 417.

A ship carrying her side-lights, with screens shorter than required by the regulations, is not to be deemed in fault if the shortness of the screens could not by any possibility have contributed to the collision. *Id.*

Where two ships incurred damage in a collision, and it was found that one of them was to blame for improper navigation, and that the other had infringed the regulations with respect to lights:—Held, that in the absence of proof that such infringement could not possibly have contributed to the collision, the damage must be divided according to the ordinary rule of the Court of Admiralty. *The Funny M. Curvill* approved. *China Merchants' Steam Navigation Company v. Bignold, The Hochung, The Lapwing*, 7 App. Cas. 512; 5 Asp. M. C. 39; 51 L. J., P. C. 92; 47 L. T. 483; 31 W. R. 303—P. C.

Absence of Lights, but no Evidence that it contributed to Collision.—An action for damages by collision in the Thames was brought by the owners of a barge against the owners of a steamer. The steamer had been obliged to alter her course in order to avoid another barge, and the barge with which the collision took place was last of three in tow of a tug, and did not carry a light as directed by the Rules of the Thames Conservancy; but there was no evidence that the want of a light contributed to the collision:—Held, that the steamer was not to blame, and that she might have acted differently if the barge had carried a light. The action was dismissed without costs; but, semble, that in successful Admiralty appeals the appellants will have the costs of the appeal. *The Swansea v. The Condor*, 4 Adm. D. 115; 48 L. J., Adm. 33; 40 L. T. 442; 27 W. R. 748—C. A.

Exhibition of, to Vessels following.—Previous to Article 12 of 1880.—Although a ship is, under some circumstances, bound to keep a look-out astern, and to shew a light or to give a signal to another ship overtaking her, and evidently unable to see her, nevertheless, where a steamer going at a high rate of speed in a fair way overtakes a sailing ship shewing no light or signal, and does not see her until too near to avoid a collision, although keeping a good look-out, the steamer will be held alone to blame, if a lower rate of speed would have given the steamer time to avoid the collision upon sighting the sailing ship. *The Earl Spencer*, 33 L. T. 235—P. C. Affirming 4 L. R., Adm. 431; 32 L. T. 370; 23 W. R. 661.

On a dark morning before daybreak in October, a small schooner with a crew of only four men was beating up into the outer harbour of Holyhead when she was run into from behind and sunk by a large paddle-wheel steamer which was entering the harbour at a speed of between ten

and eleven knots. To recover for the damage sustained in the collision a cause of damage was brought by the owners of the schooner against the steamer:—Held, first, that the steamer was to blame for entering the harbour at too great a speed. *Id.*

Held, also, that under the circumstances of the case the exhibition of a stern light was not obligatory on the schooner, and that the steamer was alone to blame for the collision. *Id.*

It is *prima facie* the duty of an overtaking ship to keep out of the way of a ship ahead of her; but if the latter ship sees another approaching her from a direction where her lights are not visible, and which vessel she had reason to suppose does not, in fact, whether keeping a good look-out or not, see her and is likely to come into collision with her, it is her duty to give some warning to the overtaking ship, not necessarily by exhibiting a light, but by some signal, such as the firing of a gun, the shewing a light, or otherwise, which will indicate her whereabouts to the overtaking ship, and call the attention of that ship to the danger of a collision. *The Anglo-Indian*, 33 L. T. 233; 23 W. R. 882—P. C.

Where one vessel during the night time is overtaking another within the meaning of Art. 17 of the regulations, although the leading vessel may be in such a position that the following vessel cannot see the regulation lights of the leading vessel, the latter is not bound, under ordinary circumstances, to give a signal or shew a light to the following vessel. *The Chanowry and The Leverington*, 42 L. J., Adm. 58; 28 L. T. 284.

A vessel, unless there is apparent danger, is not guilty of negligence in not shewing a light to a vessel following her. *The City of Brooklyn*, 1 Adm. D. 276; 24 W. R. 1056—C. A. Affirming 34 L. T. 932.

Articles 11 & 12 of 1880—Overtaking Vessels.—Light Astern only when Apprehension of Danger.—A vessel is not bound by Art. 12 of the Regulations to shew from her stern a white light or a flare-up light to a vessel overtaking her, unless there is ground for the apprehension of danger from the overtaking vessel. *The Reiher*, 4 Asp. M. C. 478; 45 L. T. 767.

—Not complied with by Binnacle Light.]—The provisions of Art. 11 of the Regulations for Preventing Collisions at Sea, that a ship being overtaken by another shall shew from her stern a light, are not complied with where the only light astern is the binnacle light in the binnacle. *The Breadalbane*, 7 Adm. D. 186; 46 L. T. 204; 4 Asp. M. C. 505.

Vessel Casting off from Moorings.]—When a vessel casting off from moorings in a navigable river places herself at night partly athwart the fairway, so that her regulation lights cannot be seen by vessels astern of her coming up the river, she is bound to make use of some conspicuous signal to warn them of her position. *The John Fenwick*, 3 L. R., Adm. 500; 41 L. J., Adm. 38; 26 L. T. 322.

A steamship, which, in getting under way in the Thames to go up the river between sunset and sunrise, is compelled to go astern and partly athwart the river in order to get clear ahead, and whose regulation lights are not visible to vessels

coming up the river, is bound to take every possible precaution to warn approaching vessels of her position, and to use the best light she has on board for that purpose. *Ib.*

Placing a service lantern, ordinarily used to give light in discharging the cargo, over the stern is not a sufficient precaution. *Ib.*

A vessel neglecting such precaution commits a breach of the 20th article of the Regulations for Preventing Collisions at Sea, and will be held to blame if a collision ensues. *Ib.*

Vessel coming to Anchor.]—A steamer manoeuvring to come to an anchor in a place and manner such, that her regulation lights cannot be seen by an approaching vessel, is bound to give timely notice of her presence by shewing a light or some other sufficient means. *The Philotaxe*, 37 L. T. 540.

Vessel at Anchor.]—A ship lying at anchor on a dark night is bound to keep a light always visible, and it is no excuse to free her from liability that the lamp had been temporarily taken down to be trimmed. *Tyne Steam Shipping Company v. Smith, The C. M. Palmer and The Larnaz*, 29 L. T. 120; 21 W. R. 702—P. C.

Vessels at anchor in the sea approaches to the River Mersey are required by 37 & 38 Vict. c. 52, s. 1, to exhibit a white light at the main or mizen mast in addition to the white light prescribed by 25 & 26 Vict. c. 63, sched., Table C., art. 7, and a vessel omitting to exhibit such additional light will, where the omission may have caused or contributed to a collision, be held to blame under 36 & 37 Vict. c. 85, s. 17. *The Lady Downshire*, 39 L. T. 236.

Every vessel, whether close-hauled or at anchor, is bound by the general rules of the sea to shew a light. *The Eclipse and the Saxonia*, 15 Moore, P. C. C. 262; 31 L. J., Adm. 201; 8 Jur., N. S. 315; 6 L. T. 6; 10 W. R. 431.

Vessel Aground or Stationary.]—When a vessel is aground in a place where her ordinary riding light cannot be distinguished by approaching vessels, and where vessels are not expected to lie, it is her duty to exhibit a light on a mast or some elevated position, and to have a look-out to give warning to approaching vessels of her position by the best means in her power. *The Thomas Lee*, 35 L. T. 406.

The word "stationary" in Art. 9 of the Rules concerning Lights, made under the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63) (1), does not denote absolute immobility, but involves a question of degree in each particular case. *The Edith*, 10 Ir. R., Eq. 345—C. A.

Accordingly, a trawler proceeding at the rate of about a quarter of a knot an hour, with her trawl down, conforms to the rules by exhibiting only a bright white light. *Ib.*

Vessel Driven from her Anchors.]—A vessel driven from her anchors by a gale of wind, and setting sail to get out to sea, is, even if wholly unmanageable, under way, and is bound to exhibit coloured lights. *The George Arkle*, Lush, 382.

A vessel with her anchor down, but not actually holden by and under the control of it, is under way within the meaning of the Admiralty

Regulation of 1858, and is bound to exhibit coloured lights. *The Esk and The Gitana*, 2 L. R., Adm. 350; 38 L. J., Adm. 33; 20 L. T. 587; 17 W. R. 1064.

On what Vessels Binding—Fishing Smack.]—It is the duty of those on board a fishing smack, even though they are just about to let go the nets, to exhibit their side-lights if the smack is under way. *The Englishman*, 47 L. J., Adm. 9; 27 L. T. 412.

A fishing smack was found to blame for not having the proper light exhibited, but the neglect did not contribute to the collision, which was solely caused by the want of a proper look-out on board the other ship:—Held, that the owners of the fishing smack were entitled to recover. *Ib.*

Before 25 & 26 Vict. c. 63, art. 9, a fishing vessel was not bound to carry coloured lights. A fishing vessel is bound to shew a light in reasonable time to an approaching vessel; but this obligation was not statutory, but an obligation of maritime law. *The Olivia*, Lush, 497; 6 L. T. 398.

—River Lighters.]—A lighter of sixty tons burthen was proceeding under sail in the Thames, above Gravesend, at night, without any light being exhibited on board her, and came into collision with a steam vessel. In a suit instituted on behalf of the owners of the lighter to recover in respect of the damage done to the lighter by reason of the collision, it was proved that the lighter was ordinarily employed in the river, and was not a sea-going vessel:—Held, that the "Regulations for Preventing Collisions at Sea" did not impose upon the lighter any obligation to carry any light, and that the lighter was not to blame for having no light. *The C. S. Butler*, 4 L. R., Adm. 238; 31 L. T. 549; 23 W. R. 113.

—Dumb-barge in Thames.]—In a cause of damage by collision in the Thames a dumb-barge held not bound to have exhibited a light. *The Owen Wallis*, 4 L. R., Adm. 175; 43 L. J., Adm. 36; 30 L. T. 41; 22 W. R. 695.

When a collision occurs between a dumb-barge without lights and a steamer on a dark night in the Thames, there is no presumption of law that the steamer is to blame. *The Swallow*, 36 L. T. 231—C. A.

d. During Fog.

Vessel when near Fog Bank.]—It is the duty of a vessel, when in the vicinity of a fog bank, to make the signals prescribed by Art. 10 of the Regulations for Preventing Collisions at Sea, to warn vessels within it of her presence. *The Milanese*, 45 L. T. 151; 4 Asp. M. C. 438—H. L. (E.). Affirming 43 L. T. 107—C. A.

—Masthead-Light alone Visible.]—When at night a masthead-light is seen, but no side-lights, it is an indication to an approaching vessel that the lights are those of a steamer whose side-lights are obscured by fog. *Ib.*

Article 12—Fog-horn to be Sounded by Mechanical Means—Infringement of Regulations.]—A barque provided only with a fog-horn sounded by means of the breath came into

collision during a fog with a steamship. The fog-horn was duly sounded before the collision, and was heard by those on board the steamship, and those on board the steamship neglected for some time after they heard the fog-horn to stop or reverse the engines. The steamship was held to blame. The barque was held to be deemed in fault for not using a fog-horn to be sounded by mechanical means, as required by Art. 12 of the Regulations for Preventing Collisions at Sea, 1879. The circumstance that the barque left port a few days before the regulations came into force was held not to afford any valid excuse for the neglect of those in charge of her to furnish her with a fog-horn to be sounded by mechanical means. *The Love Bird*, 6 Adm. D. 80; 44 L. T. 650; 4 Asp. M. C. 427. See also *The Pennsylvania* and *The Steamship Westphalia*, *infra*.

Necessary Departure—Accident to Mechanical Fog-horn.—Where the mechanical fog-horn of a sailing ship breaks down, and a mouth-horn is made use of in its place, the departure from Art. 12 of the Regulations is necessary, and the vessel is not to blame. *The Chilean*, 45 L. T. 623; 4 Asp. M. C. 478.

Article 13—Fog—Moderate Speed—Sailing Ship.—What is a "moderate speed" for a sailing ship in a fog, in accordance with Art. 13 of the Regulations for Preventing Collisions at Sea, 1879, depends on the place where the ship happens to be, and semble, per Cotton, L. J., her handiness, and is not necessarily proportioned to or less than the maximum speed she can make under the circumstances. A speed of about five knots, in the case of a sailing ship out in the Atlantic Ocean, is a "moderate speed," and, in compliance with this rule, the sailing ship being at the time under all plain sail, and going as fast as she can with the wind on her quarter. *The Elysia*, 46 L. T. 840; 4 Asp. M. C. 540—C. A.

When a ship in tow of a steam-tug and in charge of a duly licensed pilot who has the control of both vessels, is navigating a river in a fog so dense that the banks of the river cannot be seen, and those on board the tug and ship in tow do not know in what direction they are going, it is negligence on the part of both vessels to proceed. *Smith v. St. Lawrence Tow-boat Company*, 5 L. R., P. C. 308; 28 L. T. 885; 21 W. R. 569.

Although it is incumbent on steamships (notwithstanding their desire to make all progress) to slacken speed so as to avoid every possible collision, yet this necessity does not in any way relieve sailing ships from the duty of keeping a sharp look-out, and sounding such fog signals and bells as the provisions of the statute direct. *The North American v. The Wild Rose*, 14 L. T. 68.

Rate of Speed of Steamers during Fogs.—A steamer, going at the rate of seven knots an hour, ran into a barque. The collision occurred in the Atlantic Ocean, in the direct line to New York, about 200 miles to the east of Sandy Hook. There was at the time a thick fog, and the barque was not seen till within a ship's length of the steamer. The barque, though hove-to, was making headway at the rate of about a mile an hour. A bell was frequently sounded on board the barque, but no fog-horn

was used:—Held, that the steamer was alone to blame for the collision; because she was going at an improper rate of speed, and because wrong and contradictory orders were given after the barque was sighted. *The Pennsylvania*, 23 L. T. 55—1. C.

The rate of speed proper for a steamer must depend on circumstances, but in a thick fog and at a part of the ocean where frequently a great number of vessels are congregated, seven knots an hour is too great. *Ib.*

The barque was wrong in not using a fog-horn, as required by the Admiralty regulations; but, though a fog-horn would have been heard further than a bell, yet the neglect to use a fog-horn was not the cause of the vessels coming into the position which caused the collision. *Ib.*

When a steamship, bound to the westward, in the English Channel, when off the Caskets, and ten miles therefrom, was running at a speed of eight or nine knots an hour in a dense fog:—Held, that the rate of speed was unlawful. *The Steamship Westphalia*, 24 L. T. 75.

A steamer in a dense fog is bound to go as slow as it is possible for her to go and maintain steerage way. *Ib.*

In the locality mentioned the omission of a sailing vessel in a dense fog to sound her fog-horn until she heard the whistle of a steamer quite near, was great neglect on her part. The horn should be continually sounded from the moment fog sets in. *Ib.*

Four to five knots an hour is not a moderate speed for a steamer in a thick fog in the Baltic, twenty-five miles east of Gothland. *The Magna Charta*, 25 L. T. 512.

— **Standstill—Arts. 13, 18, 20.**—It is the duty of those who have charge of a steamship in motion during a dense fog on first hearing the whistle of a steamship in such close proximity to them that risk of collision between the two vessels is involved, to bring their vessel immediately to a standstill on the water, and not execute any manoeuvre with their helm until they have definitely ascertained the position and course of the other ship. *The Kirby Hall*, 8 Adm. D. 71; 52 L. J., Adm. 31; 48 L. T. 797; 31 W. R. 658.

A steamship navigating in a fog at a moderate speed hearing a whistle sounded many times, indicating that a steamer was approaching her, and had come very near to her, so near that if the vessels had then been stopped they would have been within hailing distance, is bound under the 16th article not only to stop the motion of her engines, but to reverse them, so as to stop the motion of the vessel, and ought not to wait until the vessels sight each other, when such a manoeuvre may be too late. *Morton v. Hutchinson*, *The Frankland* and *The Kestrel*, 4 L. R., P. C. 529; 27 L. T. 633; 9 Moore, P. C. C., N. S. 365.

In a dense fog it is the duty of a steam vessel to anchor as soon as circumstances will permit. *The Otter*, 4 L. R., Adm. 203; 30 L. T. 43; 22 W. R. 557.

A steam vessel proceeding, though at a moderate speed, under steam in a dense fog, after she had reached a proper anchorage-ground, held to blame for so doing. *Ib.*

Steam Ferry—Knowledge that Vessels in Course.—A steam ferry-boat started in a dense fog to cross a navigable river, those in charge of her having been informed that vessels were

anchored in or near her track. The ferry-boat, although navigated with all ordinary care, ran into and damaged a ship at anchor:—Held, that the ferry-boat was to blame. *The Lancashire*, 4 L. R., Adm. 198; 29 L. T. 927.

Inevitable Accident in a Fog.—See *The Marpesia*, 4 L. R., P. C. 212; 26 L. T. 333; 8 Moore, P. C. C., N. S. 468, *post*, col. 1581.

e. Sailing Vessels.

Observance of Sailing Rules.—The 19th article of the Sailing Rules of 1862, which directs that in "obeying and construing all the other and previous regulations, due regard is to be had to all dangers of navigation, and to any special circumstances existing in any particular case, rendering a departure from such rules necessary, in order to avoid immediate danger," does not prescribe any specific course to be adopted or pursued, since such prescription would necessarily involve on many occasions the destruction of the very ships it was framed to preserve. *The Allan v. The Flora*, 14 L. T. 860.

If a ship, bound to keep her course under Art. 18, justifies her departure from that rule under the words of r. 19, she takes upon herself the obligation of shewing both that her departure was, at the time it took place, necessary in order to avoid immediate danger, and also that the course adopted by her was reasonably calculated to avoid that danger. *The Agra and Elizabeth Jenkins*, 1 L. R., P. C. 591; 36 L. J., Adm. 16; 16 L. T. 755; 16 W. R. 735; 4 Moore, P. C. C., N. S. 435.

Departure from Sailing Rule 18.—It is dangerous to the public to leave to masters of vessels a discretion as to obeying or departing from the sailing rules; and accordingly such a discretion need not be exercised except in cases of very clear necessity. Where a collision has occurred owing to one colliding vessel having failed to observe (as its duty was) the rule of the road, by keeping out of the way:—Held, that, in the absence of proof as to the particular time at which an intention to violate that rule was clearly manifest, the other colliding vessel, being *prima facie* bound to observe the 18th rule by keeping on its course, would not have been justified in departing therefrom. *The Byfoged Christensen, The William Frederick*, 4 App. Cas. 669; 41 L. T. 535; 28 W. R. 235—P. C.

Duties when Danger of Collision.—Departure from the rule provided by 17 & 18 Vict. c. 104, s. 296, for ships meeting each other to port their helms, allowed; the circumstances being such as to render such departure necessary to avoid immediate danger. *The Moderation*, 1 Moore, P. C. C., N. S. 528; 9 L. T. 586.

A collision took place between two sailing vessels crossing, the wind being about S.S.E., and the vessel C. steering about N.N.E., the vessel S. about W. by S.; the vessel C. did not keep out of the way, but kept her course, and the vessel S., instead of keeping her course, ported her helm, alleging immediate danger as a reason for so doing:—Held, that both vessels were to blame; the vessel C. for not having kept out of the way, in accordance with the provisions of the last clause of the 12th art., and the vessel S. for not having kept her course but having improperly ported her

helm, there being no evidence of immediate danger to justify a departure from the 18th art. *The Spring*, 1 L. R., Adm. 99; 12 Jur., N. S. 788; 14 W. R. 975; *S. P., The Dapper v. The Lady Normanby*, 14 L. T. 895.

A vessel on her port tack is bound to give way to a vessel on her starboard tack, and if there is any danger of collision, to port her helm and go to leeward of the other vessel, who is to keep her course. *The North American*, 12 Moore, P. C. C. 331; Swabey, 358.

Sailing Vessel Hove-to on Port Tack.—A sailing vessel hove-to on the port tack is bound to keep out of the way of a crossing vessel under sail close-hauled on the starboard tack. *The Rosalie*, 5 Adm. D. 245; 50 L. J., Adm. 3; 44 L. T. 32.

Running Free or Close-hauled.—By the law maritime, a vessel sailing free, or a steamship, is bound to give way to a vessel close-hauled; the vessel close-hauled is not bound to alter her course, but at night is bound to exhibit a sufficient light in time to enable the other to avoid collision. *The Saxonia*, Lush. 410; 31 L. J., Adm. 201; 8 Jur., N. S. 315; 6 L. T. 6; 10 W. R. 431; 15 Moore, P. C. C. 262.

If a vessel at sea is going close-hauled to the wind, and another meeting her is going free, the rule of the sea is for the latter vessel to go to leeward; and although such vessel may either go to leeward or windward as she best can, yet she ought, as a general rule, to suppose that the vessel going to windward will keep her position. *Han-dayside v. Wilson*, 3 C. & P. 528.

The rule of the river is, that, if a light vessel is going free, and a loaded vessel is running close-hauled to the wind, it is the duty of the loaded vessel to keep her course, and of the vessel going free to bear away. *Sills v. Brown*, 9 C. & P. 601.

The general rule of navigation, where two vessels are close-hauled and nearing one another, is that the one on the port tack should give way, and the one on the starboard tack keep her luff; but this rule will not excuse the vessel on the starboard tack not taking other measures to prevent a collision, if circumstances render them necessary. *The Lady Anne*, 15 Jur. 18.

A barque held solely to blame for causing a collision off the Lizard, for not giving way upon a dark night to a small schooner, close-hauled to the wind on the starboard tack under close-reefed sails. *Mackay v. Roberts*, 9 Moore, P. C. C. 357.

When two vessels are approaching each other, nearly on the same course, and both have the wind free, each vessel is bound to port her helm and run to starboard of the other; but when one vessel is close-hauled, the running ship (the vessel that has the wind free) is bound to make way for the close-hauled ship. *The Chancellor*, 14 Moore, P. C. C. 202; 4 L. T. 627.

The 14th article of the Sailing Regulations for Preventing Collisions at Sea provides, *inter alia*—(a) A ship which is running free shall keep out of the way of a ship which is close-hauled; (c) when both are running free, with the wind on different sides, the ship which has the wind on the port side shall keep out of the way of the other; (e) a ship which has the wind aft shall keep out of the way of the other ship. A collision took place in January, 1881, between two sailing vessels, the P. and the S., which were crossing. The court having come to the

conclusion, upon conflicting evidence, that the S., though not strictly "close-hauled," was not "running," and that she was "free" at most two points, the wind being at farthest on her beam, while the wind was at most on the quarter of the P., almost certainly not more than three points from her course, and in all probability more nearly "aft":—Held, that the S. was "close-hauled," and that the P. had the wind "aft," both within the meaning of the article, and that the P. was therefore bound to have kept out of the way of the S., and was solely to blame for the collision. If the wind be at any less angle than forty-five degrees with the line of a vessel's keel, it is a wind "aft" within the article. *The Privateer*, 9 L. R., Ir. 105—C. A.

—**Foreign Vessel.**—Where a foreign vessel, close-hauled on the starboard tack, approaches another vessel at night, she is bound to keep her course. *The Cleaddon*, Lush. 158; 4 L. T. 157; 14 Moore, P. C. C. 92.

Tacking or Wearing.—When a vessel is sailing upon a wind, and passes from one tack to another, the usual and ordinary mode of effecting this change is by tacking, and not by wearing; as vessels which are navigating near the one which is changing her tack, naturally expect that the ordinary method of going about will be pursued, the usual, and, therefore, unexpected operation of wearing ought not to be resorted to, unless for some good reason, nor without sufficient sea room for the purpose. *The Falkland*; *The Navigator*, 1 Moore, P. C. C., N. S. 379; B. & L. 204; 9 Jur., N. S. 1113.

Vessels Crossing or Overtaking.—Semble, that where two ships are on converging courses, with the difference of a point and a half, the one having the other on her quarter four or five points abaft the beam, they are crossing ships, and not within the overtaking rules. *The Breadalbane*, 7 Adm. D. 186; 4 Asp. M. C. 505; 46 L. T. 204.

There is no fixed rule as to when a ship is to be considered as crossing or overtaking, but the question must be decided from the circumstances of each particular case. *The Peckforton Castle*, 8 Adm. D. 11; 47 L. J., Adm. 69; 38 L. T. 816; 26 W. R. 346—C. A.

A collision occurred in the daytime between two port-tacked vessels. One of such vessels had the wind free and the other was close-hauled. The vessel which had the wind free was being overtaken by the close-hauled vessel, and there was a difference of four points between the direction of their heads. The collision occurred by the close-hauled vessel from leeward striking the starboard beam of the vessel which had the wind free. At the hearing of an action of damage brought for the recovery of the damage sustained in the collision:—Held, first, that the 12th article of the Regulations for Preventing Collisions at Sea was applicable to the case. *Ib.*

Held, secondly, that the vessel with the wind free ought to have ported her helm in time or to have taken whatever steps were necessary to avoid the collision. *Ib.*

Vessels Crossing or Meeting.—Collision by two sailing vessels crossing and having the wind on opposite sides:—Held, that by the 12th article,

the vessel on the port side was bound to get out of the way of the vessel on the starboard side, unless she had the wind free. *The Constitution*, 2 Moore, P. C. C., N. S. 453; 10 Jur., N. S. 831; 10 L. T. 894.

When two vessels are approaching, one heading N.N.E. $\frac{1}{2}$ E., and the other S.W. $\frac{1}{2}$ W., they are crossing and not meeting. *The Henry*; *St. Cyran*, 12 W. R. 1014.

A ship and a barque were both on the port tack. The barque was the windward vessel, and had the wind three points free. The ship was close-hauled, and when first sighted by the barque was approaching her on her lee beam:—Held, that the ships were crossing each other, and that it was the duty of the barque, being the windward vessel, to get out of the way of the other. *The Franconia*, 2 Adm. D. 8; 35 L. T. 721; 25 W. R. 197—C. A.

Luffing.—A close-hauled vessel is justified in luffing so as to bring her, after she has sighted another vessel, as close to the wind as she can get so as to remain under command, and such luffing is not a deviation from her course that will relieve the other vessel, having the wind free, from the duty of getting out of her way. *The Marmion*, 27 L. T. 255—P. C.

When a ship close-hauled is bound to keep her course, luffing as close to the wind as she can without losing headway, is not a deviation within Article 18 of the Regulations for Preventing Collisions at Sea, such as will render her liable for a collision with another vessel, whose duty it is to keep out of her way. *The Aimé*, *The Amelia*, 29 L. T. 118; 21 W. R. 707—P. C.

When it is the duty of a ship to keep out of the way of another, but she is unable to do so by reason of being disabled in a former collision, and the other ship, being unaware of her disabled condition, continues her course, under Article 18, a collision ensuing is the result of inevitable accident. *Ib.*

Beating to Windward on the same Tack.—Two vessels, which had been sailing in company, were beating to windward. They were both close-hauled on the same tack, the one ahead and a little to the windward of the other. The leading vessel stood in as near as she could to a shoal, and was then obliged to go about. The other vessel kept her reach. The two vessels came into collision:—Held, that it was the duty of the following vessel to have gone about at the time she saw the leading vessel go about; and that, as the collision was occasioned by the following vessel neglecting to go about at the proper time, she was to blame for the collision. *The Priscilla*, 3 L. R., Adm. 125; 23 L. T. 566.

Ship in Stays.—When a port-tacked vessel has thrown herself into stays and becomes helpless, she ought nevertheless to execute any practicable manœuvre in order to get out of the way of a starboard-tacked vessel. *Wilson v. Canada Shipping Company*, 2 App. Cas. 389; S. C., nom. *The Lake St. Clair v. The Underwriter*, 36 L. T. 155—P. C.

A starboard-tacked vessel, when apprised of the helpless condition of a vessel which by the ordinary rule of navigation ought to get out of her way, is bound to execute any practicable manœuvre which would tend to avoid a collision. *Ib.*

Both vessels were held to blame for the collision. *Id.*

A vessel proceeding in a cause of collision and alleging herself to have been in stays at the time of the collision, and therefore helpless, is bound to prove in the first instance that such was the fact. The burden of proof then shifts, and the other side must shew that the collision was occasioned by the vessel proceeding being improperly put in stays or was an inevitable accident. *The Sea Nymph*, Lush. 23.

f. Sailing Vessels and Steamers.

Sailing Vessel meeting Steamer.—A sailing vessel, meeting a steamer, is bound to keep her course, and it is not the rule of the road that she should port her helm on nearing the steamer, such a deviation from the rules being allowed only under circumstances of immediate danger. *The Norma*, 35 L. T. 418—P. C.

— **Sailing Vessel Close-hauled.**—A vessel, sailing on the starboard tack very near the wind, met a steamer. The vessel did not put her helm to port, and a collision ensued. In an action by the owner of the vessel against the owner of the steamer, evidence was given of negligence on the part of the crew of the steamer. It was contended that he could not recover, as, by 17 & 18 Vict. c. 104, s. 296, his vessel should have put her helm to port. The judge left it to the jury to say whether the vessel was close-hauled on the starboard tack, and whether she would have lost command by putting her helm to port; intimating his own opinion as to the facts to be, that a vessel may be close-hauled, though not quite so near the wind as she could lie; and that a vessel going about was not under command:—Held, that the direction was unexceptionable. *Chadwick v. City of Dublin Steam Packet Company*, 6 El. & Bl. 771; 3 Jur., N. S. 207.

A schooner, close-hauled on the starboard tack at night, saw the starboard light and the two towing lights of a steam-tug, three points on her port bow about a mile off. The schooner kept her luff. The steam-tug had a fully-laden ship in tow, and was steaming against a head-wind in the open sea. The steam-tug kept her course until it was too late to get out of the way of the schooner, and the steam-tug and the schooner came into collision:—Held, that the schooner was right in holding her course, and that the steam-tug was alone to blame. *The Warrior*, 3 L. R., Adm. 553; 27 L. T. 101; 21 W. R. 82.

The steamship *Aracan* found at a foreign port the *Syria*, a screw steamship, totally disabled in her machinery; both vessels belonged to the same owner. The captain of the *Aracan*, to protect his employers' interest and earn salvage from the owners of the cargo of the *Syria*, took her in tow, and towed her into the English Channel, and whilst so doing came into collision with a sailing ship close-hauled on the starboard tack. The damage done by the *Aracan* caused the sailing ship to sink, but before she sank the *Syria* ranged up alongside of her and came into contact with her. The *Aracan* first saw the green light of the ship at a distance of three-quarters of a mile, and then, instead of slackening speed or starboarding her helm, attempted to cross the bows of the ship. The ship saw at two miles' distance the *Aracan* and *Syria*, with a

great length of hawser between them, and the red lights of both, and kept her course:—Held, that the *Aracan* was to blame for the collision. *Union Steamship Company v. The Aracan, The American and The Syria*, 6 L. R., P. C. 127; 43 L. J., Adm. 30; 31 L. T. 42; 22 W. R. 927.

A vessel close-hauled on the port tack, in the open sea, and in daytime, and a steamer towing a large ship, were standing so as to cross each other's bows, the steamer being on the lee-beam of the sailing vessel:—Held, that the sailing vessel was to blame for holding her reach, and that the steamer was likewise to blame for taking no measure in time to avoid collision. *The Arthur Gordon and The Independence*, Lush. 270; 14 Moore, P. C. C. 103; 4 L. T. 553; 9 W. R. 587—P. C.

A steamship is bound to give way to a vessel close-hauled, and the vessel close-hauled is not bound to alter her course. *The Savonia*, Lush. 410; 15 Moore, P. C. C. 262; 31 L. J., Adm. 201; 8 Jur., N. S. 315; 6 L. T. 6; 10 W. R. 431.

— **In Thames.**—A steam-vessel was proceeding down the River Thames, close to the Surrey shore, under the management of a licensed pilot, when she came into collision with a barge, which was sailing up the river. In an action for the damage thereby caused against the pilot:—Held, that, according to the real meaning of the 14 & 15 Vict. c. 79, s. 27, and 17 & 18 Vict. c. 104, ss. 296, 297, it was the duty of the pilot to have kept the steam-vessel to the starboard side of, but within, the fairway or midchannel, and when he saw the risk of collision, to port her helm so as to pass on the port side of the barge, and therefore it was properly left to the jury to say, whether, at the time of the collision, the steam-vessel was on the starboard side, and within the fairway or midchannel, and, whatever was the position of the steam-vessel, whether the collision was caused by the negligence of the pilot or not. *Smith v. Voss*, 2 H. & N. 97; 26 L. J., Ex. 233.

Where a steamer ascends a river with a strong current, common prudence requires that she should place herself out of the strength of the current, so as to allow full swing to the descending vessels. *The Smyrna*, 2 Moore, P. C. C., N. S. 435; 10 Jur., N. S. 977; 11 L. T. 74.

Deviation by Sailing Vessel.—A steamer was sighted by a sailing vessel at a sufficient distance to have avoided a collision. The steamer took no steps until the vessels were very near to each other, when she starboarded her helm, and the sailing vessel ported her helm to avoid a collision, which, notwithstanding, took place:—Held, that the steamer was alone to blame, as it was the duty of a steamer to keep out of the way of the sailing vessel, provided she could do it, either by starboarding or porting her helm, and that, on the other hand, it was the duty of the sailing vessel to keep her course, and that she could only be excused from deviating from it by shewing that it was necessary to do so in order to avoid immediate danger. *The Velasquez*, 1 L. R., P. C. C. 494; 36 L. J., Adm. 19; 4 Moore, P. C. C., N. S. 426.

Where Negligence of both Vessels.—In a cause of collision between a sailing ship and a steamer, although the sailing ship may be found

to have been guilty of misconduct, or not to have observed the sailing regulations, yet the steamer will be held culpable if it appears that it was in her power to have avoided the collision. *Inman v. Reck; The City of Antwerp and the Friedrich*, 2 L. R., P. C. 25; 37 L. J., Adm. 25.

It is the duty of a steamer where there is risk of collision, whatever may be the conduct of the sailing vessel, to do everything in her power that can be done consistently with her own safety in order to avoid a collision. *Ib.*

Where a steamer is charged for omitting to do something which she ought to have done, there must be clear proof, first, that the thing omitted to be done was clearly within the power of the steamer; secondly, that, if done, it would in all probability have prevented the collision; and, thirdly, that it was an act which would have occurred to any officer of competent skill and experience in command of the steamer. *Ib.*

Collision in the Atlantic ocean at midnight between a steam ship of unusual size and tonnage and a sailing vessel; the steamer going at a rate of between twelve and thirteen knots an hour; the vessel sailing close-hauled on the port tack, and being two or three miles distant when she first sighted the steamer, instead of keeping her course, ported her helm:—Held, first, that under the 18th art. of the Sailing Regulations of 1863, it was the duty of the sailing vessel to have kept her course without alteration, unless, as provided by Art. 19, the danger of collision was so imminent when the steamer was sighted as to render a departure from the 18th art. necessary to avoid danger, and that she was, therefore, partly to blame for the collision, having contributed to it by porting. *The Great Eastern*, 3 Moore, P. C. C., N. S. 31; 11 L. T. 5.

Held, secondly, that the steamer was to blame, as, even if the sailing vessel had kept her course, from the rate of speed the steamer was advancing a collision was inevitable, it being, under Art. 15, the duty of a steamer meeting a sailing vessel to reverse her engines, slacken her speed in sufficient time, so as, having regard to the state of the weather, as far as possible to avoid a collision. *Ib.*

A collision took place between a sailing ship and a steam ship on a dark night, the wind S.S.E.; the sailing ship steering N.E. by E., the steam ship S.S.W., so that the lights of the sailing ship were seen about four points on the starboard bow. The sailing ship, instead of keeping her course, ported her helm; thereupon the helm of the steam ship was put hard a-port, and her engines were reversed:—Held, that the steam ship was solely to blame for the collision. *The Lady Jocelyn*, 12 Jur., N. S. 965; *S. P.*, *The Una v. The Thomas Lea*, 14 L. T. 834; *The Fruitier v. The Fingal*, 13 L. T. 611.

Overtaking Steamer.—Semble, that the case of a faster sailing vessel overtaking a slower steamer, in the ordinary course of navigation, is governed by Art. 17 and not by Art. 15 of the Regulations for Preventing Collisions at Sea. *The Philotaze*, 37 L. T. 640.

Rate of Speed of Steamship.—An Atlantic steamship proceeding at full speed on a dark night thirty-five miles off the coast of Ireland came into collision with and sank a barque which was sailing in the same course ahead of the steamship. In an action for damages

brought by the owners of the barque:—Held, that, having regard to the state of the night, the position of the coast, and the probability of there being other vessels in the way, the steamship was proceeding at an unjustifiable rate of speed, and that her owners were therefore liable for damages. *The City of Brooklyn*, 1 Adm. D. 276; 24 W. R. 1056—C. A. See also *The Great Eastern*, *supra*.

Coming out of Dock—Exhibition of Lights.—A screw steamship had just come out of the Regent's Canal Dock in the River Thames, about 2 A.M. on a December morning, when she came into collision with a dumb-barge which was drifting up the river with the flood tide, and without having any light exhibited:—Held, that the steamship might, under the circumstances, have kept out of the way of the barge, and that she ought to have done so, and that she was alone to blame for the collision. *The Owen Wallis*, 4 L. R., Adm. 175; 43 L. J., Adm. 36; 30 L. T. 41; 22 W. R. 695.

g. Steamers.

Meeting or Approaching "End on."—Article 16 of the Regulations for Preventing Collisions at Sea only applies when there is a continuous approaching of two ships. *The Earl of Elgin and The Jesmond*, 4 L. R., P. C. 1; 25 L. T. 514; 8 Moore, P. C. C., N. S. 179.

When two vessels are meeting end on, or nearly end on, within the meaning of Article 13, and one of them, at a proper distance, ports her helm sufficiently to put her on a course which will carry her clear of the other, she thereby determines the risk, and is not "approaching another ship so as to involve risk of collision" within the meaning of Article 16, and is not bound to slacken speed or stop. *Ib.*

Vessel porting Helm before reversing Engines.—The K. and V., two large steam vessels, coming in opposite directions, sighted each other at a considerable distance; they ultimately came into collision. The K. alleged that when the two vessels were fast approaching each other the V. improperly changed its course; that the master of the K. could not rely on the V. taking a particular course; that to meet possible contingencies he ordered his engineers to stand to their engines, and almost instantly afterwards gave the order to starboard the helm, which he deemed would prevent or greatly mitigate the collision, and then stopped and reversed the engines. This was not exactly the order required by the regulations, which directed that in such a case the engines should be stopped and reversed. The Court of Admiralty had deemed both vessels to be in fault, and had adjudged accordingly; the Court of Appeal had held the master of the K. to be excused under the circumstances of the case, and had given judgment against the V. On appeal to the House of Lords:—Held, that the statutes and the regulations had not left the master of the K. a discretion in the matter; that he was bound to stop and reverse the engines, and that as he had not done so at the first moment of danger he had disregarded the regulations, and consequently that the K. must be held in part responsible. *Stoomvaart Maatschappij Nederland v. Peninsular and Oriental Steam Navigation Company*, 5 App. Cas. 876;

52 L. J., Adm. 1; 43 L. T. 610; 29 W. R. 173—H. L. (E.).

A foreign steam-vessel, B. O., saw the green and white lights of another steamer (the English steam vessel B. D.) distant about a mile and a half, and a point on the starboard bow. The B. O. ported. The B. D. kept her course, and at the last moment starboarded:—Held, that the B. O. ought either to have kept her course or to have slowed until the precise situation of the other vessel had been ascertained; that the B. O. improperly ported, and was therefore to blame. *The Black Diamond*, 9 L. T. 396; 12 W. R. 219.

—**Starboarding and Porting Helms.**—The statutory rule of port helm, given by 17 & 18 Vict. c. 104, s. 296, applied only to a case when vessels met in opposite directions end on, or nearly so, when the observance of the rule would have made the vessels diverge, so as to pass port side to port side. *The Arthur Gordon and the Independence*, Lush. 270; 14 Moore, P. C. C. 103; 4 L. T. 563; 9 W. R. 582.

—**Onus.**—In a cause of collision between two steam vessels meeting nearly end on in the River Thames, it was alleged by the defendants that the helm of their vessel was put a-starboard to avoid a barge:—Held, that the onus of proving that a departure from the 13th rule was necessary in order to avoid immediate danger lay upon the defendants; and that, in the absence of sufficient evidence to shew what became of the barge, the defendants had failed in their proof, and were, therefore, to blame for the collision, the result of not porting their helm. *The Concordia*, 1 L. R., Adm. 93; 12 Jur., N. S. 771; 14 L. T. 896.

—**Navigating against Tide.**—A steamship navigating the Thames against the tide is always bound to obey Rule 23 of the Thames Conservancy Rules, 1880, and on approaching one of the points there named, to wait until vessels then approaching it with the tide have passed her. Whether vessels are also to observe Rule 22 and pass port side to port side, depends on whether the vessel navigating against the tide is close to the shore when waiting for the one coming down with the tide to pass her, or so far out as to allow the latter to pass port side to port side. The expression "passed clear" in Rule 23 means "passed clear of the waiting ship."—Semble, where the point to be passed is on the north side of the river with a flood tide, or on the south side with an ebb tide, if the vessel navigating with the tide has her green light open when ahead of the vessel waiting, the 23rd rule alone applies, and the vessels will pass clear starboard side to starboard side; otherwise both rules apply. Steamships rounding a point in the River Thames are not bound to stop or reverse engines because at one moment they are approaching a vessel coming in the opposite direction, where there is no risk of collision if both vessels continue the curvilinear courses they are then on. *The Libra*, 6 Adm. D. 139; 45 L. T. 161; 4 Asp. M. C. 429—C. A. See *The Margaret*, 8 Adm. D. 126; 52 L. J., Adm. 65; 29 L. T. 832; 31 W. R. 843.

—**Crossing—Descending River.**—Rule 14 of the sailing and steering rules provides that "If two ships under steam are crossing, so as to in-

volve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other." A steamship in proceeding down a river, and intending to keep her course, in order to round a bend in the river, had her head slightly inclined so as to exhibit her masthead and port light only to another ship, which was proceeding up the river:—Held, that the vessels were not crossing within the meaning of the rule. That the fact that the portlight only of the first ship was seen by the latter was not conclusive evidence that the vessels were crossing; that the relative position of the vessels was not only to be regarded but also the place in which the vessels were situated. *General Steam Navigation Company v. Hedley, The Velocity*, 3 L. R., P. C. 44; 39 L. J., Adm. 20; 21 L. T. 686; 18 W. R. 264; 6 Moore, P. C. C., N. S. 263.

—**Crossing or Overtaking.**—When two steamships, bound in the same general direction, but on courses differing by one point, are steaming one behind the other, and one is overtaking the other, they are not crossing vessels within the meaning of Article 14 of the Regulations for Preventing Collisions at Sea, but the vessel which is behind the other is a vessel overtaking another within the meaning of Article 17, and is bound to keep out of the way of the leading vessel. *The Chanonry and The Leverington*, 42 L. J., Adm. 58; 23 L. T. 284.

When one vessel during the night time is overtaking another within the meaning of Article 17 of the Regulations, although the leading vessel may be in such a position that the following vessel cannot see the regulation lights of the leading vessel, the latter is not bound, under ordinary circumstances, to give a signal, or to shew a light to the following vessel. *Id.*

In a collision cause, where the plaintiffs establish a *prima facie* case that the defendants' vessel was overtaking their vessel within the meaning of Article 17, the onus of shewing excuse for the collision is thrown upon the defendants. *Id.*

Two vessels bearing down at the same time from different directions upon a well-known pilot station to take pilots on board are to be treated as crossing vessels within the meaning of Article 14 of the Regulations for Preventing Collisions at Sea, if their courses, if continued, would intersect; and the fact of their seeking pilots at the same place is not such a special circumstance within the meaning of Article 19 as will take them out of the operation of the rule requiring that the ship which has the other on her own starboard hand shall keep out of the way of the other. *The Ada, The Sappho*, 28 L. T. 825—P. C.

When a vessel is approaching a pilot station to take a pilot, and has, as regards another vessel doing the same thing, the right to keep her course, she has a right to keep sufficient headway on her to give her steerage way, so as to get on her proper course after taking a pilot, and is not bound within Article 16 to stop and reverse. The other vessel is bound to stop and let her take her pilot, or to take some other means of avoiding her. *Id.*

Article 14 of the Regulations for Preventing Collisions at Sea, which provides that "if two vessels under steam are crossing so as to involve risk of collision, the ship which has the other on

her own starboard side shall keep out of the way of the other," is not to be construed so that "keeping out of the way" means in all cases porting; a vessel may within the meaning of that article keep out of the way by stopping, or by going ahead, or by starboarding, or by porting, or by going astern, as the circumstance of the case may require. *The Norr*, 30 L. T. 576—P. C.

As a general rule wherever two steamships are on converging courses, the one abaft the beam of the other in such a position that the hinder ship cannot see the side lights of the leading ship, the former, if going at a greater speed than the latter, is to be considered as a vessel overtaking another vessel, within the meaning of Article 17 of the Regulations for Preventing Collisions at Sea, and bound to keep out of the way; and they are not to be treated as crossing vessels under Article 14. *The Franconia*, 2 Adm. D. 8; 35 L. T. 721; 25 W. R. 197—C. A.

Where one steamship is overtaking another within the meaning of Article 17 of the Regulations, and there is risk of collision, the leading ship is not to be considered as approaching another ship so as to involve risk of collision within the meaning of Article 16, and is not bound to slacken speed, or stop and reverse. *Id.*

Look-out.—A steamer, with sails up, running through a roadstead ought, even by daytime and in fine weather, to have a man on the look-out besides the captain on the bridge. *The Glannibanta, The Transit*, 1 Adm. D. 283; 34 L. T. 934; 24 W. R. 1033—C. A.

There ought to be two look-outs on the bowsprit. *The Germania*, 21 L. T. 44—P. C.

Unless there is apparent danger, it is not the duty of a vessel ahead to look out for, or shew a light to, vessels following in her wake, so as to make her guilty of contributory negligence in the event of a collision between her and one of such vessels. *The City of Brooklyn*, 1 Adm. D. 276; 24 W. R. 1056—C. A.

Changing Course.—The steamship *Esk* was going down the Thames while the steamship *Niord* was coming up. The *Esk* was coming round a point on a port helm. As the vessels approached each other, the *Niord* first ported her helm, and then put it hard a-port, till she had paid off about five points. The *Esk*, on seeing this manœuvre of the *Niord*, stopped, and reversed her engines, and put her helm hard a-starboard. The result was a collision:—Held, that the *Esk* was solely to blame for the collision; since, dealing with the question as one of general navigation, the *Esk* was in fault, either in not discovering, from insufficiency of the outlook, the course that the *Niord* was taking, or in failing, from some other cause, to port her helm as she ought to have done. *The Esk and The Niord*, 3 L. R., P. C. 436; 24 L. T. 167; 7 Moore, P. C. C., N. S. 276.

The decision in the *Velocity* (*supra*) does not justify one of two vessels (which would go clear of each other if each held her own course) in crossing the course of the other, since such an act would be a violation of the "Regulations for Preventing Collisions at Sea." But vessels are generally free to pass from one side of the mid-channel to the other. *Id.*

Where two steamships are navigating open waters, such as the English Channel, some miles

from land, one has no right to assume that the other will at a given time or place alter her course and take another course up or down channel, but the former must, as the other ship approaches, take such measures as are required by the regulations in reference to the course upon which such other ship actually is. *The Franconia, supra.*

Art. 21.—Narrow Channel.—What is.—The Strait of Messina is a narrow channel within the meaning of Article 21 of the Admiralty Regulations for Preventing Collisions at Sea; as to what particular width or length will constitute a narrow channel, quære:—Held, that the A. L. by infringing the said article occasioned the collision which afterwards happened, and failed to establish that the R. by anything which she did contributed to it or could in any way have avoided it. *Scicluna v. Stevenson, The Rhondda*, 8 App. Cas. 549; 49 L. T. 210—P. C.

Held, that the R.'s helm having been put hard a-port in a way which if successful would have put her on such a course as would have determined the risk of collision, the duty of reversing her engines did not arise till it was discovered that the vessel, owing to the action of a current, was not obeying her helm. *Id.*

Foreign Steamer.—A foreign vessel navigating the Solent, is bound by the ordinary rules of the sea, that a steamship is to be treated as a vessel having the wind free, and is bound to give way to a vessel close-hauled. *The Saxonia*, 15 Moore, P. C. C. 262; Lush. 410; 31 L. J., Adm. 201; 8 Jur., N. S. 315; 6 L. T. 6; 10 W. R. 431.

h. Speed.

Excessive.—Steamers.—An Atlantic steamship proceeding at full speed on a dark night thirty-five miles off the coast of Ireland, came into collision with and sank a barque, which was sailing in the same course with itself. In an action for damages brought by the owners of the barque:—Held, that, having regard to the state of the night, and the probability of there being other vessels in the way, the steamship was proceeding at an unjustifiable rate of speed. *The City of Brooklyn*, 1 Adm. D. 276; 24 W. R. 1056—C. A.

A steamer going ten knots an hour on a dark night up the Horse Channel, at the entrance of the Mersey, saw a sail three points on her port bow, less than half a mile distant. She ported her helm, but did not ease her engines:—Held, that the steamer was in fault for the collision which ensued, for not having stopped or eased her engines when she made out the other vessel, and that maintaining such a rate of speed was unwarrantable. *The Despatch*, Swabey, 138.

— **In Fog.**—*See ante*, col. 1549.

Excuse.—Carrying Mails.—It is no excuse for a vessel steaming at the rate of twelve knots, on a dark night, through a fair way, where vessels are accustomed to anchor, that she was under contract to carry government mails at the rate of thirteen knots. *The Vivid*, Swabey, 88.

— **Position of Peril.**—A steamship, approaching another vessel, so as to involve risk

of collision, may be justified in keeping her engines going full speed ahead, where she is placed in a position of danger by the neglect of the other vessel to exhibit one of her lights whilst shewing the other. *The Benares*, 5 Asp. M. C. 53; 48 L. T. 127. Affirmed, 9 Adm. D. 16; 32 W. R. 268—C. A.

Crowded Channel.—A steamship, proceeding at an improper rate in a channel crowded with ships, incurs the responsibility of damage occasioned by her being unable to obey the direction that, on risk of a collision, it is the duty of the steamship to keep out of the way of the sailing vessel. *The Germania*, 21 L. T. 44—P. C.

Fog Signals.—Although it is incumbent on steamships (notwithstanding their desire to make all progress) to slacken speed so as to avoid every possible collision, yet this necessity does not in any way relieve sailing ships from the duty of keeping a sharp look-out, and sounding such fog signals and bells as the provisions of the statute direct. *The North American v. The Wild Rose*, 14 L. T. 68.

Fishing Ground.—In the case of a cutter with her trawl down, and a ship under sail, the presumption is against the latter sailing at six and a half knots on a very dark night, and aware that she was crossing a fishing-ground. *The Pepperell*, Swabey, 12.

Causing Swell.—A large steamer, in the charge of a licensed pilot, in proceeding up the Pool at nearly high tide, and at a speed dangerous to small craft, caused such a swell that a barge laden with coals was sunk:—Held, first, that upon the evidence no blame or negligence was attributable to the barge. *Netherlands Steamboat Company v. Styles*, 9 Moore, P. C. C. 286.

Held, secondly, that the steamer was to blame, as the swell which sunk the barge was attributable to the speed at which she was going. *Ib.*

Held, thirdly, that the steamer was to blame, (a), in not having kept a good look-out, as she might and ought to have seen the swell and the barge in time to avoid the accident; and (b), that the pilot was solely to blame in not checking the speed or stopping the steamer. *Ib.* See also *Luxford v. Large*, 5 C. & P. 421, *ante*, col. 1537.

1. Tugs and Towing.

Vessels in Tow.—A vessel in tow of a tug, and the tug towing, is to be considered as one vessel, for the conduct of which the vessel towed is responsible. *The Cleaddon*, 14 Moore, P. C. C. 92; Lush. 158; 4 L. T. 157.

The duty of a steam-tug, with a vessel in tow at night, is to avoid other vessels. *Ib.*

A foreign vessel meeting another vessel is not governed by the Admiralty regulations, but by the rule of the sea. *Ib.* See 25 & 26 Vict. c. 63, ss. 57, 58.

But a British ship in tow of a steam-tug, meeting a foreign ship at night, is governed by the Admiralty regulations. *Ib.*

A steam-tug with a vessel in tow is not a free steamer, and bound, under all circumstances, to give way to a sailing vessel close-hauled. *Ib.*

The steamship Aracan found at a foreign port

the Syria totally disabled in her machinery; both vessels belonged to the same owner. The captain of the Aracan took the Syria in tow, and, whilst so engaged, came into collision with a sailing ship. The damage done by the Aracan caused the sailing vessel to sink, but before she sank the Syria ranged up alongside of her and came into contact with her:—Held, that having regard to the exceptional circumstances under which the towing was undertaken, the governing as well as the motive power being wholly with the Aracan, the Syria was not liable to be condemned in damages occasioned by the collision. The Syria could not be deemed, in intentment of law, to be one vessel with the Aracan, or liable for her negligence. *Union Steamship Company v. The Aracan, The American and The Syria*, 6 L. R., P. C. 127; 43 L. J., Adm. 30; 31 L. T. 42; 22 W. R. 927.

A steam-tug in charge of a ship cannot be considered as a free steamer, so as to be bound, under all circumstances, to give way to a sailing ship close-hauled. *The Arthur Gordon and The Independence*, Lush. 270; 14 Moore, P. C. C. 103; 4 L. T. 563; 9 W. R. 587—P. C.

The doctrine that a tug is liable for an injury to the tow, unless the tug can shew that she was not in fault, applies exclusively to cases of injury resulting from the violation or neglect of some duty coming within the scope of the duties devolving upon that class of employment. *The Tug Stranger*, 24 L. T. 364.

Whilst being towed by a tug a schooner sheered out of the course and struck upon a sunken rock:—Held, that it was the duty of the tow to follow directly in the course of the tug, and that the tug, therefore, was not liable for damages resulting from the accident. It is no part of the duty of the tug to take precautions against the sheering of the tow; but if the tow sheers in consequence of a manœuvre of the tug, and thereby sustains damage, the tug is liable. *Ib.*

The court has jurisdiction on claim for damage done by a vessel in tow of a steam-tug, through the misconduct of the steam-tug; the steam-tug, having been the causa causans of collision, is liable for the damage. *The Night Watch*, 8 Jur., N. S. 1161; 7 L. T. 396; 11 W. R. 189. See also cases *ante*, col. 1555.

Vessel Towed in Charge of Pilot.—When a steam-tug is engaged to tow a vessel which is in charge of a pilot, the tug is bound to obey the orders of the pilot, and the pilot is bound to give the tug proper directions and to superintend her navigation. *The Energy*, 3 L. R., Adm. 48; 39 L. J., Adm. 25; 23 L. T. 601; 18 W. R. 1009.

Where a ship in charge of a pilot, whose employment is compulsory, is being towed by a steam-tug, and the steam-tug, without waiting for orders from the pilot, suddenly adopts a wrong manœuvre, and so causes the ship to come into collision, the owners of the ship are responsible. *The Singuari*, 5 Adm. D. 241; 50 L. J., Adm. 5; 43 L. T. 768.

Where a vessel is under the charge of a licensed pilot, the employment of whom is compulsory, and is at the same time in tow of a steam-tug, the latter is bound to obey the orders of the pilot. *Spaight v. Tedcastle*, 6 App. Cas. 217; 4 Asp. M. C. 406; 44 L. T. 589; 29 W. R. 761—H. L. (E.).

When a steam-tug towing a vessel under

a towage contract is so negligently navigated as to come into collision with a vessel belonging to third parties, the owners of the steam-tug are liable for the damage done, even if at the time of the collision the vessel in tow was in charge of a licensed pilot, by compulsion of law, whose default solely occasioned the collision. *The Mary*, 5 Adm. D. 14; 48 L. J., Adm. 66; 41 L. T. 351; 28 W. R. 95.

A steam-tug towing a sailing ship controls the course of both vessels so long as no directions are given by the person in charge of the ship in tow. The steam-tug is the moving power, but it is under the control of the master or pilot on board the ship in tow. *Smith v. St. Lawrence Two-boat Company*, 5 L. R., P. C. 308; 28 L. T. 885; 21 W. R. 569.

When a ship in tow of a steam-tug, and in charge of a licensed pilot who has the control over and directs the course of both vessels, is navigating a river in a fog so dense that the banks of the river cannot be seen, and those on board the tug and ship in tow do not know in what direction they are going, it is negligence on the part of both vessels to proceed; but as it is the duty of the pilot in charge to give orders to the tug to stop so as to enable the ship in tow to come to an anchor, the neglect on the part of the pilot to give such orders is contributory negligence, which will preclude the owners of the sailing ship from recovering against the owner of the steam-tug for negligently running the sailing ship ashore by proceeding during the fog. *Ib.*

It is a want of due caution to move, by means of a steam-tug, a ship from one dock to another at night time; under such circumstances, a pilot on board the ship being towed has no such charge or control over her movements as to exculpate the owners. *The Borussia*, Swabey, 94.

Duty with regard to Tow-ropes, &c.]—It is the duty of a ship towed by another to follow exactly all her manœuvres. *The Jane Bacon*, 27 W. R. 35.

When a ship is being towed in a sea where other vessels are likely to be met, it is her duty to have the means of immediately slipping or cutting the tow-rope. *Ib.*

It is the duty of a ship towing another to keep a look-out for both. *Ib.*

A sailing vessel in danger from a steamship towing another vessel should do what she can to prevent an accident, though the fault is entirely that of the other ship. *Ib.*

Under supposed Compulsion of Foreign Orders.]—The *Ticonderoga*, under charterparty to the French government, was towed by a steamer athwart the hawse of the *Melampus*. The *Ticonderoga* alleged that she was not liable for the damage done, as her charterparty obliged her to obey orders, and put herself in tow of the steamer:—Held, that such obligation was no compulsion, so as to lay the ground for exemption from liability for damage done; as it arose from a voluntary stipulation entered into by the owners themselves. *The Ticonderoga*, Swabey, 215.

Tug Hove-to in Fairway.]—A steam-tug hove-to during fine weather in a fairway and waiting for employment, is bound to keep out of the way of sailing ships using the fairway. *The Jennie S. Barker, The Spindrift*, 4 L. R., Adm. 456; 44 L. J., Adm. 20; 33 L. T. 318.

Lights—Sailing Vessel Towing Another.]—A brigantine with a cutter towing astern came into collision with another brigantine, in the Bristol Channel, after dark. Both brigantines had the regulation side-lights exhibited, but the cutter had only a white light exhibited at her masthead, and the brigantine towing the cutter was sailing close-hauled on the starboard tack, whilst the brigantine which came into collision with her was going free:—Held, that the "Regulations for Preventing Collisions at Sea" had been infringed by the cutter, and that the vessel towing her was to be deemed in fault for the collision by virtue of the provisions of the 17th section of the Merchant Shipping Act, 1873. *The Mary Hounsell*, 4 Adm. D. 204; 48 L. J., Adm. 54; 40 L. T. 368.

Claim to Indemnity by the Owners of Defendant's Vessel against Owners of the Tug towing the Vessel.]—In an action of damage between two vessels, the court has jurisdiction, under Ord. XVI., to determine whether or not the defendants' vessel is entitled to indemnity against a tug by which she was being towed at the time of the collision. A collision took place between the vessels S. and C. The C. at the time was being towed by a tug. The owners of the S. instituted an action of damage against the C., and alleged in their statement of claim that the collision was caused by the negligence of the C. and her tug, or of one of them. The owners of the C. obtained leave to issue a notice to the tug that they claimed to be entitled to indemnity, and the court made an order that the owners of the tug be at liberty to appear and defend, being bound by any decision the court might come to as to the cause of the collision. At the hearing the owners of the tug appeared, but the defendants did not, and the court pronounced that the C. was alone to blame for the collision, and that her owners were not entitled to indemnity over against the owners of the tug:—Held, on motion on behalf of the owners of the C. to rescind so much of the judgment as pronounced that the owners of the C. were not entitled to indemnity, that the court had not exceeded its jurisdiction. *The Cartburn*, 5 Adm. D. 35; 49 L. J., Adm. 14. But this portion of the judgment was struck out on appeal, 5 Adm. D. 59; 41 L. T. 710; 28 W. R. 378—C. A.

j. Vessels Entering or Leaving Dock.

When a vessel enters docks with the permission and under the general directions of the dock-master, and within the space over which his authority by statute extends, they who are on board of her are bound to use diligence and care to carry out the directions of the dock-master in such a manner as to avoid doing damage to other vessels. *The Cynthia*, 2 Adm. D. 52; 46 L. J., Adm. 58; 36 L. T. 184.

A steamship, under the directions of the dock-master, and within the limits of his jurisdiction, when entering the St. Katharine docks, came into collision with two barges, and drove them against a steamship lying alongside the wharf, which steamship crossed a skiff and sunk it. In the City of London Court, where a cause of damage was instituted, it was found by the judge as a fact that the steamship was not liable for the damage to the skiff, because she was bound by statute to obey the dock-master, and

could not do anything but under his orders. The owner of the skiff appealed, and the court held that the master contributed to the damage by negligence in carrying out the orders of the dock-master, and therefore that the steamship was liable for the damages proceeded for. *Ib.*

A vessel leaving dock with a pilot on board, and within the space over which the dock-master's authority extends by statute, is responsible for damage resulting from the use of a tug of insufficient power by her master, even when such tug is in the general employment of the dock company, there being no obligation on the dock company to supply a tug. *The Belgio*, 35 L. T. 929—C. A.

It is a want of due caution to move, by means of a steam-tug, a ship from one dock to another at night time; under such circumstances, a pilot on board the ship being towed has no such charge or control over her movements as to exculpate the owners. *The Borussia*, Swabey, 94.

k. Vessels Moored, Anchored, or Aground.

Vessel Moored.]—During a very violent gale a brig adrift in the Tyne drove down on a steamer which was lying properly moored to mooring-buoys placed there by the harbour authorities. On the brig striking the steamer, the ring of one of the buoys was carried away, and the steamer got adrift and drove down the river, and ultimately came in contact with and did damage to a barque, whose owners instituted a cause of damage against the steamer in the county court, to recover for the damage done to their vessel by the steamer. At the hearing it was proved that the chain cables of the steamer had been unbent at the time she got adrift, and that no look-out had previously been kept on deck, though it was known that the weather was getting worse:—Held, that a defence of inevitable accident, set up by the owners of the steamer, was not sustained, and that the steamer was alone to blame for the collision. *The Pladda*, 2 Adm. D. 34; 46 L. J., Adm. 61.

— In Port.]—A vessel in port was moored to a buoy, the use of which was sanctioned by the authorities, and, a storm being expected, she also had her anchor ready to drop. The mooring buoy broke and the vessel drifted. She attempted to cast anchor, but was prevented by inevitable accident. She came into collision with another vessel which was properly moored:—Held, that the first vessel had not contributed by negligence to the collision. *Doward v. Lindsay*, *The William Lindsay*, 5 L. R., P. C. 338.

When the authorities of a port permit vessels to moor, take in and discharge cargo at a certain buoy, it must be assumed that they sanction the use of the buoy and treat it as a proper and sufficient mooring-place. *Ib.*

A yacht was intrusted to yachting agents for sale, and, by their servants, moored in the winter season without striking her top gear, whereby, on a gale occurring, the yacht drifted and fouled another yacht:—Held, that she was liable in a proceeding in rem in the Court of Admiralty. *The Ruby Queen*, Lush, 266.

Improper Moorings.]—A clipper-built ship has no right to place herself in such a berth as would make it inevitable that she must take the ground on an ebb tide, to the probable risk of

other vessels moored in the vicinity. *The Indian v. The Jessie*, 12 L. T. 586.

Where two ships come into collision, and the main allegations to be sustained or disproved are, that the collision occurred through one of the ships being improperly moored, or from her having an insufficient or improper look-out, the burden of proof (or, rather, of disproving such allegations) lies upon the ship so accused. *The John Harley v. The William Tell*, 13 L. T. 413.

The proximate cause of collision was the breaking of a steamer's port cable while mooring:—Held, that the steamer was to blame, for if she had not delayed taking measures for mooring till so late at night, the collision would not have been inevitable. *The Egyptian*, 1 Moore, P. C. C., N. S. 373; 9 Jur., N. S. 1159; 8 L. T. 776.

Vessel Aground.]—When a steamer coming up a river during a high spring tide and late at night, after passing a schooner also coming up the river, took the ground, and whilst aground was subsequently run into by the schooner:—Held, that even assuming the steamer to have been 300 yards ahead when she grounded, it was not the duty of the schooner, under the circumstances, to have dropped her anchor, with the view of avoiding the collision, and that the steamer was solely to blame. *The Elizabeth, The Adalia*, 22 L. T. 74.

— Absence of Crew.]—In an action for the negligence of the defendant's servants in managing a barge so that the plaintiff's barge was run down, the plaintiff will not be entitled to recover if the accident could have been avoided, but for the negligence of the plaintiff's own men in not being aboard his barge at the time when it was lying in a dangerous place. *Leech v. Seward*, 4 C. & P. 106.

— Whilst being Towed.]—A vessel while being towed into a harbour by a steam-tug, got aground, and the defendant's vessel, which was being towed in at the same time by the same tug, astern of the plaintiff's vessel, without any active default on the defendant's part, struck and damaged the plaintiff's vessel:—Held, no evidence of negligence for which the defendant was liable. *Harris v. Anderson*, 14 C. B., N. S. 499.

Position of Vessels in Rivers at Night-time.]—By the general maritime law those in charge of a vessel aground at night in the fairway of a navigable channel are bound to take proper means to warn others of her position. *The Industry*, 3 L. R., Adm. 303; 40 L. J., Adm. 26; 24 L. T. 446; 19 W. R. 728.

Anchoring.]—The proximate cause of a collision was the breaking of the cable of a vessel as she was taking steps for the purpose of mooring for the night. The vessel was secured by the cable to a single anchor:—Held, that the vessel was to blame for placing herself at single anchor in a position where, if the slightest accident arose to interrupt or embarrass a manœuvre, it was almost impossible to avoid a collision. *The Egyptian*, 1 Moore, P. C. C., N. S. 373; 9 Jur., N. S. 1159; 8 L. T. 776.

Vessels A. and B. coming into collision while B. is at anchor, the burden of proof is upon A.

to account for the collision, and the burden is not shifted by the fact that at such time A. was drifting in consequence of a prior collision. *The Annapolis*, 5 L. T. 326; *S. P.*, *The George Arkle*, 4 L. T. 290.

Lights on Vessels Anchored.—See **LIGHTS**, ante, col 1541.

1. Foul Berth.

Liabilities and Duties.—If one ship has given another a foul berth, the owners of the ship giving the foul berth have no right to demand that extraordinary precaution should be taken on board the other ship to avoid a collision. *The Vivid*, 42 L. J., Adm. 57; 29 L. T. 375.

The Victor gave the Vivid a foul berth, and the Vivid, in swinging, came into collision with and damaged the Victor. The usual and ordinary precautions had been taken on board the Vivid:—Held, that the Vivid was not answerable for the collision. *Ib.*

The W. A. in charge of a pilot came to anchor in the Mersey, and gave the B. T. a foul berth. Various remonstrances were from time to time made by those on board the B. T., and after a few days the vessels, in swinging to the tide, came into collision:—Held, that the owners of the W. A. were liable. *The Woburn Abbey*, 38 L. J., Adm. 28; 20 L. T. 621.

One ship brought up during a gale in a fair berth in the Downs, and another ship coming up, anchored within a cable's length of her, riding at one anchor. The gale increasing, drove both ships from their anchors, when the last ship came into collision with the first ship, so that the first ship had to be taken to the roads in a sinking state and beached:—Held, that the ship last coming up was solely liable for the collision, from having given the first ship a foul berth in riding so close to her at single anchor. *The Maggie Armstrong v. The Blue Bell*, 14 L. T. 340.

B. took up a berth in the Tyne, with the view of discharging cargo. C. took up a berth close alongside, and, as the tide fell, heeled over upon B., and damaged her:—Held, that C. was responsible for the damage so received by B. *The Lidaskjalf*, Swabey, 117.

m. Carrying Rams or other Dangerous Instruments.

Liabilities and Duties.—When a ship carries a latent instrument dangerous to others, those who have control of it are bound to take all reasonable precautions that it shall not cause damage to others. *H. M. S. Bellerophon*, 44 L. J., Adm. 7; 32 L. T. 412.

Where one of the Queen's ships carries under her bows below water a ram, not ordinarily dangerous to vessels navigating the seas, but dangerous to vessels coming in contact with it, and the officer in charge of the ship has, under the circumstances, reasonable ground for supposing that the ram will occasion damage to another (friendly) ship, and has reasonable means and opportunity of warning the other ship of the danger so as to enable her to avoid it, although the other ship has in the first instance been guilty of negligence, whereby she has occasioned the necessity for giving notice, it is the duty of the officer in charge of the Queen's

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ship to give notice to the other ship; but if there is no reasonable ground for apprehending danger, and no reasonable opportunity for giving the notice, there is no obligation to give the notice. *Ib.*

n. Launching Vessels.

Liabilities and Duties.—It is the duty of those who launch a vessel to do so with the utmost precaution, and to give such notice as is reasonable and sufficient to prevent injury happening to other vessels from the launch, and the burden of proving that these things have been done lies upon them. What is reasonable and sufficient notice depends upon local circumstances; the size and breadth of the river or waters in which the launch takes place, the amount of shipping, and other like matters. *The Glengarry*, 43 L. J., Adm. 37; 30 L. T. 341.

When in launching a vessel in a river the usual precautions taken in that river have been taken, and the usual general notice that the launch was about to take place has been given, the persons having charge of the launch have performed all they are required to do by law, and no specific notice of the exact moment of the launch is required. *Ib.*

A tug steamer, when being launched in the River Tyne, ran stern foremost into the starboard side of a steamer passing down the river, and negligently being at that place:—Held, notwithstanding the steamer's negligence, the tug might, by ordinary care, such as giving a signal before launching, have avoided the consequences of such negligence, and therefore, both being to blame, half the damage only was payable by the tug. *The United States*, 12 L. T. 33—P. C.

A river, being a public thoroughfare, must, as a rule, be kept open and free from danger for all ships navigating thereon. *The Vianna*, Swabey, 405.

On the occasion of a ship's launch, those in charge of the launch are bound to give the customary notice; if there is no custom, then reasonable notice. *Ib.*

A party launching must prove that such notice was given. *Ib.*

Vessels navigating a river are bound to observe reasonable signals of an intended launch. *Ib.*

— Custom in the Mersey.—In the River Mersey, to give notice of a launch taking place, it is customary to have the ship dressed in flags for an hour or more before high water (about which time the launch takes place); to have tugs, one at least also dressed in flags, plying about some time before the launch in front of the yard where the ship is lying; and there are usually a number of small boats lying off ready to pick up timber when the ship comes away. *The Glengarry*, supra.

When a vessel is launched in a river, the law casts upon the persons in charge of the launch the obligation of conducting the launching operations with the utmost precautions, and of giving such notice as is reasonable and sufficient to prevent any injury to passing vessels. *The Andalusian*, 2 Adm. D. 231; 46 L. J., Adm. 77.

The Angerona proceeding down river in tow of a tug, came into collision with the Andalusian, which was being launched from a ship-building yard. The yard had not been in use

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for some time. The Andalusian was properly decorated, but gave no other warning to vessels passing during the launch:—Held, that the Andalusian was alone to blame. *Ib.*

Persons in charge of a launch are bound to take the utmost precautions to avoid injury to passing vessels, such precautions being in the circumstances no more than are reasonable. It is their duty to have a tug in attendance on a launch in the Mersey, decorated so as to indicate that a launch is imminent, and if necessary to warn approaching vessels. *The George Roper* or *Steamship Bentinck Company v. Potter*, 8 Adm. D. 119; 52 L. J., Adm. 69; 49 L. T. 185; 31 W. R. 953.

A vessel in the Mersey was warned out of the way on the occasion of a launch; but though the pilot on board was aware of the approaching launch he delayed moving his vessel. The launch was postponed as long a time as was prudent, took place, and sank the vessel:—Held, that the owners of the vessel had taken every possible precaution, and were not to blame. *The Cuchapel*, 7 Adm. D. 217; 46 L. T. 171; 4 Asp. M. C. 502.

c. In the Thames.

Navigation of the Thames.—It is the general practice for steam vessels going down the River Thames to keep on the north side. If, therefore, a vessel rounding a bend on the north side, under a port helm, on her way up the river, sees the red light of one rounding the same bend on her way down, over her starboard bow, and nearer the north side than she is herself, she is not justified in supposing that the vessel coming down will cross her north, and pass her on her port side. *Malcomson v. General Steam Navigation Company, The Ranger and The Colgne*, 4 L. R., P. C. 519; 27 L. T. 769; 21 W. R. 273; 9 Moore, P. C. C., N. S. 352.

Vessels, under these circumstances, are not crossing vessels within the meaning of the 14th article of the steering and sailing rules. *Ib.*

When a steamer is going up Greenwich Reach, and sights, two points on her starboard bow, the red lights of another steamer coming down the reach along the north shore, the vessel going up being farther to the southward of the channel than the vessel coming down, the two vessels are not to be considered as crossing vessels, within the meaning of Art. 14 of the Regulations for Preventing Collisions at Sea. The vessel going up the river has no right to suppose that the vessel coming down is crossing from one side of the river to the other, but is bound to suppose that the vessel coming down the river will, in accordance with the practice of the river and her consequent right, keep along the north shore. The vessel going up should keep to the southward of the vessel going down; and if the former ports, so as to attempt to pass to the northward of the vessel coming down, and so brings about a collision, she is alone to blame. *Ib.* See also *General Steam Navigation Company v. Hedley, The Velocity*, 3 L. R., P. C. 44; 39 L. J., Adm. 20; 21 L. T. 686; 18 W. R. 264; 4 Moore, P. C. C., N. S. 263.

An allegation in a petition that the vessel proceeded against in a collision cause was "considerably farther out to the north side of the river than" the other vessel, and improperly ported, and so brought about a collision, is sufficiently proved, to entitle the owners of the vessel

making the allegation to recover, by shewing that the vessel proceeded against was farther over to the south side of the river than the other, and improperly ported. The word "considerably" need not be proved to the full extent. *Ib.*

When a sailing vessel is beating up the River Thames on a flood tide against the wind, and has gone over towards the south shore to the edge of the tide, and as near to that shore as she can safely go, so as to avoid collision with vessels at anchor on the south side of the river, she is entitled to go about without warning vessels of her intention, and a steamer coming up astern of her ought to know from her position and the state of her sails that she is going about, and is bound to take measures by stopping or otherwise, to avoid a collision. *The Palatine*, 27 L. T. 631.

Steamships.—A steamship navigating the Thames against the tide is bound to obey rule 23 of the Thames Conservancy Rules, 1880, and on approaching one of the points there named, to wait until vessels then approaching it with the tide have passed her. Whether vessels are also to observe rule 22, and pass port-side to port-side, depends on whether the vessel navigating against the tide is close to the shore when waiting for the one coming down with the tide to pass her, or so far out as to allow the latter to pass port-side to port-side. The expression "passed clear" in rule 23, means "passed clear of the waiting ship." Semble, where the point to be passed is on the north side of the river with a flood tide, or on the south side with an ebb tide, if the vessel navigating with the tide has her green light open when ahead of the vessel waiting, the 23rd rule alone applies, and the vessels will pass clear starboard to starboard; otherwise both rules apply. Steamships rounding a point in the River Thames are not bound to stop or reverse engines because at one moment they are approaching a vessel coming in the opposite direction where there is no risk of collision if both vessels keep the curvilinear course they are then on. *The Libra*, 6 Adm. D. 139; 45 L. T. 161; 4 Asp. M. C. 429.

A steamship, the C. S., left the South-West India Docks nearly opposite the curve of Blackwall Point, and proceeded down stream at easy speed against a flood tide. In a few minutes, as she was about to round Blackwall Point, she perceived the steamship M. in Bugsby's Reach, and preparing to round the point; the C. S. stopped and reversed her engines, but a collision between the C. S. and the M. took place:—Held, that rule 23 of the Thames rules did not apply, under the circumstances, to the C. S. *The Libra* (6 P. D. 139) explained. *The Margaret*, 8 Adm. D. 126; 52 L. J., Adm. 65; 49 L. T. 332; 31 W. R. 843. Varied, 9 Adm. D. 47; 53 L. J., Adm. 17—C. A.

A steam vessel was proceeding down the River Thames, close to the Surrey shore, under the management of a licensed pilot, when she came into collision with a barge which was sailing up the river:—Held, that according to the real meaning of 14 & 15 Vict. c. 79, s. 27, and 17 & 18 Vict. c. 104, ss. 296, 297, it was the duty of the pilot to have kept the steam vessel to the starboard side of, but within, the fairway or mid-channel, and when he saw the risk of collision, to port her helm, so as to pass on the port side of the barge. *Smith v. Voss*, 2 H. & N. 97; 26 L. J., Ex. 233.

Difference between Rules for River and Sea.]—Observations on the difference of the rules for the navigation of a river and those for preventing collisions at sea. *The Odessa*, 46 L. T. 77; 4 Asp. M. C. 493—C. A.

Steamships Meeting—Opposite Directions.]—Whether “two steam-vessels proceeding in opposite directions, the one up and the other down the River Thames, are approaching one another so as to involve risk of collision,” is in all cases a question of fact for the court, and is not subject to the same interpretation as that given by Art. 15 of the Regulations for Preventing Collisions at Sea for vessels meeting end on or nearly end on. When two steam-vessels are proceeding in such directions that their respective courses if continued will bring them so near each other as to cause a risk of collision, rule 22 of the Thames Conservancy Rules is imperative, and both vessels must so manoeuvre as to pass port-side to port-side. *Id.*

Semble, when two steam-vessels are proceeding one up and the other down the river, and their green lights only in sight each to each, and bearing one point on each other's starboard bows at a distance of a quarter of a mile, they are approaching so as to involve risk of collision, and are both bound to port their helms to pass port-side to port-side. *Id.*

Semble, if each had the other's green light three points on the starboard bow, they would not be approaching so as to involve risk of collision. *Id.* See also *The Esk* and *The Niord*, ante, col. 1561.

Sunken Vessel—Vessel Sunk by Collision for which her Owner alone to Blame—Warning to Harbour-master.]—The D., in consequence of the sole default of her master and crew, had sunk in the Thames, and had become a wreck obstructing the navigation of the river. Her mate sent a message to the harbour-master at G. to inform him of the accident, who said that he would cause the wreck to be lighted. A few hours afterwards, the wreck not having been lighted, a vessel, without any fault on the part of those on board her, came into collision with the wreck and sustained damage. An action of damage having been instituted on behalf of the owner of the damaged vessel against the owners of the D., the judge at the trial refused to admit the evidence shewing that the mate of the D. had sent a message to the harbour-master, and that the latter had promised to light the wreck:—Held, that the evidence was wrongly rejected, that the collision had not been caused by the negligence of the owners of the wreck, and that they were not liable for the damage done. *The Douglas*, 7 Adm. D. 151; 51 L. J., Adm. 89; 47 L. T. 502; 5 Asp. M. C. 15—C. A. Reversing 30 W. R. 692.

Collision in Dock in London.]—The county court has jurisdiction under the Admiralty Court Act, 1861, s. 7, to hear such a case. *Reg. v. City of London Court*, 8 Q. B. D. 609; 51 L. J., Q. B. 305; 30 W. R. 566.

Crossing Ships in the Thames.]—When one of two steamers in the Thames was steering parallel to the shore and the other was steering in an oblique course across the stream:—Held, that they were crossing vessels, so that under the

29th of the Rules of 1872 for the navigation of the Thames, the one which had the other on her own starboard was bound to keep out of the way of the other. *The Oceano*, 3 Adm. D. 60—C. A.

Vessels Towed by Steam in the Thames.]—No. 4 of the bye-laws of the Thames Conservators, July, 1877, is as follows:—“Above and to the westward of Albert Bridge at Chelsea, six vessels and no more may be towed together in a single line at one time, and the distance between any two of the vessels shall not exceed fifty feet:”—Held, that the towing of eight barges by a steam-tug, the first four being in a single line, and the last four two abreast, but lashed closely together, was an infringement of the bye-law. *Gadney v. Rough*, 40 L. T. 258.

Barges and Lighters Navigating the Thames.]—The regulations for preventing collisions at sea issued under the Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), ss. 31, 32, and Order in Council of the 9th of January, 1863, do not apply to a ballast lighter which, though at times navigated under sail, never goes to sea, but is wholly employed within the limits of the jurisdiction of the Thames Conservancy. *The C. S. Butler*, 4 L. R., Adm. 238; 31 L. T. 549; 23 W. R. 113.

When such a vessel has been injured in a collision her owners will not, in the absence of any bye-law of the conservators of the Thames prescribing lights to be carried by her, be held disentitled to recover damages in a cause of collision on the ground that she contributed to the collision by being under way before sunrise without having any lights exhibited. *Id.*

Dumb-barges.]—Dumb-barges in motion driving with the tide up or down the River Thames at night are not bound to carry lights. *The Owen Wallis*, 4 L. R., Adm. 175; 43 L. J., Adm. 175; 33 L. T. 41; 22 W. R. 695.

A dumb-barge coming up the River Thames in a flood-tide may keep on either side of the river, and there is no obligation on her by custom or otherwise to keep in mid-channel. *Id.*

There is no duty on a dumb-barge driving with the tide in the Thames to keep out of the way of a steamship; but it is the duty of the steamship to keep out of the way of the barge. *Id.*

When a collision occurs between a dumb-barge without lights and a steamer on a dark night in the Thames, there is no presumption of law that the steamer is to blame. *The Swallow*, 36 L. T. 231—C. A.

Damage caused by Anchor hanging over Bow.]—A dumb-barge, by the negligent navigation of those in charge of her, was suffered to come into contact with a schooner moored to a mooring-buoy in the River Thames. The schooner had her anchor hanging over her bow with the stock above water, contrary to the Thames bye-laws. The anchor made a hole in the barge and caused damage to her cargo. But for the improper position of the anchor neither the barge nor her cargo would have received any damage. In an action of damage by the owners of the barge against the schooner:—Held, that both vessels were to blame, and that therefore the owners of the barge were entitled to half the damage sus-

tained. *The Margaret*, 6 Adm. D. 76; 50 L. J., Adm. 67; 44 L. T. 291; 29 W. R. 533—C. A.

p. In the Mersey.

Lights.—Vessels at anchor in the sea approaches to the River Mersey are bound by 37 & 38 Vict. c. 52, s. 1, to exhibit a white light at the main or mizen mast, in addition to the white light prescribed by 25 & 26 Vict. c. 63, sched., Table C., art. 7, and a vessel omitting to exhibit such additional light will, where the omission may have caused or contributed to collision, be held to blame under s. 17 of the 36 & 37 Vict. c. 85. *The Lady Downshire*, 39 L. T. 236.

Launching Vessels.—In the River Mersey, to give notice of a launch taking place, it is customary to have the ship dressed in flags for an hour or more before high water (about which time the launch takes place); to have tugs, one at least also dressed in flags, plying about some time before the launch in front of the yard where the ship is lying. When in launching a vessel the usual precautions and the usual general notice have been given, the persons in charge of the launch have done all they are required to do by law. *The Glengarry*, 43 L. J., Adm. 37; 30 L. T. 341.

When a vessel is launched in a river, the law casts upon the persons in charge of the launch the obligation of conducting the launching operations with the utmost precautions, and of giving such notice as is reasonable and sufficient to prevent any injury to passing vessels. *The Andalusian*, 2 Adm. D. 231; 46 L. J., Adm. 77.

The *Angerona*, proceeding down river in tow of a tug, came into collision with the *Andalusian*, which was being launched from a ship-building yard. The yard had not been in use for some time. The *Andalusian* was properly decorated, but gave no other warning to vessels passing during the launch:—Held, that the *Andalusian* was alone to blame. *Id.*

Persons in charge of a launch are bound to take the utmost precautions to avoid injury to passing vessels, such precautions being, in the circumstances, no more than reasonable. It is their duty to have a tug in attendance on a launch in the Mersey, decorated so as to indicate that a launch is imminent, and, if necessary, to warn approaching vessels. *The George Roper or Steamship Bentinck Company v. Potter*, 8 Adm. D. 119; 52 L. J., Adm. 69; 49 L. T. 185; 31 W. R. 953.

Where a launch was about to take place in the River Mersey at high water, and the usual general notice had been given, and the launch was dressed with flags and all usual precautions taken, and in due time before the launch a tug proceeded to a vessel lying at anchor off the place where the launch was about to take place and warned her thereof, and subsequently in sufficient time offered to tow her out of the way; but, owing to the conduct of those on board the vessel at anchor, whose pilot was aware before she anchored that the launch was about to take place, that vessel was still in the way, when the launch, which was delayed as long as it was prudent to do so, took place, and the launch struck the vessel and sank her:—Held, that the owners of the launch had taken every possible precaution and were not to blame for the collision, and that the vessel at anchor was alone to

blame. *The Cachapool*, 7 Adm. D. 217; 46 L. T. 171; 4 Asp. M. C. 502.

Semble, a vessel at anchor in the track of a vessel about to be launched is bound to get out of the way of the launch if she has had warning of the launch in due time and facilities for moving out of the way in time (such as a tug offering and being ready to tow her) are afforded by those in charge of the launch. *Id.*

Compulsory Pilotage—Proceeding to Sea.—When a vessel leaves a dock in the Mersey on her voyage to sea and receives slight injuries to a yard-arm, necessitating repairs, and in consequence is anchored under the directions of the pilot in the river, intending to go to sea on the next day, the pilot remaining in charge, but on the next morning before resuming her voyage and whilst still at anchor she gets into collision and does damage to another vessel, she is not "proceeding to sea" within the meaning of the 139th section of the Mersey Docks Act Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), and the pilot is not in charge by compulsion of law. *Id.*

q. In the Tees.

"Maximum of Speed Six Miles per Hour."—The 22nd clause of the bye-laws of the River Tees, which provides that no steamship shall be navigated on any part of the River Tees at a higher rate of speed than six miles per hour, is to be construed as prohibiting a steamship proceeding against the tide being navigated at a greater speed than six miles per hour over the ground. *The R. L. Alston*, 8 Adm. D. 5; 48 L. T. 469; 5 Asp. M. C. 43—C. A. Reversing 30 W. R. 707.

r. In the Tyne.

Bye-Laws as to Navigation.—By the bye-laws regulating the navigation of the River Tyne (clause 17), all vessels proceeding to sea must keep to the south side of mid-channel, and (clause 20) "vessels crossing the river and vessels turning take upon themselves the responsibility of doing so safely with reference to the passing traffic." Under these bye-laws a vessel outward bound coming at full speed out of the Tyne dock on the south side of the River Tyne, and crossing the river to the north side, whether intentionally, in violation of clause 17, or unintentionally by reason of the force of the tide, is bound to use the utmost caution to avoid the passing traffic, and to contemplate before attempting to come out any contingencies, such as tide, stoppage of the traffic, &c., which may arise, and she should only cross if it can be done without risk to that traffic; if a collision occurs by want of such caution, the ship will be responsible. *The Henry Morton*, 31 L. T. 859.

Semble, that the 21st clause of the bye-laws, providing that "when steam vessels are proceeding in the same direction, but with unequal speed, the vessel which steams slowest shall, when overtaken," take certain measures to allow the overtaking steamship to pass her, applies only to a vessel overtaking and passing another actually upon the same course with itself. *Id.*

A brig, in ballast, coming up the Tyne, along the south shore, came into collision with a smack being tugged down along the same shore. She pleaded, in defence, a custom of that river that vessels in ballast should come along the south

shore:—Held, that no such custom could be maintained against the express provisions of the 17 & 18 Vict. c. 104. *The Hand of Providence*, Swabey, 107.

Launch.—See *The United States*, ante, col. 1570.

s. In the Channel.

In the English Channel the rules as to vessels at sea, and not the rules as to vessels in a river, apply; and in the English Channel there is no customary course for vessels. *The Franconia*, 2 Adm. D. 8; 35 L. T. 721; 25 W. R. 197—C. A.

t. In the Danube.

Rules of Navigation.—The treaty of peace, signed at Paris, in 1856, after putting the Danube, with respect to the rights of persons using it for the purposes of navigation, in the same category as other great European rivers separating different states were placed by the Congress of Vienna, provided that a commission, in which Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, should each be represented by one delegate, should have power to establish certain fixed duties to be levied, to cover the expenses of certain works which were in progress, which commission was to be temporary. It also provided for a river commission, which was to be permanent; its duties being to prepare regulations of navigation and a river police. The commission to consist of delegates from the states traversed by the river along its whole line. The European commission issued provisional regulations for the police of the Lower Danube, and one of those regulations contained rules for navigating the Danube:—Held, that the rules were not binding on vessels navigating the Danube, the European commission having no authority to make such regulations. *The Smyrna*, 2 Moore, P. C. C., N. S. 435; 10 Jur., N. S. 977; 11 L. T. 74.

u. Bye-Laws of River and Harbour.

Breach of—River.—Bye-laws made by a local authority governing the navigation of a river are to be taken as evidence of what it is the duty of vessels to do in the circumstances named therein; and although the mere breach of one or any of them will not be sufficient reason for holding a ship to blame for a collision, yet, if that breach occasions or contributes to the collision, the existence of the bye-law will afford the best reason for holding the ship violating the bye-law to be guilty of a breach of duty, and consequently to blame for the collision. *The Raithwaite Hall*, 30 L. T. 233.

When a bye-law regulating the navigation of a river prescribes the side of the river upon which a ship is to navigate going up or down the river, the observance of this bye-law is doubly necessary during a fog when vessels can only be made out at short distances; and the breach of the bye-law cannot be excused by the plea that it was usual during foggy weather to navigate on the wrong side of the river in order to insure greater safety for the vessel so doing. *Ib.*

—**Harbour.**—Where a master and crew are bound by statute to obey the directions of a harbour-master in going into dock, and a col-

lision is occasioned by the ship being conducted according to the harbour-master's directions, the ship is not liable. *The Bilbao*, Lush, 149.

Duty of Harbour-master—Collision caused by Vessel approaching Sunken Vessel.—The D., in consequence of the sole default of her master and crew, had sunk in the Thames, and had become a wreck obstructing the navigation of the river. Her mate sent a message to the harbour-master at G. to inform him of the accident, who said that he would cause the wreck to be lighted. A few hours afterwards, the wreck not having been lighted, a vessel, without any fault on the part of those on board her, came into collision with the wreck and sustained damage. An action of damage having been instituted on behalf of the owner of the damaged vessel against the owners of the D., the judge at the trial refused to admit the evidence shewing that the mate of the D. had sent a message to the harbour-master, and that the latter had promised to light the wreck:—Held, that the evidence was wrongly rejected, that the collision had not been caused by the negligence of the owners of the wreck, and that they were not liable for the damage done. *The Douglas*, 7 Adm. D. 151; 5 Asp. M. C. 15; 61 L. J., Adm. 89; 47 L. T. 502—C. A. Reversing 30 W. R. 692.

As to Vessels Sunk in Rivers and Canals.—See WATER.

v. Law regulating Navigation of British and American Ships on High Seas.

The law administered by the Admiralty Courts of Great Britain and the United States, relating to all rules of navigation and rules concerning lights in cases of collision on the high seas, is the same. *The Nerada*, 27 L. T. 722.

The rule contained in the Merchant Shipping Amendment Act, 1862 (25 & 26 Vict. c. 63), s. 33, that the omission by any ship, after a collision, to render all practicable assistance to another, shall be presumptive evidence against the former that she is in fault, does not apply to United States ships, because that rule has not been adopted by the United States. *Ib.*

A steamer is bound both by British and United States law, to keep out of the way of a sailing vessel, and to keep a good look-out. The duty to keep a look-out is especially incumbent upon a steamer going at a rapid pace in hazy weather, in an ordinary track of vessels trading from one port to another. *Ib.*

w. Vessels of Foreign Sovereigns.

Jurisdiction of Court of Admiralty.—A steam vessel belonging to the Khedive of Egypt had come to England to be repaired, with a cargo on board. She was not a man-of-war. Upon her trial trip she came into collision with and sunk the Batavier; the owners of the Batavier caused her to be arrested by a warrant of the Court of Admiralty. An application having been made for a prohibition:—Held, that the Court of Admiralty was the proper tribunal to determine whether the steam vessel was entitled to the immunity allowed to the vessels of a sovereign state, and that a prohibition ought not to issue. *Charkieh, In re*, 8 L. R., Q. B. 197; 42 L. J., Q. B. 75; 28 L. T. 190; 21 W. R. 437.

The Charkieh, belonging to the Khedive of Egypt, and usually employed in carrying mails and passengers, came to England with merchandise and for repairs. Having completed her repairs, and while on a trial trip down the Thames, she came into collision with the Batavier. On arrest by the owners of the Batavier:—Held, first, that his highness the Khedive is not entitled to the privileges of a sovereign prince. *The Charkieh*, 4 L. R., Adm. 59; 42 L. J., Adm. 17; 23 L. T. 513.

Held, secondly, that even the privileges of a sovereign prince would not extend to immunity from arrest in a suit for damage by collision. *Ib.*

Held, thirdly, that if the privileges did extend to such an immunity, they would have been waived in this case by the employment of the ship at the time as a trader. *Ib.*

Semble, that, within the ebb and flow of the sea in the case of salvage, the obligatio ex quasi contractu attaches jure gentium upon the ship to which the service has been rendered, and in the case of collision; the obligatio ex quasi delicto attaches jure gentium upon the ship which is the wrongdoer, whatever be her character, public or private. *Ib.*

In considering the international status of the Khedive of Egypt:—Held, that the court may inquire into the general history of the government of Egypt, the firmans of the Porte and European treaties concerning the relations between Egypt and the Porte, and that the court may also obtain direct information from the Foreign Office. *Ib.*

National Vessel of War—Exemption from Arrest.—A vessel of war commissioned by the government of a foreign state, and engaged in the national service of her government, was stranded on the coast of England. She had a cargo of machinery on board her, alleged to belong to private individuals, of which her government had for public purposes charged itself with the care and protection. Important and efficient salvage services were rendered to the ship and cargo. A suit was instituted on behalf of certain of the salvors against the ship and her cargo. The court refused to order a warrant to issue for the arrest of the ship or cargo, and held that it had no jurisdiction to entertain the suit. *The Constitution*, 4 Adm. D. 39; 48 L. J., Adm. 13; 40 L. T. 219; 27 W. R. 739.

A steam-packet conveying mails and carrying on commerce, and which belongs to the sovereign of a foreign state, and is officered by officers commissioned by him, comes within the category of vessels which are exempt from process of law, and cannot therefore be arrested so as to give a British subject a right to proceed against her. *The Parlement Belge*, 5 Adm. D. 197; 42 L. T. 273; 28 W. R. 642—C. A.

x. Salvaging Vessels.

Negligence.—When damage is inflicted upon a ship by another engaged in rendering salvage services to the former, the court regards the negligence of the salvor less severely than it does the negligence of a vessel wholly unconnected with the injured vessel, but will condemn the salvor in the damage where he has been guilty of gross negligence and want of proper navigation. *The C. S. Butler*, *The Baltic*, 4 L. R., Adm. 178; 43 L. J., Adm. 17; 30 L. T. 475; 22 W. R. 752.

y. Vessels in Charge of Pilots.

See cases ante, XVII, PILOTS AND PILOTAGE.

3. LOSS OF LIFE.

What is a "Ship" within Merchant Shipping Act.—A collision took place between a steamship and a fishing coble. The coble sank, and three men on board were lost. The coble was of ten tons burden, twenty-four feet in length, decked forward only, with two movable masts, and a sail for each. She was accustomed to go twenty miles out to sea, and to remain out for some hours at a time, and was usually under sail, but was sometimes propelled by oars when convenient. An inquest was held on the body of one of the men who was lost, and a solicitor appointed by the Board of Trade took notes of the evidence, and forwarded them to the Board, who applied to two justices to hold an inquiry into the collision. The justices held the inquiry, decided that the coble was a sea-going ship, that there was a collision between two ships, and that the master and mate of the steamer did not duly render assistance to save life, and ordered that the certificates of the master and mate of the steamer should be suspended for three months:—Held, first, that if the coble was a ship, one ship had caused loss to another; and even if she was not, there was a casualty to the steamship, and therefore there was a case for investigation by the justices under 17 & 18 Vict. c. 104 (the Merchant Shipping Act, 1854), s. 433. *Ferguson or Hutchinson, Ex parte*, 6 L. R., Q. B. 280; 40 L. J., Q. B. 105; 24 L. T. 96; 19 W. R. 746.

Held, secondly, that the word "ship" applied to all craft which substantially went to sea, and only used oars as an auxiliary power, and that there had been a collision between two ships within the 25 & 26 Vict. c. 63 (Merchant Shipping Act, 1862), s. 33, and that therefore the order was good. *Ib.*

Caused by Collision—In what Cases.—A brig, by the negligence of those on board her, came into collision with a bark in January, about 5 A.M., off the Lizard. In the collision the main rigging of the bark was carried away, and shortly afterwards her fore and main masts went by the board. Towards evening the wind increased in violence, and about 2 A.M. the next morning the bark was driven on shore, and some of her crew were drowned:—Held, that the loss of life was occasioned by the collision. *The George and Richard*, 3 L. R., Adm. 466; 24 L. T. 717.

Liability of Foreign Ships to Damages for Loss of Life.—An action was instituted against a foreign ship to recover damages for the death of the husband of the plaintiff alleged to have been caused by a collision brought about by the improper navigation of the ship proceeded against:—Held, that the Admiralty Court had jurisdiction to entertain the action. *The Franconia*, or *Jeffrey v. Owners of the Franconia*, 2 Adm. D. 163; 46 L. J., Adm. 33; 36 L. T. 640; 25 W. R. 796—C. A.

4. INEVITABLE ACCIDENT.

Definition of.—Inevitable accident is where the collision could not possibly have been pre-

vented by proper care and seamanship under the particular circumstances of the case. So that where the defence of inevitable accident is set up on behalf of a vessel *prima facie* to blame for a collision, the defence, to succeed, must be supported by proof that everything was done which could and ought to have been done to avoid the collision; and this, though the vessel is in some degree disabled, and so less manageable than she would otherwise have been. *The Calcutta*, 21 L. T. 768—P. C.

Inevitable accident is that which the party charged with the damage could not possibly prevent by the exercise of ordinary care, caution, and maritime skill. *The Marpesia*, 4 L. R., P. C. 212; 26 L. T. 333; 8 Moore, P. C. C., N. S. 468.

When in a cause of collision the defence of inevitable accident is raised, the onus of proof lies, in the first instance, on those who bring the suit against the vessel and seek to be indemnified for damage; and does not attach to the vessel proceeded against until a *prima facie* case of negligence and want of due seamanship is shewn. *Ib.*

Two sailing vessels approaching stem on in such a manner as that, under the sailing rules, each would be bound to port, being in a dense fog, only sighted each other at a distance of about two hundred yards. The defendant's vessel, having been close-hauled on the port tack, was then preparing to go about, and had eased off her head sheets. Both vessels immediately ported, but came into collision. Only one minute elapsed between the time of sighting and the collision. The plaintiff's petition alleged, that the defendant's vessel neglected to port, and it was stated, in answer to a question by the judge of the Admiralty Court, that the head sheets of the defendant's vessel were not again hauled aft. On this evidence that vessel was held to blame by the Admiralty Court, on the ground that she had not executed all the proper manœuvres which she might have executed after sighting the other vessel:—Held, that the collision was the result of an inevitable accident, the defendant's vessel having done all that could be effected by ordinary care, caution, or maritime skill in the short space of time that elapsed; and that the plaintiff, if he meant to rely upon the fact that the head sheets had not been again hauled back, ought to have alleged that fact in his petition as the cause of the collision; the allegation of neglect to port not sufficiently indicating the nature of such omission. *Ib.*

Inevitable accident is where the collision could not have been prevented by proper care and seamanship in the particular circumstances of the case. *The Secret*, 26 L. T. 670.

A defendant, in order to support a defence of inevitable accident, is bound to shew that everything was done which could and ought to have been done to avoid a collision. *Ib.*

Inevitable accident is that which a party could not possibly prevent by the exercise of ordinary care, caution, and maritime skill. It is not enough to shew that the accident could not be prevented by the party at the very moment it occurred, but the question is, what previous measures have been adopted to render the occurrence of it less probable. *The Uhla*, 19 L. T. 89.

Where damage might have been avoided by shipping cable and setting sail:—Held, that it was not an inevitable accident, but the result

either of negligence or the absence of proper nautical skill. *Ib.*

Tempestuous weather is an excuse for the failure to exercise proper nautical skill which should be received with the greatest possible caution. *Ib.*

A schooner ran foul of a ship, whereby the latter became unmanageable. Her anchor was let go, when she swung round upon and came in collision with a brig lying at anchor:—Held, that the collision was inevitable, those on board the ship having done what they could to avoid it. *The Hibernia*, 4 Jur., N. S. 1244.

An inevitable accident is such as could not have been prevented by the exercise of ordinary care, caution, and maritime skill. *The Pladda*, 2 Adm. D. 34; 46 L. J., Adm. 61.

Latent Defect.—The owners of a vessel are not liable for damage caused to another vessel in a collision occasioned by the sudden breaking down of an apparatus in which there was an inherent latent defect, in the absence of any negligence in the user of the apparatus. *The Virgo*, 35 L. T. 519; 25 W. R. 397.

Disabled Vessel.—When a ship seeks to excuse her failure to comply with the sailing regulations, and with a seamanlike precaution, by shewing that such a failure was in consequence of her being disabled in a prior collision, it is material to inquire whether the prior collision was due to her default or was the result of inevitable accident. *The Kjobenhaven*, 30 L. T. 136—P. C.

When it is the duty of a ship to keep out of the way of another ship, but she is unable to do so by reason of being disabled in a former collision, and the other ship being unaware of her disabled condition continues her course, a collision ensuing is the result of inevitable accident. *The Aimo*, *The Amelia*, 29 L. T. 118; 21 W. R. 707—P. C. And *Cp. Seecombe v. Wood*, 2 M. & Rob. 290.

Costs.—A sailing ship in a gale drove from her anchors across a sand and her rudder was so damaged as to render the ship unmanageable; in this condition she came into collision after sunset with a brig at anchor. At the time of the collision the ship had her anchor-light exhibited and no other light. In an action of damage by the owners of the brig against the ship it was held that the collision was occasioned by inevitable accident, and that the ship, in the circumstances of the case, was not to be deemed in fault for not carrying side-lights or the three red lights prescribed by Art. 5 of the Regulations for Preventing Collisions at Sea, and that the suit ought to be dismissed without costs. *The Buckhurst*, 6 Adm. D. 152; 51 L. J., Adm. 10; 46 L. T. 108; 30 W. R. 232; 4 Asp. M. C. 84.

When the defence of inevitable accident is sustained, the plaintiff will not be ordered to pay the costs, unless he might have known that there was, apart from the merits, a good legal defence. *The Virgo*, 35 L. T. 519; 25 W. R. 397.

It is a rule in the Admiralty Court, where a collision is found to be the result of an inevitable accident, to make no order as to costs, unless it can be shewn that the suit was brought unreasonably and without sufficient grounds. *The Marpesia*, 4 L. R., P. C. 212; 26 L. T. 333; 8 Moore, P. C. C., N. S. 468.

It is the practice of the Admiralty Court in case of inevitable accident that each party should pay its own costs. But if, from the circumstances of the collision, it must have been obvious that the collision was an inevitable accident, the court will use its discretion as to dismissing the suit with costs. *The Innisfail, The Secret*, 35 L. T. 819.

Where the court finds inevitable accident, the general rule is, that each party pays his own costs; but the court still holds, and will on occasion exercise, a discretionary power to condemn the plaintiff in costs. *The London*, B. & L. 82; 9 Jur., N. S. 1330; 9 L. T. 348.

5. ACTS AND DUTIES AFTER THE COLLISION.

Failure to render Assistance.—The Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), s. 16, having imposed upon the master of every ship, in case of collision with another ship, a duty, "if and so far as he can do so without danger to his own vessel, crew, and passengers (if any), to stay by the other vessel until he has ascertained that she has no need of further assistance, and to render to the other vessel, her master, crew, and passengers (if any), such assistance as may be practicable and as may be necessary to save them from any danger caused by such collision;" this duty is not discharged by a steamship where, it being practicable and safe to lower a boat to render assistance, although possibly dangerous to stay by the injured ship, she continues her voyage without lowering her boat, and merely hails and signals for other vessels to go to the assistance of the injured ship. *The Adriatic*, 33 L. T. 102.

A ship failing to render assistance to another with which she has been in collision, and shewing no reasonable cause for such failure, will be held to blame for the collision, unless proof is given to the contrary on her behalf. *Id.*

When a collision takes place which might probably endanger life, it is the duty of the vessel to stay by until the extent of the damage is ascertained. *The Queen of the Orcell*, 7 L. T. 839; 11 W. R. 499.

If it does not stay by, the burden of proof that the collision did not take place by its default is thrown upon the owners. *Id.*

The first duty of any vessel that by collision injures another vessel, is to wait to ascertain the extent of that injury, and to render what assistance it may be able to protect life and property. *The Germania*, 21 L. T. 44—P. C.

When Risk of Capture Imminent.—Although it is the duty of every vessel, whether British or foreign, to render assistance to another which she has injured in collision, the rule will not compel a ship to remain alongside another so injured so as to run risk of capture by an enemy's fleet. *The Thuringia*, 41 L. J., Adm. 44; 26 L. T. 446.

Compulsory Pilotage.—Under 25 & 26 Vict. c. 63, s. 33, in the case of collision between two ships it was declared to be the duty of the person in charge of each ship to render assistance to the other, and in case he failed to do so without reasonable excuse, the collision in absence of proof to the contrary was to be deemed to have been caused by his wrongful act. Two steamships, the *Queen* and *Lord John Russell*,

each under the charge of a compulsory pilot, came into collision in the Thames. The *Queen* was solely to blame, and after the collision she rendered no assistance to the other vessel, and shewed no excuse for having failed to do so:—Held, that the mere fact of her having a pilot on board did not exempt her from liability. *The Queen*, 2 L. R., Adm. 354; 38 L. J., Adm. 39; 20 L. T. 855.

The person in charge intended by that section is the master. *Id.*

Salvage.—A vessel which has caused a collision is not entitled to salvage services for assistance rendered after such collision. *The Glengaber*, 3 L. R., Adm. 534; 41 L. J., Adm. 84; 27 L. T. 386; 21 W. R. 168.

6. LIMITATION OF LIABILITY.

a. Before the Merchant Shipping Act, 1862.

Liability—Extent of.—By the ancient law of the sea there is no limitation to the liability of a wrongdoer. *The Wild Ranger*, 32 L. J., Adm. 49; 9 Jur., N. S. 134; 7 L. T. 724.

Under the former statutes, viz., 53 Geo. 3, c. 159, and 17 & 18 Vict. c. 104, ss. 504 and 505, the actual or provable value of the ship at or immediately before the collision, was the criterion of liability, but now the wrongdoing ship's tonnage is the measure of the owner's liability. See *Wilson v. Dickson*, 2 B. & A. 2; and *Leycester v. Logan*, 4 Kay & J. 725.

b. Where Claim Lies for Limitation.

Parties—Master—Part Owner.—In a cause of limitation of liability, one of the owners of the vessel sued, being master as well as part owner, but not having been on deck at the time of the collision:—Held, that there was no obligation upon the master to be upon deck; that the fact of the master being part owner was no reason for charging the other owners with blame; and that there was no evidence to shew that the collision took place by the fault or with the privy of the master. *The Oby*, 1 L. R., Adm. 102; 12 Jur., N. S. 817.

The ground of forfeiture of the statutory exemption from unlimited liability is personal blame; the fault of one owner does not, therefore, involve in its consequences a forfeiture by his co-owners. *The Spirit of the Ocean*, 34 L. J., Adm. 74; 12 L. T. 239.

The owners of a ship, who are entitled to the privilege of limited liability, are not necessarily those whose names appear upon the ship's register. *Id.*

A master, also part owner of a ship, sold his shares, but before the transfer had been registered the ship, through his default, came into collision with and damaged another vessel:—Held, that the master was not an owner so as to affect the privilege of limited liability. *Id.*

In an action by shipowners to limit their liability in respect of a collision with their vessel, and where it appears that the master, who was on board at the time of the collision, was a part owner, and the collision occurred without the negligence or privy of the remainder of the owners, they have a right to have their liability limited, with a reservation of any right of action

there may be against the master personally in respect of his negligence. *The Cricket, The Endeavour*, 48 L. T. 535; 5 Asp. M. C. 53.

By Railway Company.]—A railway company carrying passengers and goods partly by railway and partly by its own ships, is entitled to the limitation on the liability of shipowners imposed by the Merchant Shipping Acts. *London and South-Western Railway Company v. James*, 8 L. R., Ch. 241; 42 L. J., Ch. 337; 28 L. T. 48; 21 W. R. 151.

Admitting Liability.]—It is not necessary that owners of a vessel and cargo preferring their claim in the Court of Admiralty to limited liability, should acknowledge, in the first instance, that their vessel was to blame. *The Amalia*, 1 Moore, P. C. C., N. S. 471; B. & L. 151; 32 L. J., Adm. 191; 9 Jur., N. S. 1111; 8 L. T. 805; 12 W. R. 24.

Vessel not a Registered British Ship—Vessel newly Launched.]—A newly-built vessel, exceeding fifteen tons burthen, on being launched, ran into and damaged a passing ship. The owners of the damaged ship thereupon instituted an action against the newly-built vessel to recover for the damage done to their ship, and the court pronounced the vessel proceeded against solely to blame for the collision. Afterwards an action of limitation of liability was instituted by the owner of the newly-built vessel, a natural-born subject, who therein claimed a declaration that he was entitled to a limitation of liability in respect of the damage occasioned by the collision. At the hearing of the action it appeared that the newly-built vessel, though registered as a British ship at the time of the institution of the action, was not so registered at the time of the collision:—Held, that the vessel was not a registered British ship when the collision occurred, and that the owner was not entitled to have his liability limited. *The Andalusian*, 3 Adm. D. 182; 47 L. J., Adm. 65; 39 L. T. 204; 27 W. R. 172.

When Ship Sunk.]—The Normandy and Mary came into collision, and the Normandy was sunk. Cross causes of damage were instituted, but had not been heard, nor the liability for the collision determined; but the owners of the Normandy paid into court the amount of their liability, as limited by statute:—Held, first, that the court had jurisdiction in a suit for limitation of liability, even though the Normandy had been sunk, and therefore could not be arrested. *The Normandy*, 3 L. R., Adm. 152; 39 L. J., Adm. 48; 23 L. T. 631; 18 W. R. 903.

When Bail given though no actual Arrest.]—In suits for limiting the liability of the owners of a wrongdoing vessel the court has jurisdiction if bail has been given by the owners, even though there has been no actual arrest. *The Northumbria*, 3 L. R., Adm. 24; 39 L. J., Adm. 24; 21 L. T. 683.

British and Foreign Vessels.]—Collision in the Mediterranean Sea, beyond British jurisdiction, between an English and a Belgian vessel, whereby the latter with her cargo was sunk:—Held, that the 25 & 26 Vict. c. 63, s. 54, with respect to limited liability, applied equally to

British and foreign vessels. *The Amalia*, 1 Moore, P. C. C., N. S. 471; B. & L. 151; 32 L. J., Adm. 191; 9 Jur., N. S. 1111; 8 L. T. 805; 12 W. R. 24.

The 17 & 18 Vict. c. 104, Part IX., ss. 504, 514, did not apply to a collision on the high seas between foreign ships, of which the owners were foreigners. *Cope v. Doherty*, 4 Kay & J. 367; 4 Jur., N. S. 451. Affirmed on appeal, 2 De G. & J. 614; 27 L. J., Ch. 600; 4 Jur., N. S. 699; *S. P.*, *The Wild Ranger*, 32 L. J., Adm. 49; 9 Jur., N. S. 134; 7 L. T. 724; 11 W. R. 255.

But where a British ship damaged a foreign ship by a collision within the distance of three miles from the shore of the United Kingdom, the provisions of that statute, limiting the liability of the owner to the value of the ship, applied. *General Iron Screw Collier Company v. Schurmanns*, 1 Johns. & H. 180; 29 L. J., Ch. 877; 6 Jur., N. S. 883; 4 L. T. 138; 8 W. R. 732.

Where a foreign ship is condemned in damage arising from a collision, and the proceeds of the sale are not more than sufficient to meet that damage, the crew have no prior right against the ship for their wages. *The Linda Flor*, Swabey, 309.

c. Mode of Estimating Liability.

Amount per Ton.]—When damage is done by a ship both to persons and goods, the ship is to be estimated at not less than 15*l.* per ton, for the purpose of adjusting the compensation to be paid to claimants in respect of loss of life or personal injury. *Nixon v. Roberts*, 1 Johns. & H. 739; 30 L. J., Ch. 844; 7 Jur., N. S. 820; 4 L. T. 679; 9 W. R. 890.

But where all demands in respect of personal injury or loss of life have been settled, and the only claimants against the ship are the owners of property, which has been damaged, the ship is not to be estimated at more than her actual value, notwithstanding the fact that loss of life or personal injury has occurred. *Ib.*

Where claimants of both kinds appear, the owners of property are entitled to have the compensation for loss of life and personal injury marshalled, so as to throw it primarily on the excess (if any) of the value of 15*l.* per ton, over the actual value of the ship. *Ib.*

The 17 & 18 Vict. c. 104 did not repeal, but only modified, the 9 & 10 Vict. c. 93 (Lord Campbell's Act), so far as the latter created liability for the loss of life by collision at sea. *Glaholm v. Barker*, 1 L. R., Ch. 223; 35 L. J., Ch. 259; 12 Jur., N. S. 82; 13 L. T. 653; 14 W. R. 296.

By the joint operation of the 9 & 10 Vict. c. 93, and the 25 & 26 Vict. c. 63, s. 54, the liability of the owner of a sailing vessel for loss of life occasioned by collision with another vessel at sea, is limited to 15*l.* per ton of the registered tonnage of his vessel. *Ib.*

The liability of a shipowner in respect of loss of life to the seamen of a vessel run down by his ship, is not limited to 30*l.* for damages payable in each case of death; and this rule applies to all cases, whether the Board of Trade does or does not institute proceedings in respect of such loss of life. *Glaholm v. Barker*, 2 L. R., Eq. 598; 35 L. J., Ch. 657; 12 Jur., N. S. 764; 14 L. T. 880; 14 W. R. 1006.

Measurement of Tonnage.]—The owners of a

German steam vessel instituted an action under the Merchant Shipping Act, 1862, s. 54, to limit their liability for damages occasioned by a collision. The vessel had three decks, and her crew was berthed below the spar deck. By an Order in Council, dated the 26th June, 1873, made under s. 60, it was directed that German steamships measured after the 1st of January, 1873, should be deemed to be of the tonnage mentioned in their registers in the same manner, and to the same extent, as the tonnage denoted in the certificate of registry of British ships was deemed to be their tonnage. In the register of this ship the crew space was deducted:—Held, that the Order in Council of the 26th of June, 1873, did not make the certificate of registry conclusive evidence of the tonnage or of the propriety of deducting the space solely appropriated for berthing the crew. *The Franconia*, 3 Adm. D. 164; 39 L. T. 57; 27 W. R. 128—C. A.

Held, also, that under the Merchant Shipping Act, 1854, s. 21, sub-s. 4, a closed-in space, solely appropriated to the berthing of the crew, is to be excepted in estimating the tonnage only when it is on the upper deck, and not when it is between the spar deck and the tonnage deck. *Ib.*

Held, also, that the crew space cannot in the case of a foreign, any more than of a British, ship, be deducted under the Merchant Shipping Act, 1867, s. 9, unless the provisions of that section as to inspection by a surveyor appointed by the Board of Trade, and the other conditions therein contained, have been complied with; and, therefore, that, as in the present case these conditions had not been complied with, the space appropriated for berthing the crew must not be deducted. *Ib.*

A vessel had an upper deck above her main deck, but such upper deck was not continuous from stem to stern of the vessel, and the hatches and other fittings in it were not water-tight:—Held, that such upper deck was not a third deck or spar deck within the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 21, sub-s. 5; and that the space between it and the main deck was not space available for cargo, or for accommodation of passengers or crew, within sub-s. 4, and consequently should not be reckoned in estimating her tonnage. *Lord Advocate v. Clyde Steam Navigation Company*, 2 L. R., H. L. (Sc.) 409; 32 L. T. 287.

If at the time of a collision the deduction in respect of crew space authorized by 30 & 31 Vict. c. 124, s. 9, has not been made from the registered tonnage and does not appear on the register, the owners cannot afterwards limit their liability on the basis of a deduction made subsequently to the collision, but the register as it existed at the time of the collision is conclusive. *The John Ormston or The John McIntyre*, 6 Adm. D. 200; 50 L. J. Adm. 76; 30 W. R. 276.

Claim by Shipowner of Expenses of Salvage of Cargo.—The payment into court of 8l. a ton under 25 & 26 Vict. c. 63, s. 54, does not place the shipowner in the position of a person who has not done wrong. The owner of a ship sunk by a collision in the Thames admitted it to be his fault, and paid into court 8l. a ton in a suit to limit his liability. The Thames conservators having powers under the Removal of Wrecks Act, 1877, and the Thames Conservancy Acts,

raised the ship and delivered the ship and cargo to the owner, he undertaking to pay the expenses of raising. Part of the cargo was some wool, which was damaged by being sunk:—Held, that the shipowner was bound to deliver the wool to the owner of the wool without claiming from him by way of contribution to salvage any part of the expenses of raising the ship and cargo. *The Ettrick or Prehn v. Bailey*, 6 Adm. D. 127; 45 L. T. 399; 4 Asp. M. C. 465—C. A. Affirming 50 L. J., Adm. 65; 44 L. T. 817.

Both Vessels to Blame.—Where there has been misconduct on the part of both vessels, the sum total of the joint damage is payable by the two in equal shares. *The Milan*, Lush. 388; 31 L. J., Adm. 105; 5 L. T. 590.

There is an exception to this rule where a want of proper look-out on the part of one of the vessels occasioned the accident. *Ib.*

Upon a question arising, whether the owner of cargo lost by the collision is in eadem conditione with the owner of the vessel as to the right to recover:—Held, that though both ships are to blame, the owner of the cargo not having any control over the blameworthy master and mariners of the vessel upon which his goods were carried, is not to be considered as having any share in the delictum, so as to be thereby disentitled to recover either under the old law of the Admiralty or under 17 & 18 Vict. c. 104, s. 298. *Ib.*

He has a claim, therefore, upon the other vessel for the one-half of his loss. *Ib.*

Where both vessels were held to blame for causing the collision, the damages were directed to be divided. *The Independence*, 14 Moore. P. C. C. 103.

Condition of Injured Vessel.—If a portion only of the damage is clearly attributable to the wrong-doer, and that portion cannot be distinguished from the rest, the wrong-doer is responsible for the whole damage. *The Egyptian*, 10 L. T. 910.

Even though the injured vessel may have been at the time of collision in such a condition that the collision occasioned an unusual amount of damage, a wrong-doer is nevertheless responsible for all the consequences. *Ib.*

Improper Navigation—Wrong Lights.

—Where two ships incurred damage in a collision, and it was found that one of them was to blame for improper navigation, and that the other had infringed the regulations with respect to lights:—Held, that in the absence of proof that such infringement could not possibly have contributed to the collision, the damage must be divided according to the ordinary rule of the Court of Admiralty. *The Fanny M. Curvill* (44 L. J., Adm. 34) approved. *China Merchants' Steam Navigation Company v. Bignold*, *The Hochung*, *The Lapwing*, 7 App. Cas. 512; 51 L. J., P. C. 92; 47 L. T. 485; 5 Asp. M. C. 39—P. C.

Action of Tort—Variance between Rules of Admiralty Court and Courts of Common Law.

—The plaintiffs shipped goods on board the defendants' vessel, the Crown Prince, under a bill of lading, which contained exceptions of, among other things, "collision," and "accidents, loss, or damage, from any act, neglect, or default

whatsoever of the pilots, master, or mariners, or other servants of the company in navigating the ship." In the course of the voyage the Crown Prince came into collision with another vessel of the defendants', the Atjeh. The plaintiffs' goods were in consequence lost. The collision was due to negligence, for which the Atjeh was mainly in fault; but the Crown Prince also was in some degree to blame:—Held, that the defendants had not committed a breach of the contract created by the bill of lading, and that no action could be maintained against them on the ground of failure to perform the undertaking therein contained to carry the goods safely upon the voyage. Per Brett, L. J.: No stipulation on the part of the defendants could be implied as to the conduct of those on board the Atjeh, and although the negligence of the Atjeh was not within the exceptions, nevertheless it was not within the contract created by the bill of lading. Per Baggallay and Lindley, L. JJ.: The exception "collision," although it did not cover the negligence of the Crown Prince, covered the negligence of the Atjeh, and the defendants were expressly relieved from liability for the negligence of the Crown Prince by the other exceptions in the bill of lading. *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Company*, 10 Q. B. D. 521; 52 L. J., Q. B. 220; 48 L. T. 546; 31 W. R. 445; 47 J. P. 260; 5 Asp. M. C. 65—C. A.

Held, further, that the defendants were liable in tort for the negligence of those engaged in navigating the Atjeh, but that the amount payable by the defendants must be limited to one-half of the loss sustained by the plaintiffs, pursuant to the Supreme Court of Judicature Act, 1873, s. 25, sub-s. 9. *Id.*

Mode of Distribution.]—Two ships, V. and K., having come into collision, the owners of the V. brought an action in rem in the Admiralty Division against the owners of the K., who counter-claimed, and both ships were held to blame. The owners of the K. brought an action in the Admiralty Division to limit their liability under the Merchant Shipping Amendment Act, 1862 (25 & 26 Vict. c. 63), s. 54, and paid the amount of their liability into court. The damage to the V. was greater than that to the K., and the fund in court was not sufficient to satisfy all the claims for which the owners of the K. were answerable in damages:—Held (Lord Bramwell doubting), that the owners of the V. were entitled to prove against the fund for a moiety of their damage, less a moiety of the damage sustained by the K., and to be paid in respect of the balance due to them after such deduction, *pari passu* with the other claimants out of such fund. *Chapman v. Royal Netherlands Steam Navigation Company* (4 Adm. D. 157) overruled. *Stoomvaart Maatschappij Nederland v. Peninsular and Oriental Steam Navigation Company*, 7 App. Cas. 795; 52 L. J., Adm. 1; 47 L. T. 198; 31 W. R. 249; 4 Asp. M. C. 567—H. L. (E.).

In an action of collision in the Admiralty Division, where both ships have been injured and both ships have been held to blame, and have accordingly been condemned to pay the moiety of each other's damage, and either of the parties to the collision has applied to have his liability limited under the Merchant Shipping Act, 1862, s. 54, no set-off is allowed between the two amounts for which they are liable in

damages, until the limitation of liability imposed by that statute has been applied. The S. and V. came into collision, both ships were damaged, but the V. was sunk with her cargo and lost. In an action by the owners of the V., and counter-claim by the owners of the S., both ships were held to blame, and condemned to pay the moiety of each other's damage. Under this judgment the damage payable by the S. was 14,000*l.*, and that payable by the V. was 2,000*l.* The owners of the S. then brought an action in the Chancery Division for limitation of their liability, and paid into court 5,212*l.*, the aggregate amount of 8*l.* a ton on her registered tonnage:—Held (Brett, L. J., dissenting), that the owners of the V. must prove for 14,000*l.* against the fund in court, and must pay the 2,000*l.* in full to the owners of the S. *Chapman v. Royal Netherlands Steam Navigation Company*, 4 Adm. D. 157; 48 L. J., Adm. 449; 40 L. T. 433; 27 W. R. 554—C. A.

S. 54 of the Merchant Shipping Amendment Act, 1862, which limits the liability of a shipowner to a certain amount per ton, does not apply to a case where two ships are to blame for a collision, and where the owners of one ship are relieved from all liability by the owners of the other, under s. 388 of the Merchant Shipping Act, 1854, on the ground that the damage done to the other ship was caused by the fault of a compulsory pilot; but under the Admiralty rules, inasmuch as both ships are to blame, the owners of the ship so relieved from liability are only entitled to be paid by the owners of the other ship a moiety of the damage caused to their ship. *The Hector* (No. 2), 8 Adm. D. 218; 52 L. J., Adm. 51; 48 L. T. 890; 31 W. R. 881—C. A.

The power given by 17 & 18 Vict. c. 104, s. 514, to the Court of Chancery is simply to determine the amount of a shipowner's liability, and to distribute that amount among the several claimants, and not to decide the question of liability or non-liability. *Hill v. Audus*, 1 Kay & J. 263; 3 Eq. Rep. 422; 24 L. J., Ch. 229.

It does not apply, where the liability is denied altogether. *Id.*

To what Damages Limitation extends—Loss of Goods—Delay.]—A railway company, known to be also shipowners, contracted to carry passengers and goods from London to Guernsey. The passengers and goods were taken by railway from London to Southampton, and were there put on board a ship which belonged to the company. The ship, on her way to Guernsey, came into collision with another ship and sank with several of the passengers and all the goods. Actions were brought against the company by surviving passengers for loss of luggage and for delay, by shippers of goods for loss of goods, and by the administrators of lost passengers for damages:—Held, that, as to all the damages (except those for delay), the liability of the company was, by the Merchant Shipping Acts, limited to the amount of 15*l.* per ton on the tonnage of the ship; that the amount so payable should be distributed by the Court of Chancery, and that all the actions against the railway company (except those for delay) should be restrained. *The Andalusian*, 3 Adm. D. 182; 47 L. J., Adm. 65; 39 L. T. 204; 27 W. R. 172.

— **Two Vessels Injured by same Improper Navigation.]**—By reason of the improper navi-

gation of a steamship she ran into and damaged a ship, and immediately afterwards ran into and sank a steam-tug which was near the ship, and about to take the ship in tow. In a suit for limitation of liability, instituted on behalf of the owner of the steamship, it was held that the whole of the damage so caused by such improper navigation as aforesaid to the ship and steam-tug and goods on board the ship and steam-tug was caused substantially at the same time and on the same occasion, and that the plaintiff, who was entitled to have his liability limited according to s. 54 of the Merchant Shipping Act Amendment Act, 1862, was entitled to have his liability in respect of the whole of such damage limited to an amount not exceeding 8*l.* per ton for each ton of his steamship's tonnage. *The Rajah*, 3 L. R., Adm. 539; 41 L. J., Adm. 97; 27 L. T. 102; 21 W. R. 14.

Where the damage sustained by all the claimants exceeds in the aggregate the whole amount for which the shipowner is liable (*viz.* at the rate of 15*l.* per registered ton of his ship), the fund must be distributed rateably amongst all the claimants in proportion to the damages sustained by them respectively; but where the whole amount of damages is less than the whole amount for which the shipowner is liable, the amount of damages sustained by each claimant is to be paid in full. *Glaholm v. Barker*, 2 L. R., Eq. 598; 35 L. J., Ch. 657; 12 Jur., N. S. 764; 14 L. T. 880; 14 W. R. 1006.

d. Practice.

Order for Release on Payment of Limited Amount into Court.]—The defendants in a collision cause, in which their ship was under arrest, having instituted a suit for limitation of liability, the court, upon the motion of the plaintiff in the limitation suit, ordered the ship to be released, on payment into court in that suit of the aggregate amount of 15*l.* per ton of the registered tonnage of the ship, and of a sum to cover interest and costs, and did not require that the plaintiff in the limitation suit should admit liability before ordering the release. *The Sisters*, 32 L. T. 837.

Transfer of Fund Paid in, to credit of Limitation Suit.]—A vessel which had been arrested in a cause of damage was released on payment into court of the amount to which the liability of her owners was limited by statute, together with a sum to cover interests and costs. *The Sisters*, 1 P. D. 281; 35 L. T. 36. *See supra.*

Subsequently the vessel was pronounced solely to blame for the collision, and her owners, who had instituted a cause of limitation of liability, moved the court to decree for a limitation of their liability, and to order that the sum in court should be transferred to the credit of the limitation of liability suit. The court decreed a limitation of liability, but considered it unnecessary to order that the amount in court should be transferred to the credit of the limitation of the liability suit. *Id.*

Facts entitling to Limitation must now be stated in Defence.]—To entitle a defendant to the limitation of liability given by the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), s. 54, the facts which bring the case within that enactment must, since the Judicature

Act, 1873, be stated in the defence, though before that act such a statement would have been bad as a plea to the damages. *Wahlberg v. Young*, 45 L. J., C. P. 783; 24 W. R. 846.

Order for Stay on Payment into Court, and Bail.]—The defendants admitted liability in respect of damage to property and loss of life, but no claim had been asserted in respect of loss of life. The court ordered all proceedings against the ship to be stayed upon the defendants paying in the value of the ship at the rate of 8*l.* per ton, and giving bail for the rest of the value at 15*l.* per ton. *The Clutha*, 45 L. J., Adm. 108; 35 L. T. 36.

Staying Proceedings.]—Where owners of cargo have recovered judgment in a collision action brought by them, and the owners of the ship carrying the cargo subsequently bring an action against the same ship to recover damages in respect of the same collision, and the damages in both actions would exceed the value of the defendants' ship at 8*l.* per ton, and the damage in the cargo action alone would not exceed that amount, the court will not stay proceedings in the cargo's action until after judgment in the ship's action, on the ground that without such stay the defendants have to institute a limitation of liability action, which would be unnecessary if the defendants obtained judgment in the ship's action. *The Alne Holme* (No. 2), 4 Asp. M. C. 593; 47 L. T. 309.

Prohibition—Order Staying Proceedings in other Courts.]—A steam vessel having, through negligence, come into collision with another ship, and having been sunk and totally lost in consequence, the owners, with a view to obtaining a decree limiting their liability, instituted a suit in the Court of Admiralty. Cross causes of damage had previously been instituted between the owners of the vessels, and the defendants had, in the cause instituted against them by the owners of the other ship and her cargo, paid into court 5,000*l.* (being an amount less than 15*l.* per ton on each ton of the vessel's registered tonnage) as security to enable them to prosecute the cause in which they were the plaintiffs. A passenger, who had sustained personal injury from the collision, sued the owners of the steam vessel for damages in the Court of Exchequer, whereupon the judge of the Court of Admiralty made an order in the limitation suit that all actions and suits pending in any other court in relation to the subject-matter should be stopped; and he afterwards decreed that the owners were entitled to limited liability, and were only answerable to the extent of 6,376*l.*, being the full amount of 15*l.* per ton, which he directed them to pay into court:—Held, that, under these circumstances, neither the ship nor the proceeds thereof were "under arrest of the Court of Admiralty," within s. 13 of the 24 Vict. c. 10, and that the Court of Admiralty had no jurisdiction under the Merchant Shipping Act, 1854, or the Amending Act of 1862, to entertain the suit, and that a prohibition might accordingly issue to that court from the Court of Exchequer accordingly. *James v. London and South-Western Railway Company*, 7 L. R., Ex. 187; 41 L. J., Ex. 82; 26 L. T. 187; 20 W. R. 538. Affirmed, 7 L. R., Ex. 287; 41 L. J., Ex. 186; 27 L. T. 382; 21 W. R. 25—Ex. Ch.

The court could have granted an injunction to restrain actions at common law in respect of the same collision, even though the goods were to be carried partly by sea and partly by land. *The Normanby*, 3 L. R., Adm. 152; 39 L. J., Adm. 48; 23 L. T. 631; 18 W. R. 903.

The power to stop actions and suits pending in any other court applies, notwithstanding the circumstance that the adverse claimant has obtained a definitive sentence or judgment of the Court of Admiralty condemning the ship; and the utmost to which the latter is entitled under such a judgment, in respect of the loss he has sustained, is to share rateably with the other claimants in the value of the ship and freight. *Leycester v. Logan*, 3 Kay & J. 446; 26 L. J., Ch. 306.

But a court of equity has no control over the ship itself, and cannot prevent the party who has obtained such a judgment from proceeding to a sale of the ship, and retaining out of the proceeds such costs as he may be entitled to retain under the order of the Admiralty court. *Ib.*

Proceedings in other Court not stayed on production of Order.]—An order made by the Court of Admiralty under 24 Vict. c. 10, s. 13 (which confers on that court the same powers of stopping proceedings as were conferred on the Court of Chancery by the Merchant Shipping Act, 1854, s. 514), is not a "writ of injunction, rule or order of either of the superior courts of common law or equity at Westminster," within the Common Law Procedure Act, 1852, s. 226; and, therefore, proceedings in an action in the Court of Exchequer will not be stayed upon the production of such an order made by the Court of Admiralty. *Milburn v. London and South-Western Railway Company*, 6 L. R., Ex. 4; 40 L. J., Ex. 1; 23 L. T. 418; 19 W. R. 105.

Reference as to Distribution of Amount after Stay.]—In a collision cause, although the defendant is entitled, upon admission of liability and payment into court of the amount of his liability under the Merchant Shipping Act, 1862, s. 54, to a stay of proceedings as against himself, plaintiffs having separate interests may, at the defendant's cost, proceed to a reference to settle the respective amounts due to them, and may tax their costs. *The Expert*, 36 L. T. 258.

Costs.]—Although the plaintiff in an action for limitation of liability is ordinarily liable to pay the costs of the action, yet if the defendants raise unnecessary issues on which they fail, he is entitled to the costs of those issues, and he will not be ordered to pay the costs occasioned by a dispute between rival claimants to the proceeds of the court. *The Empusa*, 5 Adm. D. 6; 48 L. J., Adm. 36; 41 L. T. 383; 28 W. R. 263.

A vessel was arrested for losses exceeding 300*l.* The defendants admitted their liability, and paid into court 252*l.*, the amount of their statutory liability at 8*l.* per ton.—Held, that the plaintiffs were entitled to the costs of proceeding in the court. *The Young James*, 39 L. J., Adm. 1.

Interest on Amount—Owner Liable to Pay from Date of Collision.]—The owners of a ship, though their liability to damages in respect of the loss of goods owing to a collision is confined, by the Merchant Shipping Act Amendment Act, 1862, s. 54, to an aggregate amount not exceed-

ing 8*l.* per ton of the ship's tonnage, are liable to pay interest on that amount from the date of the collision. *Smith v. Kirby*, 1 Q. B. D. 131; 24 W. R. 207.

The owners of a ship claiming in the Court of Admiralty to have their liability limited, under 25 & 26 Vict. c. 63, s. 54, in respect of damages occasioned by collision, to an aggregate amount not exceeding 8*l.* for each ton of the ship's tonnage, are liable to pay interest on such aggregate amount from the date of the collision. *The Northumbria*, 3 L. R., Adm. 6; 18 W. R. 188.

The amount of damages being paid by order of the court into the registry, the party finally adjudged to receive the same was not allowed interest from the date of such payment into court. *The North American*, Lush. 79.

The owners of a ship causing a collision are liable to pay interest upon the sum payable as damages, although such damages may amount to the maximum sum limited by 25 & 26 Vict. c. 63, s. 54, and if the ship injured is in ballast at the time of the accident, such interest will be calculated from the date of the collision. *Straker v. Hartland*, 2 Hem. & M. 570; 34 L. J., Ch. 122; 10 Jur., N. S. 1143; 11 L. T. 622.

Where a sum is awarded as damages for collision, the liability to have paid such sum dates from the time at which the loss is considered to have arisen, and the sum awarded bears interest from that date. *The Amalia*, 34 L. J., Adm. 21; 13 W. R. 111.

7. DAMAGES.

a. In general.

Amount.]—When a collision takes place between two vessels by the negligence of the crew of the defendant's vessel, whereby the plaintiff's vessel is injured, and afterwards and before any effort has been made to save the plaintiff's vessel her master and crew unjustifiably abandon her, and she is consequently totally lost, the defendant will not be liable for such total loss of the plaintiff's ship, but only for the expense which would have been incurred in making good the actual damage occasioned by the collision. *The Thuringia*, 41 L. J., Adm. 44; 26 L. T. 446.

The master and crew of a vessel injured by collision are bound to shew ordinary courage and nautical skill in endeavouring to save their vessel from total loss, and the defendant will not, on a reference to the registrar and merchants to assess the damages, be held liable for any loss which might have been avoided by the exercise of such ordinary skill and courage. *Ib.*

Avoidable Consequential Damage.]—In a cause of damage the defendant will not be liable for any consequential damage which the plaintiff might have averted by the exercise of ordinary skill and courage. *Ib.*

Personal Injuries.]—The Court of Admiralty has jurisdiction to entertain an action and to assess the damages in respect of personal injuries done by a ship. *The Beta*, 38 L. J., Adm. 50; 20 L. T. 988; 17 W. R. 933—P. C.; *S. P.*, *The Sylph*, 2 L. R., Adm. 24; 37 L. J., Adm. 14; 17 L. T. 519; *The Uhla*, 37 L. J., Adm. 16, n.; *The Gulfaze*, 2 L. R., Adm. 325; 38 L. J., Adm. 12; 19 L. T. 748.

Repairs and Impaired Value.—A yacht belonging to the plaintiff having been sunk in a collision, and evidence having been given that her marketable value was depreciated:—Held, that in addition to the claims made for repairs, the plaintiff was entitled to be paid such sum as would compensate for the impaired value. *The Georgiana v. The Anglican*, 21 W. R. 280.

The owners of a ship damaged by collision are entitled to the full expenses of repairing her and fitting her for sea, though such repairs may make her more valuable than she was before the collision. *The Pactolus*, Swabey, 173.

Where a ship carrying cargo was sunk in a collision, and afterwards raised and repaired, and the costs of repairs exceeded the original value of the ship, which might have been ascertained before the repairs were commenced:—Held, that the owner could not recover upon a principle of partial loss, but that the measure of damages was the value of the ship before the collision, with interest from the date when the cargo would in ordinary course have been delivered, together with the costs of raising, and the cost of placing the ship in dock for inspection, less the value of the wreck as raised. *The Empress Eugénie*, Lush, 138.

If a collision takes place between two vessels by the negligence of the crew of the defendant's vessel, whereby the plaintiff's vessel suffers damage and is necessarily run aground, and afterwards and before any expenses are incurred, by the negligence of the plaintiff's servants, a total loss of his ship ensues, the defendant is not liable for such total loss of the ship, but is liable for the expense which would have been incurred in making good the partial damage. *The Flying Fish*, 2 Moore, P. C. C., N. S. 77; B. & L. 436; 34 L. J., Adm. 113; 12 L. T., 619.

Costs of Action for Salvage.—In an action for running down a vessel, it appeared that the plaintiff had been compelled to employ a steam-tug, the owners of which demanded 150*l.* for salvage, and commenced a suit in the Admiralty Court for its recovery, in which suit the plaintiff paid 20*l.* into court, and a decree was ultimately made, awarding 45*l.* and costs. The question of the liability of the defendant to pay these costs, and also the costs of the plaintiff in defending that suit, having been reserved upon these facts for the opinion of the court:—Held, that the plaintiff was not entitled to recover them. *Tindall v. Bell*, 11 M. & W. 228; 12 L. J., Ex. 161.

The vessels C. and L. came into collision, in consequence of which salvage services were rendered to the C. The salvors brought a suit, and recovered 50*l.* The L. was condemned in a suit for damage brought by the C., and on reference to the registrar and merchants as to the amount, they struck out the costs of the salvage suit incurred by the C., because her owners had made no tender to the salvors:—Held, that such costs are, by the practice of the court, a proper item in the amount to be accorded in a suit for damage, and that there is no general principle laid down (in *Tindall v. Bell*, 11 M. & W. 228) which had been relied upon to induce the court to depart from its usual practice. *The Legatus*, Swabey, 168.

Demurrage.—Demurrage is allowed to the owners of a ship damaged by collision during the time that she has been necessarily delayed

for the purpose of effecting the repairs rendered requisite by the collision, and of transacting business unquestionably connected with the collision. *The City of Buenos Ayres*, 25 L. T. 672.

As the master has, in some circumstances, the duty cast upon him of acting as agent for the cargo as well as the ship, the making a protest and obtaining the necessary official documents in a foreign port relating to the damage done to both ship and cargo is business unquestionably connected with the collision. Delay in their preparation caused by the dilatoriness of the foreign authorities, and by no default of the master, is chargeable to the collision. *Id.*

The rate of demurrage allowed to steam vessels of the ordinary class, carrying cargo, is 6*d.* per ton on the gross tonnage, or 8*d.* per ton on the net tonnage, per day. This estimate is arrived at by doubling the amount of the wages of the crew and of the cost of their provisions, so as to include both expenditure and loss of trade. *Id.*

Loss of Charterparty—Freight.—In estimating the loss sustained by a ship in a collision, a charterparty entered into contingently on the arrival of the ship at a fixed date at another place should be taken into consideration, the amount recoverable being the freight that would have been earned under the charterparty, less any expenses which would naturally be incurred in the performance of it. *The Star of India*, 1 Adm. D. 466; 45 L. J., Adm. 102; 35 L. T. 407; 25 W. R. 377.

The *Star of India* and the *Cheviot* came into collision on the 1st of May, by which the latter vessel was unable to load cargo by the time stipulated for in the charterparty, which was accordingly cancelled. She was not sufficiently repaired to obtain another charterparty until the 4th of July. The collision was the fault of the *Star of India*:—Held, first, that the owners of the *Cheviot* were entitled to some compensation for loss of the charterparty. *Id.*

Held, secondly, that such compensation was not included in the usual allowance of fourpence per ton a day for demurrage. *Id.*

Where a party who has received a damage by collision claims to be indemnified for a consequential loss, arising from the non-employment of his vessel whilst under repair, he is bound to prove that he has sustained a direct and positive loss; it will not be sufficient to shew that the vessel, if she had not been detained in dock, might have earned certain probable freight. *The Clarence*, 3 Rob. Ad. Rep. 283; S. P., *H. M. S. Inflexible*, Swabey, 200.

The vessel C., which was proceeding in ballast to Montreal to load a cargo of grain for the United Kingdom pursuant to charterparty, was injured by collision with another vessel, and compelled to put into port to repair. The repairs necessarily occupied so long a time that it was not reasonably possible for the C. to have arrived at Montreal in time to fulfil her charter before the navigation of the St. Lawrence was stopped by ice for the winter. In these circumstances the owners of the C. abandoned the charter, and it was found that they acted prudently in so doing:—Held, that the loss arising from the abandonment of the charter was a loss caused by the collision. *The Consett*, 5 Adm. D. 229.

Claim for Loan on Security for Freight.—

The master of the ship C., bound from Philadelphia to Antwerp, obtained at Philadelphia from M. a loan of money on freight upon the security of an instrument signed by him, by which it was stipulated that the loan should be repaid after arrival of the C. at Antwerp or other intermediate port at which the voyage should end, and that if there should be no payment of freight the loan should not be paid back. The C., whilst on the course of her voyage to Antwerp, came into collision with another ship and sank, and her cargo was lost. The collision was occasioned by the negligence of those in charge of the other ship, and her owners instituted an action for limitation of their liability. In such action a sum of money was awarded out of the proceeds paid into court to the owners of the C. for loss of freight. M. claimed a portion of this sum in respect of his loan:—Held, that his claim was well founded. *Semble*, where in an action for limitation of liability a sum of money is awarded as compensation for loss of freight to the owners of a vessel run down by the plaintiff's ship, the holder of a bottomry bond on the freight of the vessel run down, is entitled to claim, in respect of the loan of bottomry, a portion of the sum awarded for loss of freight. *The Empusa*, 5 Adm. D. 6; 48 L. J., Adm. 36; 41 L. T. 383; 28 W. R. 263.

Sum in the Nature of Freight—Bill of Lading.]

—A ship A. and her cargo belonged to the same owners, and the plaintiffs advanced 1,000*l.* as a loan to such owners, and received as security, in conformity with the agreement made between them and the borrowers, the bill of lading, on which the master indorsed a receipt for 1,000*l.* as advanced freight, and also a policy of insurance on advanced freight. Ship A. was lost through a collision with the defendants' vessel, whose negligence was admitted. It was proved that the difference between the value of the cargo at the port of destination and at the port of loading would have considerably exceeded 1,000*l.* In an action by the holders of the bill of lading for 1,000*l.* against the defendants' ship:—Held, that the plaintiffs were entitled to recover the sum, though it was not, strictly speaking, advanced freight, but a prospective increase in the value of the cargo, and that the insurers were subrogated to the rights of the plaintiffs. *The Thyatira*, 8 Adm. D. 155; 52 L. J., Adm. 85; 49 L. T. 406; 32 W. R. 276.

A sum in respect of disbursements for ship A. on her voyage and wages paid in advance had been awarded to the owners of the A. by the registrar and merchants:—Held, further, that this was no bar to the plaintiffs' right to recover in this action. *Id.*

Evidence of Value of Vessel.]—In estimating the value of a vessel at the time of a collision, whereby she was lost, the best evidence is the opinion of competent persons who knew the vessel shortly before the time of loss; next, the opinion of persons well conversant with shipping generally. The original price of the vessel, the cost of repairs done, the amount at which she was insured, &c., are evidence of value, but evidence of inferior weight. *The Ironmaster*, Swabey, 441.

The value of a ship within the meaning of the 17 & 18 Vict. c. 104, s. 504, was what she would have fetched if sold immediately before

the collision, without deduction in respect of costs of sale. *Leycester v. Logan*, 4 Kay & J. 725.

Personal Injuries—Insurance.]—A clause in a policy of insurance on a ship, that in case the ship shall, by accident or negligence of the master and crew, run down or damage any other ship, and the assured shall thereby become liable and pay as damages any sum not exceeding the value of the ship insured and her freight, by any judgment of any court of law or equity, the assurers shall pay such proportion of three-fourths of the sum so paid as the sum assured bears to the value of the ship and her freight, does not extend to damages recovered against the ship-owners for personal injury caused to persons on board a ship with which the ship assured had come in collision. *Taylor v. Dewar*, 5 B. & S. 58; 33 L. J., Q. B. 141; 10 Jur., N. S. 361; 10 L. T. 267; 12 W. R. 579.

Costs of Defence—Insurance.]—A policy was made subject to a stipulation that, in case the vessel should by accident or negligence run down or damage any other vessel, and the assured should thereby become liable to pay and pay as damages any sum not exceeding the value of ship and freight, by or in pursuance of any judgment of any court given in any action defended with the consent of the underwriters, they (the underwriters) would bear and pay a given proportion of the sum so paid. The owners were sued for running down another vessel, and obtained a judgment in their favour, but were put to costs:—Held, that these costs were not recoverable from the underwriters either under the running-down clause or under the usual suing and labouring clause. *Xenos v. Fox*, 4 L. R., C. P. 665; 38 L. J., C. P. 351; 17 W. R. 893—Ex. Ch.

Specific Agreement for Liquidation of Damages.]

—The ship G. having come into collision with the ship W., the owner of the ship W. caused the ship G. to be arrested, but, in consideration of the insurers agreeing to pay to the owners the amount of damage which the ship W. had received by the collision, her owners released the ship G. from arrest:—Held, that the word "damage" included not only the damage to the ship itself, but consequential damage, such as loss of freight and costs in the Admiralty Court. *Heard v. Holman*, 19 C. B., N. S. 1; 34 L. J., C. P. 239; 11 Jur., N. S. 544; 12 L. T. 455; 13 W. R. 745.

Agreement to Raise Boat—Pleading—Evidence.]

—A plaintiff brought an action of contract to recover the expenses of raising a boat which had been sunk in a collision with a vessel of the defendant, when the latter was being navigated by the plaintiff, a pilot employed for that purpose. The defendant denied such contract, on which issue was joined, and at the trial tendered evidence to shew that the collision was occasioned by the plaintiff's fault:—Held, that such evidence was inadmissible. *Speeding v. Young*, 33 L. J., C. P. 286.

Held, also, that the plaintiff, after verdict in his favour, was not entitled to the costs of evidence, tending to shew that the collision was not occasioned by his negligence. *Id.*

Limitation of Damages.]—See LIMITATION OF LIABILITY, *ante*, col. 1684, *et seq.*

b. Liability of Cargo, Freight and Ship.

Cargo.—A cargo laden on board a vessel at the time of collision is in no case liable to be sued for the damage. *The Victor*, Lush. 72.

A cargo arrested for freight will be released upon payment of the freight into court, with an affidavit of value. *Ib.*

Where a cargo is improperly detained under arrest, the owner is entitled to costs and damages. *Ib.*

The owner of cargo on board a ship sued for collision is only compellable to pay into court the freight due from him to the shipowner. *The Leo*, Lush. 444; 31 L. J., Adm. 78; 6 L. T. 58.

Deductions, as by charter, from gross freight will be allowed; and if the cargo is delivered at a place short of destination by reason of the collision, such reasonable deduction as may have been agreed upon between the shipowner and the owner of cargo. *Ib.*

Costs of paying freight into court may also be deducted. *Ib.*

— Part of Cargo Discharged when Arrested.]

—All the cargo on board a vessel at the time of a collision belonged to the same owner, but only a part of the cargo was on board when the vessel was arrested:—Held, that the lien for the whole freight extended to every part of the cargo on board at the time of the collision. *The Roeliff*, 38 L. J., Adm. 56.

Liability of Freight.—By a charterparty made on the 4th of August, between the master of the barque Orpheus and a merchant, it was stipulated that the barque should proceed with a cargo of salt from Liverpool to Viborg, and there deliver the same on being paid freight. By another charterparty made on the 5th of August, between the master and another merchant, it was stipulated that the Orpheus should proceed to Viborg (with liberty to take an outward cargo for owner's benefit) and there load a cargo of deals and proceed therewith to Grimsby, and deliver the same on being paid freight as stipulated. She proceeded with her outward cargo to Viborg, and there loaded her homeward voyage and proceeded with it to Grimsby. While on her outward voyage she came into collision with and did damage to the barque Emilia. Her owners instituted a suit for damage against the Orpheus and her freight, and upon her arrival at Grimsby arrested her, and arrested her homeward cargo, for the freight due in respect thereof. The value of the Orpheus was not sufficient to satisfy the claim:—Held, that she was at the time of the collision in the course of earning the homeward freight, and that the homeward freight was liable to contribute to satisfy the claim. *The Orpheus*, 3 L. R., Adm. 308; 40 L. J., Adm. 24.

Recognition of Maritime Lien by Courts.]—

All civilized nations recognize the validity of maritime lien, and will enforce it when it has been declared by a foreign court; but it is essential that it should appear from the proceedings of the foreign court that the object of the suit was the sale of the ship, and not a personal remedy against the captain or owners. *The Bold Buccleugh* (7 Moo. P. C. 267) considered. *The City of Mecca*, 6 Adm. D. 106; 4 Asp. M. C. 412; 50 L. J., Adm. 53; 44 L. T. 750—C. A.

Lien on Ship.—Damage creates a lien on the ship causing the collision. *Harmer v. Bell*, 7 Moore, P. C. C. 267.

A Scotch steamer ran down an English vessel in the Humber. An action was commenced in the Court of Admiralty in England by the owners of the English vessel against the owners of the steamer, and a warrant of arrest issued against the ship; but before the ship could be arrested she had sailed for Scotland. A suit was then commenced by the owners of the English vessel against the owner of the steamer, in the Court of Session in Scotland, for the damage, and the steamer was arrested under process of that court, but subsequently released upon bail. Afterwards, and pending these proceedings, the steamer was sold, without notice to the purchaser of this unsatisfied claim against her. The proceedings in the Court of Session were still pending, when the steamer, having come within the jurisdiction of England, was again arrested under process of the High Court of Admiralty in England, and an action for damage commenced in that court for the same cause of action as was still pending in Scotland, instructions being sent to Scotland to abandon the proceedings in the Court of Session. The owner of the steamer appeared under protest in the Admiralty court, and pleaded, first, *lis alibi pendens*; and, secondly, that he was a purchaser for value without notice:—Held, first, that the plea of *lis alibi pendens* was bad, as the suit in Scotland was, in the first instance, in personam, the proceedings being commenced by process against the persons of the owners of the vessel, and the arrest of the steamer only collateral to secure the debt, while the proceedings in the Admiralty court in England were, in the first instance, in rem, against the vessel, and therefore the two suits being in their nature different, the pendency of one suit could not be pleaded in suspension of the other. Secondly, that as, by the civil law, a maritime lien does not include or require possession, but being the foundation of proceedings in rem (a process requisite only to perfect a right inchoate from the moment the lien attaches), such lien travels with the thing into whosoever possession it may come, and when carried into effect by a proceeding in rem, relates back to the period when it first attached; the steamer was liable for the damage committed by her, though in the hands of a purchaser without notice of the damage, or the proceedings instituted against her. *Ib.*

Lien follows Ship.—A maritime lien for damage caused by a collision, follows the ship causing the damage, into whosoever hands she may go, and can be enforced at any time, provided there has been no improper delay, or laches, in enforcing such lien. *Dean v. Richards, The Europa*, 2 Moore, P. C. C., N. S. 1; B. & L. 89; 32 L. J., Adm. 189; 9 Jur., N. S. 690; 8 L. T. 368. *And see preceding case.*

— Laches—Effect of—What is.]—A delay of three years to arrest the ship was held not to be an unreasonable delay, the owners of the damaged vessel having used reasonable diligence to discover her whereabouts. *Ib.*

Reasonable diligence means not doing everything possible, but doing that which, under ordinary circumstances, and having regard to expense and difficulty, could be reasonably required. *Ib.*

A collision having occurred between a foreign vessel and an English vessel, the master of the foreign vessel admitted his liability, and gave, in satisfaction of the damage, a bill of exchange, payable on the arrival of his vessel at her port of destination in Scotland. Her master, however, took her to France, where, her owner becoming bankrupt, she was sold by the assignees of his estate to the defendants, who brought her to England, where she was arrested by the owners of the English vessel in respect of the collision, the bill of exchange never having been paid:—Held, that the owners of the English vessel had not lost their lien for damage by reason of laches, or by the subsequent sale of the vessel. *The Charles Amelia*, 2 L. R., Adm. 330; 38 L. J., Adm. 17; 19 L. T. 429.

Increase of Value by Repairs.—A vessel damaged by collision was arrested and subsequently repaired, whereby her value was considerably increased:—Held, that she was only liable to arrest for her value at the time when she was arrested. *The St. Olaf*, 38 L. J., Adm. 41.

Personal Remedy where Value Insufficient.—If the value of the defendant's vessel and freight is not equal to the damage done, the plaintiff may, after judgment, obtain a monition against the defendant personally to satisfy the deficiency. *The Zephyr*, 11 L. T. 351; 12 W. R. 890.

Various Claims—Damage—Bailees Suing.—In a cause of collision instituted by the bailees of a barge against a steamship, they were competent to sue in rem in the Admiralty court; but in order to protect the defendants from the possibility of another suit by other parties on the same subject, the court directed that the money awarded as compensation for the damage should not be paid until it should be satisfactorily established that such payment would release the defendants from all claims by the owners of the barge in respect of the collision. *The Minna*, 2 L. R., Adm. 97.

Priority over Wages.—The owners of a vessel who have recovered judgment against another ship in an action for damage by collision have a prior right against the proceeds of such ship to seamen who have recovered judgment against the same ship for wages earned before and after the collision. *The Elin*, 8 Adm. D. 39; 51 L. J., Adm. 77. Affirmed, 8 Adm. D. 129; 52 L. J., Adm. 55; 49 L. T. 87; 31 W. R. 736—C. A.

8. PARTIES.

Foreigners and their Representatives.—Foreigners injured, or the representatives of foreigners killed, may sue in the Court of Admiralty in respect of injuries done by a British vessel on the high seas. *The Explorer*, 3 L. R., Adm. 289; 40 L. J., Adm. 41; 23 L. T. 604; 19 W. R. 166. But see next case.

Relatives of Persons Drowned.—But under 24 Vict. c. 10, s. 7, which enacts "that the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship," the Court of Admiralty has not jurisdiction in a suit instituted by the relatives of persons drowned by the sinking of a ship run down by another

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ship. *Smith v. Brown*, 6 L. R., Q. B. 729; 40 L. J., Q. B. 214; 24 L. T. 808; 19 W. R. 1165.

Child en ventre sa mère.—In a suit for limitation of liability, instituted on behalf of the owners of a brig against the owners of a barque, an appearance was entered on behalf of a child of one of the drowned men killed by the collision, en ventre sa mère. The court reserved leave to the child en ventre, if born within due time, to prefer its claim for damages sustained by the death of its father. *The George and Richard*, 3 L. R., Adm. 466; 24 L. T. 717. The child was afterwards born, and its claim was assessed. *S. C.*, 20 W. R. 246.

Right of Underwriters for Damages by Collision.—The right of the underwriters of a lost ship for damages against a wrong-doer is merely to make the same claim that the insured might have made. *Simpson v. Thomson*, 3 App. Cas. 279; 38 L. T. 1.

In the case of a collision between two ships belonging to the same owner, by which one was totally lost through the exclusive fault of the other:—Held, that the underwriters could make no claim against the sum paid into court, under the Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), s. 54, the insured being himself the person who had caused the damage. *Ib.*

Bailees of a Barge Competent to Sue in Rem.—The bailees of a barge are competent to sue in rem in the Admiralty Court in cases of collision. *The Minna*, 2 L. R., Adm. 97.

Action against Pilot in Charge of Vessel.—The Court of Admiralty has no jurisdiction to entertain a suit against a pilot for damage occasioned to a ship by his negligence whilst in charge of another ship. *The Alexandria*, 3 L. R., Adm. 574; 41 L. J., Adm. 94; 27 L. T. 565.

The Court of Passage and the county courts, having no larger admiralty jurisdiction than the Court of Admiralty, cannot, therefore, entertain such a suit. *Ib.*

Officers of the Royal Navy.—The captain of a sloop of war is not answerable for damage done by her running down another vessel; the mischief appearing to have been done during the watch of the lieutenant, who was upon deck, and had the actual direction and management of the steering and navigating of the sloop at the time, and when the captain was not upon deck, nor was called by his duty to be there. *Nicholson v. Mouncey*, 15 East, 384. And see *Huggatt v. Montgomery*, 2 N. R. 446; *Rose v. Miles*, 4 M. & S. 101.

Vessel Chartered to the Navy Commissioners.—If a ship is chartered to the commissioners of the navy as an armed vessel, and an injury is done to another vessel by the misconduct of the persons on board the former, while a commander of the navy and a king's pilot are on board, an action for the injury may be sustained against the owners of the chartered ship. *Fletcher v. Brad-dick*, 2 N. R. 182.

Master Obeying Orders.—A. and B. were respectively owners of vessels which, with many others, were taken up by government for the conveyance of troops upon an expedition of

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war in the Black Sea. The transports were towed by steamers to their destination, each steamer having attached to her two transports, the masters of which were under her immediate order and control. The commander of the steamer to which B's vessel and another were attached, on reaching the anchoring ground in the evening, having dropped his anchor, desired the masters of his tows to hold on by their warps or hawsers; but, in the course of the night, a storm arose, which caused B's vessel to swing with violence against A's vessel, whereby it was considerably damaged. In an action for the damage so caused, the judge told the jury that B. would not be responsible if the injury complained of resulted from a strict obedience on the part of the master to the orders of the officer in command of the steamer; but that, assuming that the master was justified by the orders he received in abstaining from anchoring in the first instance, it was for them to consider whether he had not been guilty of negligence and want of good seamanship in continuing to hold on by his warp under the altered state of circumstances, there being some evidence to shew that the accident might have been averted if he had dropped his anchor when the storm came on:—Held, no misdirection. *Hodgkinson v. Fernis*, 2 C. B., N. S. 415; 26 L. J., C. P. 415; 3 Jur., N. S. 818.

In Charge of Contractor.]—The ship of the defendant is liable for the act of a contractor in sole charge of the ship. *The Ruby Queen*, Lush. 266.

Wilful Act of Crew—Master.]—If one of a ship's crew does a wilful act of injury to another ship, without any direction from or privity of the master, an action cannot be maintained against the master, although he was on board at the time. *Bowcher v. Noidstrom*, 1 Taunt. 568.

Chartering Vessel—Duty of Owner.]—A steam vessel was under charterparty for six months, the owners to keep it in order, for the conveyance of goods from Newcastle and Goole, or such other coasting station as the charterer might from time to time employ it in. The crew was appointed by the owners, but paid by the charterer, who was also to pay all disbursements. The charterer did not interfere with the navigation of the vessel; but while he was on board, through the negligence of the crew, it ran against and injured the plaintiff's keel:—Held, that the owners were liable. *Fenton v. Dublin Steam Packet Company*, 1 P. & D. 103; 8 A. & E. 835.

Employment of Waterman—Restriction in Statute.]—The owner of a barge employed M., a freeman of the Waterman's Company, and W., an apprentice of a freeman, to navigate it from the Pool to Lambeth and back, and they were to receive 7s. each for the voyage. By the Waterman's Act, none but freemen and apprentices of freemen or of the widows of freemen, are allowed to act as watermen or lightermen on the river Thames within certain limits. While under the care and management of M. and W., and by their misconduct, the barge injured another barge:—Held, that the owner was liable, M. and W. being in point of law his servants; and that he was not protected from his *prima facie* liability in respect of the injury occasioned by their

misconduct, by the Waterman's Act restraining him to select his servants in the particular trade from a privileged class. *Martin v. Temperley*, 4 Q. B. 298; 3 G. & D. 497; 12 L. J., Q. B. 129; 7 Jur., 150.

When Vessel in Charge of Pilot Compulsorily.]—See XVII. PILOTS AND PILOTAGE.

Vessel Attempting to Salvage.]—The policies of insurance upon a steam vessel and the bills of lading provided that she might "assist and tow vessels in all situations," and in the course of the voyage the vessel in attempting to render salvage services to another steam vessel damaged the latter so that she sank:—Held, that the owners of the first steam vessel were liable for the damage to the latter vessel. *The Thetis*, 38 L. J., Adm. 42. And see cases post, col. 1633.

What Ships.]—The court has jurisdiction over an action brought by a British subject against a foreign ship for a collision in foreign waters. *The Guiswald*, Swabey, 430.

Before 24 & 25 Vict. c. 10, s. 7, a master of a Danish schooner lying alongside the quay at the port of Ibralia, in the Danube, got on board an English barque lying outside him; and with a view to get the schooner out, wilfully cut the barque adrift from her moorings, whereby she swung to the stream and capsized a barge, which contained part of her cargo belonging to Turkish owners:—Held, that the Turkish owners of the cargo destroyed could not sue the Danish schooner in the Court of Admiralty. *The Ida*, Lush. 6.

The court had jurisdiction of a collision between an English and an Irish vessel in the Great North Holland Canal. *The Diana*, 32 L. J., Adm. 57; 9 Jur., N. S. 26; 7 L. T. 397; 11 W. R. 189.

And to entertain a suit against a steam-tug by the vessel in tow for damage done to such vessel by collision caused by the conduct of the tug. *The Night Watch*, 32 L. J., Adm. 47.

By the 24 & 25 Vict. c. 10, s. 7 the court has jurisdiction in a cause of damage done by a sea-going vessel to a barge propelled by oars within the body of a county. *The Malvena*, Lush. 493; B. & L. 57; 1 Moore, P. C. C., N. S. 357; 9 Jur., N. S. 527; 8 L. T. 403; 11 W. R. 576.

But the court has not jurisdiction under 3 & 4 Vict. c. 65, s. 6, or 24 & 25 Vict. c. 10, s. 7, or otherwise, to entertain a claim against a steam-tug for damage occasioned to the vessel towed by negligence in towing, if the damage arises, not by collision but by the vessel taking the ground. *The Robert Pow*, B. & L. 99. And see the cases under ADMIRALTY AND STATUTORY RULES. *supra*, 2.

9. EVIDENCE.

Reports by Officer of her Majesty's Ships—Inspection of.]—After a collision between one of her Majesty's ships and another ship, it is the duty of the commanding officer of her Majesty's ship to forward a report of the collision to the Lords Commissioners of the Admiralty. But in a cause of damage against one of her Majesty's ships a motion to inspect such a report was refused on affidavit by the Secretary to the Admiralty that it would be prejudicial to the public

interests to allow such reports to be inspected. *H.M.S. Bellerophon*, 44 L. J., Adm. 5; 31 L. T. 756; 23 W. R. 248.

Reports of Surveys—Inspection of.]—The defendant in an action of damage to cargo is not entitled to obtain from the plaintiff an inspection of reports of surveys in possession of the plaintiff, written and prepared solely for the purpose of the action. *The Theodore Korner*, 3 Adm. D. 162; 47 L. J., Adm. 85; 38 L. T. 818; 27 W. R. 307.

Where Court assisted by Trinity Masters.]—In a cause of damage, where the court is assisted by Trinity masters, evidence will not be received on a mixed question of law and nautical skill. *The Earl Spencer*, 32 L. T. 370; 23 W. R. 661.

In a cause of collision in which the evidence was entirely oral, and the judge of the Admiralty Court, assisted by Trinity masters, determined on the evidence which vessel was in fault, and decreed damages accordingly: the judicial committee, approving the finding, affirmed that judgment, and dismissed the appeal with costs. *The Alice and The Princess Alice*, 2 L. R., P. C. 245; 38 L. J., Adm. 5; 19 L. T. 678; 17 W. R. 209.

Assessors.]—Semble, that where the two assessors disagree, the court can call in a third, and, after submitting the evidence already given to him, have the case re-argued before the three assessors. *The Philotars*, 37 L. T. 540.

The judgment is that of the judge, and he may decide in accordance with advice of one or more of the assessors or not as he thinks fit. *Ib.*

Entries in Log.]—Entries made in the ship's log by the mate of a vessel relative to a collision and signed by him and the captain nearly two days after the collision, cannot be used as evidence on behalf of the ship in which they were made, after the decease of the persons making and signing them. *The Henry Coxon*, 3 Adm. D. 156; 47 L. J., Adm. 83; 38 L. T. 819.

The log-book of one of the ships produced contained an erasure as to the wind at the time of the collision, but the alteration was rather adverse to the case on behalf of the ship:—Held, that the erasure was immaterial, it being adverse to the case on behalf of the ship. *The Constitution*, 10 Jur., N. S. 831; 10 L. T. 894—P. C.

The court will admit a light ship log, on production by the officer of the Trinity House in whose custody such logs are kept, without requiring the evidence of the person who made the entries. *The Maria Das Dorias*, B. & L. 27; 11 W. R. 500.

The books containing the entries made by the coastguard, and sent to the coastguard office, are admissible to prove the state of wind and weather at the time of the collision, without calling the person who made the entries. *The Catherine Maria*, 1 L. R., Adm. 53; 12 Jur., N. S. 380.

Captain's Examination taken by Receiver of Wrecks.]—The examination of the captain of the plaintiff's ship, taken by the receiver of wrecks under 17 & 18 Vict. c. 104, s. 448, is not admissible for the defendant for the purpose of proving the fact that the damage to the ship from the collision was on her starboard bow; such fact being offered for the purpose of shewing

that the plaintiff's ship was in fault, the question which ship caused the damage to the other not being a matter which the receiver had power to examine into. *Nothard v. Pepper*, 17 C. B., N. S. 39; 10 Jur., N. S. 1077; 10 L. T. 782.

A certified copy of an examination taken before a receiver of wrecks cannot be used to discredit the captain in the witness box; the original only can be admitted. *The Emperor; The Zephyr*, 12 W. R. 890.

The statement of the appearer as to how a collision happened, or who was to blame for it, is not evidence against the owners, although if the appearer makes subsequently an inconsistent statement, it may be used to impeach his general credibility. *Ib.*

Though it may be intended to contradict a witness as to statements made by him before a receiver of wrecks, it is not necessary to subpoena the receiver to produce the original deposition, as a certified copy will be sufficient for the purpose. *The Oscar*, 10 L. T. 789; 12 W. R. 872.

Depositions.]—Depositions made by persons on board a ship relative to a collision cannot, even after the decease of the deponents, be used as evidence on behalf of that ship at the trial. *The Henry Coxon*, *supra*.

Allegations and Proof.]—On appeal, in a cause of collision by drifting, between two vessels originally at anchor, the statement in the defendants' answer in the Admiralty Court as to the bearing of their vessel in respect to the other when at anchor, varied from the proof:—Held, that the statement as to the bearing of one vessel in respect of the other when at anchor was immaterial, and was therefore not necessary under the Admiralty Rules, 1859, No. 67, and that the variance was therefore immaterial. *The Rosita*, 2 L. R., P. C. 214; 38 L. J., Adm. 20; 19 L. T. 753; 17 W. R. 209.

Lights.]—Evidence of an order, as to the lights, given twelve hours before the collision, is admissible, but not of conversations with respect to them. *The Aleppo*, 35 L. J., Adm. 9; 14 L. T. 228.

Proof of Loss.]—On a reference to the registrar in a cause of damage, the plaintiffs, who were underwriters of the cargo, and had paid as for a total loss, produced in support of their title as owners of the cargo lost, the policies of insurance of the cargo, the bills of lading, and the invoice and copy manifest:—Held, that they must give further evidence of the value of the goods, and of a discharge from the owners of the cargo. *The John Bellamy*, 3 L. R., Adm. 129; 39 L. J., Adm. 28; 22 L. T. 244.

When Actions Consolidated.]—The court cannot except by consent order that evidence in one suit that has been heard shall be admitted as evidence in a subsequent suit. *The Demetrius*, 3 L. R., Adm. 523; 41 L. J., Adm. 69; 26 L. T. 324; 20 W. R. 761.

In consequence of a collision between vessels A. and B., both the vessels and also the cargo laden on board the A. sustained damage. A suit in rem was instituted by the owners of the A. against the B. to recover the damage done to their vessel. A cross suit was instituted by the owners of the B. against the A. These suits

were heard and determined. Afterwards a suit in rem was instituted on behalf of the owners of the cargo on board the A. against the B. to recover the damage done to the cargo :—Held, that the court had no power to order the evidence taken in the suit by the owners of the A. against the B. to be admitted in the suit instituted on behalf of the owners of cargo. *Ib.*

Opinion.]—In an action for negligently steering a ship, whereby she was wrecked, and the plaintiff lost his passage in her, no evidence can be given of a specific act of negligence, which is not the foundation of the action ; but evidence may be given that the captain had often expressed his conviction that the officer to whom he gave charge of the ship was incompetent for that situation ; and experienced nautical men may be called as witnesses, and asked whether, in their judgment, particular facts which have been proved amount to gross negligence. *Malton v. Nesbit*, 1 C. & P. 70.

But a nautical witness cannot be asked whether he thinks, having heard the evidence, that the conduct of the captain was correct or not. *Sills v. Brown*, 9 C. & P. 601.

In an action for running down the plaintiff's ship, a nautical witness may be asked, whether, having heard the evidence, and admitting the facts proved by the plaintiff to be true, he is of opinion that the collision could have been avoided by proper care on the part of the defendant's servants. *Fenwick v. Bell*, 1 C. & K. 312.

Evidence of Ownership.]—In an action for damage done to the plaintiff's lug-boat, by the negligence of the defendant's servant in steering his barge, it was proved that the barge was the defendant's, but the plaintiff's witness could not identify the bargeman who was steering the barge :—Held, that this was *prima facie* evidence that the barge was steered by the defendant's servant ; and that, if the barge was on hire, or in the use of any other person, it lay on the defendant to shew those facts. *Joyce v. Capell*, 8 C. & P. 370.

10. PRACTICE, PLEADING, AND COSTS.

And see the general head of PRACTICE, *infra*, XXIII.

Concurrence or Election of Remedies.]—A party, having two remedies, an action in personam and an action in rem, resorted, in the first instance, to his personal action, and obtained judgment, but could not recover the amount sued for :—Held, that he was entitled afterwards to proceed in rem. *The Bengal* ; *The John and Mary*, Swabey, 471 ; 5 Jur., N. S. 1085.

Operation of Decree unappealed against.]—There were cross suits respecting a collision between a steamer and a sailing vessel. The court held both to blame. The steamer alone appealed in both suits :—Held, that as the sailing vessel had not appealed from the decree which declared she was in the wrong such decree operated as *res judicata*, that the allegations made in her suit were not substantiated. *The City of Antwerp and the Friedrich*, 2 L. R., P. C. 25 ; 37 L. J., Adm. 25.

It is no bar to an action for a collision at sea that a judgment in rem has been recovered in the Admiralty court, and execution levied by the sale of the defendant's vessel, where the damage done was more than the amount realized by such sale. *Nelson v. Couch*, 15 C. B., N. S. 99 ; 33 L. J., C. P. 46 ; 10 Jur., N. S. 366 ; 8 L. T. 577 ; 11 W. R. 964.

Foreign Suit Pending.]—In a cause of damage in respect of collision between two foreign vessels in the Bosphorus ; semble, that if a suit as to the same subject-matter is pending elsewhere whereby the plaintiff can obtain full indemnity, the Court of Admiralty will suspend the proceedings in its court or put the plaintiff to his election ; and the court will so act whether the proceedings elsewhere are in rem or in personam. *The Mali Ivo*, 2 L. R., Adm. 356 ; 38 L. J., Adm. 34 ; 20 L. T. 681.

Judgment obtained.]—Where cross actions between an English and a foreign ship were heard and judgment given in a foreign court in favour of the English ship in both actions, and suits in the Court of Admiralty were afterwards heard and the English vessel found alone to blame :—Held, that, she must be condemned in damages and costs, notwithstanding the foreign judgments. *The Delta*, *The Erminia Foscolo*, 1 Adm. D. 393 ; 45 L. J., Adm. 111 ; 25 W. R. 46.

Personal Remedy—Value Insufficient.]—If the value of the defendant's vessel and freight is not equal to the damage done, the plaintiff may, after judgment, obtain a monition against the defendant personally to satisfy the deficiency. *The Zephyr*, 11 L. T. 351 ; 12 W. R. 890.

Remission of Action from Court of Appeal.]—If the cause is remitted from the Court of Appeal, with injunction "to proceed according to the tenor of former acts had and done," the court has no authority to relax an order made previously to the appeal. *The William Hunt*, Lush. 25.

Consolidation of Actions.]—Where several actions are brought against a ship in respect of one collision by different plaintiffs, and several bail bonds given, and the actions are consolidated by order of the court, and the damage pronounced for in the usual course, the court has the power to open the order of consolidation and disavow the actions, but will not do so unless due cause is shewn. *Ib.*

Cross Actions.]—Where there is a cross action, and both come on to be heard together by consent of proctors, the court decides in the cross action according to the facts pleaded and proved in the original action. *The Vortigern*, Swabey, 518.

The owners of a ship, A., brought an action in a cause of damage against the owners of B. The court found both to blame ; no cross action had been entered pending those proceedings. Subsequently the owners of B. entered an action in a cause of damage against the owners of A., who gave an appearance under protest :—Held, that the owners of A. must give an absolute appearance, though a cross action, in the first instance, would have been the proper course. *The Calypso*, Swabey, 28.

Where cross actions were brought, and one vessel was found solely to blame, but her owners were freed from responsibility because the collision was caused by the act of a pilot who was employed compulsorily, in the action brought by the innocent vessel, the court dismissed the plaintiffs without costs, but in the cross action condemned the guilty vessel in costs. *The Anna-polis*, Lush. 295; 30 L. J., Adm. 201.

Collision between two foreign vessels, A. and B.; total loss of A.; B. was arrested in an action by the owner of A.; cross action by the owners of B., but no appearance. The court refused to stay proceedings in the action against B. until an appearance was given in the cross action. *The North American*, Lush. 79.

— **Security.**—When cross causes are instituted in respect of a collision, security cannot be required, under 24 & 25 Vict. c. 10, s. 34, for a greater amount than the value of the vessel of the defendant from whom security is demanded, though that may have sunk and the action against the owner is a personal one. *The Calcutta*, 17 W. R. 744.

As to Restraining Actions, &c., in Cases of Limitation of Liability.—See *ante*, col. 1591 *et seq.*

Preliminary Acts.—Where the case is to be heard on *vivâ voce* evidence only, the preliminary acts are to be exchanged before the evidence is taken. *The Ruby Queen*, Lush. 266.

— **When required.**—In an action for damage to cargo sustained in a collision between two ships where the action is brought against the ship carrying the cargo, the parties are not bound to file preliminary acts under Ord. XIX. r. 30. *The John Boyne*, 36 L. T. 29; 25 W. R. 756.

Pleadings—Allegations and Proof.—The court will proceed *secundum allegata et probata*, even though entertaining some doubt whether, in so doing, it will arrive at the real truth and justice of the case. *The North American*, 12 Moore, P. C. C. 331; Swabey, 358.

In a cause of collision, therefore, a party suing cannot recover in full if he fails to prove the case set up in his pleading and evidence, although no fault is proved against his vessel, and fault is established against the other vessel. *Id.*

A plaintiff is only entitled to recover *secundum allegata et probata*. *The Ann*, Lush. 55; 13 Moore, P. C. C. 198.

The principle laid down in these cases is to be strictly adhered to, but that rule applies only to the party proceeding to recover the damage sustained. *The East Lothian*, 14 Moore, P. C. C. 1; Lush. 241; 4 L. T. 487.

A plaintiff is only bound to plead facts from which the court may infer that the collision was occasioned by the default of the party proceeded against. *Id.*

A counter-allegation by the defendant, pleading a certain fact as the cause of the collision, may as an answer to the action fail to be proved; nevertheless, a plaintiff must establish his case according to his own pleadings and evidence, not upon the failure of the defence set up by the defendant. *Id.*

The pleadings should be confined to the merits of the collision. *The George Arkle*, Lush. 222.

Special damages, as rewards paid to salvors

for services rendered necessary by the collision, are not to be pleaded. *Id.*

An allegation in a petition that the vessel proceeded against in a collision cause was "considerably farther out to the north side of the river than" the other vessel, and improperly ported and so brought about a collision, is sufficiently proved, to entitle the owners of the vessel making the allegation to recover, by shewing that the vessel proceeded against was farther over to the south side of the river than the other, and improperly ported. The word "considerably" need not be proved to the full extent. *Malcolmson v. General Steam Navigation Company, The Ranger and The Cologne*, 4 L. R., P. C. 519; 27 L. T. 769; 21 W. R. 273; 9 Moore, P. C. C., N. S. 352.

In a cause of damage, alleged to have been done by, and imputable to the acts of the owners, and their servants, of the vessel proceeded against, a general denial was pleaded in answer, and a special defence that the damage complained of was the same as had already been adjudicated upon in a court of law, and judgment obtained and satisfied; at the hearing it was proved by a witness, who was the principal defendant in the action, that the damage proceeded for was occasioned by acts done by him on his own responsibility, and in the assertion of a right claimed by him as consignee for sale of the vessel, and not as the agent on behalf of the owners; whereupon the judge held, that the suit could not be maintained: but, inasmuch as the defence thus disclosed had not been specifically pleaded, declined to give the defendants their costs, or to go into the special defence, though his judgment thereon was asked for by the defendants' counsel:—Held, that the appeal was not for costs alone within the meaning of the rule of the appellate court against the allowance of appeals involving costs only; that the general traverse and denial of the averments in the petition was sufficient to justify the evidence produced; and that the defendants were further entitled to have the judgment of the court, as asked on the special defence pleaded, that if prejudiced by such judgment they might appeal. *The Orient, Yeo v. Tatem*, 3 L. R., P. C. 696; 40 L. J., Adm. 29; 24 L. T. 918; 20 W. R. 6.

If a plaintiff in a collision suit intends to rely upon a particular act of negligence by the defendant, he is bound specifically to allege that act in his pleadings, and it is not sufficient that the act may be included generally in an allegation in the pleadings, which do not clearly state such particular act; as it is likely to mislead the defendant, and prevent his being prepared to meet that particular case. *The Marpesia*, 4 L. R., P. C. 212; 8 Moore, P. C. C., N. S. 468; 26 L. T. 333.

Seemingly, that the established rule, which requires a plaintiff in a cause of damage to state with reasonable certainty the instances of neglect on which he intends to rely, and if he relies on a breach of a statutory rule of navigation, that he should specifically plead that the act done or not done was in violation of that particular rule, does not apply to a case where one vessel is under way and the other incapable of moving. *The Secret*, 26 L. T. 670.

When the petition states such facts on the part of the plaintiff, as if proved or admitted, would lead to the conclusion that the vessel charged with the collision was to blame, it is

then rather for the defendant to shew what has been done than for the plaintiff to shew what might have been avoided. *Id.*

Where a plaintiff charges two separate collisions, whereby his vessel, being at anchor, was driven on the rocks, and sustained great damage, and the first collision was such, that the plaintiff's vessel might, and probably would have driven on the rocks if no second collision had happened, he will be entitled to recover, on proving the first collision only, as the rule that a plaintiff must recover *secundum allegata et probata* is thereby satisfied. *The Despatch*, Lush. 98; 14 Moore. P. C. C. 83.

Where the plaintiffs pleaded that the collision was caused by the defendant's vessel having suddenly put her helm a-starboard, and the evidence given in support of the petition was that the collision was caused by the defendant's vessel having ported instead of continuing her course under a starboard helm :—Held, that the evidence could not be applied to the statement in the petition, and that the plaintiffs, therefore, were not entitled to recover. *The Haswell*, B. & L. 247—P. C.

The rule, that a party seeking redress for an injury can only recover *secundum allegata et probata*, applies only to cases where the averments alleged are material to the issue raised. *The Alice and The Rosita*, 5 Moore, P. C. C., N. S. 300; 38 L. J., Adm. 20; 19 L. T. 753; 17 W. R. 209.

Where, therefore, in a case of collision caused by a vessel drifting and driving down upon another at anchor in the same anchorage, though the relative bearing of the two vessels previously to the collision was incorrectly pleaded and alleged by the vessel proved to be entitled to redress :—Held, that the vessels not being in motion, their previous relative bearing when at anchor was not a material fact to the issue, namely, which vessel caused the collision, so as to render the actual proof of the damage of no avail, and so entitle the offending party to the benefit of the rule. *Id.*

To a petition alleging that the M. had been for some time close-hauled on the starboard tack, and that the W. N. on the port tack came into collision with her, the answer admitted that the W. N. was close-hauled on the port tack, and alleged that the M. was seen on the port tack distant about a mile :—Held, that the defendants were bound also to allege what was subsequently done on board the W. N. and before the collision, and the mode of the collision. *The Why Not*, 2 L. R., Adm. 265; 38 L. J., Adm. 26; 18 L. T. 861.

In a cause of collision by the owners of a vessel and the crew for their private effects, admissions by the crew, as to the circumstances of the collision, cannot be pleaded. *The Foyle*, Lush. 10.

— **Limitation of Liability must be Specially Pledged.**—See *Wahlberg v. Young*, ante, col. 1592.

— **Admissions.**—An allegation averred that by an act of the legislative council of India, and the rules and regulations passed pursuant to such act, the defendants were exempted from responsibility for the damages sued for by reason of the ship being in charge of a pilot, whom they were obliged by the provisions of that act to take on board. The responsive allegation did not traverse such averment as to the fact of the act and rule and regulations, and the requirement to take a pilot

on board, but simply alleged that the defendants were not exempted by the act, and the rules and regulations :—Held, that the act and the rules and regulations being pleaded, and not denied, there was no necessity to prove them, the responsive allegation admitting, as far as was necessary between the parties to the cause, the act, rules and regulations as a fact, though not the effect of their operation in law. *The Peerless*, 13 Moore. P. C. C. 484; Lush. 103.

Replying.—A plaintiff may plead new matter in reply, if it is really matter of reply, and not properly a part of the case set up in his behalf. *The Bothnia*, Lush. 52.

Adding Pleas.—The court will not, at the hearing of a cause of collision, allow a plea to be added alleging that the vessel proceeded against was in charge of a licensed pilot, and that the accident was caused by his default. *The Alhambra*, B. & L. 286.

Burden of Proof.—In a damage cause, brought by the owners of a sailing vessel against a steam vessel, it is not incumbent upon them to plead that the sailing vessel, after observing the steam vessel, kept her original course. The burden of proof, and therefore of plea, is in this respect upon the defendant, to shew that the course of the sailing vessel was altered, and the collision caused thereby. *The West of England*, 1 L. R., Adm. 308; 36 L. J., Adm. 4.

Plea, that a steamer overtaking a sailing vessel could not comply with the 17th Art. in consequence of the state of the weather, and the neglect on the part of those on board the sailing vessel to take proper precautions to avoid a collision :—Held, that the proof of such a plea was entirely on the steamer, who must make out in her defence that it was impracticable for her, in consequence of the state of the weather, to have seen the sailing ship in time to avoid her; and that the steamer was pursuing her course at a reasonable speed, such weather considered. *The Hannah Park and The Lena*, 14 L. T. 675.

A plaintiff, whose vessel has been run down at anchor, may charge negligence generally, and the burden of proof, the collision proved, is thrown upon the defendant to establish his defence. *The Bothnia*, Lush. 52.

The onus probandi lies on a party seeking to recover compensation for damage occasioned by a collision, and that party must establish that the loss was attributable to the neglect or default of the other party, or else he cannot recover. *Morgan v. Sim*, 11 Moore, P. C. C. 307.

Right of Beginning.—Where a defendant admits in the pleadings that his ship, when under way, ran into a vessel at anchor, but denies that the vessel at anchor was the vessel of the plaintiff, the plaintiff must begin and prove his case. *The Earl of Leicester*, B. & L. 188.

The defendants, by their pleadings, made no charge against the plaintiffs, but only denied generally the averments in the petition, and pleaded inevitable accident :—Held, that defendants ought to begin. *The Thomas Lea*, 38 L. J., Adm. 37; 20 L. T. 1017.

Right of Reply.—In a cause of collision, in which the evidence has been taken before an examiner of the court, the plaintiff's counsel is entitled to reply. *The Itjkan*, 14 W. R. 973.

Security for Costs.—Where a plaintiff has recently executed a deed of assignment of all his property to an assignee, he will be required to give security for the costs of suit, unless he satisfies the court that he is solvent. The fact that he is carrying on business is not sufficient proof of his solvency. *The Lake Megantic*, 36 L. T. 183.

A defendant in a collision cause making a counter-claim for the damage sustained by his own vessel, must, if he is resident out of the jurisdiction, give security for the costs, not merely of his counter-claim, but of the whole action. *The Julia Fisher*, 2 Adm. D. 115; 36 L. T. 257; 25 W. R. 756—C. A.

If he makes default in giving security for costs pursuant to order, he will have his counter-claim dismissed. *Ib.*

Reference—Plaintiff out of Jurisdiction.—Where a decree has been made of both vessels to blame, the court will not refer the damage of both vessels to the registrar, but will leave the defendant to his cross-action, notwithstanding that the ship of the plaintiff perished in the collision, and the plaintiff resides out of the jurisdiction. *The North American*, Swabey, 466.

What Damages.—Upon a decree pronouncing generally for damages occasioned by a collision, and ordering a reference to the registrar to assess the amount, the defendant is not liable for such damages as might have been avoided by the exercise of ordinary nautical skill and diligence after the collision on the part of the servants of the plaintiffs in charge of their ship. *The Flying Fish*, B. & L. 436; 2 Moore, P. C. C., N. S. 77; 34 L. J., Adm. 113; 12 L. T. 619.

If upon such reference the plaintiffs present a case of immediate partial damage resulting in the total loss of their ship, and no evidence is given on either side of the pecuniary extent of such partial damage, and the registrar is of opinion that the plaintiffs are not entitled to recover the total loss upon the ground that by ordinary skill and diligence after the collision they might have avoided it, but are entitled to recover the partial damages, he should not assess the amount of the partial damages conjecturally and report such amount to be due, but should make a special report to the court; and the court will then order a further reference to ascertain the amount of the partial damages by evidence. *Ib.*

Costs of.—An action of damage was brought by the owners of the ship V. against the ship S., and the owners of the S. claimed damages by way of counter-claim against the V. At the hearing of the action the court found both ships to blame for the collision, condemned the owners of each ship in a moiety of the damage sustained by the other, referred the question of damages to the registrar and merchants and made no order as to costs. Afterwards the owners of the S. brought their counter-claim into the registry. No tender was made by the owners of the V., and the registrar struck off less than one-ninth of the amount claimed, but made no recommendation as to the costs of the reference. The court, on the application of the owners of the S., condemned the owners of the V. in the costs of and incident to the reference. *The Consett*

(*infra*) followed. *The Savernake*, 5 Adm. D. 166; 49 L. J., Adm. 711; 29 W. R. 123.

In an action of damage brought by the owners of the ship J. and the owners of the cargo on board her against another vessel, the court pronounced that the two vessels were both to blame for the collision, and condemned the defendants in a moiety of the damage proceeded for:—Held, that the owners of the cargo on board the J. were entitled to the costs of the affidavits brought in by them in support of their claim at the reference. *The Consett*, 5 Adm. D. 52; 49 L. J., Adm. 24; 42 L. T. 33; 28 W. R. 307. Affirmed, 5 Adm. D. 77; 28 W. R. 622—C. A.

Where, in an action of damage, the defendant sets up a counter-claim relating to the collision in respect of which the action is brought, and both ships are held to blame, and a reference is ordered to ascertain the amount of damage sustained by each ship, each party is, as a general rule, entitled to the costs of establishing his claim before the registrar, provided that not more than one-fourth of his claim has been disallowed. *The Mary*, 7 Adm. D. 201; 5 Asp. M. C. 33; 48 L. T. 28; 31 W. R. 248.

Where a plaintiff claimed unliquidated damages in respect of loss of the remainder of a season's fishing occasioned by a collision, and on a reference to the registrar and merchants, the defendant objected to the claim altogether, but the plaintiff recovered, being awarded less than two-thirds of the amount claimed by him as damages, the court gave him costs in respect of the reference on the ground of the peculiarity of the plaintiff's claim, and without prejudice to the general rule as to costs of references. *The Gleaner*, 38 L. T. 650.

Where the amount of damage is referred to the registrar and merchants, and a tender is made by the defendant but not accepted by the plaintiff, if the amount pronounced to be due is less than two-thirds of the claim, but exceeds the tender of the defendant, the plaintiff is liable for the general costs of the reference, but the defendant for the costs occasioned by his making an insufficient tender. *The Seine*, Swabey, 513.

The ordinary rule, that a plaintiff shall pay the costs of the reference to the registrar and merchants, if their report disallows more than one-third of his claim, is not to be relaxed, even if he fails in substantiating his entire claim upon a question of law only. *The Empress Eugénie*, Lush. 138.

Costs—Defence on Merits and on Ground of Compulsory Pilotage.—Where the defendants in a collision suit raise a defence on the merits, and also set up a plea of compulsory pilotage, and the court dismisses the suit on the ground that the plea of compulsory pilotage is established, each party to the suit will, in accordance with the practice prevailing in the Court of Admiralty before the Judicature Acts, be left to bear his own costs. *The Matthew Cay*, 5 Adm. D. 49; 49 L. J., Adm. 47; 41 L. T. 759; 28 W. R. 262.

In an action in the Exchequer Division, tried by a jury, for damages caused by collision of the defendants' ship with the plaintiffs' ship, the defendants raised several grounds of defence, but succeeded only on the ground that the collision was caused by the negligence of the pilot, whom they were compelled by law to employ. The plaintiffs afterwards, under Ord. LV., applied to the Exchequer Division for an order depriving

the defendants of costs, on the ground that in the Admiralty Division a defendant under similar circumstances is entitled to no costs:—Held, that, whether the Exchequer Division had or had not power to make such an order, it ought not to be made, for the rule which prevails in the Admiralty Division does not extend to the other divisions. *General Steam Navigation Company v. London and Edinburgh Shipping Company*, 2 Ex. D. 467; 47 L. J., Ex. 77; 36 L. T. 743; 25 W. R. 694. See sub nom. *The Dainz*, 47 L. J., Adm. 1; 37 L. T. 137—C. A.

Defendants in a cause of damage who rely at the hearing upon the defence of compulsory pilotage only, but whose pleadings raise other issues that are not proved, are not entitled to their costs. *The Livina*, 25 L. T. 887.

Defendants in a collision suit by their answer denied that their vessel was to blame, and also set up the defence of compulsory pilotage. The court decided that their vessel was to blame, but dismissed the suit upon the ground that the defence of compulsory pilotage was established:—Held, that the plaintiff was not entitled to any portion of the costs of the suit. *The Schwan, The Robert Morrison*, 4 L. R., Adm. 187; 43 L. J., Adm. 18; 30 L. T. 537; 22 W. R. 743.

In an action of damage, if the only defence is that the damage was caused by the negligence of a pilot taken by compulsion of law, the defendants, if successful in establishing this defence, are entitled to costs. *The Juno*, 1 Adm. D. 135; 45 L. J., Adm. 105; 34 L. T. 741; 24 W. R. 902; *S. P., The Royal Charter*, 2 L. R., Adm. 362; 38 L. J., Adm. 36; 20 L. T. 1019; 18 W. R. 49.

The Admiralty Division will adhere to the practice of the High Court of Admiralty as to costs in compulsory pilotage. *The Princeton*, 3 Adm. D. 90; 47 L. J., Adm. 33; 38 L. T. 260.

—**Royal Navy.**—In a cause of damage instituted on behalf of Her Majesty in her office of Admiralty, and of the commander and crew of one of her Majesty's ships against a private shipowner, the court, on a finding for the defendant, declined to condemn the crown in costs, but condemned the commander and crew to pay the whole of the costs. *The Leda, B. & L.* 19; 32 L. J., Adm. 58; 9 Jur., N. S. 208.

Co-plaintiffs are severally liable to the whole of the costs. *Id.*

—**Of Reference.**—*See cases supra.*

—**Both Vessels to Blame—Action by Owners of Cargo.**—The owners of a cargo laden on board a vessel which had been sunk in a collision with another vessel brought an action of damage against the owners of such other vessel. The judge of the Admiralty Division pronounced that both vessels were to blame for the collision, gave the plaintiffs half their damages from the defendants, and condemned the defendants in the costs of the action. The decision that both vessels were to blame was upheld by the Court of Appeal:—Held, that as the plaintiffs had failed on the issue that the vessel carrying the cargo was not to blame, no costs ought to have been given. *The City of Manchester*, 5 Adm. D. 221; 49 L. J., Adm. 80; 42 L. T. 521.

The case of *The Milan* (Lush. 388) does not lay down any general rule that wherever owners

of cargo succeed in an action brought by them to recover damages for the loss of or injury to the cargo, they are entitled to the whole costs of the litigation. "The circumstances of each particular case must introduce a variation in the way the costs are given" (per Baggallay, L. J.). *Id.*

When both ships are to blame for a collision, the damages are equally divided, and each party bears his own costs. *The Agra and Elizabeth Jenkins*, 1 L. R., P. C. 501; 36 L. J., Adm. 16; 16 W. R. 735; 4 Moore, P. C. C., N. S. 438.

—**Limitation of Liability.**—Although the plaintiff in an action for limitation of liability is ordinarily liable to pay the costs of the action, yet, if the defendants raise unnecessary issues on which they fail, he is entitled to the costs of those issues, and he will not be ordered to pay the costs occasioned by a dispute between rival claimants to the proceeds. *The Empusa*, 5 Adm. D. 6; 48 L. J., Adm. 36; 41 L. T. 383; 28 W. R. 363.

A vessel was arrested for losses exceeding 300*l.*, the amount of their statutory liability at 8*l.* per ton:—Held, that the plaintiffs were entitled to the costs of the proceeding in the court. *The Young James*, 39 L. J., Adm. 1.

—**Damage caused by Inevitable Accident.**]

—A sailing ship in a gale drove from her anchors across a sand and her rudder was so damaged as to render her unmanageable; in this condition she came into collision after sunset with a brig at anchor. At the time of the collision the ship had her anchor light exhibited and no other light. In an action of damage by the owners of the brig against the ship, it was held that the collision was occasioned by inevitable accident, and that the ship, in the circumstances of the case, was not to be deemed in fault for not carrying side lights, or the three red lights prescribed by Article 5 of the Regulations for Preventing Collisions at Sea, and that the suit ought to be dismissed without costs. *The Buckhurst*, 6 Adm. D. 152; 51 L. J., Adm. 10; 46 L. T. 108; 30 W. R. 232.

It is a rule in the Admiralty Court where a collision is found to be the result of inevitable accident, to make no order as to costs, unless it can be shewn that the suit was brought unreasonably and without sufficient *prima facie* grounds. *The Marpesia*, 4 L. R., P. C. 212; 26 L. T. 333; 8 Moore, P. C. C., N. S. 468.

It is the practice of the Admiralty Court in cases of inevitable accident that each party should pay its own costs. But if, from the circumstances of the collision, it must have been obvious that the collision was an inevitable accident, the court will use its discretion as to dismissing the suit with costs. *The Innisfail; The Secret*, 35 L. T. 819.

—**On Appeal.**—When the Court of Appeal varies the decision of the judge of the Admiralty Division, by which he found one vessel wholly to blame for a collision, by finding that the collision was an inevitable accident, the practice of the Privy Council that each party should, except under very exceptional circumstances pay their own costs, will be followed. *The City of Cambridge*, 35 L. T. 781—C. A.

When the Court of Appeal varies a decision of the judge of the Admiralty Division, by which he found one vessel wholly to blame for a colli-

sion, by finding that both vessels are to blame, each party will pay its own costs, both in the court below and in the Court of Appeal. *The Corinna*, 35 L. T. 781—C. A.

Semble, in successful admiralty appeals the appellants will have their costs of the appeal. *The Swansea v. The Condor*, 4 Adm. D. 115; 48 L. J., Adm. 33; 40 L. T. 442; 27 W. R. 748—C. A. And *Cp. The City of Berlin*, 2 Adm. D. 187; 47 L. J., Adm. 2; 37 L. T. 307; 25 W. R. 793—C. A.

When the Court of Appeal varies the decision of the court below by finding both vessels to blame for a collision, there will be no order as to costs, but each party must bear the costs of the whole litigation. *The Milanese*, 45 L. T. 151—H. L. (E.).

Action and cross action; judgment, both ships to blame and damages to be divided; appeal by one party in both actions, and adherence to the appeal by the other party; the judgment being affirmed, each party was sentenced to pay his own costs. *The Saxonia*; *The Eclipse*, Lush. 410—P. C.

Judgment of the Court of Admiralty in a cause of collision, which imputed mutual blame, and condemned each party in a moiety of the damages and costs, reversed by the judicial committee upon a review of the evidence and the opinion of the nautical assessors. *The Singapore and The Hebe*, 1 L. R., P. C. 378; 4 Moore, P. C. C., N. S. 271.

Costs of Reference in cases of Limitation of Liability.—*See ante*, col. 1593.

XIX. SALVAGE AND TOWAGE.

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1. SERVICES ENTITLING TO SALVAGE.

a. Distinction between Salvage and Towage.

Where no Danger.—In a salvage suit promoted in respect of certain services whereby the defendant's vessel, which at the time such services were rendered was in neither actual nor imminent probable danger, had been safely towed into port:—Held that such services must be regarded as towage, and not as salvage services. No tender of the amount thereof having been made, such amount could not be recovered in a salvage suit. *The Strathnaver*, 1 App. Cas. 58; 34 L. T. 148—P. C.

Steamer's Main Shaft broken.—Where a steamship carrying fore and aft sails only, and not rigged for proceeding under sail alone, breaks the main shaft of her propeller and is compelled to take assistance from another ship which tows her forty miles into a port, the service is of a salvage character, although the service is not attended with any danger to the salvors. *The Jubilee*, 42 L. T. 594.

Extent of Tug's Duty under Contract.—A steam-tug entered into a contract to tow a ship at sea into the port of Liverpool for 45l. During the performance of the service a hurricane arose and the vessels were in serious danger. The tug, at great peril to herself, continued to tow the ship during the hurricane, and by so doing prevented the ship drifting upon a lee-shore. The wind soon afterwards moderated, and the tug, still continuing to tow the ship, brought her into the port of Liverpool in safety:—Held, that the tug was entitled to salvage reward. *The I. C. Potter*, 3 L. R., Adm. 292; 40 L. J., Adm. 9; 23 L. T. 603; 19 W. R. 335.

Though a towing vessel may be justified in abandoning her contract, it is still her duty to remain by the towed vessel to render assistance; but for such assistance she may claim salvage reward. *Id.*

When a towage contract was made and the services commenced in fine weather, but subsequently a violent hurricane came on and both vessels were in extreme danger on account of the proximity of a lee shore, and the tug continued the towage, though she had her bunkers full, four pumps at work, and the pressure of her engine was above the weight she could safely bear:—Held, that the continuance of the towage was a salvage service. *Id.*

The criterion by which it is to be ascertained whether a vessel under contract to tow has become a salvor is, whether supervening circumstances have occurred such as to justify her in abandoning the contract of towage; and in order to justify her in abandoning the contract of towage, there must be among the supervening circumstances an element of serious danger, which was not in the contemplation of the parties at the time they entered into the contract. *Id.*

A tug under contract to tow a ship into port may be entitled to salvage reward for bringing the ship into port, although nothing has occurred to occasion an actual interruption to the towage. *Id.*

Towage of a ship near the land in unsettled weather, if her ground tackle is disabled, is in the nature of salvage. *The Albion*, Lush. 282.

A tug engaged under the ordinary contract to tow, may, by the performance of substantial salvage service in saving the ship towed from supervening danger, earn salvage reward, though not herself incurring risk. *The Pericles*, B. & L. 80.

Service performed by a steamer to a disabled vessel can never be considered as mere towage. *The Charles Adolphe*, Swabey, 153.

A contract to tow embraces the risk of ordinary bad weather, but is put an end to by weather rendering the completion of the undertaking impossible; and in that case subsequent services may be in the nature of salvage. *The Gulatea*, Swabey, 349; 4 Jur., N. S. 1064.

A contract to tow in law implies an engagement that each party to the contract will perform his duty in completing it; that proper skill and diligence will be used on board both the vessel and tug; and that neither party, by neglect or mismanagement, will create unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken. *The Julia*, 14 Moore, P. C. C. 210; Lush. 224.

If in the course of the performance of the contract, any inevitable accident happens to the one, without any default on the part of the other, no cause of action arises, as such accident is one of the necessary risks of the engagement to which each party was subject. But on the other hand, if the wrongful act of either occasions any damage to the other, such wrongful act creates a responsibility on the party committing it, if the other party has not by any misconduct, or unskilfulness on his part, contributed to the accident. *Ib.*

A contract to tow is not a warranty to tow to destination, but an engagement to use best endeavours and competent skill for that purpose, with a vessel properly equipped. *The Minnehaha*, Lush. 335; 15 Moore, P. C. C. 133; 30 L. J., Adm. 211; 7 Jur., N. S. 1257; 4 L. T. 810; 9 W. R. 925.

If performance of the stipulated service is rendered impossible by a vis major, the obligation is terminated. *Ib.*

If unforeseen danger unavoidable by the steam-tug supervenes to the ship in tow, as by breaking of the hawser, the steam-tug is bound to complete the service, if possible; and the steam-tug, if thereby incurring risk and performing duties not within the scope of the original engagement, is entitled to salvage reward. *Ib.*

The conversion of towage into salvage depends on the circumstances of each case. *Ib.*

A steam-tug engaged in towing or performing salvage services is generally bound to follow the directions of the pilot in charge of the ship. *Ib.*

If, in the performance of a contract to tow, an unforeseen and extraordinary peril arises to the vessel towed, the steam-tug is not at liberty to abandon the vessel, but is bound to render to her the necessary assistance, and thereupon becomes entitled to salvage reward. *The Saratoga*, Lush. 318.

A steam-tug under contract to tow into dock was lashed alongside a vessel; in rounding to enter the dock basin the tide forced the vessel and the steam-tug close to a landing-stage, the steam-tug next to the stage; the pilot of the vessel hailed the tug to hold on and go ahead, which the tug did, but was forced against the

stage, and injured:—Held, that the steam-tug was bound to endeavour to save the vessel from the impending peril, especially upon the order of the pilot, and so doing was entitled to salvage reward, including repayment of all damages and losses thereby incurred. *Ib.*

When the master of a steamer engages to tow a vessel, it is upon the supposition that the wind and weather and the time of performing the service will be what are ordinary at the time of year; but if an unexpected change of weather or other unforeseen accident occurs, he is bound to adhere to the vessel, and to do all in his power to rescue her from danger; and he will be entitled to reasonable extra remuneration for the extra service. *The White Star*, 1 L. R., Adm. 68.

A steamer engaged to tow is bound, notwithstanding a merely temporary accident interrupting the service, and endangering the vessel towed, to complete the stipulated service with all reasonable skill and promptitude, and for so doing the steamer, if incurring no risk, is not entitled to salvage reward. *The Annapolis*; *The Golden Light*, Lush. 355; 5 L. T. 37.

Acceptance of Service.—An express demand or an express acceptance of salvage services actually performed is not necessary to entitle to salvage reward; but for services rendered without demand or acceptance, and indirectly only, no salvage is due. *Ib.*

Towing Vessel Clear, in Collision—Rights of Tug.—Where two vessels are in collision and are entangled together in a position dangerous to both, salvors who, by towing one of the vessels clear, free both vessels from danger, are entitled to recover salvage reward from the owners of both vessels. A screw steamship drifted, during a gale of wind, across the bows of a ship at anchor in the Mersey, and with her propeller caught the anchor chains of the ship, and the two vessels were held together in a position dangerous to both. A steam-tug went to the assistance of the ship, and held her whilst her chains were slipped and towed her clear of the steamship:—Held, that the owners, master, and crew of the tug were entitled to recover salvage reward from the owners of the steamship. *The Tandyck*, 7 Adm. D. 42. Affirmed, 5 Asp. M. C. 17; L. T. 47 695—C. A.

b. Distinction between Salvage and Pilotage.

Consideration for Services.—When a pilot has assisted in navigating a vessel from a dangerous situation to safe anchorage, the test, whether he is entitled to be remunerated for salvage services, is not, on the one hand, whether the vessel was at the time of succour in distress, or, on the other hand, whether she was then damaged; but the test is, whether the risk attending the services to the vessel was such, that the pilot could not be reasonably expected to perform them for the ordinary pilot's fees, or even for extraordinary pilotage reward. A vessel was, during a heavy storm, being driven to leeward towards dangerous sands: her captain was ignorant of the locality, and her loss appeared almost inevitable: some pilots, seeing her danger, put off to sea at the peril of their lives in order to assist her; they were unable to board her by reason of the height of the sea: but by preceding

her and signalling to her, they guided her to a safe anchorage. The vessel had sustained no damage:—Held, that the pilots were entitled to be remunerated for salvage services. *Akerblom v. Prier*, 7 Q. B. D. 129; 4 Asp. M. C. 441; 50 L. J., Q. B. 629; 44 L. T. 837; 29 W. R. 797—C. A.

A fishing-smack fell in near the Long Sand buoy with a foreign steamship. The steamship had been on the sands near the Kentish Knock light-ship, but had got off with some damage to her rudder, and had a signal for a pilot hoisted. The master of the smack boarded the steamship and piloted her to the entrance of Harwich harbour:—Held, that the owners, master and crew of the fishing-smack were entitled to salvage remuneration. When a person goes on board of a vessel in distress, and pilots her into harbour, he is entitled to salvage remuneration, unless it is established that he has contracted to render the services for pilotage remuneration only. *The Anders Knappe*, 4 Adm. D. 213; 48 L. J., Adm. 53; 40 L. T. 684.

A foreign vessel fifty miles off the Dutch coast being in difficulty, in consequence of the boisterous state of the weather, and being leaky, called in the assistance of an English fishing-smack, and engaged the captain by a written agreement "to pilot and to sail ahead for 50l." After four days' boisterous weather, during which the captain of the smack worked at the pumps, the vessel was got into port. In an action for salvage services:—Held, that nothing had been done to convert pilotage service into a salvage service, and that the sum specified in the agreement was a sufficient compensation. *The Jonge Andries*, Swabey, 226. Affirmed, Swabey, 303; 11 Moore, P. C. C. 313.

Waterman acting as Pilot.—A Dutch barque was riding at anchor off Deal, and waiting to proceed down Channel, and a waterman who, though not a licensed pilot, was in the habit of piloting vessels, was taken on board her, under an arrangement whereby he was to receive 7s. a-day, with 5l. in addition, for navigating the vessel as pilot until she arrived off Beachy Head. The day after the waterman came on board, and whilst the barque was still at anchor, a gale came on, and the tempestuous state of the weather caused the vessel to drive, and rendered it necessary to slip the chain, when, under the direction of the waterman, the vessel was taken through the Gull Stream and brought up in safety in Margate Roads. In a salvage suit instituted on behalf of the waterman and other persons who had rendered services to the vessel:—Held, that the services rendered by the waterman were within the scope of his contract, and that he was not entitled to claim as a salvor. *The Eolus*, 4 L. R., Adm. 29; 42 L. J., Adm. 14; 28 L. T. 41; 21 W. R. 704.

The exceptions to the general rule, that a pilot cannot claim as a salvor, ought to be few and well-defined. The services of a pilot cannot easily be converted into those of a salvor. The same rule of law applies to a licensed waterman when acting as a pilot. *Id.*

A pilot entering into an engagement to pilot a vessel undertakes to supply local knowledge and the peculiar skill of his class, and will not be allowed, even though he contributes to the safety of the vessel, to change the character of his service from pilotage to salvage, except where

the vessel was in distress before he went on board to render the service, or where such circumstances of extreme danger and personal exertion supervene, which exalt his service into a salvage service. *Id.*

c. Other Cases.

Lying alongside Vessel after taking her to Anchorage.—When a steam-tug is engaged to render assistance to a ship aground in the night-time, and succeeds in getting her off, and takes her to a safe anchorage for the night and lies alongside of her till morning, the salvage service does not end on the ship being anchored, but the steam-tug is entitled to reward for the time she lies alongside the ship ready to render further assistance if required. *The Philotaze*, 29 L. T. 515.

Attempt to render Assistance.—A steam-tug attempting to render assistance to a ship exhibiting signals of distress may, in a case where such ship is afterwards saved by means of other assistance, be entitled to salvage reward, even though her efforts have been practically unavailing. *The Melpomene*, 4 L. R., Adm. 129; 29 L. T. 405.

When a ship makes a signal of distress, and another goes out with the bona fide intention of assisting that distress, and as far as she can does so, but an accident occurs which prevents her services being as effectual as she intended them to be, and no blame attaches to her, the court will not allow her to go entirely unrewarded, but for the interests of commerce and of navigation, and as an encouragement to perform salvage services, will give some reward if the property is saved by other means. *Id.*

When Service Unsuccessful.—When salvors enter into an agreement to take a disabled vessel into harbour for a specific sum, and do all in their power to perform their engagement; but, in consequence of an adverse change of wind, fail to fulfil it, they are nevertheless entitled to salvage reward. *The Lutece*, 21 L. T. 797.

Efforts to give assistance under an engagement to a ship in distress will, although the ship receives no benefit from them, be rewarded as being in the nature of salvage services, if the ship is otherwise saved. *The Undaunted*, Lush. 90; 29 L. J., Adm. 176.

Attempted services performed under an agreement of salvage are entitled to be rewarded where the performance of them is rendered impossible by the act of God. *Id.*

Salvage is a reward for services actually conferred, and not for services attempted to be rendered. *The Chetah*, 2 L. R., P. C. 205; 38 L. J., Adm. 1; 19 L. T. 621; 17 W. R. 233; 5 Moore, P. C. C., N.S. 278. *S. P., The Eintracht*, 29 L. T. 851.

A steamer employed under an agreement for a specific sum to tow a partially-disabled steam vessel to a specific destination, towed the vessel for some hours, but in consequence of a gale causing the breaking of the hawser, left the vessel in a position of considerable danger, from which she was only saved by her own exertions:—Held, that as it did not appear that the towing had contributed to her safety, the steamer was not entitled to towage, as she had not performed her contract; nor to salvage, as no attempt was

made by her to save the vessel. *The Edward Hawkins*, 15 Moore, P. C. C. 486; 31 L. J., Adm. 46.

Constructive Acceptance of.]—Where two vessels are in collision and are entangled together in a position dangerous to both, salvors who, by towing one of the vessels clear, free both vessels from danger, are entitled to recover salvage reward from the owners of both vessels. A screw steamship drifted, during a gale of wind, across the bows of a ship at anchor in the Mersey, and with her propeller caught the anchor chains of the ship, and the two vessels were held together in a position dangerous to both. A steam-tug went to the assistance of the ship, and held her whilst her chains were slipped and towed her clear of the steamship:—Held, that the owners, master, and crew of the tug were entitled to recover salvage reward from the owners of the steamship. *The Vandyck*, 7 Adm. D. 42. Affirmed, 5 Asp. M. C. 17; 47 L. T. 695—C. A.

When Salvor leaves Ship in Distress under belief that Service no longer wanted.]—When a steamship has been engaged to render assistance to another in distress by towing her to her port of destination, and after several hours' towing, the ships are parted by no default of the salvor, and the conduct of the ship in distress leads the salvor to the honest belief that his services are no longer required, and thereupon the latter proceeds to her own destination, he is not thereby deprived of his right to salvage reward, but upon the other vessel arriving safely in port by her own exertions, may proceed against her in respect of the services actually rendered. *The Nellie*, 29 L. T. 516.

Service to One of Two Ships in Collision—Two Tugs.]—A collision having occurred between two ships, the Woburn Abbey and the British Trident, two steam-tugs, the Superb and the Conqueror, went to their assistance. In order to extricate the Woburn Abbey, it was necessary that the British Trident should be towed away from her, and the pilot of the Woburn Abbey requested the captain of the Superb to perform this service. The Superb then towed the British Trident, but the ships still dragged. The Conqueror arrived about half-an-hour after the Superb, and the two tugs together held the British Trident and the Woburn Abbey, and prevented the ships from dragging further:—Held, that the benefit received by the Woburn Abbey from the services of the Superb was a direct and not an indirect benefit; that there was no substantial difference between the merits of the Superb and the Conqueror, and therefore that they were entitled to equal amounts of salvage. *The Woburn Abbey*, 21 L. T. 707—P. C.

When Vessel rendering Service and Vessel aided belong to same Owner.]—When salvage services are performed by one ship to another, both ships belonging to the same owners, the master and crew of the ship which has performed the salvage services are entitled to salvage remuneration, provided the services performed are not within the contract which they originally entered into with the owners, and which they would be paid for by their ordinary wages. *The Sappho*, 3 L. R., P. C. 690; 40 L. J., Adm. 47; L. T. 795; 19 W. R. 24.

The Nero and the Sappho were steam-vessels belonging to the same owners. The Nero in the prosecution of a voyage observed the Sappho in a disabled condition on the high seas. By means of exertion and labour on the part of the crew of the Nero, she got the Sappho in tow, and towed her into a port of safety. In rendering this service the Nero deviated from her voyage:—Held, that the crew of the Nero was entitled to sue the Sappho for salvage remuneration. *Id.*

A steam vessel, laden with a general cargo, became disabled at sea in consequence of her machinery breaking down. Her cargo had been shipped under bills of lading, which contained among the excepted perils "accidents from machinery." Another steam vessel belonging to the same owners fell in with the disabled vessel, and towed her into safety:—Held, that the owners of the vessel rendering the service were entitled to recover salvage remuneration against the cargo laden on board the disabled vessel, and that the master and crew of the vessel rendering the service were entitled to recover salvage remuneration against the disabled vessel, her freight and cargo. *The Miranda*, 3 L. R., Adm. 561; 41 L. J., Adm. 82; 27 L. T. 389; 21 W. R. 84.

Sending Seamen on board Vessel in Distress.]

—A ship fell in on the high seas, in the winter season, with a brig in distress for want of sufficient hands to work her. The master of the ship sent two of his crew, who had volunteered to go, on board the brig, and by their assistance the brig was navigated safely into a British port. In consequence of the absence of the two men, the ship was exposed to risk, and the remainder of her crew had to undergo extra labour:—Held, that not only the two men who went on board the brig, but the master and owners of the ship and the rest of the crew of the ship, were entitled to salvage reward for the services rendered. *The Charles*, 3 L. R. Adm. 536; 26 L. T. 594; 21 W. R. 13.

Where a ship is in distress, and accepts the services of strange hands, the services are in the nature of salvage, although the work done may be of no great difficulty or importance. *The Bowar-sund*, Lush. 77.

Where the crew of a vessel is much reduced by death or sickness, another vessel supplying the deficiency on the high seas from among her own crew, is entitled to salvage. *The Roe*, Swabey, 84.

Loan of Navigator to Infected Vessel.]—The loan of a navigator to a vessel in distress, by reason of her own navigators being incapacitated by an infectious disease, is a salvage service on the part of the ship lending the navigator. *The Skiblaner*, 3 Adm. D. 24; 47 L. J., Adm. 84; 38 L. T. 150.

It is a salvage service of a very high order on the part of a navigator to go on board an infected vessel and navigate her. *Id.*

Detaining Seamen of Salvaged Vessel.]—The court will not lay down any general rule, but will be guided by the circumstances of each case, in determining whether or not the master of the salvors' vessel is justified in refusing to allow the crew of the salvaged vessel to return to their own ship before the completion of the salvage. *The Cleopatra*, 37 L. J., Adm. 31.

Taking out Anchor and Chain in Bad Weather.]—Taking out during bad weather an anchor and a chain to a vessel, which is compelled to slip her cable to get away from a dangerous position and run for a place of safety, is, although the anchor and chain in the result are not needed, a salvage service; 280*l.* awarded to two luggers and their crew on a value of 40,000*l.* *The Aeolus*, 4 L. R., Adm. 29; 42 L. J., Adm. 814; 28 L. T. 41; 21 W. R. 704.

Vessel in Distress making ambiguous Signal.]—When a vessel makes an ambiguous signal it will be construed by the court according to the condition of the vessel when boarded; if she is damaged, and is in need of assistance, the signal will be treated as a signal for assistance, and those answering it as salvors; if she is not damaged and wants only a pilot, the signal will be treated as a signal for a pilot only. *The Racer*, 30 L. T. 904.

Salvors, induced by an ambiguous signal to put off from the shore to the assistance of a ship, are not entitled to salvage reward, if the actual condition of the ship shows that the signal was for a pilot only. *The Little Joe*, Lush. 88; 6 Jur., N. S. 783; *The Otto Hermann*, 33 L. J., Adm. 189.

Second Salvors wrongfully dispossessing First.]—If first salvors lawfully in possession of a derelict ship are wrongfully and violently dispossessed by second salvors, who succeed in bringing the ship into safety, the second salvors will receive no benefit from the service they may render, but the whole reward will go to the benefit of the original salvors. *The Kathleen*, 43 L. J., Adm. 39; 31 L. T. 204. See also *The Magdalen*, 31 L. J., Adm. 22; 5 L. T. 807.

Two fishing smacks fell in with a derelict vessel twenty miles from the English coast, and took her in tow after great risk, and two days afterwards brought her close to Yarmouth, when the smacksmen to expedite the completion of the salvage engaged a steam tug to take her in tow, but through the mistake or misconduct of those on board the tug the vessel got aground, whereupon the tug left the smacksmen and went in search of assistance. In their temporary absence a number of beachmen took possession of the vessel and brought her safely into harbour. A liberal salvage was allowed to the smacksmen on appeal, reversing the decision of the Admiralty Court, which had decreed salvage to the beachmen only. *The Atlas*, 15 Moore, P. C. C. 329; 31 L. J., Adm. 210; 8 Jur., N. S. 753; 10 W. R. 850.

Ship engaged to render Service and waiting to do so—Other Ship employed for less Sum.]—When a ship is engaged to render assistance to another ship in distress, without any fixed sum being agreed upon, and does remain by ready to give assistance, she cannot be deprived of her right to reward by reason of another vessel offering and being engaged to tow for a less sum than the former ship is willing to accept, and she will be entitled to recover a fair sum which will remunerate her for the services rendered, and compensate her for the loss she has sustained. *The Maude*, 36 L. T. 26.

Giving Information.]—The mere giving information as to the locality, even to a foreign ship, will not constitute a salvage service. *The Little Joe*, Lush. 88; 6 Jur., N. S. 783.

— Vessel going out of her Course.]—A steam tug, having a vessel in tow, saw a ship ashore, and went out of her way to inform, and informed, another steam tug of what she had seen. The other steam tug thereupon proceeded to the stranded ship and towed her into safety. In an action of salvage instituted on behalf of both steam tugs against the ship:—Held, that the owners, masters, and crews of both steam tugs were entitled to salvage remuneration. *The Sarah*, 3 Adm. D. 39; 37 L. T. 831.

River and Sea Salvage.]—There is no distinction between river salvage and sea salvage, the danger and meritorious nature of the services in either case being the ground on which the quantum of compensation is awarded. *The Carrier Dove*, 2 Moore, P. C. C., N. S. 243.

What is "a Ship or Boat Stranded or in Distress."]—Justices awarded salvage in respect of services rendered to a hopper barge which had been found adrift without any person on board of her in the Wash, about three miles from Boston. The barge was not furnished with any means by which she could be propelled, and was used for dredging purposes:—Held, that the barge was "a ship in distress" on the shore of a sea or tidal water within the meaning of the Merchant Shipping Act, 1854, s. 458. *The Leda* (Sw. 40) followed. *The Mac, or Macadam v. Saucy Polly*, 7 Adm. D. 126; 51 L. J., Adm. 81; 46 L. T. 907—C. A.

2. LIFE SALVAGE.

Nature of Services.]—A liberal reward is to be given for the saving of human life, consideration being had to the degree of peril to which the salvors and the persons saved are exposed. *The Eastern Monarch*, Lush. 81.

The court will always take into its special consideration the salvation of human life, and give a corresponding reward. *The Bartley*, Swabey, 198.

In estimating salvage services the court will be guided above all by the consideration whether there was danger to human life. *The Thomas Fielden*, 32 L. J., Adm. 61.

Passengers and Crew.]—The words "persons belonging to such ship," in the 17 & 18 Vict. c. 104, s. 458, include passengers on board the ship as well as the master and crew; and who, in respect to remuneration for life salvage, stand on the same footing as the master and crew. *The Fusilier*, 2 Moore, P. C. C., N. S. 51; 34 L. J., Adm. 25; 11 Jur., N. S. 289; 12 L. T. 186; 13 W. R. 592.

Liability of Cargo Owners to Contribute.]—The owners of the cargo are liable to contribute to that portion of the claim of salvors which arises from saving the lives of passengers, although the salvors may have rendered no direct benefit to the cargo, as the benefit to property is not a criterion of remuneration for life salvage. *Ib.*

The remuneration of service in life salvage does not rest upon a consideration of any direct benefit conferred upon those upon whom there falls the liability to pay, but rather upon the interest which the community has in encouraging the efforts of salvors; and upon this ground the

owners of cargo on board a salvaged vessel are liable to a share of the payment of life salvage for the rescue of those on board. *Ib.*

Amount.]—The accident of the amount of salvage awarded exceeding the value of the salvage vessels is wholly immaterial, as the value of such vessels is not an element to detract from the value of the salvage service. *Ib.*

Twenty-five men, the crews of four boats, saved the lives of ten men, and gave information to a steamboat, which rescued others. The services lasted about four hours and were attended with much danger. Part of the cargo of the value of 40,000*l.* having been afterwards recovered, the court awarded the salvors of life 500*l.* *Cargo ex Schilles*, 1 Adm. D. 473; 46 L. J., Adm. 9; 35 L. T. 97. *S. C.*, on appeal, 2 Adm. D. 145; 36 L. T. 714—C. A.

In a case of salvage the court, having out of the proceeds of ship and cargo, amounting to 608*l.*, awarded one-half to salvors of property, awarded 150*l.* to life salvors taking off the crew, together with costs to both plaintiffs. *The Anna Helena* (No. 2), 49 L. T. 204.

Priority.]—Preservation of human life is made, by 17 & 18 Vict. c. 104, s. 459, a distinct ground of salvage reward, with priority over all other claims for salvage where the property is insufficient. *The Coromandel*, Swabey, 205.

Not rendered in British Waters.]—A Dutch vessel took fire on the high seas, and some of her crew and some passengers who were on board her escaped in boats, and were picked up by a French schooner. The schooner afterwards fell in with a British steam-vessel, and the persons who had been picked up by the schooner were, at their own request, put on board the steam-vessel, and were carried by her into an English port. The schooner was not within British waters during any portion of the time when the services were rendered:—Held, that the schooner had not rendered services such as to entitle her to claim salvage reward by virtue of the provisions of the Merchant Shipping Act, 1854, or the Admiralty Court Act, 1861. *The Willem III.*, 3 L. R., Adm. 487; 25 L. T. 386; 20 W. R. 216.

The Court of Admiralty has no original jurisdiction to award salvage for the saving of life only; and the 17 & 18 Vict. c. 104, does not give the court jurisdiction over salvage of life only performed on the high seas, at a distance of more than three miles from the shores of the United Kingdom, at least, if the ship from which the lives are saved is a foreign ship. It is immaterial to this question that before action the ship has been brought by other salvors into a British port. *The Johannes*, Lush. 182; 30 L. J., Adm. 91; 3 L. T. 757. See 25 & 26 Vict. c. 63, s. 59.

When Salvor, after towing Vessel, abandons her and saves Crew.]—When a steamship, having taken in tow a vessel in distress, after towing her for some hours, on the weather getting worse and the lives of her crew becoming endangered, takes the crew out of her and finally abandons her in a place where she is afterwards picked up by another vessel and taken into port, the owners, master, and crew of the steamship are entitled to salvage reward in respect of the lives so saved, but not in respect of ship and cargo. *The Eintracht*, 29 L. T. 851.

Saving Boats' Crew who left Ship contrary to Orders.]—A steam-vessel incurred serious damage by a collision, and her master ordered her boats to be got out. Some of her crew, without leave from the master, got into one of the boats and rowed away. The boat's crew was afterwards picked up at sea, and rescued from a position of danger, by a smack. In a salvage suit instituted on behalf of the owners and crew of the smack against the steamship:—Held, that they were entitled to recover for the service they had rendered. *The Cairo*, 4 L. R., Adm. 184; 43 L. J., Adm. 33; 30 L. T. 535; 22 W. R. 742.

Taking Shipwrecked Persons off Island.]—A ship was wrecked in the Red Sea off an island which was uninhabited and without water. A ship took the passengers and crew on board and brought them to England:—Held, that the service was not life-salvage. The sum of 200*l.* was awarded to the ship for services. *Cargo ex Woosung*, 44 L. J., Adm. 45; 33 L. T. 394.

There is no salvage of life entitling a ship to recover reward where the ship takes off from an island, on a barbarous but inhabited coast, a ship's crew and passengers who have been wrecked there, but have been previously got ashore in safety, and who, although suffering privations from scarcity of water and exposure, are not in any immediate danger. *Ib. S. C. on appeal*, 1 Adm. D. 260; 35 L. T. 8; 25 W. R. 1.

When Ship wholly Lost.]—When lives and cargo have been saved from a ship, but the ship has been totally lost, the owners of the cargo are liable to pay salvage in respect of the lives, and the owners of the lost ship are not liable to contribute to such payment. *Cargo ex Sarpidon*, 3 Adm. D. 28; 37 L. T. 505; 26 W. R. 374.

Award only allowed out of res salvæ.]—Life salvage awards can only be made out of the res salvæ, and not against owners of a ship personally. *Ib.*

— Validity of Agreement.]—A steamship was requested by another steamship in distress to stand by her. An agreement was accordingly made between the two masters for a fixed sum that the sound vessel would remain by the damaged one until she was in a safe position to get to port. The sound vessel remained by the damaged one until the latter was about to sink, when she took her crew on board, and the damaged steamer immediately afterwards sank. The owners, master, and crew of the salvaging ship brought an action for life salvage:—Held, that as no res was saved the action would not lie either as a salvage action simply or on the agreement. *The Renpor*, 8 Adm. D. 115; 52 L. J., Adm. 49; 48 L. T. 887; 31 W. R. 640—C. A.

Claim against Specie subsequently Saved by Divers.]—A German steamship was wrecked in British waters, and the lives of ten passengers and some of her crew were saved by certain boats. Subsequently, divers employed by the owners of cargo in the steamship succeeded in recovering from the wreck a large amount of specie. A cause of salvage was instituted on behalf of the owners, masters and crews of the boats against the owners of the specie:—Held,

that the plaintiffs were entitled to be paid salvage remuneration out of the proceeds of the specie. *Cargo ex Schiller*, 2 Adm. D. 145; 36 L. T. 714—C. A. Affirming 46 L. J., Adm. 9.

3. PARTIES ENTITLED.

Passengers.]—Passengers rendering services to ship, where there is a common danger, are not entitled to salvage reward. *The Vrede*, Lush. 322; 30 L. J., Adm. 209.

Passengers voluntarily remaining on board a vessel injured by a collision, and working at the pumps, are not entitled to salvage. *Ib.*

A ship being in danger, and the captain and part of the crew having made their escape, a passenger, at the request of the rest of the crew, took the command, and brought the ship safe to port. The merits of the passenger in saving the ship were acknowledged by the owner in a letter to one of the underwriters, wherein he expressed a desire to make him a compensation:—Held, that the passenger was entitled to sue the owner for the salvage. *Newman v. Walters*, 3 B. & P. 612.

Pilots.]—The court will not favour a claim for salvage by the party originally engaged as a pilot, but at the same time, pilots are, not to be compensated by mere pilotage remuneration for salvage services. *The Jonge Andries*, 1 Swabey, 226, 303; 11 Moore, P. C. C. 313. *See also cases ante*, col. 1621.

Seamen.]—Salvage service may be performed by the seamen of the ship saved when an abandonment of her has put an end to their original contract. *The Vrede*, 30 L. J., Adm. 209.

If, upon a ship being wrecked, the master, improperly disregarding the interests of the owners of ship and cargo, discharges the seamen, the discharge is nevertheless valid, unless the seamen are proved to have fraudulently accepted their discharge; and subsequent services rendered by them to ship and cargo are salvage services. *The Warrior*, Lush. 476; 6 L. T. 133.

In order to deprive a seaman of his right to share in salvage, neither the agreement for the vessel to be employed in salvage service, nor the stipulation that he shall waive his claim for salvage, need be in writing to satisfy 25 & 26 Vict. c. 63, s. 18, but both must be clearly proved by those who dispute his right. *The Pride of Canada*, B. & L. 208.

Enforcing Payment.]—No action is maintainable by a seaman for his share of salvage awarded by two justices, under 17 & 18 Vict. c. 104, s. 460, and paid to the owner of the salvor vessel. *Atkinson v. Woodhall*, 1 H. & C. 170; 31 L. J., Ex. 174; 8 Jur., N. S. 720; 6 L. T. 361; 10 W. R. 671.

The owner of a vessel, to whom the aggregate amount of salvage had been paid, offered a seaman less than he claimed as his share, which the seaman refused:—Held, no evidence of money received to the seaman's use, or of an account stated. *Ib.*

Mate remaining on Vessel abandoned by Crew.]

—Two vessels came into collision on the high seas. One of the vessels (a barque) received damage, and all her crew, except her mate, escaped on board the other vessel. The mate of the barque remained on board her, and navigated her until

he obtained assistance from a steam vessel. The steam vessel then took the barque in tow and brought her into port in safety, the mate still assisting in her navigation:—Held, that in awarding salvage to the owners, master and crew of the steam vessel, the right of the mate of the damaged ship to claim salvage reward for his services should be taken into consideration, and that the mate, upon his claim being brought before the court, was entitled to rank as a salvor. *The Le Jonet*, 3 L. R., Adm. 556; 41 L. J., Adm. 95; 27 L. T. 387; 21 W. R. 83.

Masters.]—Where the master undertakes the responsibility of deviating from his course, and so imperilling his insurance, for the purpose of rendering salvage service, he is entitled to considerable reward. The fact that a considerable sum has been awarded to the owners of the salvaging vessel, does not diminish the amount to which the master and crew are entitled. *The Aletheia* 13 W. R. 279.

The steamer *Thetis*, while on a voyage from Marseilles to London, fell in with the *Sardis*, which had been disabled by an accident to her machinery. The master of the *Thetis* agreed to tow the *Sardis* to port for a sum agreed on. In endeavouring to do so the *Thetis* negligently came into collision with the *Sardis* and sunk her. The policy upon the *Thetis* and her bills of lading provided that she might assist and tow vessels in all situations. The master of the *Thetis* had never received any instructions from the owners as to performing salvage services:—Held, that the master of the *Thetis* was acting within the scope of his general authority as master in endeavouring to tow the *Sardis* to port, and that the owners of the *Thetis* were consequently liable for the damage caused by his negligence in so doing. *The Thetis*, 2 L. R., Adm. 365; 38 L. J., Adm. 42.

Seemable, that even if there had been no clause in the policy of insurance or bills of lading as to salvage services, the master would nevertheless have been acting within his general authority as master in rendering salvage services to the *Sardis*. *Ib.*

Receiving whole Salvage—Remedy of Owner.]

—A master receiving, under an award, salvage money from the owners of property to which he, the ship and crew, have rendered salvage services, is not bound to hand over to his owner the portion he bona fide conceives to be his own proper share; the remedy of the owner is to apply to the court under s. 498 for a distribution of salvage. *The Princess Helena*, Lush. 190; 30 L. J., Adm. 137; 4 L. T. 869.

An owner of a ship refused to pay wages due to a master for a voyage, unless credited with salvage money received by the master under an award, and kept by him for his own share; the master refusing to account for a subsequent voyage, except on condition of a settlement for the former voyage, without reference to the salvage money:—Held, that the payment of wages was improperly withheld, and that the master was entitled to ten days' double pay. *Ib.*

Where an owner thinks that a proper share of the salvage reward has not been paid to him, his proper course is to bring the share so paid to him into court, to pray for a monition to the master to do the same, and to apply for an order of distribution. *Ib.*

Ship Agents.—Where ship agents render extraordinary services in saving property, the court will, under particular circumstances, allow a claim as agent and a claim as salvor to be united and combined. *Cargo ex Honor*, 1 L. R., Adm. 87; 35 L. J., Adm. 113; 12 Jur., N. S. 773; 15 W. R. 10.

Charterer or Owner.—By agreement between the owner of a steamer and C., he agreed to charter the steamer for the purpose of running between certain named ports, and to pay a sum weekly for the use of the steamer until the agreement was determined in manner therein provided. The agreement provided that C. should pay all expenses of the crew and other expenses incidental to the running of the steamer, excepting only marine insurance, which was to be defrayed by the owner; that the steamer should be delivered up by C. on the termination of the agreement in as good condition as at the time of making the agreement, reasonable wear and tear excepted; that the master should not, except in the event of his misconduct, be removed by C. without consent of the owner. The steamer, while running under this agreement, fell in with a disabled vessel and towed her into safety:—Held, that C. was entitled to salvage reward, in respect of the service rendered by the steamer, and that the owner was not entitled to salvage reward. *The Scout*, 3 L. R., Adm. 512; 41 L. J., Adm. 42; 26 L. T. 371; 20 W. R. 617.

The charterers of a vessel are not, except under very special circumstances, entitled to the salvage earned by that vessel. *The Alfen*, Swabey, 189.

The owners rendering salvage services, being also the charterers of the vessel receiving the services, are not thereby debarred from claiming salvage reward, unless the effect of the charter-party has been to divest the owners of the possession and control of the salvaged vessel, and to transfer the same for the time to the charterers. *The Collier*, 1 L. R., Adm. 83; 12 Jur. N. S., 789.

The claim of an owner to a share in a salvage reward beyond compensation for damage incurred by his vessel, is of a feeble character, and he has no claim to the custody of such money. *The Princess Helena*, Lush, 190; 30 L. J., Adm. 137; 4 L. T. 869.

Part Owners.—When a part owner has an interest in the vessel salvaged, his co-owners and the master and the crew of the salvaging vessel may sue for salvage; the sum to which they are entitled being computed by deducting, from the value of the entire service, the share which would have been due to such part owner, if he could have joined. *The Caroline*, Lush, 334; 5 L. T. 89.

Lords of Manors.—A lord of a manor is not entitled to salvage for taking, against the consent of the owner, and preserving parts of a ship thrown on his manor, when the servants of the owner are there to take care of it for him. *Sutton v. Buck*, 2 Taunt. 302.

Beachmen.—Two fishing smacks fell in with a derelict vessel, about seventy miles from the English coast, and took her in tow after great risk, and two days afterwards brought her close to Yarmouth, when the smackmen, to expedite the completion of the salvage, engaged a steamer to take her in tow, but through the mistake

or misconduct of those on board the tug the vessel got aground, whereupon the tug left the smackmen, went in search of assistance, and, in their temporary absence, a number of beachmen took possession of the vessel and brought her safely into harbour. The Admiralty court held, that owing to the misconduct of the tug the smackmen's efforts, however meritorious, did not successfully save the vessel, and that they were not entitled to share in the salvage, and decreed salvage to the beachmen only. Upon appeal, the judgment was reversed, and a liberal salvage allowed to the smackmen. *The Atlas*, 15 Moorc, P. C. C. 329; 31 L. J., Adm. 210; 8 Jur., N. S. 753; 18 W. R. 850.

Steamers.—Steam vessels are important agents in salvage services, and their owners will be adequately rewarded. *The Spirit of the Age*, Swabey, 286.

The capability of steamers to perform services with greater rapidity and certainty entitles them as salvors to a higher scale of reward. *The Otto Hermann*, 33 L. J., Adm. 189. See also *The Palmyra*, 25 L. T. 884.

Where Collision.—A collision occurred between two vessels, A. and B. A. was in tow of a steam-tug; the tug afterwards rendered assistance to B. B. was found solely to blame for the collision:—Held, that the tug's right of salvage remuneration was not affected by 25 & 26 Vict. c. 63, s. 33, which makes it the duty of ships mutually to assist each other after a collision. *The Hannibal v. The Queen*, 2 L. R., Adm. 53; 37 L. J., Adm. 12.

The 25 & 26 Vict. c. 63, s. 33, does not debar the innocent sufferer in a collision from salvage reward for services subsequently rendered to the other party to the collision. *The Retriever v. The Queen*, 17 L. T. 329.

The case of a towing ship is not a *casus omissus* from the statute. The tug of the vessel declared not to blame in a collision, rendered salvage services to the wrongdoer:—Held, that this section did not affect the right of the tug to salvage reward. *Id.*

Vessel rendering Services necessary.—A vessel rendering assistance to another which she has injured in collision cannot claim salvage reward if the collision takes place by her default. *The Glengaber*, 3 L. R., Adm. 534; 41 L. J., Adm. 84; 27 L. T. 386; 21 W. R. 168.

The owners, master, and crew of a vessel which renders assistance to a vessel injured by collision are not deprived of their right to salvage reward by the fact that some of the owners are also owners of another vessel by whose misconduct the collision takes place. *Id.*

A vessel rendering salvage assistance is not deprived of her right to reward by the fact that she is employed by a vessel whose misconduct renders her employment necessary. *Id.*

A collision occurred between two vessels. Both were found to blame. A cause of salvage was instituted by the master and crew of one of the vessels for having saved a quantity of specie laden on board the other vessel:—Held, that the salvors were not entitled to reward for saving property which they had by their own wrongful acts contributed to place in jeopardy. *Cargo ex Capella*, 1 L. R., Adm. 356; 16 L. T. 800.

A tug under a contract to tow, which by mis-

conduct or negligence or want of reasonable equipments, occasions or materially causes danger to the ship in tow, is not entitled to salvage reward for rescuing the ship from such danger. *The Minnehaha*, Lush. 335; 15 Moore, P. C. C. 133; 80 L. J., Adm. 211; 7 Jur., N. S. 1257; 4 L. T. 810; 9 W. R. 925.

A tug agreed to tow a ship from Liverpool round the Skerries for a fixed sum. The tug negligently towed the ship in bad weather too near a lee shore, and the weather becoming worse, the hawser parted, and the ship being in a position of danger was compelled to let go her anchors to avoid being driven on shore. From this position she was rescued by the tug after being compelled to slip her anchors and chains, which were lost:—Held, that the tug was not entitled to claim salvage remuneration, and that her owners were liable to pay for her anchors and chains. *The Robert Dixon*, 5 Adm. D. 54; 42 L. T. 334; 28 W. R. 716—C. A.

— **Handing over to Person Causing Injury.**—Salvors having brought a vessel in distress to a situation of safety from ordinary peril, but not to anchor, and having given up the charge to a licensed pilot, are not prejudiced as to their claim by injury subsequently happening to the ship from the negligence of such pilot. *The Bomareund*, Lush. 77.

When Salvor does Damage to the Vessel in Distress.—A screw steamer fell in with a disabled barque in the English Channel, and in answer to signals of distress approached her to render assistance. In rendering salvage services to the barque damage was caused to that vessel by the negligent navigation of the screw steamer, the two vessels coming into collision on three occasions. To recover for the damages sustained in these collisions, the owners of the barque promoted a cause of damage against the steamer, and subsequently an action for the recovery of salvage remuneration was brought by the owners of the steamer against the barque. On the two causes coming on to be heard together:—Held, that the owners of the barque were entitled to recover in the damage cause, and that the owners of the steamer were entitled to recover in the salvage cause. *The C. S. Butler, The Baltic*, 4 L. R., Adm. 178; 43 L. J., Adm. 17; 30 L. T. 475; 22 W. R. 752.

A salvor whose ship succeeds in bringing an injured ship into safety, but in so doing inflicts damage upon her by coming into collision through negligence and want of proper navigation, which is gross but not wilful, is not thereby deprived of his right to a reward which has been agreed upon between the masters of the respective vessels. *Id.*

Ship belonging to or hired by Government.—A transport ship, hired by government, and performing by orders of the officer of a Queen's ship, salvage services not within the terms of the charterparty, is entitled to a share of the amount awarded as salvage. *The Nile*, 4 L. R., Adm. 449; 44 L. J., Adm. 38; 33 L. T. 66.

A ship belonging to the Bombay Government with a hired commander and crew is, with respect to the provisions of the Merchant Shipping Act, 1854, s. 484, in the same position as a Queen's ship with commissioned officers. *Cargo ex Woosung, infra.*

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— **Officer and Crew.**—An officer of a Queen's ship, by whose orders some of his crew and a transport ship effected salvage, is entitled to a share of the salvage awarded. *Id.*

The commander and crew of a Queen's ship have the same rights to remuneration for salvage as the master and crew of a merchant ship. *Cargo ex Woosung*, 1 Adm. D. 260; 35 L. T. 8; 25 W. R. 1. Reversing 44 L. J., Adm. 45.

The commander of a Queen's ship, sent to render help to a wrecked ship, cannot impose terms and refuse to give salvage services unless those terms are accepted. *Id.*

Officers and crews of the Queen's ships are entitled to salvage rewards, though the fact that their own property is not risked in such services will be taken into consideration. *The Earl of Eglinton*, Swabey, 7.

A larger proportion will be given where the property saved is of great value. *Id.*

Officers and crews of her Majesty's ships, on receiving the consent of the Admiralty, as required by 17 & 18 Vict. c. 104, s. 485, may recover salvage from the owners of ship and cargo for services rendered thereto, and for salvage services rendered to passengers belonging to the ship. *The Alma*, Lush. 378.

Board of Trade's Vessels.—The Board of Trade, as owners of a steam-tug and lifeboat belonging to Ramsgate harbour, may sue for an award of salvage in respect of service rendered by the steam-tug and lifeboat. *The Cybele*, 3 Adm. D. 8; 47 L. J., Adm. 86; 37 L. T. 773; 26 W. R. 345—C. A.

4. AMOUNT AWARDABLE, APPORTIONMENT, DEDUCTIONS, AND CONTRIBUTION.

a. Principles on which Award made.

Short Time Occupied in Rendering Service.—Where salvage services are rendered by steamships, the amount of salvage which the court will award is not necessarily affected by the fact of the services performed occupying only a short time. *The Northumberland v. The Andalusia*, 12 L. T. 584.

Not Assessed on Quantum meruit Principle.—Salvage expenses are not assessed upon the quantum meruit principle, but on the general principle of maritime law, rewarding persons who by great, and perhaps dangerous, exertions bring in a ship, for which exertions, if not successful, nothing would have been paid. *Aitchison v. Lohre*, 4 App. Cas. 755; 49 L. J., Q. B. 123; 41 L. T. 323; 28 W. R. 1. See also *Bird v. Gibb, The De Bay, infra.*

Although the quantum of remuneration to salvors is to some extent to be affected by the value of the property saved, it must not be raised to an amount altogether out of proportion to the services actually rendered. *The Amérique*, 6 L. R., P. C. 468; 31 L. T. 854; 23 W. R. 488.

Insufficiency—Great Danger incurred by Salvors.—Salvage services of a highly meritorious character having been performed by salvors, in saving the lives of the crew, and the ship and cargo having been valued at 45,000*l.*, the Admiralty Court awarded 1,000*l.* as salvage for such services:—Held, that the sum was insufficient,

and the remuneration increased to 2,000*l.*, in consideration of the great danger the salvors incurred, and of the fact of the saving of lives, and the value of the ship and cargo. *The Glenduror*, *Arnold v. Cowie*, 3 L. R., P. C. 589; 24 L. T. 499.

Consideration of Risk.—In awarding the amount for salvage services well performed, the court holds the shortness of the duration of such services as an element of meritoriousness; and where the amount of property saved is very large, the court will not take advantage of the extent of such amount further than to give a liberal reward, according to the meritoriousness of the services actually performed. *The United Kingdom v. The Syrian*, 14 L. T. 833.

In estimating the value of salvage services, circumstances, among others, to be considered by the court are, the degree of danger to which the vessel was exposed, and from which she was rescued by the salvors, the mode in which the services of the salvors were applied, and the risk incurred by the salvors in rendering those services. *The Chetah*, 2 L. R., P. C. 205; 38 L. J., Adm. 1; 19 L. T. 621.

In estimating salvage reward to the owners of the salving vessel, the circumstances that the salving vessel deviating from her course might have vitiated the insurance, the possibility of being answerable to the owners of the cargo for such deviation, and the exposure to danger of the salving ship, in rendering salvage services, are elements to be taken into consideration. *The Sir Ralph Abercrombie*, 1 L. R., P. C. 454; 4 Moore, P. C. C., N. S. 374.

Where no special risk has been incurred by the salvors, salvage reward is allotted upon a calculation of a fair remuneration for time and trouble to the owners of the salving vessel and to each hand engaged. *The Otto Hermann*, 33 L. J., Adm. 189.

Where there is danger to the salvors, the risk of life receives the greatest remuneration. *Ib.*

A lower scale of remuneration is given where the vessel saved is not one of present danger, but a case of urgency. *Ib.*

The lowest where, a vessel being disabled from proceeding, as in the case of a steam vessel in want of fuel, there is a possible contingency of serious consequences. *Ib.*

In all cases, the value of the vessel salving is regarded, and to whatever remuneration is given must be added a sum to meet any damage she sustains. *Ib.*

Where Life Salvage.—*See ante*, col. 1626.

Effect of Mistake or Misconduct.—Where salvage is finally effected, those who meritoriously contribute to that result are entitled to a share in the reward, although the part taken by them would not of itself have produced the result. *The Atlas*, 15 Moore, P. C. C. 329; 31 L. J., Adm. 210; 8 Jur., N. S. 753; 10 W. R. 850. *See The Rosalind*, 12 L. T. 553.

If success is finally obtained, no mere mistake or error of judgment in the manner of procuring it, nor misconduct short of that which is wilful and may be considered criminal on the part of the salvors (which must be proved by those who impute it), will work an entire forfeiture of the salvage. *Ib.*

Mistake or misconduct, other than criminal,

which diminishes the value of the property saved, or occasions expense to the owners, is properly to be considered in the amount of compensation to be awarded. *Ib.*

Salvors may forfeit, partially or totally, by various degrees of misconduct, their right to salvage reward; but the evidence to establish their misconduct must be conclusive. *The Charles Adolphe*, Swabey, 153.

Violent and overbearing conduct on the part of salvors, although it may not amount to such wilful misconduct as to cause an entire forfeiture of salvage reward, will yet operate to induce the court to diminish the amount of the reward. *The Marie*, 7 Adm. D. 203; 47 L. T. 737; 5 Asp. M. C. 27.

The master and crew of the Y., a vessel in distress, got on board the K., a steamer standing by her. The mate and two of the crew of the K. afterwards went on board the Y. but refused to take her master back with them. The mate subsequently also refused the services of a steam-tug, and finally having from want of local knowledge anchored the Y. in an insecure place, she began to drift, was forsaken by the salvors, and sank. She was subsequently raised by her owners at considerable expense. In an action for salvage the owners of the Y. denied that a reward was due, and counter-claimed for damages:—Held, that the mate was guilty of misconduct in refusing to take the master of the Y. on board of her, and to engage the services of the tug; but that if the Y. had been ultimately saved such misconduct would have worked a partial forfeiture of the reward only. *The Fan-Yean*, 8 Adm. D. 147; 52 L. J., Adm. 67; 49 L. T. 186; 31 W. R. 950.

Held, further, that as the loss arising from the misconduct of the salvors was probably equal to that from which the Y. was first rescued, no salvage reward was due. Counter-claim for damages dismissed. *Ib.*

Where a wreck had been greatly damaged by the erroneous conduct of the salvors in their treatment of it, the court awarded them a smaller sum, deducting from the reward which it would have otherwise held that they had earned, a certain amount as compensation for the additional damage thus done to the property, and the court proportioned the amount that it deducted to the want of skill shewn. *The Magdalen*, 31 L. J., Adm. 22; 5 L. T. 807.

A derelict ship was fallen in with by a steamer, and towed to Bridlington Bay, but received considerable damage by taking the ground as she was going into the harbour:—Held, that the salvors were wrong in attempting to carry a vessel of such size into the harbour, and that something must be deducted on that score from the salvage they would otherwise have received. *The Gerla*, Swabey, 230.

Damage to Salvor.—If a vessel rendering salvage services is damaged without negligence on her own part, she is entitled to recover the damage and demurrage during repairs from the salvaged vessel. *The Mud Hopper*, 40 L. T. 462.

Where the salvors' vessel is injured or lost whilst engaged in the salvage service, the presumption is that the injury or loss was caused by the necessities of the service, and the burden of proof is on the parties alleging that the loss was caused by the default of the salvors. *The Thomas Blyth*, Lush, 16.

Where the property saved is ample, losses voluntarily incurred by the salvor should be transferred to the owner of the property saved, and in addition the salvor should receive a compensation for his exertions and for the risk he runs of not receiving any compensation in the event of his services proving ineffectual. *Bird v. Gibb, The De Bay*, 8 App. Cas. 559; 52 L. J., P. C. 57; 49 L. T. 414—P. C.

The losses should be ascertained with precision where practicable, but in that case the salvage remuneration added thereto should be fixed on a more moderate scale than where the losses cannot be fixed with precision. *Ib.*

Evidence—Loss of Earnings by and Damage to Salvage Ship.—In an action for salvage, evidence of the loss of earnings by and of the costs of repairing damage done to the salvaging vessel in consequence of rendering salvage services is admissible. But these sums are to be regarded as elements for consideration in estimating the amount of the salvage reward, but are not to be considered as fixed amounts to be awarded to the salvors in respect of these matters. *The Sunnyside*, 8 Adm. D. 137; 52 L. J., Adm. 76; 49 L. T. 401; 31 W. R. 859.

Loss of Information leading to Profitable Employment.—A paragraph in a statement of claim for salvage, stating that by rendering the salvage service the salvaging vessel had been prevented from obtaining information which would have resulted in profitable employment, ordered to be struck out, as relating to matters which the court could not take into consideration in estimating the value of the services. *The Cybele*, 2 Adm. D. 224; 47 L. J., Adm. 13; 37 L. T. 165; 25 W. R. 830; *S. C.*, on appeal, 3 Adm. D. 8; 47 L. J., Adm. 86; 37 L. T. 773; 26 W. R. 345.

b. Amount and Proportion generally.

Not more than a Moiety.—In no instance, however meritorious the service performed, does the Court of Admiralty in England decree more than a moiety for salvage. *The Inca*, 12 Moore, P. C. C. 189; Swabey, 370. But see *The Rasche*, and other cases, *post*, col. 1639.

Value, how Calculated.—Salvors are entitled upon a value calculated at the place where their services terminated. *The Norma*, Lush. 124; 5 L. T. 340.

The value of freight salvaged is to be reckoned *pro ratâ itineris peracti*, and the other equities of the case. *Ib.*

A ship bound from Honduras to England was disabled on the voyage, and towed into Bermuda, where expenses nearly equal to the whole freight were incurred to refit; the voyage home was afterwards completed, and the cargo delivered. The court allowed salvage upon one-half of the total gross freight. *Ib.*

Transhipment.—Rule for estimating value where the salvage concluded at one port, and the cargo was transhipped and brought to another, and there sold; the salvors are only entitled to salvage on the value at the port where their services concluded. *The George Dean*, Swabey, 290.

Suit entered against Vessel alone.—Her

Majesty's steamship *Leopard* rendered a salvage service to an English vessel then in the service of the French government, and laden with a valuable cargo. The suit was entered against the vessel alone, her value being 4,247*l.* The court, advert- ing to the difficulty of apportioning salvage where the cargo was not before it, awarded 600*l.* on the value of the vessel. *The St. Mary Pleasants*, Swabey, 224.

Amounts Awarded.—A sum of 400*l.* was decreed, in pursuance of an agreement for that sum, for salvage service to ship, cargo and freight. The value of ship and freight only were then known. Afterwards the owners of the cargo were proceeded against, and offered to pay their proportion of the 400*l.* upon the net proceeds of cargo.—Held, in ascertaining net value of the cargo, that 2½ per cent. discount, and certain other items sworn to be accustomed charges, might be deducted, but not a gratuity of 5*l.* 5*s.* to the master, and that costs of the original proceedings must be borne by the owners of the cargo proportionably with the owners of the ship, though the former were not before the court when the decree was made. *The Peace*, Swabey, 115.

A collier steamer of the value of 5,000*l.*, bound from Newcastle to Seville with a cargo, fell in, in the English Channel, with a large American ship, totally disabled by tempest. A boat, at great peril, was sent on board, and the vessel taken in tow, and brought safely into Portland. The value of the property saved was 52,000*l.* The court awarded to the salvors 2,800*l.*—1,500*l.* to the owners, 500*l.* to the master, 800*l.* to the crew, and double shares to the seamen who boarded in the boat. *The Saint Nicholas*, Lush. 29.

The *Grenada*, 684 tons register, bound from Singapore to Liverpool, with a general cargo, fell in, when about four days' sail from Chili, with the barque *Golondrina*, 475 tons register, laden with a cargo of copper regulus, bound from Chanaval, in Chili, for Swansea, and in distress, her first and second mate having deserted her previously to her departure from Chanaval, and her master having jumped overboard in a deranged state of mind from drinking. At the request of the crew of the barque the master of the *Grenada* put on board her his second mate, who, after great difficulty, brought the barque safely into Swansea. The value of the property saved amounted to 26,000*l.* The court awarded to the salvors 1,800*l.*, 1,000*l.* to the owners, 300*l.* to the second mate, 200*l.* to the master, and 300*l.* to the crew, to be distributed according to their ratings. *The Golondrina*, 1 L. R., Adm. 334.

Salvage services were rendered by four steamers; one had come into collision with the vessel salvaged, and was found to blame, and she rendered the principal services. The value of the property salvaged was 22,200*l.*—Held, that the three vessels not to blame were entitled to reward. And the court awarded 310*l.* *The Glengaber*, 3 L. R., Adm. 534; 41 L. J., Adm. 84; 27 L. T. 386; 21 W. R. 168.

Twenty-five men, the crews of four boats, saved the lives of ten men, and gave information to a steamboat, which rescued others. The services lasted about four hours, and were attended with much danger. Part of the cargo, of the value of 40,000*l.*, having been afterwards recovered, the court awarded the salvors of life 500*l.*

Cargo ex Schiller, 1 Adm. D. 473 ; 46 L. J., Adm. 9 ; 35 L. T. 97 ; *S. C.*, on appeal, 2 Adm. D. 145 ; 36 L. T. 714—C. A.

In a most meritorious case of salvage, where a steamship which had got aground on the shore of the Red Sea, ninety-five miles from Suez, in such a position that without help she must before many hours had elapsed have been lost with all hands on board her, was towed off the shore and to within a few miles of Suez by another steamship, the court, on a value of 62,000*l.*, awarded to the salvors 6,000*l.* *The Lancaster*, 8 Adm. D. 65 ; 48 L. T. 679 ; 31 W. R. 612 ; 5 Asp. M. C. 58.

Excessive Claim.—Where a steamship, disabled by the breaking of her crank-shaft, was towed a distance of about thirty miles without danger or risk by another steamship belonging to the same owners as the disabled vessel, and fifteen of the crew of the towing vessel instituted a salvage action in the sum of 5,000*l.* against the vessel towed, and arrested the vessel, cargo, and freight therein, the court held such services to be salvage services, but of so slight a character that on a value of 105,500*l.* it awarded 15*l.*, and ordered the salvors to pay all the costs of the action, expressing disapprobation both at the institution of the action in the High Court, and at the arrest of the vessel for such an amount. *The Agamemnon*, 48 L. T. 880.

c. In Case of Derelicts.

More than Moiety.—Derelict, being sine spe recuperandi, is distinguishable from salvage in the amount awarded. *The Inca*, 12 Moore, P. C. C. 189 ; Swabey, 370.

A moiety of the value of the vessel and cargo, in a case of the salvage of a derelict, was formerly the amount awarded, but the maritime courts now give only such amount as is fit and proper with reference to all the circumstances of the case, having regard especially to the value of the property salvaged. *The Scindia*, 1 L. R., P. C. 241 ; 4 Moore, P. C. C., N. S. 84.

A ship on a voyage from Melbourne to London fell in with a derelict brigantine 220 miles to the westward of the Lizard, in the month of February, and put an officer and three hands on board her, who, under circumstances of great difficulty and danger, and after much hardship, brought her in safety to Liverpool. In a salvage suit instituted on behalf of the owners, master and crew of the ship, the court, after directing expenses incurred by the salvors to be paid to them out of the proceeds of the salvaged property, awarded more than a moiety of the residue as salvage reward. *The Rasche*, 4 L. R., Adm. 127 ; 42 L. J., Adm. 71 ; 22 W. R. 240.

Abandonment of Derelict by Salvors—Right to Remuneration.—The barque N. fell in with the K., a derelict barque, in the Atlantic, and put five hands on board of her, who navigated her for three days. The K. then fell in with the barque B., and the five hands on board of the K. were, at their own request, taken on board the B. The B. then sent some of her own crew on board the K. and took her in tow, and towed her till the tow-rope broke, when the vessels parted company and the hands on board the K., with the assistance of the L., a steamship which they afterwards fell in with, brought the K. into Falmouth. In suits instituted on behalf of the

masters, owners, and crews of the N., the B., and the L., the court held, that the masters, owners, and crew of the N. were not entitled to salvage reward, but awarded salvage to the remaining plaintiffs. *The Killeena*, 6 Adm. D. 193 ; 51 L. J., Adm. 11 ; 45 L. T. 621 ; 30 W. R. 339 ; 4 Asp. M. C. 472.

Amount of Award.—The value of the property salvaged was 12,663*l.*, and the total award made by the court for salvage was 4,200*l.* *The Anna Helena* (No. 2), 49 L. T. 204.

A derelict vessel was found in the North Atlantic Ocean, 800 miles from land, in a seriously damaged condition, and was navigated into Queenstown by salvors, who incurred great risk and hardship in rendering the service. The value of the derelict was 5,100*l.* The court awarded 2,300*l.* as salvage reward. *The Craigs*, 5 Adm. D. 186 ; 29 W. R. 446.

Where a derelict vessel and cargo of the value of 1,452*l.* were salvaged by a steamer, which, with her cargo, was of the value of 30,000*l.*, the Vice-Admiralty Court awarded 300*l.* for salvage :—Held, that, under the circumstances, that sum was not sufficient, and the same increased to 450*l.* *The True Blue*, 1 L. R., P. C. 250 ; 4 Moore, P. C. C., N. S. 96.

Salvors having by meritorious services, rendered at the risk of their lives, salvaged a derelict vessel, her cargo and freight, valued together at 750*l.*, the court awarded 360*l.* as salvage remuneration. *The Hebe*, 4 P. D. 217.

A steamer laden with a valuable cargo, and having passengers on board, fell in with a derelict brig in the Bristol Channel, and with great difficulty, in spite of a strong wind and heavy sea, succeeded in towing her into port. The value of the brig, together with her cargo and freight, amounted to nearly 2,800*l.* The court awarded 900*l.* to the salvors. *The Andrina*, 3 L. R., Adm. 286 ; 22 L. T. 488.

Wrongful Dispossession.—If first salvors lawfully in possession of a derelict are wrongfully dispossessed by second salvors who succeed in bringing the ship into safety, the second salvors will receive no benefit from the service they may render, but the whole reward will go to the original salvors. *The Kathleen*, 43 L. J., Adm. 39 ; 31 L. T. 284.

Where a tug was engaged by the crew of two smacks to tow a derelict into port, but through the mistake of the tug the vessel got aground, whereupon the tug went in search of assistance and some beachmen took possession of the vessel and brought her into harbour, a liberal salvage was awarded to the smacksmen. *The Atlas*, 15 Moore, P. C. C. 329 ; 31 L. J., Adm. 210 ; 8 Jur., N. S. 753 ; 18 W. R. 850.

A derelict was found at sea by salvors, who were incapable of performing the attempted service, but remained by the wreck until a second set of salvors came up, who dispossessed these first and brought it into port. The court allotted to the first set a sufficient sum to cover the expenses to which they had been put. *The Magdalen*, 31 L. J., Adm. 22 ; 5 L. T. 807.

d. Reviewing Award on Appeal.

Insufficient Award.—The Court of Appeal will increase the amount of a salvage award, if in its opinion, considering the value of the pro-

perty salvaged, and of the salvaging vessel, the award of the court below is insufficient. *The City of Berlin*, 2 Adm. D. 187; 37 L. T. 307; 25 W. R. 793—C. A. See also *The True Blue*, *supra*.

Excessive Award.]—When the Court of Admiralty had awarded an exceptional and excessive amount of remuneration solely from regard to the value of property salvaged, the Judicial Committee, notwithstanding their general rule of non-interference upon a question of mere discretion, reduced the amount by two-fifths. *The Amérique*, 6 L. R., P. C. 468; 31 L. T. 854; 23 W. R. 488.

An award of 30,000*l.* on a value of 190,000*l.* in the case of a derelict ship reduced to 18,000*l.* on the ground that the award was out of proportion to the services rendered. *Ib.*

Where a judge had awarded 3,500*l.* for losses and 5,000*l.* for remuneration (the property saved being 67,000*l.*):—Held, that a total of 6,000*l.* was sufficient. *Bird v. Gibb, The De Bay*, 8 App. Cas. 559; 52 L. J., P. C. 57; 49 L. T. 414.

The Court of Appeal is unwilling to interfere with the judicial discretion in cases of salvage, where the quantum awarded is alone the subject of appeal. Though there is no precedent for the reduction of an amount awarded, yet in principle there can be no difference between increasing and reducing such amounts, both being equally an interference with judicial discretion. And the amount must be reduced on appeal when the sum awarded is exorbitant or manifestly excessive. *The Chetah*, 2 L. R., P. C. 205; 38 L. J., Adm. 1; 19 L. T. 621; 17 W. R. 233; 5 Moore, P. C. C., N. S. 278.

Therefore, where the judge of the Admiralty Court, acting upon his own unassisted judgment, greatly overrated the value of the services rendered by the salvors:—Held, that the amount of his award must be reduced. *Ib.*

Deviation of Vessel.]—The Court of Appeal will alter an award of salvage made by the court below, where there is reason to believe that the court below has not taken into consideration the circumstance that rendering a salvage service to property alone constitutes a deviation in point of law, however small the deviation may be in point of fact. *The Farnley Hall*, 46 L. T. 216—C. A.

Discretion.]—In appeals as to the quantum of salvage allowed the court will not interfere with or moderate the amount awarded by the Admiralty Court, unless that amount was exorbitant or excessive, though the Court of Appeal may be unable to affirm the principle on which the amount was assessed, or would have awarded a less amount than that awarded by the Admiralty Court. *The Woburn Abbey*, 21 L. T. 707—P. C.

In appeals as to the quantum awarded, the difference ought to be very considerable (to the extent of one-third at least), in order to induce the court to interfere upon a question of mere discretion. *Arnold v. Cowie, The Glenduror*, 3 L. R., P. C. 589; 24 L. T. 499.

The Court of Appeal will hesitate to interfere with the decision of local authorities on a question of salvage, but at the time is bound to act upon its own judgment if it should be of opinion that the award is wholly inadequate. *The Messenger*, Swabey, 191.

The Appellate Court will not disturb an award of salvage on the ground of the court below

having awarded too large a sum, unless satisfied, beyond all doubt, that the judge has made an exorbitant estimate of the salvage services. *The Fusilier*, 3 Moore, P. C. C., N. S. 51.

The judicial committee is always reluctant to review cases of salvage, which involve the exercise of the discretion of the judge of the court, but, being a final court of appeal, will, if the justice of the case requires it, increase the amount. *The Scindia*, 1 L. R., P. C. 241; 4 Moore, P. C. C., N. S. 84.

The Court of Appeal in a disputed question respecting the amount of remuneration awarded for a salvage service, is indisposed, except it appears that the judgment is clearly erroneous, to interfere with the compensation which the court in its discretion has awarded. *The Clarise*, 12 Moore, P. C. C. 340.

The amount of compensation to be awarded is in the discretion of the judge of the Court of Admiralty, and the judicial committee will not interfere with the manner in which that discretion has been exercised, either by diminishing or increasing the amount awarded, except in a case of very extraordinary character. *The Neptune*, 12 Moore, P. C. C. 346.

The Court of Appeal is very unwilling to interfere with the judicial discretion exercised by the judge below with regard to the amount awarded for salvage services, and will not do so unless the sum awarded is other than a reasonable remuneration for the services rendered, and unless the difference is very considerable. *The England*, 2 L. R., P. C. 253; 38 L. J., Adm. 9; 20 L. T. 46; 5 Moore, P. C. C., N. S. 344.

— More than one Vessel Salvaging.]—In reviewing decisions in salvage suits in regard to the sums allotted for salvage services, where there is more than one salvaging vessel, the judicial committee, adhering to the rule laid down in the above cases, will not, unless under strong circumstances, interfere with the judicial discretion of the judge of the Admiralty Court. *The England*, 2 L. R., P. C. 253; 38 L. J., Adm. 9; 20 L. T. 46; 5 Moore, P. C. C., N. S. 344.

From the Cinque Ports.]—An appeal to the Court of Admiralty under 1 & 2 Geo. 4, c. 76, from an award of the commissioners of the Cinque Ports in a salvage case is in the nature of a rehearing rather than of an appeal, and it is obligatory on the court to allow a restatement of the case and to admit fresh evidence. The court will, however, in the exercise of its discretion as to costs, discourage the giving of fresh evidence unwarrantably. *The Caledonia*, 17 W. R. 626.

Costs.]—Although the sum awarded by the Appellate Court for salvage services is under 200*l.*, costs will be allowed if the case is a fit one to be brought before the Appellate Court. *The Minnehaha*, Lush. 335; 15 Moore, P. C. C. 133.

— Parties Interested.]—On appeal against apportionment of salvage reward, the owners of the salvaged vessel were cited and asked for an indemnity for their costs, which the appellants refused, and gave notice that no relief would be applied for against the owners. The owners were held to be entitled to their costs up to the time of such notice. *The Castlewood*, 42 L. T. 702.

e. Apportionment.

In what Shares.—A ship built on purpose to convey the obelisk known as Cleopatra's Needle, was, whilst laden with the obelisk, abandoned about ninety miles N.E. of Ferrol, on the coast of Spain. A steamship discovered her and lay by her for a night, and the next day four of her crew volunteered and went to the ship, and after much difficulty and at considerable risk succeeded in getting the rudder clear and a hawser attached. The steamship, after towing her for fifty-two hours, brought her into port. The court appraised the ship and obelisk at 25,000*l.*, and awarded 2,000*l.*, and apportioned the latter sum as follows, viz., 1,200*l.* to the owners of the steamship, 250*l.* to her master, and the rest among the officers and crew according to their ratings, as follows, viz., double shares to the chief officer, second engineer and other volunteers, and three shares to the seamen immersed in water while clearing the shackles and tow-line; the rest among the others of the crew. *The Cleopatra*, 3 Adm. D. 145; 47 L. J., Adm. 72.

The master of a Norwegian brig bound to Cardiff, with a crew of nine men, fell in, in the North Sea between Heligoland and the Dogger Bank, with a derelict vessel in a very crippled condition, and put his mate and two of his crew on board her. The mate and the two men on board the derelict, shortly after they had boarded her, fearing that she was about to founder, endeavoured to leave her, but their boat was swamped, and one of the men drifted astern, and was picked up by a fishing-smack. The mate and the other hand succeeded in bringing the derelict safely into the English Channel, and within three miles of Dungeness; she was then taken in tow by a steamship and towed to the entrance of Dover Harbour, within which she was subsequently placed in safety. Actions of salvage were instituted by the owners, master, and crew of the brig, and by the owners, master, and crew of the steamship against the derelict vessel and her cargo, and the court awarded a moiety of the value of the property proceeded against, and apportioned three-fifths of the amount to the owners, master, and crew of the brig. *The Livietta* (No. 1) 8 Adm. D. 24; 48 L. T. 799; 31 W. R. 643.

A brig was driven out to sea shorthanded, and after she had been eighty days at sea and much damaged, with only four men on board, two of them disabled, a ship placed on board of her two hands, who assisted in working her till she was brought, after twelve days, into port. The brig and her cargo were of the value of 8,174*l.*:—Held, that this was a salvage service. An award was made of 400*l.*, and it was apportioned—to the owners, 50*l.*; to the master, 50*l.*; to the crew, 100*l.*; to the men placed on board the brig, 200*l.* *The Charles*, 3 L. R., Adm. 536; 26 L. T. 594; 21 W. R. 13.

In apportioning 1,500*l.*, where the services were mainly the personal exertions of the master and crew of a sailing vessel, the court awarded 500*l.* to the owners, 650*l.* to the crew, and 350*l.* to the master. *The Palmyra*, 25 L. T. 804.

Special Reward to Mate.—Two Norwegian barques, both bound to England, fell in with each other on the high seas, about 3,000 miles from Liverpool; one of the barques was in distress, her first mate having died, and her master,

her second mate, and one of the crew being sick with yellow fever. The other barque was shorthanded, but her mate, with the consent of her master, went on board the distressed vessel and succeeded in navigating her to Liverpool. During the voyage, the master, the second mate, and two of the crew died. On the arrival of the vessel at Liverpool an action of salvage was instituted against her. At the hearing of the action, the value of the salvaged property was taken at 5,136*l.* 13*s.* 2*d.* The court awarded 600*l.* to the mate who had gone on board the distressed vessel, 100*l.* to the owners of the salving vessel, 50*l.* to her master, and 150*l.* amongst the remaining plaintiffs. *The Skid-ladner*, 3 Adm. D. 24; 47 L. J., Adm. 84; 38 L. T. 150.

Special Reward to Master.—Where 3,500*l.* had been awarded for salvage services rendered by a steamship, 2,000*l.* was awarded to the owners and 700*l.* to the master for his skilful navigation in dangerous circumstances, the order of the Vice-Admiralty Court of Bermuda being varied. *The Castlewood*, 42 L. T. 702—P. C.

Amount to Owners.—In a suit instituted to recover salvage reward in respect of services rendered in towing a disabled vessel into safety, the court awarded a total sum of 4,000*l.*, of which 3,000*l.* was apportioned to the owners. *The Kennure Castle*, 7 Adm. D. 47; 30 W. R. 708; 5 Asp. M. C. 27.

Sailing Vessel or Steamship.—In apportioning salvage reward among the owners, master and crew of a sailing vessel which has rendered salvage services, the court will not allot to the owners the same proportion of the reward as in the case of services rendered by a steamship (usually one-half), unless the circumstances shew that the vessel itself, as where the services are effected by steam power, was the chief agent in effecting the salvage. *The Palmyra*, 25 L. T. 884.

The capability of steamers to perform services with greater rapidity and certainty entitles them as salvors to a higher scale of reward. *The Otto Herman*, 33 L. J., Adm. 189.

— **On Deviation having been Occasioned.**—In a service mainly rendered by the steam power of the salving ship, and which had occasioned a deviation in point of law, and in rendering which the crew were exposed to some peril, an apportionment of two-thirds to the ship-owners and one-third to the master and crew, altered to five-ninths to the shipowners and four-ninths to the master and crew, and the total award increased from 600*l.* to 900*l.*; owner's share increased from 400*l.* to 500*l.*; master's share increased from 80*l.* to 100*l.*; crew's share increased from 120*l.* to 300*l.* *The Farnley Hall*, 46 L. T. 216; 4 Asp. M. C. 499—C. A.

Custom to Share Salvage—Disproportionate Risks.—Where there is a custom to share in salvage awards in a particular manner according to the ratings of the salvors on board their ship, yet if some of the salving crew have exposed themselves to much greater risk than the rest, the court will give them a larger share on equitable principles. *The Sarah*, 3 Adm. D. 39; 37 L. T. 831.

Agreement for Apportionment.]—*See cases post*, col. 1648.

f. Deductions.

Expenses incurred in salving a vessel, such as pumping, watching, &c., which strictly ought to be paid by the marshal, will, if paid by the salvors, be deducted by the court from the value of the salvaged vessel in assessing the salvage reward. *The Le Jonet*, 27 L. T. 387.

In apportioning the amount awarded as salvage, the court will not allow the owners of the vessel performing the service to deduct any expenses except those claimed in the petition in the salvage suit. *The Wigtownshire*, 36 L. J., Adm. 11.

g. Contribution.

Shipowners.]—The *C.*, a Spanish steamship, fell in at sea with the *Sarpedon*, an English steamship, with signals of distress flying, and entirely helpless from injuries sustained in a collision with a third vessel. The passengers of the *Sarpedon* and a quantity of specie, which had formed part of her cargo, having been taken on board the *C.*, attempts were made by the master and crew of the *C.* to tow the *Sarpedon* into safety. These attempts were ineffectual, and ultimately, after the master and crew of the *Sarpedon* had gone on board the *C.*, the *Sarpedon* was abandoned, and her passengers, master, and crew were landed in safety at an English port. Afterwards the specie was arrested in an action of salvage instituted at the suit of the owners, master, and crew of the *C.*, who claimed in the action to recover for life salvage and for salvage services rendered to the *Sarpedon* and the specie. The owners of the specie appeared as defendants, and served a notice on the owners of the *Sarpedon* calling upon them to contribute to the remuneration claimed by the plaintiffs. Thereupon the owners of the *Sarpedon* appeared. At the hearing of the action the court awarded salvage remuneration to the plaintiffs for the services rendered, but reserved all questions as to the liability of the owners of the *Sarpedon*. The owners of the specie then moved the court to declare that such portion of the sum awarded as was awarded for life salvage ought to be recouped to the owners of the specie. The court refused the motion on the ground that no property belonging to the owners of the *Sarpedon* having been salvaged, they could not be held personally liable to pay any portion of the sum awarded. *The Cargo ex Sarpedon*, 3 Adm. D. 28; 37 L. T. 505; 26 W. R. 374.

Shipowner and Owner of Cargo.]—The payment into court of 8*l.* a ton under 25 & 26 Vict. c. 63, s. 54, does not place the shipowner in the position of a person who has not done wrong. The owner of a ship sunk by a collision in the Thames admitted it to be his fault, and paid into court 8*l.* a ton in a suit to limit his liability. The Thames Conservators having powers under the Removal of Wrecks Act, 1877, and the Thames Conservancy Acts, raised the ship and delivered the ship and cargo to the owner, he undertaking to pay the expenses of raising. Part of the cargo was some wool, which was damaged by being sunk.—Held, that the shipowner was bound to deliver the wool to the owner of the wool without claiming from him by way of contribution to

salvage any part of the expenses of raising the ship and cargo. *The Eltrick or Pohn v. Bailey*, 6 Adm. D. 127; 45 L. T. 399; 4 Asp. M. C. 465—C. A. Affirming 50 L. J., Adm. 65.

Ship and cargo must each pay its own share of salvage; neither can be made liable for the salvage due from the other, whether the salvors proceed in the Admiralty Court or before the local magistrates. *The Pyrennee*, B. & L. 189.

The owners of goods on board a ship are bound to contribute to the general salvage of the ship and cargo as in a case of general salvage. *Briggs v. Merchant Traders' Ship, Loan and Assurance Society*, 13 Q. B. 167; 18 L. J., Q. B. 178; 13 Jur. 787.

Bullion liable to Contribute in the same Proportion as other Property.]—Where steam-tugs rendered salvage services by towing a sinking ship with passengers, cargo and bullion on board into safety, it was held, that the bullion was liable to contribute to the salvage reward in proportion to its value rateably with the other property salvaged. *The Longford*, 6 Adm. D. 60; 50 L. J., Adm. 28; 44 L. T. 254; 29 W. R. 491.

Shipowner and Charterer.]—Where a ship was chartered on the voyage out and home, at 2*l.* 10*s.* per ton, register measurement, per month, 2,500*l.* to be paid on clearing outwards, the like sum at the end of twelve months, and the remainder, three months after being reported at the Custom-house on her return: and the ship delivered her outward cargo, and sailed with her homeward cargo, and was captured and recaptured on the homeward voyage; and the ship and cargo were sold by consent of all parties, the owners and charterers having respectively made claim in the Admiralty Court to ship and goods, where restitution was decreed to them upon payment of salvage:—Held, that the charterers (having paid the two sums of 2,500*l.*) were not liable to contribute to the shipowner for salvage in respect of their goods, where the proceeds of the goods fell short of the sum due for the residue of the freight; but that the shipowner, in respect of the freight, was liable for the whole salvage; and the charterers having paid such contribution out of the proceeds of the goods, under a security given by them for payment of the salvage, with the assent of the shipowner as far as his liability was concerned:—Held, that they might set it off in an action by the owner for the residue of the freight. Secus, as to the charges of establishing the claim to the cargo, and procuring the decrees for its restitution: for the charterers alone were liable to them. *Cox v. May*, 4 M. & S. 152.

Ships in Collision.]—Two vessels came into collision. The court pronounced them both in fault. One vessel was subsequently abandoned, but salvaged by other parties:—Held, that the owners of the abandoned vessel could not recover the salvage awarded against them from the other vessel. *The Linda*, 4 Jur., N. S. 146.

5. AGREEMENTS RELATING TO SALVAGE SERVICES.

Inequitable Agreements.]—The master of the London agreed for 400*l.* to tow the Waverley into Lisbon, about twenty-five miles. The weather, which was bad at the time of the

agreement, subsequently became worse, and much difficulty was experienced in performing the salvage. In a suit for salvage the owners of the *Waverley* tendered 400*l.*, the amount agreed upon for salvage, and 123*l.* 11*s.* 8*d.* for quarantine expenses and consequent detention of the London:—Held, that the agreement was equitable at the time when it was made, and was therefore valid notwithstanding the subsequent circumstances. *The Waverley*, 3 L. R., Adm. 369; 40 L. J., Adm. 42; 24 L. T. 713.

Held, also, that the agreement was not affected by the tender of the amount of the extra expenses. Tender pronounced for, with costs from the time of making the tender. *Id.*

An English steamship, bound from Sumatra to Jedda, having on board as passengers 550 pilgrims, was wrecked in the Red Sea. The pilgrims took refuge on a rock where, if bad weather had set in, they would have been exposed to imminent danger. In answer to signals of distress a steamship came up, and her master refused to rescue the pilgrims for a less sum than 4,000*l.*, which was the amount of the passage-money to be paid to the owners of the wrecked vessel for carrying the pilgrims from Sumatra to Jedda. Ultimately the master of the wrecked vessel signed an agreement to pay 4,000*l.* to the master of the steamship to take the pilgrims to Jedda, and the pilgrims were taken in his ship to Jedda in safety. In an action to enforce the agreement:—Held, that it must be set aside as inequitable, and the court awarded 1,800*l.* as salvage remuneration. *The Medina*, 2 Adm. D. 5; 35 L. T. 779; 25 W. R. 156—C. A. Affirming 45 L. J., Adm. 81.

Where, in the opinion of the court, a salvage agreement is exorbitant, the court will refuse to enforce it. In a case where the master of a disabled ship at sea about 340 miles from Queens-town, requested assistance from a mail steamer, and agreed in writing to make his owners responsible to the extent of 15,000*l.*, provided the master of the mail steamer would tow the disabled ship to Queenstown, and the service was performed, the court declined to enforce the agreement, and awarded to the salvors by way of salvage reward 7,000*l.*, in addition to a sum sufficient to cover penalties which had become payable by the owners of the mail steamer by reason of the vessel deviating to perform the service. *The Sileria*, 5 Adm. D. 177; 43 L. T. 319; 29 W. R. 156.

Where an agreement is clearly established, the court will uphold it unless wholly inequitable, and will not set it aside on the ground that it is a hard bargain. *The Firefly*, Swabey, 240.

An agreement dishonestly made by the master to secure, to so-called salvors, an excessive reward, is not valid against the owner of the ship. *The Theodore*, Swabey, 351.

An agreement between salvors and the agent of the salving ship to leave the amount of their reward to his determination is inequitable and void. *The Enchantress*, Lush. 93; 30 L. J., Adm. 15.

An agreement will be upheld, unless proved to be very exorbitant, or to have been obtained by compulsion or fraud. *The Helen and George*, Swabey, 368.

It is competent to the master to make an agreement with salvors as to the remuneration for their services, and if the agreement is consistent

with justice and equity, it will bind the owners. *The Arthur*, 6 L. T. 556.

The burthen of proof is upon the parties alleging the agreement. *Id.*

Where Sum too Small.]—An agreement for a sum of 8*s.* 6*d.*, overruled as utterly futile, where it appeared that there was danger incurred by the salvors in rendering the service. *The Phantom*, 1 L. R., Adm. 58; 12 Jur., N. S. 529; 14 W. R. 774.

Execution more Difficult than Expected.]—When an agreement to fix the amount of the remuneration to be paid for salvage services has been deliberately entered into at the time of the commencement of the danger between perfectly competent parties, the court will not allow the agreement to be set aside, merely because the execution of it has turned out more difficult than was anticipated at the time of making the contract. *The Waverley*, 3 L. R., Adm. 369; 40 L. J., Adm. 42; 24 L. T. 713.

An agreement will not, if just at the time when it was made, be subsequently set aside because the services have been of longer duration than the salvors expected at the time when the agreement was entered into. *The Cato*, 35 L. J., Adm. 116.

A foreign vessel, fifty miles off the Dutch coast, being in difficulty, in consequence of the boisterous state of the weather, and being leaky, called in the assistance of an English fishing smack, and engaged the captain, by a written agreement, "to pilot and to sail ahead for 50*l.*" After four days' boisterous weather, during which the captain of the smack worked at the pumps, the vessel was got into port. The owners of the smack refused the tender of 50*l.*, and brought an action for salvage services rendered to the vessel. The court was of opinion that the agreement being to perform a service for a specific sum, was not to be set aside because the weather became tempestuous, and by reason thereof, that the vessel was longer in arriving at a port of safety than might reasonably be anticipated; and held, that salvage was barred by the agreement, as nothing was done to convert pilotage service into a salvage service, and that the sum specified in the agreement was a sufficient compensation. *The Jonge Andries*, Swabey, 226. Affirmed, Swabey, 303; 11 Moore, P. C. C. 313.

Agreements to Oust.]—An agreement entered into between the master of a salving ship and the officer commanding the distressed vessel, by which the latter acknowledges the receipt of the men, and undertakes "to pay all expenses attached thereby, as my vessel is in distress for want of men, and I cannot bring her in without help," is not such an agreement as will oust the right of the salvors to reward, but is an agreement to pay expenses in all events. *The Charles*, 3 L. R., Adm. 536; 26 L. T. 594; 21 W. R. 13.

Agreement for Apportionment of Salvage.]—The 182nd section of the Merchant Shipping Act, 1854, does not prevent seamen who are entitled to recover salvage remuneration from entering into an arrangement through their solicitor for the apportionment of the amount due to them. Where the owners of a ship have received a lump sum in respect of services rendered by their ship, master and crew, and have paid over to the crew

a portion of such sum which the crew, acting under the advice of their own solicitor, have accepted in settlement of their claims for salvage, the court will not, where the portion so paid over is not extravagantly small, disturb the settlement in the absence of fraud or concealment. *The Afrika*, 5 Adm. D. 192; 49 L. J., Adm. 63; 42 L. T. 403.

Under 17 & 18 Vict. c. 104, s. 498, the court will decree an equitable apportionment, unless an equitable agreement is proved, or any equitable tender has been made. *The Enchantress*, Lush. 93; 30 L. J., Adm. 15.

When salvors have entered into an agreement as to the apportionment of salvage, which in the opinion of the court is equitable, and not obtained by coercion, the court will uphold the agreement, and apportion the salvage awarded in accordance therewith. *The James Armstrong*, 4 L. R., Adm. 380; 33 L. T. 390.

When persons agree to render a salvage service and to apportion the salvage in a particular way, and further salvage services are rendered, not contemplated by the agreement, the whole body of salvors is entitled to share in the reward, and not only those actually engaged in the further salvage operations. *The Cudix and The Boyne*, 35 L. T. 602.

Costs of all parties were ordered to be paid out of fund in court, except a defendant's, in consequence of his misconduct to the co-salvors. *Id.*

By 17 & 18 Vict. c. 104, s. 182, every stipulation by which any seaman consents to abandon any right which he may have or obtain in the nature of salvage shall be wholly inoperative. By 25 & 26 Vict. c. 63, s. 18, this section "does not apply to the case of any stipulation made by the seamen belonging to any ship, which according to the terms of the agreement is to be employed on salvage service, with respect to the remuneration to be paid to them for salvage services to be rendered by such ship to any other ship:"—Held, that these sections do not fetter the discretion of the court upon the subject of these agreements, but that their effect is to render such agreements not illegal, and to place them on the same footing on which they stood before any legislation on the subject. *The Ganges*, 2 L. R., Adm. 370; 38 L. J., Adm. 61.

The plaintiff was temporary master of a steam-tug in the place of B., and without any extraordinary exertion or peril rendered salvage services to a vessel in distress. The steam-tug belonged to a company whose business it was to render towage and salvage services to vessels in distress. Theseamen employed by the company were paid, according to a special agreement, certain fixed wages and a fixed rate of poundage on all towage and salvage money earned by the tug. The plaintiff knew that B. was employed under this agreement. The plaintiff claimed salvage remuneration independently of the agreement:—Held, that the agreement, as it did not appear to be inequitable, was valid, and the plaintiff was bound by it, and therefore could not maintain his claim for salvage. *Id.*

By the ancient law of the Court of Admiralty, as well as by statute law prior to 25 & 26 Vict. c. 63, s. 18, any stipulation by which a seaman agreed to abandon a claim for salvage was invalid. *The Pride of Canada*, 9 L. T. 546.

The burden of proof is upon those who assert

such an agreement to shew, not merely the existence of the agreement, but that the seamen were fully aware of all its consequences. *Id.*

6. ASSIGNMENT OF RIGHT TO SALVAGE.

An assignment by a seaman of his right to salvage reward already acquired, is wholly void and inoperative by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 182, although such assignment is for valuable consideration, and in an action for distribution of salvage a defence setting up such an assignment is bad. *The Rosario*, 2 Adm. D. 41; 46 L. J., Adm. 52; 35 L. T. 816.

Sixteen of the crew of a steamship sued her owners for distribution of salvage. The owners answered that after the date of the salvage services, but before the distribution of the salvage money, fourteen had assigned to the defendants for good consideration all their shares:—Held, that the fourteen were nevertheless entitled to sue. *Id.*

7. DERELICTS AND WRECK.

Derelict—What is.]—A laden barge accidentally breaking loose from her moorings in the Thames, and drifting about with no one on board, is not derelict, and consequently not wreck within the meaning of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), and persons finding her and mooring her in safety are not precluded from recovering salvage for so doing by reason of their neglecting to comply with the provisions of s. 450, and to deliver the barge to the receiver of wreck. *The Zeta*, 4 L. R., Adm. 460; 44 L. J., Adm. 22; 33 L. T. 477; 24 W. R. 180.

When on the alarm attending a collision the crew of one vessel jumps on board the other, such abandonment does not of itself constitute a case of derelict. *The Fenix*, Swabey, 13.

In the case of a derelict, the salvors have a right to exclusive possession of the vessel; unless it has been utterly abandoned, and is in contemplation of law a derelict, the occupying salvors are bound to give up charge to the master on his appearing and claiming charge, and the master may then refuse to continue to employ them, and may employ others, and may take what measures he thinks fit for the preservation of the vessel. *The Champion*, B. & L. 69.

Where a vessel was picked up with four to five feet water in the hold, her compasses and the seamen's clothes having been taken off, the court pronounced against her as a derelict, though it did not appear that her crew had left sine spe recuperandi. *The Gertrude*, 30 L. J., Adm. 130.

A vessel having run ashore on the coast of Essex, was assisted by the owner of a smack, who put down an anchor and a hawser attached to the vessel, for the purpose of securing her. The smack then left her, for the purpose of carrying away some of her stores, with the intention, however, of returning. The owner of another smack came to her afterwards, and finding no one in or near the vessel, and her deck under water, took away the anchor and hawser, and delivered them up to the deputy vice-admiral of Essex:—Held, that the anchor and hawser were not parted with, or left and abandoned, within 1 & 2 Geo. 4, c. 75, s. 1, and

that the deputy vice-admiral was not justified in detaining them until salvage was paid or security given for its payment. *Clark v. Chamberlain*, 2 M. & W. 78.

— **Abandonment of, by Salvors—Right to Remuneration.**—The barque N. fell in with the K., a derelict barque, in the Atlantic, and put five hands on board of her, who navigated her for three days. The K. then fell in with the barque B. and the five hands on board of the K. were, at their own request, taken on board the B. The B. then sent some of her own crew on board the K. and took her in tow, and towed her till the tow-rope broke, when the vessels parted company and the hands on board the K., with the assistance of the L., a steamship which they afterwards fell in with, brought the K. into Falmouth. In suits instituted on behalf of the masters, owners, and crews of the N., the B., and the L., the court held, that the master, owners, and crew of the N. were not entitled to salvage reward, but awarded salvage to the remaining plaintiffs. *The Killeena*, 6 Adm. D. 193; 45 L. T. 621; 51 L. J., Adm. 11; 30 W. R. 339; 4 Asp. M. C. 472.

— **Amount of Salvage Award.**—The value of the property salvaged was 12,663l., and the total award made by the court for salvage was 4,200l. *Id.*

Salvors having, by meritorious services rendered at the risk of their lives, salvaged a derelict vessel, her cargo and freight, valued together at 750l., the court awarded 360l. as salvage remuneration. *The Ilcbe*, 4 Adm. D. 217.

A derelict vessel was found in the North Atlantic Ocean, 800 miles from land, in a seriously damaged condition, and was navigated into Queenstown by salvors, who incurred great risk and hardship in rendering the service. The value of the derelict was 5,100l. The court awarded 2,300l. as salvage reward. *The Craigs*, 5 P. D. 186; 29 W. R. 446. *And see cases ante*, col. 1640.

Wreck.—Timber which has been moored on a river (some miles above a harbour) opposite to the owners' premises, and has drifted therefrom to the sea, in consequence of an accidental loosening of the fastenings, is not a wreck within 17 & 18 Vict. c. 104, s. 458, entitling the justices to make an award for salvage, and the salvors, obligees of a bond given by the owner to abide this award, are not entitled to sue on such bond. *Palmer v. Rouse*, 3 H. & N. 505; 27 L. J., Ex. 437.

The jurisdiction of the Admiralty subsists as long as the shore is covered with water, and the rights of lords of manors can exist only as long as the land is left dry. Therefore a ship cannot be considered "wreckum maris," nor the claim of a lord of the manor to wreck sustained, unless at the time of taking possession she is either on the shore itself or left high and dry on land. *The Pauline*, 2 Rob. Adm. Rep. 358; 9 Jur. 286. See also *Stackpole v. Reg.*, 9 Ir. R., Eq. 619—C. A.

8. AGREEMENTS AS TO TOWAGE.

Implied Undertaking as to Fitness of Tug supplied to Perform Services.—The plaintiff, a master mariner, contracted with the defendants for a lump sum to be paid him by the defend-

dants, to take a certain specified steam-tug of the defendants', towing six sailing barges, from Hull to the Brazils, the plaintiff paying the crew and providing provisions for all on board for seventy days. The engines of the steam-tug were damaged and out of repair at the time of the contract, but neither the plaintiff nor defendants were then aware of this. The consequence, however, of the engines being so defective was that the time occupied in the voyage was increased, and the plaintiff's gain in performing his contract was much less than it would otherwise have been.—Held, by Brett and Cotton, L. J.J., that as the contract related to a specified vessel, there was no implied undertaking by the defendants that it should be reasonably efficient for the purposes of the voyage, and that therefore the defective state of the engines gave the plaintiff no cause of action, it not appearing that the engines were in a worse state when the plaintiff took possession of the vessel than they were at the time of the contract. *Robertson v. Amazon Tug and Light-crane Company*, 7 Q. B. D. 598; 51 L. J., Q. B. 68; 46 L. T. 146; 30 W. R. 308; 4 Asp. M. C. 496—C. A.

Held, contra, by Bramwell, L. J., that the defective state of the engines gave the plaintiff a cause of action, as there was an implied undertaking by the defendants that the engines were not so defective. *Id.*

Validity.—The master agreed with a tug for towage from Sea Reach, in the Thames, to a London wharf, and agreed to pay 6l. and give an order upon the owner of the wharf for the amount usually allowed by him (under the name of "towage") as a premium to vessels of the kind coming to his wharf. The service was performed by the tug, and the master paid the money, but refused to give the order on the owner of the wharf. The amount actually paid by the owner of the wharf, according to his practice, was proved; and it was also proved that if an order, signed by the master of the vessel towed, was presented by the master of the tug, the money would be (as a matter of practice) paid to him.—Held, that the master of the vessel had no authority to agree to transfer to the master of the tug an uncertain sum payable to the owners of the vessel; and that the court had no authority to enforce such a contract or give damages for the breach of it. *The Martha*, Lush. 314.

The owners and crew of a tug sued for salvage services, alleging that an agreement entered into for towage service was invalid, by reason of the fact of the illness of a great part of the crew of the vessel salvaged having been withheld. No danger to property was proved.—Held, that there was no salvage service, and the court pronounced for the agreement with costs. *The Canora*, 1 L. R., Adm. 54; 12 Jur., N. S. 528..

Delay—Payment of Extra Sum.—When a contract is entered into to tow a vessel from one point to another for a fixed sum, the tug cannot claim extra remuneration in the nature of payment for towage in respect of a delay which occurs during the transit without any fault on the part of the tug or the tow. *The Hjennett*, 5 Adm. D. 227; 49 L. J., Adm. 66; 42 L. T. 514.

Evidence of Making.—A master of a steam-

tug, of which the defendant was owner, was employed by the plaintiff to tow his smack out of a harbour. In so doing the smack was stranded, through the negligence of the master. The plaintiff had on previous occasions hired the defendant's steam-tug, and on paying the charge had received a receipt, upon the back of which was printed a notice that the defendant would not be answerable for damage occasioned by any supposed negligence of his servants:—Held, that it was a question for the jury whether the contract was made on the terms printed on the back of the receipts. *Symonds v. Pain*, 6 H. & N. 709; 30 L. J., Ex. 256.

9. LIABILITY OF TUGS FOR NEGLIGENCE.

Action against Tug for Damage—Contributory Negligence is no Answer.]—Where a vessel is under the charge of a licensed pilot, the employment of whom is compulsory, and is, at the same time, in tow of a steam-tug, the latter is bound to obey the orders of the pilot. In case of a mischief occurring to the vessel, occasioned directly by the conduct of the steam-tug, the tug (which had not noticed the pilot's signal) cannot, in an action brought by the owners of the vessel for damage, set up, as a legal defence, contributory negligence, upon the ground that if the pilot, when the mischief was about to happen, had himself done a certain thing the mischief might possibly have been avoided. *Bland v. Ross (The Julia)* (Lush. 231; 14 Moo. P. C. 210) commented on and approved. *Spaight v. Tedcastle*, 6 App. Cas. 217; 44 L. T. 589; 29 W. R. 761—H. L. (E.).

Where the Vessel in Tow in Charge of a Pilot by Compulsion of Law.]—Where a steam-tug towing a vessel under a towage contract is so negligently navigated as to come into collision with a vessel belonging to third parties, the owners of the steam-tug are liable for the damage done, even if at the time of the collision the vessel in tow was in charge of a duly-licensed pilot by compulsion of law, whose default solely occasioned the collision. *The Mary*, 5 Adm. D. 14; 48 L. J., Adm. 66; 41 L. T. 351; 28 W. R. 95.

Jurisdiction.]—The court has jurisdiction to entertain a suit instituted by the owners of a vessel against a steam-tug engaged to tow the vessel for negligently towing the vessel so as to cause her to come into collision with and do damage to another vessel. *The Energy*, 3 L. R., Adm. 48; 39 L. J., Adm. 25; 23 L. T. 601; 18 W. R. 1009.

A damage to a vessel whilst being towed, caused by the improper navigation of the tug which was towing it, is within the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), s. 54, sub-s. 4, notwithstanding such damage occurred also through a breach of the towing contract, and the owner of the tug is therefore entitled to the limitation of liability given by that section if such damage occurred without his actual fault or privity. *Wahlberg v. Young*, 45 L. J., C. P. 783; 24 W. R. 846.

Seemingly, that if the damage occurred from a mere breach of the contract to tow, the owner of the tug would not be entitled to the benefit of such section. *Id.*

Claim for Salvage—Negligence.]—A tug under contract to tow a ship is not entitled to salvage remuneration for rescuing the ship from danger brought about by the tug's negligent performance of her towage contract. A tug agreed to tow a ship from Liverpool to the Skerries for a fixed sum. The tug imprudently towed the ship in bad weather too near a lee shore, and the weather becoming worse during the performance of the agreed towage service, the hawser parted and the ship was placed in a position of danger and was compelled to let go her anchors to avoid being driven on shore. From this position she was rescued by the tug, having been compelled to slip her anchors and chains, which were lost:—Held, that the tug was not entitled to claim salvage remuneration, and that her owners were liable to pay for the loss of the anchors and chains. *The Robert Dixon*, 5 Adm. D. 54; 42 L. T. 344; 28 W. R. 716—C. A.

Tug bound to follow Directions, and not Liable for consequent Danger.]—Sensible, if a tug receives positive directions from the ship she is towing as to the course she is to steer, she is bound to obey them; and if the ship gets into danger in consequence of such directions the tug is not liable. *Id.*

See also cases under PILOTS AND PILOTAGE and COLLISION, *supra*.

Condition exempting from Liability from Negligence of Tug Owners or Servants.]—The master of a steam tug, who had contracted to tow a fishing smack out of the harbour of Great Yarmouth to sea on the terms that his owners should not be liable for damage arising from any negligence or default of themselves or their servants, after the towage had been in part performed, took in tow in addition to the smack six other vessels, and in consequence was unable to keep the fishing smack in her course, so that she went aground and was lost. By having more than six vessels in tow at once the master of the tug disobeyed a regulation made by the harbour-master of Great Yarmouth under statutory authority. The owners of the fishing smack brought an action against the owners of the steam tug to recover damages:—Held, that the loss of the smack was occasioned by the negligence of the master of the tug; but that the defendants were protected from liability by the terms of the towage contract, and that the action must be dismissed. *The United Service or Cole v. Great Yarmouth Steam Tug Company*, 8 Adm. D. 56; 52 L. J., Adm. 18; 48 L. T. 486; 31 W. R. 614; 5 Asp. M. C. 55. Affirmed, 9 Adm. D. 3; 53 L. J., Adm. 1—C. A.

10. JURISDICTION.

a. High Court.

Extent of—Value.]—The Court of Admiralty and the Admiralty Court of the Cinque Ports have both jurisdiction over claims for salvage where the value of the property saved does not exceed 1,000*l.* *The Jennie Paul*, 1 L. R., Adm. 336; 36 L. J., Adm. 11; 16 L. T. 125; 15 W. R. 776.

The words in 25 & 26 Vict. c. 63, s. 49, determining the jurisdiction of the Court of Admiralty by the value of the property saved, mean the value of the property when first brought into safety by the salvors, and not its value at any

subsequent period. *The Stella*, 1 L. R., Adm. 340; 36 L. J., Adm. 13; 16 L. T. 335; 15 W. R. 936.

A salvage suit was instituted in the Court of Admiralty, in a sum exceeding 300*l.*; the value of the property saved was less than 1,000*l.*:—Held, that the court had jurisdiction to entertain the suit. *The Empress*, 3 L. R., Adm. 502; 41 L. J., Adm. 32; 25 L. T. 885; 20 W. R. 553.

By 17 & 18 Vict. c. 104, s. 460, and 25 & 26 Vict. c. 63, ss. 49, 50, the Court of Admiralty has not jurisdiction to determine and award the amount of salvage due if the value of the property saved is proved not to exceed 1,000*l.*, but nevertheless it retains jurisdiction to condemn in costs and damages salvors so wrongfully arresting property, and for other collateral purposes. *The Kate*, B. & L. 218; 33 L. J., Adm. 122; 10 Jur., N. S. 444; 9 L. T. 782.

A claim for less than the sum of 200*l.* was made for salvage service rendered within the limits of the United Kingdom, i. e. within three miles from the shore:—Held, that, under 17 & 18 Vict. c. 104, s. 460, the Court of Admiralty had not jurisdiction to adjudicate on the claim. *The Leda*, Swabey, 40; 2 Jur., N. S. 119.

Where the value of the property saved does not exceed 1,000*l.*, the Court of Admiralty will, notwithstanding an absolute appearance is given by the defendant, refuse to proceed in the salvage suit, on the ground that 17 & 18 Vict. c. 104, s. 460, and the 25 & 26 Vict. c. 63, s. 49, prohibit the court from exercising jurisdiction. *The Louisa*, B. & L. 59; 9 Jur., N. S. 676; 11 W. R. 614. See also *The William and John*, post, col. 1637.

Owner.—It is immaterial to this question that the party defending is the mortgagee, not the owner of the ship. The word "owners" in 17 & 18 Vict. c. 104, s. 460, if necessary, extends to all persons interested in the property. *Ib.*

Estoppel.—In a salvage suit the defendants entered an absolute appearance. The vessel being arrested, was released on the 11th January, on an undertaking by the proctors of the owners to file an affidavit of value within a week. On the 15th they filed an affidavit stating the value of the vessel, freight and cargo to be over 1,000*l.* On the 19th a receiver of wreck made an affidavit that the value was under 1,000*l.* On the 1st February the defendants applied to dismiss the suit with costs on the ground that the court had no jurisdiction, which in such a case lay with the justices, under 25 & 26 Vict. c. 63, s. 49:—Held, that, under the circumstances, the defendants had estopped themselves from objecting to the jurisdiction, and the application was dismissed with costs. *The Dart*, 21 L. T. 765.

Agreement giving.—Two causes of salvage against a vessel were consolidated upon motion by the defendants, and with the consent of all parties. On a petition being subsequently filed, the defendants moved for its dismissal, with costs and damages, on the ground that the value of the property saved was under 1,000*l.*:—Held, that the proceedings in reference to the consolidation must be construed as an agreement which gave the court jurisdiction under 31 & 32 Vict. c. 71, s. 9. *The Herman Wedel*, 39 L. J., Adm. 30; 23 L. T. 876.

Damages against Salvors for Arresting.—The court will not decree for damages unless

the circumstances shew mala fides or crassa negligentia on the part of the salvors in arresting, whereof the fact that salvors arrested without first obtaining a valuation of the property from the receiver of wreck (as provided for by 25 & 26 Vict. c. 63, s. 50) is not conclusive evidence. *The Kate*, B. & L. 218; 33 L. J., Adm. 122; 10 Jur., N. S. 444; 9 L. T. 782.

Objection, when taken.—The objection to the jurisdiction of the court, on the ground that the property is under 1,000*l.*, should be alleged when the appearance is entered; but where a defendant appeared absolutely, and raised the objection after the petition was filed, the court entertained it, but refused costs. *The Louisa*, B. & L. 59; 9 Jur., N. S. 676; 11 W. R. 614.

Services where Rendered.—Defendants in a cause of salvage, instituted against the cargo of a foreign ship to recover for salvage services rendered in saving the lives of a number of the crew and passengers on board such ship, alleged in their statement of defence that the vessel in which the cargo proceeded against had been laden was not, at the time the salvage services were rendered, stranded or in distress on the shore of any sea or tidal water within the limits of the United Kingdom. The plaintiffs demurred, on the ground that the facts therein stated were not sufficient to exclude the jurisdiction of the court. The court sustained the demurrer. *The Deutschland*, 25 W. R. 755.

Onus of Proof of Distance.—To oust the court of its municipal jurisdiction, it lies upon the defendant to prove that the vessel was at a distance from shore, to which the powers of the court do not extend. *The Gertrude*, 30 L. J., Adm. 130.

In Cinque Ports.—The 17 & 18 Vict. c. 104, s. 460, does not alter the jurisdiction of the Court of Admiralty and the Cinque Ports in cases of salvage services performed within the limits of the Cinque Ports. *The Maria Luisa*, Swabey, 67; 2 Jur., N. S. 264.

b. Justices.

Meaning of "Ship or Boat Stranded or otherwise in Distress on the Shore of any Sea or Tidal Water."—Justices awarded salvage in respect of services rendered to a hopper barge, which had been found adrift without any person on board of her in the Wash, about three miles from Boston. The barge was not furnished with any means by which she could be propelled, and was used for dredging purposes:—Held, that the barge was a "ship in distress on the shore of a sea or tidal water," within the meaning of the Merchant Shipping Act, 1854, s. 458, and that the justices had jurisdiction to award salvage. *The Leda* (Sw. 40) followed. *The Mac or Macadam v. Saucy Polly*, 7 Adm. D. 126; 51 L. J., Adm. 81; 46 L. T. 907; 5 Asp. M. C. 553—C. A. Reversing 7 Adm. D. 38; 51 L. J., Adm. 20; 46 L. T. 206; 30 W. R. 552.

"Sum Claimed."—The 17 & 18 Vict. c. 104, s. 460, and 25 & 26 Vict. c. 63, s. 49, being read together, enact, that all disputes as to the amount of salvage, where either the sum claimed does not exceed 200*l.* or the value of the property

saved does not exceed 1,000*l.*, shall be referred to justices of the peace, and thereby in those cases exclude the jurisdiction of the Court of Admiralty. *The William and John*, B. & L. 49; 32 L. J., Adm. 102; 9 Jur., N. S. 284; 8 L. T. 56; 11 W. R. 535.

By "the sum claimed" is meant the sum claimed by the salvors before the dispute is referred. *Id.*

The words "disputes as to the amount of salvage" extend to cases where an agreement stipulating for a fixed amount has been made. *Id.*

The existence of an agreement does not confer jurisdiction upon the Court of Admiralty, but where that jurisdiction exists, and has been properly set in motion, may induce the court to give costs to the salvors, although they recover a sum less than 200*l.* See also *cases ante*, cols. 1654, 1655.

"Sum in Dispute."—The words "sum in dispute" in 17 & 18 Vict. c. 104 s. 464, do not mean the sum awarded by the justices and appealed against; and where the only evidence of the sum in dispute is, that the salvors claimed before the justices a certain amount of salvage, not exceeding 200*l.*, an appeal from the award of the justices lies to the Admiralty Court. *The Andrew Wilson*, B. & L. 56; 32 L. J., Adm. 104; 9 Jur., N. S. 474; 8 L. T. 177.

Salvors, having sent in a formal demand in writing for 40*l.*, afterwards, before the justices, claimed a sum not exceeding 200*l.* The justices found that no salvage was due, and from that decision the salvors appealed:—Held, that the sum in dispute was the sum formally demanded, and that as that was under 50*l.*, an appeal did not lie. *The Mary Anne*, 34 L. J., Adm. 73; 12 L. T. 238.

When the sum in dispute exceeds 50*l.*, the court has jurisdiction to entertain an appeal, even though the value of the property salvaged is under 1,000*l.* *The Generous*, 2 L. R., Adm. 57; 37 L. J., Adm. 37; 18 L. T. 552; 16 W. R. 519.

Appeal—Varying Order.—The court will not entertain an appeal from the salvage award of justices upon the mere question of amount, unless plainly exorbitant. *The Cuba*, Lush. 14; 6 Jur., N. S. 152.

The salvors brought a barge off a dangerous position near the Nore Sand, and claimed 80*l.* The magistrates at Maidstone awarded 15*l.*:—Held, that the latter sum was quite inadequate, and the court gave 40*l.* *The Harriett*, Swabey, 218.

Unless the amount awarded is wholly inadequate, the court will not disturb the award, even though it is of opinion that the magistrates should have given a somewhat larger sum. *The Jeune Louise*, 37 L. J., Adm. 32.

— **Practice.**—The court rarely admits new evidence on the hearing of an appeal from an award of magistrates. *The Generous*, *supra*.

Estoppel.—The value stated by the owners of salvaged property in proceedings before commissioners is not conclusive upon the salvor though assented to at the time. *The Hope*, 14 L. T. 467. And see *The Elise*, Swabey, 436.

c. County Court.

Extent of.—By 17 & 18 Vict. c. 104, ss. 458, 460, and 25 & 26 Vict. c. 63, s. 49, where certain

services are rendered to a ship or a boat in distress on the seashore, there shall be payable to the parties by whom the service is rendered a reasonable amount of salvage, the amount, in case of dispute, where the sum claimed does not exceed 200*l.*, or the value of the property saved does not exceed 1,000*l.*, to be referred to the arbitration of two justices or a county court judge:—Held, that a county court judge may exercise this jurisdiction where there has been a salvage agreement for a fixed sum, and that a rule by which such proceedings are to be commenced in the county court by plaint and summons is valid. *Beadnell v. Beeson*, 3 L. R., Q. B. 439; 37 L. J., Q. B. 171; 18 L. T. 401; 16 W. R. 1008; 9 B. & S. 315.

— **Distribution of Salvage.**—A county court, having admiralty jurisdiction, has jurisdiction to entertain a suit of distribution of salvage where the amount which the court is asked to apportion does not exceed 300*l.*, notwithstanding that the value of the property saved exceeds 1,000*l.* *The Glannibanta, Elmore v. Trim*, 2 Adm. D. 45; 46 L. J., Adm. 75; 36 L. T. 27; 25 W. R. 518.

The admiralty jurisdiction of the county courts extends to the distribution of salvage, although there has been no original claim in the county court for salvage. *Id.*

Towage.—The words of 3 & 4 Vict. c. 65, s. 6, "claim in the nature of towage," do not include a claim by a towed vessel against her tug for misconduct. The damage referred to by that section and by 24 & 25 Vict. c. 10, s. 7, is that which results from a collision. *The Robert Pow*, B. & L. 99; 32 L. J., Adm. 164; 9 L. T. 237.

The value stated by the owners of salvaged property in proceedings before commissioners is not conclusive upon the salvor, even though assented to at the time. *The Hope*, 14 L. T. 467.

Enforcing Bonds given to Receivers of Wreck.]

—As it is a matter of grave doubt whether the county courts having admiralty jurisdiction have power to enforce salvage bonds given to receivers of wreck under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 468, the Court of Admiralty will, on the application of a salvor in respect of whose services such a bond has been given, grant leave to proceed in the High Court under the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 9. *The John Evans*, 43 L. J., Adm. 9; 30 L. T. 308.

11. PRACTICE, PLEADING, AND PROCEDURE.

a. Parties.

And see the general head of PRACTICE, *infra*.

Several Salvors.—The court will protect owners where the expenses have been increased by separate suits having been brought by two sets of salvors, and the interest of the one set has been denied by the other. *The Bartley*, Swabey, 198.

Who to Sue.—Two suits afterwards consolidated were brought, one by the owner and the other by the charterer of the salving ship, for salvage to a ship also chartered to the same charterer:—Held, that as under the terms of the

charterparty the charterer of the salving ship was for the time being the owner, he, and not the owner, was entitled to institute the suit. *The Scout*, 3 L. R., Adm. 512; 41 L. J., Adm. 42; 26 L. T. 371; 20 W. R. 617.

Third Party—Procedure.—In an action for damage by collision brought by a vessel at anchor against a vessel in tow of a tug, the owners of the tug were made third parties under Ord. XVI. r. 18, as the defendants claimed to be indemnified by the owners of the tug against the plaintiffs' claim on the ground that the improper navigation, if any, was that of the tug. An application for directions under Ord. XVI. r. 21, was subsequently made, and the plaintiffs thereupon asked that the third parties should be dismissed from the action on the ground that the plaintiffs would be embarrassed by the proceedings between the defendants and the third parties:—Held, that the third parties must be dismissed, as under the circumstances questions would probably arise between them and the defendants by which the plaintiffs might be embarrassed, as they were different from those upon which the action between the plaintiffs and defendants would turn. *The Bianca*, 8 Adm. D. 91; 52 L. J., Adm. 56; 48 L. T. 440; 31 W. R. 954; 5 Asp. M. C. 60.

Hearing.—Where there are rival salvors, the salvor who first enters his suit has the right to begin, unless special circumstances are shewn. *The Morocco*, 24 L. T. 598.

Rival salvors have a right to cross-examine each other's witnesses, but only on a point at which they are at issue. A salvor who saves life in addition to the services rendered by him in connexion with the other salvors, is not bound to consolidate where the salvors cannot agree as to the conduct of the cause. *Id.*

In a suit by rival salvors being heard together, the witnesses called on behalf of one set of salvors will be liable to cross-examination; first, on behalf of the rival plaintiffs, and then on behalf of the defendants. *The Philadelphia*, B. & L. 28.

Right to Begin.—The right to begin does not shift with the burden of proof, but is almost universally with the claimant. *The Magdalen*, 31 L. J., Adm. 22.

Consolidation of Actions.—Salvage suits may be consolidated on the motion of the plaintiffs and without the consent of the defendants. *The Melpomene*, 4 L. R., Adm. 129; 42 L. J., Adm. 45; 28 L. T. 76; 21 W. R. 956.

When a vessel had been arrested in two causes of salvage, which upon motion by consent of all parties had been consolidated, and a petition was afterwards filed, a motion to dismiss the suit with costs and damages, as the value of the property saved was under 1,000*l.*, was rejected with costs. *The Herman Wedel*, 39 L. J., Adm. 30; 23 L. T. 876.

Counsel.—When the interests of one of the parties in a consolidated salvage suit is adverse to the interests of the others, separate counsel on his behalf may be heard at the hearing of the consolidated cause. *The Scout*, 3 L. R., Adm. 512; 41 L. J., Adm. 42; 26 L. T. 371; 20 W. R. 617.

b. Tender.

Tender.—In a case where two actions of salvage were instituted against the same vessel, on behalf of plaintiffs having adverse interests, to recover salvage reward in respect of services rendered on the same occasion, the court, on the plaintiffs refusing to consent to a consolidation order, allowed the defendants to make a single tender in respect of the claims in both actions. *The Jacob Landetrom*, 4 Adm. D. 191; 40 L. T. 38.

A defendant may, by act in court, tender a sum of money in satisfaction of the plaintiff's claim, and reserve the question whether he is liable to pay costs. *The Hickman*, 3 L. R., Adm. 15; 21 L. T. 472; 18 W. R. 151.

Where no tender has been made in a salvage suit for services which were actually towage, the amount of claim could not be recovered. *The Strathnaver*, 1 App. Cas. 58; 34 L. T. 148.—P. C.

Effect on Costs.—See *post*, col. 1664.

On Appeal against Award.—The sum of 800*l.* had been awarded by the Cinque Port Commissioners to salvors for services rendered to a brig and her cargo. The owners of the brig and cargo, pursuant to 1 & 2 Geo. 4, c. 76, instituted an appeal against this award in the Court of Admiralty, and afterwards tendered 100*l.* by act in court:—Held, on motion to direct the notice of tender to be taken off the file, that the appellants were entitled to make such tender by act in court, notwithstanding that no tender had been made prior to the institution of the appeal. *The Annette*, 4 L. R., Adm. 9; 42 L. J., Adm. 13; 28 L. T. 372; 21 W. R. 552.

c. Arrest and Sale.

Bail.—When a ship has been found to blame in a cause of collision, and a cause of salvage has been instituted against the other (the injured) ship, the owners of the ship found to blame have a right to intervene in the salvage cause to protect their own interest; and if they choose to put in bail to answer the claim of the salvors in lieu of the bail given by the owners of the injured vessel, the court will give them the conduct of the defence of the salvage suit; under such circumstances the owners of the injured vessel are entitled to have their bail released, and to be paid their costs up to the time when the new bail is put in. *The Diana*, 31 L. T. 203.

What Liable to Arrest to Secure Payment.—Services were rendered, by means of which a vessel and the goods on board were saved from total loss, and the lives of a number of passengers also were saved. Suits were instituted on behalf of the persons who rendered the services, against the vessel and her cargo, to recover salvage reward:—Held, that the wearing apparel of the passengers, and other things belonging to them ejusdem generis, on board the vessel, were privileged from arrest. *The Willem III.*, 3 L. R., Adm. 487; 25 L. T. 386; 20 W. R. 216.

Release of Property.—A vessel which had been saved was valued by a receiver of wreck at less than 1,000*l.* The salvors obtained an order for a commission of appraisement, but did

not execute it, and after three weeks gave notice that they proceeded no further in the suit:—Held, that they might, within four days of obtaining the order, have ascertained the value, and that therefore they must be condemned in damages for detention of the vessel during the rest of the three weeks. *The Margaret and Jane*, 38 L. J., Adm. 38; 20 L. T. 1017.

After release of salvaged property by the receiver of wreck upon security to his satisfaction, salvors have no right to detain the property, or to arrest it. *The Lady Katherine Barham*, Lush. 404; 5 L. T. 693.

Sale of Cargo Salvaged.—A barque laden with a cargo shipped at Charleston under bills of lading whereby the cargo was to be delivered on payment of freight at Bremen, whilst prosecuting her voyage to Bremen was run into in the English Channel and damaged by another vessel, which was alone to blame for the collision. The master and crew of the barque abandoned her, and in her abandoned state she was taken possession of by salvors, who brought the barque and her cargo into Dover. The cargo was damaged by sea-water, and was alleged to be deteriorating. In a suit instituted by some of the salvors against the barque, her cargo, and freight, the court on an application made on their behalf, without notice to the owners of the barque, ordered the cargo to be sold. The owners of the barque afterwards hearing of the order, and wishing to have the cargo transhipped and carried on to its destination, applied to rescind the order, and offered to give bail for the cargo. The court, being of opinion that it was for the benefit of all parties that the cargo should be sold, refused to prevent the sale, but reserved all questions of freight. Afterwards the cargo was sold and the proceeds brought into court, and the owners of the barque then applied for an order for payment out of the proceeds in court of a sum of money in respect of freight:—Held, that, by the abandonment of the barque, the contract to pay freight had been dissolved, and that the owners of the barque were not entitled to any payment in respect of freight. *The Kathleen*, 4 L. R., Adm. 269; 43 L. J., Adm. 39; 31 L. T. 204; 23 W. R. 350.

When a ship and cargo are brought into port by salvors, and a suit is instituted in the Court of Admiralty to recover salvage reward, that court will, on the application of the salvors, acting with the assent of the owners of the cargo, order a sale of the cargo to prevent deterioration from damage done, although the shipowner, desirous of carrying on the cargo so as to earn freight, opposes the sale and offers to give substantial bail for both ship and cargo; but such sale will be ordered subject to all questions of right to freight. *Id.*

Derelict—Default Action—Sale before Judgment.—Where in a salvage action, in which no appearance had been entered, it was alleged upon affidavit that the ship and cargo were daily deteriorating in value, and that large expenses were being incurred in respect of the charge of the property, and that the plaintiffs had been in communication with the owners as to a sale, the court, on motion by the plaintiffs prior to decree, ordered an appraisal and sale of the property. *The Anna Helena* (No. 1), 5 Asp. M. C. 61; 48 L. T. 681.

Bringing in Account of Freight.—A ship was arrested, after discharge of cargo, in a suit for salvage; bail was given for ship and freight:—Held, that the owners of the vessel proceeded against were bound to bring in an account of freight on oath, and to set forth when, and the names of the parties by whom, such freight had been paid. *The Peace*, Swabey, 85.

d. Pleadings.

Agreement with Shipowner—Suit against Cargo.—In a cause of salvage against ship, freight, and cargo, the shipowner, after the institution of the cause, paid a sum in settlement of the claim against him, which was accepted by the plaintiffs. The plaintiffs proceeded against the cargo, and pleaded in their petition the payment of this sum by the shipowner, and stated the amount:—Held, that they were not entitled to plead the amount so accepted by them, although they might plead the fact that they had so settled with the shipowner. *The Due Checchi*, 4 L. R., Adm. 35, n.; 26 L. T. 593; 20 W. R. 686.

Amount Paid to Third Parties.—In a suit instituted on behalf of the owners, master and crew of a steam-tug, to recover salvage reward for salvaging a disabled vessel and her cargo, it appeared by the petition that persons other than the plaintiffs in the cause had assisted in the service, and in an article in the answer filed on behalf of the owners of the salvaged vessel and her cargo, the defendants alleged that they had been ordered by a court of competent jurisdiction to pay to such other persons 240*l.* in respect of the assistance so rendered by them. The plaintiffs moved to strike out this article. The court, holding that the article was relevant to the matters in issue in the suit, rejected the motion. *The Antelope*, 4 L. R., Adm. 38; 42 L. J., Adm. 42; 28 L. T. 74; 21 W. R. 464; *S. P.*, *The Due Checchi*, *supra*.

Specific Expenses.—When in a salvage cause the petition states expenses to have been incurred in rendering the services without stating their amount and the answer admits all the allegations of the petition, the Court of Admiralty will not allow evidence to be called by the plaintiff to shew the amount of the expenses. If specific amounts are claimed they must be pleaded so as to give the defendant the opportunity of admitting or denying them. *The Eintracht*, 29 L. T. 851.

Inferences.—When in a salvage suit the defendants admit all the allegations of fact in the petition, but deny the inferences of fact made therefrom in the petition, the plaintiffs may call evidence to establish those inferences. *Id.*

Separate Petitions—Repeating Allegations.]

—Where in a cause of salvage against a derelict ship, rival salvors institute separate causes and file separate petitions, alleging misconduct against one another, the Court of Admiralty will not allow the defendants, in their answer to the petition of one set of salvors, to plead that in the petition of the other set there are allegations of misconduct, and that they, for the purpose of the cause, and not otherwise, adopt those allegations; they must either make the allegations of misconduct as their own statements, or omit them. *The Kathleen*, 4 L. R.,

Adm. 269; 43 L. J., Adm. 39; 31 L. T. 204; 23 W. R. 350.

When rival salvors file separate petitions, alleging misconduct against each other, and the defendants in their separate answers repeat the charges of misconduct made by each salvor against the other, so that the answers are contradictory, the defendants will not be allowed, on the hearing of both causes at the same time, to cross-examine one set of salvors to shew that they and not the other set had been guilty of misconduct. *Ib.*

Negligence.—Negligence, though not specifically pleaded in the answer, may be proved to negative a claim to salvage upon a simple traverse of salvage services; but if the defendants mean to charge the claimants with purposely having brought the ship in danger, such defence must be specifically pleaded in the answer. *The Minnehaha*, Lush. 335; 15 Moore, P. C. C. 133.

General Denial that Salvage Due.—On a motion by salvors, on objection to certain articles of the defendants' answer, which averred, that though the services rendered might be of the nature of salvage service, yet that because the owners of the salving and the charterers of the salved vessel were the same persons, no salvage was due; the court ordered the article denying that any salvage was due to be struck out, but not the other articles detailing the facts, which, if proved, might not bar the claim for salvage, but might affect the quantum. *The Collier*, 1 L. R., Adm. 83; 12 Jur., N. S. 789.

Amending and Adding.—The court refused to allow defendants to add to their pleas an allegation that the salvors, since the commencement of the suit, had assaulted some of the witnesses who were going to give evidence on behalf of the owners. *The Fielden*, 11 W. R. 156.

e. Evidence.

Amount—Different Suit.—In a salvage suit evidence of the amount in which another suit has been instituted in another court for services rendered at the same time is not admissible. *The Antelope*, 27 L. T. 663.

Agreed Value.—When, in a salvage action, the defendants filed affidavits of value of their ship, freight, and cargo, which values have been accepted and agreed to by the plaintiff, the defendants will not be allowed at the hearing to give evidence to decrease the values. *The Hanna*, 37 L. T. 364.

Depositions before Receivers of Wreck.—A receiver of wreck, in taking depositions under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 448, should put down the facts deposed to as given by the deponent, and should not correct any statement made by the deponent which, within the personal knowledge of the receiver, is erroneous. *The Lancashire*, 29 L. T. 927.

The examination of the crew of a salved vessel taken by the receiver of wreck under the Merchant Shipping Act, 1854, s. 448, is not admissible as evidence in a salvage suit for the purpose of proving the facts stated in the examination. *The Little Lizzie*, 3 L. R., Adm. 56; 23 L. T. 84; 18 W. R. 960.

Contradictory.—When the evidence is directly contradictory, the court considers only on whom the onus of proof lies, and whether that party has discharged it. The court seldom, if ever, attributes perjury to either side. *The Nymphe*, 5 L. T. 365.

f. Costs.

Tender—Costs of Proceedings subsequent to.—A salvage suit was brought, and a sum less by 18*l.* than the limit of 300*l.* of the county courts jurisdiction was recovered. The agreed value of the property saved was 2,200*l.*; the claim was for 700*l.*; there was considerable conflict of evidence as to the degree of meritoriousness of the services, and questions of some difficulty arose:—Held, having regard especially, though not solely, to the smallness of the difference between the sum awarded and the limit of the jurisdiction of the county court, that the case was proper for a certificate to entitle the plaintiffs to costs. *The Hickman*, 3 L. R., Adm. 15; 39 L. J., Adm. 7; 21 L. T. 472; 18 W. R. 151.

When a tender is made in a salvage suit, it should state that it is a tender for salvage and costs, or should specify the ground upon which costs are not tendered, and refer the question of costs to the consideration of the court. *Ib.*

The master of the London agreed for 400*l.* to tow the Waverley into Lisbon, about twenty-five miles. The weather, which was bad at the time of the agreement, subsequently became worse, and much difficulty was experienced in performing the salvage. In a suit for salvage the owners of the Waverley tendered 400*l.*, the amount agreed upon for salvage, and 123*l.* 11*s.* 8*d.* for expenses and detention:—Held, that the agreement was equitable and must be upheld, with costs from the time of making the tender. *The Waverley*, 3 L. R., Adm. 369; 40 L. J., Adm. 42; 24 L. T. 713.

Sufficiency of Tender.—If in an action for salvage services rendered in the United Kingdom, a tender under 200*l.* "with such costs (if any) as may be due by law," for the services rendered, is accepted, the court will not certify for costs, except for special cause shewn. *The John*, Lush. 11.

Where a tender in a salvage suit is pronounced for, the usual practice is to condemn the plaintiffs in the costs incurred since the time of tender, but this practice is not invariable, and where the court is of opinion that the tender is not a liberal one, it will in its discretion make no order with regard to such costs. *The Lotus*, 7 Adm. D. 199; 47 L. T. 447; 30 W. R. 892; 4 Asp. M. C. 595.

One of several salvors, sued for salvage services rendered in the United Kingdom. The defendants tendered, by act of court, 40*l.*, "with costs up to time of tender," which the plaintiff refused. The defendants then resisted the claim, partly on the question of amount, and partly on the ground (which they failed to support) that the plaintiff had been party to a settlement of the whole claim with one of the co-salvors. The court overruled the tender, and gave 100*l.*:—Held, that, notwithstanding the question of agreement, the case was not a fit one to be tried in the superior court, and accordingly refused to certify for costs, under 17 & 18 Vict. c. 104, s. 460. *The Comte Nesselrood*, Lush. 454; 31 L. J., Adm. 77; 6 L. T. 57.

Held, also, that thereby, notwithstanding the

form of tender, the plaintiff was not entitled to his costs up to the time of tender. *Ib.*

Whenever defendants intend to rely upon 17 & 18 Vict. c. 104, s. 460, as governing the question of costs, the facts, material for that purpose, should be distinctly pleaded and proved. When a tender is pronounced sufficient, costs do not, as a rule, follow the decision. *The Favourite*, 5 L. T. 773.

Although the ordinary practice of the court is to recognize only such tenders as are made in acts of court, provided they are of a fixed sum with costs, and without any condition, still if it should appear in any case that the salvors, before action brought, have, with a full knowledge of all the circumstances, rejected a liberal offer of remuneration, an actual tender of money, and a smaller sum is awarded, they will lose the costs of the suit. *The Sovereign*, Lush. 85; 29 L. J., Adm. 113; 6 Jur., N. S. 832.

When a tender of 200*l.* for the services has been made and accepted, the plaintiff is entitled to costs, notwithstanding the 17 & 18 Vict. c. 104, s. 460. *The Germ*, 15 W. R. 937.

Costs of Parties against whom no Claim made out.—When parties have been summoned to appear against whom no claim to contribution is made out, the parties so summoned are entitled to their costs. *The Cargo ex Sarpodon*, 3 Adm. D. 28; 37 L. T. 505; 26 W. R. 374.

Certificate for Costs.—Although a suit for salvage might have been tried in a county court, the judge of the Court of Admiralty will certify for costs if it is less expensive to try there than in the county court. *The Beaumaris Castle*, 40 L. J., Adm. 41; 24 L. T. 448.

Salvage out of United Kingdom.—Salvage services were rendered to a vessel beyond three miles from the shore of the United Kingdom. The sum of 100*l.* only was awarded:—Held, that since the salvage was not in the United Kingdom, the provision in 17 & 18 Vict. c. 104, s. 460, did not apply so as to bar the salvors of their costs. *The Actif*, Swabey, 237; 3 Jur., N. S. 893.

Proceedings through Default of other Side.—The costs of salvors, incurred in taking affidavits before issue joined, are allowed when the defendants have not unreservedly admitted the facts pleaded in the petition, and supported by the affidavits. *The Fairlina*, 14 W. R. 869.

Where a master refuses to go on shore and refer to the local justices the amount of salvage due for services rendered in the United Kingdom, and removes the vessel from the local jurisdiction, and an action is thereon brought in the Court of Admiralty, the court, awarding only 50*l.*, will certify for the salvor's costs under 17 & 18 Vict. c. 104, s. 460. *The Alpha*, Lush. 89.

Interest.—Although execution has not issued, interest upon a salvage award is recoverable from the date of the judgment, and interest on the solicitor's taxed bill of costs from the date of the allocatur of the taxing-master. *The Jones Brothers*, 46 L. J., Adm. 75; 37 L. T. 164.

The court has no power to refuse interest because the judgment recovered is for salvage. *Ib.*

Two Actions for Salvage against the same Property.—In a case where the defendants, in VOL. VI.

two actions of salvage instituted against the same property, were ordered to pay only one set of costs, to be apportioned between the plaintiffs in the two actions, the court directed that the apportionment should be made according to the amount of the plaintiff's respective bills of costs. *The Pasithea*, 5 Adm. D. 5.

Where separate salvage suits have been unnecessarily prosecuted, the court will only allow one set of costs, and direct the amount allowed to be distributed rateably amongst the plaintiffs in the separate suits. *The Sarah*, 3 Adm. D. 39; 37 L. T. 831.

Allowance and Taxation of Costs and Charges.]

—The practice of bringing in on taxation in salvage suits two separate bills of costs—one containing the expenses incident to the employment of an agent at the out-port, and the other the remaining charges incurred in respect of the conduct of the suit—though formerly prevailing among the proctors of the Court of Admiralty, is no longer to be followed, and in future one bill only, containing all charges, whether out-port or otherwise, is to be delivered into the registry. *The City of Brussels*, 42 L. J., Adm. 72; 29 L. T. 312; 22 W. R. 71.

A proctor retained to conduct a salvage suit may legally employ a person who is not a solicitor or proctor as his agent at the out-port, but for the performance of other than proctorial acts only; and charges for work done and disbursements made by such agent in the capacity of a clerk will, if unobjectionable in other respects, be allowed to the proctor on taxation. *Ib.*
A charge of 10*l.* 10*s.* for agency allowed in such a case. *Ib.*

Paid out of Fund in Court.—Costs of all parties were ordered to be paid out of fund in court, except a defendant's, in consequence of his misconduct to the salvors. *The Cadiz*, 35 L. T. 602.

Of Appraisement.]—See infra.

Costs of Appeal.—Though in appeals as to the amount of salvage the Privy Council generally did not give a successful appellant his costs of the appeal, such appeals under the Judicature Act form no exception to the general rule that a successful appellant is entitled to his costs. *The City of Berlin*, 2 Adm. D. 187; 47 L. J., Adm. 2; 37 L. T. 807; 25 W. R. 793—C. A.

In successful admiralty appeals the appellants will have the costs of the appeal. *The Swansea v. The Condor*, 4 Adm. D. 115; 48 L. J., Adm. 33; 40 L. T. 442; 27 W. R. 728—C. A.

g. Other Matters.

Decree Altered or Amended in Consequence of Mistake in Value of Cargo.—Salvage services having been rendered to a ship laden with cargo, a salvage suit was instituted against ship, freight, and cargo. Separate appearances were entered on behalf of the owner of the ship and the owner of the cargo. The owner of the cargo filed an affidavit of value stating the value of the cargo, and the owner of the ship filed an affidavit of value stating the value of the ship and freight. At the hearing, the court, taking these values as accurate, by its decree awarded to the salvors a certain sum as salvage. Some time afterwards, the owner of the cargo discovered that he had

by mistake included in his valuation of the cargo the value of the freight, and that the freight was of more value than appeared by the affidavit of value filed on behalf of the owner of the ship, and he made application to reduce the value of the cargo, and to reduce the amount it had previously decreed as salvage. On the mistake being proved:—Held, that the court had power to correct the mistake and to make the necessary alterations in the decree. *The James Armstrong*, 4 L. R., Adm. 380; 33 L. T. 890.

Appraisement.—An appraisement made by the marshal will be held conclusive as to the value of the property salvaged. *The Cargo ex Venus*, 1 L. R., Adm. 50; 12 Jur., N. S. 379; 14 W. R. 460; *S. P., The R. M. Mills*, 3 L. T. 513.

Costs.—A salvaged vessel was valued by a receiver of wreck at 746l. on the 3rd of December. On the 8th the salvors instituted a suit in 2,500l.; on the 18th they applied for an appraisement of the vessel; on the 14th of January following they gave notice that they proceeded no further in the suit:—Held, that the salvors must have been aware within a short time of taking out the appraisement that the value fixed by the receiver was substantially correct, and that they must therefore be condemned in costs, and in damages from the 22nd of December to the 14th of January. *The Margaret Jane*, 2 L. R., Adm. 345; 38 L. J., Adm. 38; 20 L. T. 1017; 17 W. R. 1064.

Salvors are entitled to the costs of a commission of appraisement when it appears that there is a substantial difference between the appraised value and that alleged by the defendants. *The Paul*, 1 L. R., Adm. 57; 35 L. J., Adm. 16; 14 L. T. 192.

The value of ship, as appraised by the officer of the court, was less, and of the cargo more, than the values tendered by the defendant. The court condemned the defendant in the costs of the appraisement. *The Magdalen*, 5 L. T. 692.

The owner alleged the value of a ship to be one-fifteenth less than it afterwards was found to be; the amount claimed was less than the sum for which the owners were willing to give security, but the costs of the suit would extend the claim beyond that sum:—Held, that the costs of the appraisement should be costs in the cause. *The Rapid*, 18 W. R. 150.

12. LIEN.

Sum Paid to Release Ship.—A shipowner who has paid a sum of money, under 9 & 10 Vict. c. 99, in order to release the ship and cargo from a claim for salvage, has a lien on the cargo for the proportion of those expenses payable to him by the owners of the goods, and an insurable interest in the cargo in respect of such lien. *Briggs v. Merchant Traders' Ship Loan and Assurance Association*, 13 Q. B. 167; 18 L. J., Q. B. 178; 13 Jur. 787.

Of Finder.—The deputy vice-admiral who received an anchor and a bawser, alleged to have been left at sea, from the finder, refused on application by the real owner to deliver them up, until the salvage was paid, or security given for the payment of it:—Held, that this was a conversion, but that if he had merely refused to deliver them up until it was ascertained whether salvage was due or not, it would not have

amounted to a conversion. *Clark v. Chamberlain*, 2 M. & W. 78; 2 Gale, 217.

Solicitor—Expenses of sending Home—Priority.—Solicitors for defendants in a salvage action against a foreign ship, who are entitled to a charge upon the ship, or the proceeds thereof, for their costs and expenses incurred in the preservation of the property, do not take priority of the claim of the foreign government, who, on the abandonment of the ship by her owners, are entitled, by the provisions of their code, to a lien upon the ship, or the proceeds, for the expenses of sending back the ship's crew to their own country. An Italian ship was brought into a British port by salvors. A salvage action having been instituted, the ship was sold by order of the court, and a sum was awarded out of the proceeds to the salvors. After payment of that sum, and the costs of the plaintiffs, a balance of 60l. 10s. 3d. remained in court. The defendants' solicitors had incurred expenses in pumping the ship, paying the marshal's possession fees, &c., and claimed a charging order upon the balance in court for such expenses, and sought payment out of such balance to them. The Italian Government, through their consul in this country, had sent home the crew of the ship, and had incurred expenses by so doing. By Italian law such last-mentioned expenses are a lien upon the ship. The Italian consul opposed payment out to the defendants' solicitors, and claimed priority for the lien of the Italian Government:—Held, that the Italian Government was entitled to such priority. *The Livietta* (No. 2), 8 Adm. D. 209; 52 L. J., Adm. 81; 49 L. T. 411.

Cargo raised from Wreck.—H. & Co., owners of copper ore, employed T. to convey it in his barge from Liverpool to Birkenhead, and to deliver it there to L., to be crushed in his mills, L. having agreed to indemnify H. & Co. against all risk of such transit. The barge, with the ore on board, having afterwards, without any fault of T., sunk in the Mersey, he informed H. & Co. of the accident, and requested to be employed to raise the ore, when he was told that H. & Co. had nothing to do with it, and that he should see L., who had the management of it. L., when applied to by T. as to getting the ore up, said that he was insured with S., and that T. must therefore go to S. for orders. T. having accordingly obtained from S. directions to do the work, raised the ore, and afterwards conveyed it to Birkenhead, and then claimed a lien on it as against H. & Co. for the expenses of raising it:—Held, that he had no right to such lien, on the ground either of any contract with H. & Co., or of general average loss or of salvage. *Castellain v. Thompson*, 13 C. B., N. S. 105; 32 L. J., C. P. 79; 7 L. T. 424; 11 W. R. 147.

Respondentia Bond.—W., a merchant in London, shipped at Hayti, on board the *Galam*, a cargo of wood to Europe. She became unseaworthy, and put into a port in the island of Terceira. The master, being without funds, and the ship in need of repairs, took up a respondentia bond on the security of the cargo, payable on the arrival of the cargo at Falmouth, her first port of destination in Europe. The *Galam* was afterwards condemned, and

the cargo unshipped; but the master took no steps for the purpose of forwarding the cargo to its destination. W., on being informed of the loss, chartered another vessel, the *Mary Jane*, of which C. was master, to proceed in ballast, and to fetch home the cargo. The *Mary Jane* took on board the cargo, and in proceeding homewards was stranded on Scilly, and the cargo was unshipped and stored, subject to C.'s lien in respect of freight. C. knew nothing of the respondentia bond:—Held, that as the subsequent carrying of the cargo by C. was essential to make it available, either for the holder of the bond or anybody else, it was to be considered as salvage service. *Cargo ex Galam*, 2 Moore, P. C. C., N. S. 216; 33 L. J., Adm. 97; 10 Jur., N. S. 477; 9 L. T. 550; 12 W. R. 495.

XX. BOTTOMRY AND RESPONDENTIA.

1. *Instruments amounting to*.
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1. INSTRUMENTS AMOUNTING TO.

Maritime Risk essential Ingredient.—A master, being in want of funds, and without credit, in a foreign port, executed an agreement with certain parties for advances to be made to him. This agreement contained the following conditions: that the master should draw a bill of exchange, to cover such advances, upon the consignees of the ship at the port to which he was proceeding; that within thirty-four days after his arrival at such port he should discharge and pay such bill of exchange, and all interest which might have become due upon it, together with the money paid by way of premium for effecting an insurance of the vessel during the intended voyage, and until the vessel had taken her departure from the port to which she was proceeding, on a further outward voyage, as also interest on all such money as last aforesaid, at the rate of 9½ per cent. per annum, from the time of payment up to the time of such repayment; and for securing the repayment of all such sums and interest, the master bound, pledged, mortgaged and hypothecated the ship, with her tackle, apparel and appurtenances:—Held, that such an agreement is not an instrument which can be enforced in the Court of Admiralty; it is not a bottomry bond; for there is no maritime risk, an ingredient essential to its vitality. *The Indomitable*, Swabey, 446; 5 Jur., N. S. 632.

Personal Obligation—No Pledge on Cargo.—In a respondentia bond, the condition, after reciting that the money was lent upon the goods laden and to be laden on board a ship on her voyage out and home, was that if the ship should pro-

ceed on her voyage, and return within thirty-six months (the dangers of the sea excepted), and if the borrower within thirty days after her arrival should pay to the lender the sum agreed on, or if in the voyage and within thirty-six months the ship should be lost by fire, enemies or other casualties, the borrower should within six months after such loss pay to the lender a proportionable average on all the goods carried out and acquired during the voyage which should be saved, then the obligation to be void:—Held, that this was no more than a personal obligation from the borrower to the lender, and did not give the latter any specific pledge or lien on the home cargo, or the proceeds thereof. *Bush v. Fearon*, 4 East, 319; 1 Smith, 103.

Payment not Dependent on Arrival of Ship.—

A vessel having put into a foreign port in a damaged state, the master borrowed money of a merchant there for necessary repairs and disbursements; to secure which he drew bills upon his owner, and also executed an instrument which purported to be an hypothecation of the ship, cargo and freight. By this instrument, the merchant who advanced the money forbore all interest beyond the amount necessary to insure the ship to cover the advances: and the master took upon himself and his owner the risk of the voyage, making the money payable at all events, and subjecting the ship to seizure and sale by virtue of process "out of the High Court of Admiralty of England, or any court of vice-admiralty possessing jurisdiction at the port at which the vessel might at any time happen to be lying or to be, according to the maritime law and custom of England," in the event of the bills being refused acceptance or dishonoured:—Held, that this not being such an hypothecation as could be enforced in the Court of Admiralty, the payment of the money borrowed not being made to depend upon the arrival of the vessel, the merchant had no insurable interest in the ship. *Stainbank v. Shepard (in error)*, 13 C. B. 418; 1 C. L. R. 609; 22 L. J., Ex. 341; 17 Jur. 1032—Ex. Ch.

2. VALIDITY.

a. *Matters affecting*.

Agreement for Purchase of Ship.—A bottomry bond originally valid is not affected by any agreement by the bondholder for the purchase of the ship. *The Heligoland*, Swabey, 491.

Bondholder—Communication of Bond to Mortgagees.—A bottomry bondholder is under no obligation to communicate the existence of the bond to the mortgagees of the ship and is not affected by the owner concealing it from the mortgagees. *Id.*

Laches.—A mortgagee cannot set up, as a defence to a bond, the laches of the bondholder, unless his position has been thereby prejudiced. *Id.*

Part not exposed to Maritime Risk.—A bond, covering in part property not exposed to maritime risk, is bad as to that part, but may be valid as to the residue. *The Sultan*, Swabey, 504; 5 Jur., N. S. 1069.

Where a part only of goods hypothecated by a respondentia bond reaches its destination, such part is only liable to pay a proportional part of

the money secured by the bond, namely, according to the proportion that the value of the goods brought to their destination bears to the total value of the property on which the bond was given. *Ib.*

Executed before Shipment of Cargo.]—A bottomry bond upon ship, freight, and cargo for necessary repairs to the ship, executed after the repairs done and the contract of affreightment, but before actual shipment of the cargo, is invalid as against cargo. *The Jonathan Goodhue*, Swabey, 355.

Executed after Advance.]—If money is advanced upon consideration that a bottomry bond shall be given, the fact that such a bond is executed subsequently to such advance does not affect the validity of the bond, nor place the advance upon the footing of personal credit. *The Laurel*, B. & L. 191; 33 L. J., Adm. 17; 11 Jur., N. S. 346; 9 L. T. 457; 13 W. R. 352.

Transactions between Owner and Mortgagee.]

—Transactions between the owner and mortgagee of the vessel which might render the voyage illegal, cannot invalidate a bottomry bond given by the master to a bona fide lender, who has only to look to the facts, that is, in distress, that the master has no credit, and that the money is required for a necessary purpose. *The Mary Ann*, 1 L. R., Adm. 13.

Consideration—Pledging Credit.]—A bond may be given, though money has not actually been advanced, to a person who has pledged his own credit for the expenses incurred. *The Royal Arch*, Swabey, 269.

On Freight—Advances on Personal Security—

Advance by Agents.]—A. & Co. agreed to purchase at Akyab cargoes of rice for F. & Co., A. & Co. to be secured by hypothecation of the bills of lading and a fixed freight of 5s. per ton. Whilst the ship was loading one of the cargoes, A. & Co. advanced about 540l. for ship's disbursements, but upon hearing that F. & Co. had stopped payment, induced the master to execute a bottomry bond both for the advances already made and also for a further sum of small amount:—Held, that the first advances were made partly upon personal security and partly upon the margin of freight, and could not therefore be secured by a subsequent bottomry. *The Empire of Peace*, 39 L. J., Adm. 12; 21 L. T. 763.

Held, also, that the further advances were too trivial to render the bond valid with respect to them. *Ib.*

A bottomry bond is not invalid merely because the advance secured by the bond is made by agents of the ship, provided that they could not be expected to advance on the personal credit of the owners, and gave the master an opportunity of obtaining an advance on the owners' personal credit elsewhere by refusing such an advance. *Smith v. Bank of New South Wales, The Staffordshire*, 4 L. R., P. C. 194; 41 L. J., Adm. 49; 27 L. T. 46; 20 W. R. 557; 8 Moore, P. C. C., N. S. 443.

A bottomry bond can only hypothecate something which is in danger of perishing by maritime risk during the time that the bond is running, and therefore cannot validly pledge freight to be earned on a voyage after that maritime risk is ended and the bond is forfeited. *Ib.*

Bills—Collateral Security.]—A ship being mortgaged to G., sailed on a voyage to Melbourne and back. On her arrival at Melbourne she required necessary repair, and the agents having refused to make further advances upon credit, the master entered into a bottomry bond, hypothecating the ship and her freight to Melbourne and back, and drew bills on G. for the amount secured by bottomry. Before the bills arrived in England G. died, and the holders of the bond and bills failing to obtain either acceptance or payment took proceedings on the bond:—Held, that they, having failed in obtaining acceptance or payment of the bills, were entitled to sue upon the bond, but that the bond could not validly hypothecate freight which had not been earned at the time the bond was payable. *Ib.*

A bottomry bond may be given at the same time with, and as a collateral security for, bills drawn on the owners for money so borrowed. *Stainbank v. Shepard*, ante, col. 1670.

When a bottomry bond on ship, freight, and cargo has been given by the master of a ship as collateral security for a bill of exchange drawn by him upon the bondholders, on the understanding that if the bill is properly met by funds being placed in the hands of the latter, the bottomry bond will not be enforced, but the master or shipowners, having placed no funds in the bondholders' hands, give notice that they do not intend to meet it, the bond is not invalid as against the cargo, although the bondholders have conditionally accepted the bill, and have neither presented it to the master for payment nor protested it. *The Onward*, 4 L. R., Adm. 38; 42 L. J., Adm. 61; 28 L. T. 204; 21 W. R. 601.

Demurrage—Compromised Claim.]—A master of a chartered ship having sold a part of the cargo to pay expenses of demurrage, the ship was in course of a subsequent voyage arrested in a foreign port at the suit of the charterer. The charterer's claim was, with the sanction of the court, compromised for a sum of money, and a bond given to the charterer in payment of that sum:—Held, that the bond was invalid. *The Ida*, 3 L. R., Adm. 542; 41 L. J., Adm. 85; 27 L. T. 457; 21 W. R. 39.

b. Extent of Authority of Master and Mate.

Agent for Cargo Owners.]—The character of agent for the owners of the cargo is imposed upon the master by the necessity of the case, and by that alone. The master is invested by presumption of law, with authority to hypothecate the cargo, on the ground that the owners have no means of expressing their wishes; but when such means exist, when communication can be made to the owners, the character of agent is no longer imposed on the master, because the necessity which creates it does not arise. *The Hamburg*, post, col. 1676.

Agent for Owner of Ship.]—If the master orders repairs for his ship, or borrows money on a bottomry bond in order to execute the repairs, he is the agent alone of the owner of the ship in ordering such repairs and borrowing money. *Benson v. Duncan*, 3 Ex. 644; 18 L. J., Ex. 169; 14 Jur. 218—Ex. Ch.

—Cargo Owner claiming Indemnity against

Ship Owner.]—Where, therefore, a ship was damaged by perils of the sea, and the master hypothecated, by a bottomry bond, the ship, freight and cargo, amongst which were the goods of the plaintiff, and the ship and freight not realizing the amount borrowed, his goods were attached in the Admiralty Court until contribution was paid by him towards the difference due to the obligee of the bond, and he was obliged to pay his proportion of the costs of the suit instituted in the Admiralty Court:—Held, that he could maintain an action against the owner of the ship on an implied promise to indemnify. *Id.*

How Derived.]—The extent of the authority conferred on the master of a vessel to bind the owners either of the ship or of the cargo, is derived from, and governed by, the law of the flag. *The Karnak, infra.*

Necessity.]—To authorize a captain to hypothecate a ship or freight for repairs, the necessity for such hypothecation must exist; if, therefore, an agent of the shipowner, in a foreign port, has sufficient funds in his hands for the repairs, the captain cannot hypothecate. *Lyall v. Hicks*, 27 Beav. 616.

The consent of a managing part owner to a bottomry bond binds his co-owners, and is strong evidence of the necessity of the bond. *The Royal Arch*, Swabey, 269.

A master has power to hypothecate the cargo as well as the ship for a reasonable purpose only, for the benefit of the ship and cargo. *Hussie v. Christie*, 13 Ves. 599; 9 East, 426.

Where it appeared that at a foreign port, at which the master had taken in necessary supplies, the owner of the vessel had a recognized agent within the possible and probable knowledge of the person making the advance:—Held, that the bottomry bond given for such advance was void. *The Faithful*, 31 L. J., Adm. 81.

The existence of the necessity which the maritime law requires to validate the hypothecation of the ship and cargo by bottomry, is to be ascertained by evidence in the usual manner, the meaning of the term "necessity" in respect of hypothecation by the master, being analogous to its meaning in other parts of the law. *The Karnak*, 2 L. R., P. C. 505; 38 L. J., Adm. 57; 21 L. T. 159; 17 W. R. 1028; 6 Moore, P. C. C., N. S. 136.

The necessity, which will validate the hypothecation of a cargo by bottomry, is a high degree of need, arising when choice is to be made of one of several alternatives, under the peril of severe loss, if a wrong choice should be made. And any combination of events which should prevent the completion of the voyage with profit unless money should be obtained by bottomry, would raise the question whether there was need for bottomry in such high degree as to create a necessity. If, though the repairs are complete, yet the ship cannot leave the port until they are paid for, the completion of repairs is an immaterial fact in estimating the degree of need for bottomry. *Id.*

Pledging Owner's Personal Credit.]—A master has no authority to hypothecate for money borrowed at a foreign port for necessary repairs and disbursements, and by the same instrument pledge the personal credit of his owner

for such advances, whether maritime interest be stipulated for or not. *Stainbank v. Shepard*, 13 C. B. 418; 1 C. L. R. 609; 22 L. J., Ex. 341; 17 Jur. 1032—Ex. Ch.

The master of a vessel requiring supplies for the further prosecution of her voyage, is bound to ascertain whether such supplies can be procured on the personal credit of the owner, before he resorts to a bottomry bond as security for their amount. *Heathorn v. Darling*, 1 Moore, P. C. C. 5.

Master's Personal Credit.]—A bottomry bond given by a master upon a threat of arrest for supplies previously furnished on his personal credit, is void. *Gore v. Gardner*, 3 Moore, P. C. C. 79.

To justify resort by a master of a ship to a bottomry bond, it is requisite by maritime law that the advances should be merely to enable the ship to refit; or to pay for the repairs and dispatch of the vessel for the completion of her voyage; and that the master should be unable to obtain such advances upon personal credit. *Soares v. Rahn*, 3 Moore, P. C. C. 1.

Though the debts which a master in need of repairs in a foreign port has incurred may be personal, he may borrow money upon bottomry of ship, freight, and cargo to pay them from any one not his creditor. *The Karnak, supra.*

For Insurance Premiums.]—The master putting into a foreign port of distress has no authority to insure the ship and freight for performing the residue of the voyage, and has no authority, therefore, to grant a bottomry bond on the ship to pay for the premiums of such insurance. *The Serafina*, B. & L. 277.

To Free from Arrest for Salvage.]—Where a vessel is lying stranded, and the master cannot communicate with the owner, the master, in order to tranship and send on, may on his own authority give a respondentia bond to release the cargo lying under arrest for salvage. *The Sultan*, Swabey, 504; 5 Jur., N. S. 1369.

Charges on Unloading Outward Cargo.]—Every disbursement at a foreign port, necessary to enable a ship to prosecute her voyage, made in or about the ship herself or her crew, is a proper subject for bottomry. Charges upon the unloading of the outward cargo are such necessary disbursements. *The Edmond*, Lush. 211; 30 L. J., Adm. 128. And see Lush. 57; 29 L. J., Adm. 76.

Such disbursements must be for charges for which the owner or master of the ship is liable; those for which the consignee of the cargo is liable are not the subject of bottomry. *Id.*

Average Contribution.]—A debt for general average contribution, arising in respect of an outward voyage, being a personal debt only, is not a sufficient foundation for a bottomry bond on the ship for the voyage homeward. *The North Star*, Lush. 45; 29 L. J., Adm. 73.

Mate.]—In a case of capture and recapture, a mate, in the absence of the captain, has a right to hypothecate the ship for the purpose of paying the salvage to the captors. *Parmeter v. Tud-hunter*, 1 Camp. 541.

Duty to Communicate with Owners.]—Before

resorting to bottomry for raising necessary supplies, it is absolutely necessary, where practical, that notice should be given by the master to the owner of the vessel, and an allegation that such owner was insolvent is no excuse for not communicating with him, unless he has been judicially declared insolvent, and the ownership of the vessel vested in his assignees, to whom such notice must then be given. *The Panama, Barron v. Stewart*, 3 L. R., P. C. 199; 39 L. J., Adm. 37; 23 L. T. 12; 18 W. R. 1011; 6 Moore, P. C. C., N. S. 484.

A British ship, under a charter from London to Callao, put into Melbourne for repairs. The master, who was also a part-owner, fearing that the shipwrights would, unless their claims were paid, detain the vessel, and that she might thus be unable to fulfil her charter, raised the necessary funds from the ship's assets at Melbourne upon a bottomry bond of the ship and freight:—Held, that the bond was not invalidated by the absence of a previous communication between the master and the co-owner. *The Staffordshire*, 25 L. T. 137; 8 C., 4 L. R., P. C. 194; 41 L. J., Adm. 49; 27 L. T. 46; 20 W. R. 557; 8 Moore, P. C. C., N. S. 443.

Held, also, that the mortgagee of a ship cannot, for the purposes of such previous communication as is necessary between the party hypothecating the ship and the owner, be deemed an owner; though it may be otherwise if the mortgagee is also the ship's agent and agent for the owner. *Id.*

The authority of a master to pledge by bottomry, for the purpose of raising money for the absolute necessities of the ship, only arises when he cannot obtain the necessary advances upon the personal credit of the owner, and such power to raise money by bottomry is vested in the master, although the owner resides in the same country, provided there are no means of communication with the owners, and the exigency of the case requires it. *Wallace v. Fielden*, 7 Moore, P. C. C. 398.

A ship, on a voyage from Galveston, United States, to Liverpool, put into Bermuda disabled. The master wrote to the owners of the ship and cargo, and meanwhile, to avoid delay and loss, commenced repairing the ship. The repairs were completed, and the master then, fearing detention of the ship, and having received no replies from the owners of the ship and cargo, raised money to pay for the repairs on bottomry of the ship, freight, and cargo. The lenders were not the repairers of the ship:—Held, that the bond was valid and bound the cargo. *The Karnak*, 2 L. R., P. C. 505; 38 L. J., Adm. 57; 21 L. T. 159; 17 W. R. 1028; 6 Moore, P. C. C., N. S. 136.

The possibility of communication with the owners of the ship or cargo must be construed by estimating the cost and risk incidental to the delay from the attempt to make such communication, and the probability of failure, after every exertion made. *Id.*

— **With Owner of Cargo.**—The master of a ship, being only the agent of the cargo in special cases of necessity, is bound, when the circumstances permit, to communicate with the owner of the cargo before he does any act which seriously affects the value of the cargo. *The Onward*, 4 L. R., Adm. 38; 42 L. J., Adm. 61; 28 L. T. 204; 21 W. R. 601.

A master, therefore, putting into Port Louis, Mauritius, for repairs to his ship, and intending to raise money for those repairs upon bottomry, not only on ship and freight, but also upon cargo of an imperishable nature and belonging to one firm residing in Great Britain, is bound to communicate with them before having recourse to bottomry; otherwise the bond is invalid. *Id.*

Bottomry bond upon ship, freight, and cargo, taken up by the master of a small Swedish vessel at a port in Sweden. Part of the cargo was consigned to England:—Held, that, considering the distance between Sweden and England, and the means of communication, it was essential to the validity of the bond, so far as the cargo was concerned, that the master should communicate with the owners of the cargo before resorting to hypothecation of the cargo, as he could have obtained an answer within a period not inconvenient with regard to the exigency of the circumstances of the case. *The Bonaparte*, 8 Moore, P. C. C. 459.

The master during the voyage executed a bottomry bond hypothecating the ship, freight, and cargo. The cargo was not perishable, and the master could have communicated with the owners of the cargo before executing the bond:—Held, that the master should have communicated with the owners of the cargo, and that the bond was invalid in respect of the cargo. *The Hamburg*, 2 Moore, P. C. C., N. S. 289; B. & L. 253; 33 L. J., Adm. 116; 10 Jur., N. S. 600; 10 L. T. 206; 12 W. R. 628.

Whether a master of a vessel without funds or credit must communicate with the owners of the cargo before hypothecating the ship, freight, and cargo, in order to enable him to pay the expense of the necessary repairs of the vessel, is a question which can only be decided by the circumstances of each particular case. *Id.*

The master, before giving a bottomry bond on ship, freight, and cargo, is bound, as against owners of cargo, to communicate both with the owners of ship and the shippers or consignees of cargo, where such communication is under all the circumstances reasonably practicable; but not otherwise. *The Olivier*, Lush. 484; 31 L. J., Adm. 137; 6 L. T. 259.

The master, before he hypothecates the cargo, ought, if he has the means of doing so, to communicate with the owner; and this is not merely to give the owner an opportunity of advancing the requisite funds, but also to give him an opportunity of unlading the cargo; although he cannot do this without payment of the entire freight. *The Lizzie*, 2 L. R., Adm. 254; 19 L. T. 71.

What Communication to Owner Sufficient.—To justify a master in giving a bottomry bond on cargo where communication with the owners is necessary, a mere statement of injuries sustained by the ship and of the consequent necessity for repairs entailing considerable expense, unaccompanied by a statement that a bottomry bond is proposed, is not a sufficient communication; the law does not require the owners from such premises to draw the conclusion that the ship and cargo must be bottomried; although it may not be required that the words "bottomry of cargo" should be used in the communication, the fact itself should be stated, or at least the necessity for a bottomry bond should be an obvious and

irresistible inference from the circumstances stated. *The Onward, supra*.

A communication detailing the disasters to the ship, and the probable expense of repair, but not expressing the intention to bottomry the cargo, and requesting the owners of cargo to wait for further information, is not, where any communication is necessary, sufficient; more especially where the information as to the bottomry has been given to the shipowners, but withheld from the owners of cargo; and under such circumstances the owners of cargo are not bound to conclude that the master will resort to bottomry, or to reply to the communication. *Id.*

A master cannot bottomry a ship without communication with his owner, if communication is practicable, and, a fortiori, he cannot hypothecate the cargo without communicating with the owner of it, if communication with such owner is practicable. Such communication must state not merely the necessity for expenditure, but also the necessity for hypothecation. *Kleinwort v. Cassa Marittima of Genoa*, 2 App. Cas. 166; 36 L. T. 118; 25 W. R. 608—P. C.

A statement by the master of the injuries sustained by a ship and of the repairs necessary is not a sufficient communication with the owners to justify him in giving a bottomry bond upon the ship and cargo, if unaccompanied by a statement that such bond is necessary. *Id.*

The mere receipt by the owners of the cargo of general information that the ship is damaged, and in need of repairs, does not impose upon them the duty of supplying money for such repairs without further information. *Id.*

A Swedish vessel, bound from a port in Sweden to Hull, was driven, by stress of weather, to put back into another port in Sweden. This took place in November, 1848. Ten days afterwards the cargo was unladen, and the ship found to be greatly damaged. The repairs were completed, and the cargo reloaded. The master at once communicated with the owners of the ship resident in Sweden, who, being without funds, consented to the master taking up a bottomry bond for payment of the necessary repairs, and the British consul at the port where the vessel lay wrote on behalf of the master, and as his agent, to the consignees at Hull, informing them of the damage sustained by the vessel, but made no application for money, nor referred to the necessity of repairs. No answer was made to this letter, and the master, in March, 1849, hypothecated the ship, freight, and cargo, for the money borrowed for the repairs:—Held, that such letter to the consignees was a sufficient notice to authorize the master raising money by bottomry on the cargo. *The Bonaparte*, 8 Moore, P. C. C. 450.

Pleading.—A plea, alleging that the bottomry bond was executed by the master without any express authority from the defendant; and that, at the time when the same was executed, the amount of the costs and expenses exceeded the amount of the value of the ship when repaired, and all the freight that could be earned by the voyage, should the vessel arrive at its destination; and that the defendant, so soon as he received notice, abandoned the ship, and all right and title to the same, and all freight in respect of the voyage, and did never ratify the act of the master:—Held, bad. *Benson v. Duncan*, 3 Ex. 644; 18 L. J., Ex. 169; 14 Jur. 218—Ex. Ch.

A defence that a bottomry bond is void for want of communication with the shipowner or consignee of the cargo must be specially pleaded. *The Olivier*, Lush. 484; 31 L. J., Adm. 137; 6 L. T. 259.

c. Governed by what Law.

Where Ship is Foreign.—The owner of cargo who ships it on board a foreign vessel, ships it to be dealt with by the master according to the law of the flag, that is, the law of the country to which the vessel belongs, unless that authority be limited by express stipulation at the time of the shipment. Therefore a bond made by the master of a foreign ship hypothecating cargo laden on board such ship, if valid according to the law of the flag of the ship, will be enforced by the English Admiralty Court, on the arrest of the ship and cargo at the port of London (the port of discharge within the meaning of the bond), although the conditions imposed by English law as essential to the validity of such bond have not been complied with. *The Gaetano and Maria*, 7 Adm. D. 137; 51 L. J., Adm. 67; 46 L. T. 835; 30 W. R. 766; 4 Asp. M. C. 470—C. A.

The validity of a bottomry bond taken up in a foreign port upon a foreign ship, freight, and cargo, the owners of the cargo being English, and the ship and cargo being proceeded against in England, is to be governed by the general maritime law, and not by the *lex loci contractus*, or the law of the country to which the vessel belongs. *The Hamburgh*, 2 Moore, P. C. C., N. S. 289; B. & L. 253; 32 L. J., Adm. 161; 9 Jur., N. S. 440; 8 L. T. 175; 11 W. R. 547. See *S. C. in P. C.*, ante, col. 1676.

A master of a French ship contracted to carry a cargo, the property of the plaintiff, from the West Indies to Liverpool. The ship being sea-damaged, put into a port of refuge for repairs, to meet the charges of which the master hypothecated the ship, freight, and cargo. The French law is not in force either at the place where the charterparty was executed, or where the cargo was shipped, or the port of refuge where the ship was repaired. Upon the arrival of the ship at Liverpool, proceedings were instituted in the Admiralty Court upon the bottomry bonds executed by the master, to which suit the owners (the defendants), being French subjects, and domiciled in France, did not appear, relying on the French law, that the owner of a ship may in all cases free himself from the acts and engagements of the master, in all that concerns the ship and voyage, by the abandonment of the ship and freight. The value of the ship being insufficient to satisfy the bonds, the plaintiff, in order to save his cargo, paid the remaining sum due upon the bonds, costs, &c., and then sued the defendants as upon an implied indemnity:—Held, that he was not entitled to recover. *Lloyd v. Guibert*, 6 B. & S. 60; 33 L. J., Q. B. 241; 10 Jur., N. S. 949; 12 W. R. 953. Affirmed, 35 L. J., Q. B. 74; 6 B. & S. 100—Ex. Ch.

Local Law.—A lien on the ship and freight existing by local law, for advances and commissions, cannot convert a transaction on personal credit into a bottomry transaction, so as to render valid a bond subsequently given, or prevent the ordinary reference of the fairness of the commission to the registrar and merchants. *The*

Laurel, B. & L. 191; 33 L. J., Adm. 17; 11 Jur., N. S. 346; 9 L. T. 457; 13 W. R. 352.

The existence of such a local law may be properly pleaded as material evidence to support an allegation that the agreement was to make advances on the credit of the ship and freight, and that the commissions were customary. *Ib.*

East India Trade.—The 7 Geo. 1, c. 21, s. 2, which prohibits loans of money on bottomry of vessels designed to trade in the East Indies, has, since the other restrictions upon the East India trade have been removed, been repealed by implication. *The India*, B. & L. 221; 33 L. J., Adm. 193; 12 L. T. 316.

3. ALLOWABLE ITEMS.

Premiums of Insurance before Bond.—A charterer may deduct from the freight payable to a bondholder the premium for insurance of part of the freight advanced, according to stipulations in the charterparty before the bond was granted. *The Catherine*, Swabey, 263.

Expenses of Ship at Port.—All expenses incurred in the port where the bond is given, relating to the ship or crew, being expenses for which the master or owner of the ship is liable, and being necessary to enable the ship to proceed on her voyage, may be allowed. *The Edmond*, Lush, 211.

Discharging Cargo.—Expenses of discharging outward cargo allowed in a bond for the homeward voyage. *Ib.*

Law Expenses.—The agent of a ship abroad applied a balance of freight in discharge of law expenses relating to the ship's business, and took a bottomry bond for other payments, for which there was a lien on the ship:—Held, that the amount of such law expenses could not be deducted from the bond. *Ib.*

Commissions.—Where a cargo is unshipped, stored, and transhipped at a foreign port, and a respondentia bond is given to defray the charges, the court, though considering the custom of the port, will not allow as items in the bond any commissions beyond a reasonable amount, calculated upon a principle of quantum meruit. *The Glenmanna*, Lush, 115.

Commissions charged at St. Thomas's of two per cent. on the value of cargo for storage, and of two and a half per cent. for landing and re-shipping, disallowed, and in lieu thereof reasonable sums allowed. *Ib.*

Commissions of five per cent. on cash advances reduced to two and a half per cent., according to the practice observed in the registry. *Ib.*

Commissions on freight in respect of the vessels chartered to tranship, disallowed. *Ib.*

A usage to establish a right to deduct commission for obtaining the charter from the freight as against the holder of a bottomry bond, must be distinctly proved. *The Karnak*, *infra*.

Advance to Master.—Advance of money to master for alleged services in taking care of the cargo and for personal expenses, was not allowed as charges on cargo. *The Glenmanna*, *supra*.

In a suit on a bottomry bond hypothecating

"ship, cargo, and freight," it appeared that the master had before bottomry obtained advances on account of freight from the charterers:—Held, that the obligee had no claim to freight so advanced by the charterers prior to bottomry, provided the advances were made *bonâ fide*. *The Karnak*, 2 L. R., P. C. 505; 38 L. J., Adm. 57; 21 L. T. 159; 17 W. R. 1028; 6 Moore, P. C. C., N. S. 136.

4. PRIORITIES.

Master's Wages.—The claim of a master for his wages earned and disbursements made subsequently to a voyage, during which a bottomry bond has been given on his ship, takes priority over the claim of a bondholder. *The Hope*, 23 L. T. 287.

A bottomry bondholder is entitled to priority over the claim of a master for wages earned on previous voyages. *Ib.*

The master of a French lugger executed bottomry bonds on ship, freight, and cargo, and bound himself personally by the bonds. The ship arrived at her port of destination, and the bonds were indorsed to the owners of the cargo, who instituted a suit against ship, freight, and cargo, to enforce payment of the bonds. The master afterwards instituted a suit against the ship and freight for wages. The proceeds of the ship were insufficient to pay the bonds: but the proceeds of the ship, together with the freight and the value of the cargo, were sufficient to pay the bonds as well as the wages of the master:—Held, that the master was entitled to have his wages paid out of the proceeds of the ship before any portion of that fund was appropriated to the payment of the amount due on the bonds. *The Eugénie*, 4 L. R., Adm. 123; 29 L. T. 314; 21 W. R. 957.

Bottomry bond on ship, freight, and cargo; proceeds of ship and freight insufficient:—Held, that though the master bound himself by the bond, and was also a part owner of the vessel, the owners of part of the cargo could not oppose his right to be paid his wages and disbursements in priority to the bondholder. *The Daring*, 2 L. R., Adm. 260; 37 L. J., Adm. 29.

The general rule that a master who has bound himself as well as ship and freight for the payment of a bottomry bond is not entitled to payment of his own claims in priority, will not be acted upon where the bottomry bondholder will not be prejudiced by the master being paid before him. *The Edward Oliver*, 1 L. R., Adm. 379; 36 L. J., Adm. 13; 16 L. T. 575.

By a bottomry bond, the master covenanted that he had authority to charge the vessel, and that the vessel and cargo, with the freight, should at all times after the voyage be liable for the payment of the amount due under the bond:—Held, that this covenant did not affect the master's right to be paid his wages in priority to the bondholder. *The Salacia*, 32 L. J., Adm. 41; 9 Jur., N. S. 27; 8 L. T. 91; 11 W. R. 189.

Seamen's Wages.—Seamen's wages earned before the giving of a bond are to be preferred to the bond. *The Union*, Lush, 128; 30 L. J., Adm. 17.

Bond on ship, freight, and cargo, ship and freight insufficient to pay the same, suit by seamen against ship and freight for wages, the owners of the cargo allowed to defend, because

having an interest in the administration of the fund, but the claim of the seamen ultimately pronounced for, as superior to that of the bondholder, and therefore to that of the owners of the cargo deriving through him. *Ib.*

Repayment of Wages.—The court will not, unless upon application being made to it, sanction the repayment of wages to bondholders out of the proceeds of the sale of a ship. *The Cornelia Henrietta*, 1 L. R., Adm. 51; 12 Jur., N. S. 396; 14 W. R. 502.

Necessaries.—A broker, procuring necessaries to be supplied to a ship, and paying for them, gives credit to the master and owners, and stands in a different position from a tradesman supplying; his claim, therefore, does not take precedence as a claim under a bottomry bond. *The Flor de Funchal*, 35 L. J., Adm. 119.

A bottomry bond is preferred to a claim of necessaries previously pronounced for, the necessaries having been supplied before the bond. *The William F. Safford*, Lush. 69.

— **Merging Claims.**—A cause of necessaries was instituted in a county court, and subsequently transferred to the Court of Admiralty. The petition in the Court of Admiralty alleged that a bottomry bond was given as security for the amount due for necessaries:—Held, first, that the claim for necessaries merged in the bottomry. *The Elpis*, 4 L. R., Adm. 1; 42 L. J., Adm. 43; 27 L. T. 664; 21 W. R. 576.

Held, secondly, that the suit having been transferred as one for necessaries could not be retained as a cause of bottomry. *Ib.*

Payment of Prior Charges.—The court granted leave to bondholders to pay prior charges, and to have a lien on the ship, cargo and freight, in respect of such payments, which were small in amount, on an affidavit specifying the charges to be paid. *The Fair Haven*, 1 L. R., Adm. 67; 14 W. R. 821.

Advances under Charterparty.—A bottomry bond cannot affect a previous contract in a charterparty, so as to take precedence of money advances made subsequently to the bond under the authority of the charterparty. *The Salacia*, 32 L. J., Adm. 43.

Mortgages.—A bottomry bond is entitled to priority of payment over a mortgage during the voyage for which the bond was executed; but when due, should be enforced within reasonable time, and a voluntary agreement on the part of the holder to postpone payment under it alters its character totally, and substitutes a contract over which the Admiralty Court, at least, has no jurisdiction. *The Royal Arch*, Swabey, 269.

Dock Dues.—A person who has advanced money for the purpose of discharging dock dues stands in the same position as the dock company, and his claim ranks with pilotage and towage claims, and has priority over the claim of a holder of a bottomry bond of a previous date. *The St. Lawrence*, 5 Adm. D. 250; 49 L. J., Adm. 82.

Lien for Freight Preferred.—W. shipped at Hayti, on board the ship Galam, a cargo for

Europe. The ship during the voyage became unseaworthy, and put in at Angra, where she was condemned and the cargo discharged. The captain took up a sum of money on the security of the cargo, and granted a respondentia bond for the amount, payable with interest on the arrival of the ship at the port of Falmouth. W. chartered the ship *Mary Jane*, of which C. was master and owner, to proceed to Angra and fetch home the cargo. The *Mary Jane* proceeded on her voyage, and on her return she was by bad weather driven ashore at Scilly, and it became necessary to unship the cargo, which was received by B. & Co., on behalf of C., and subject to a right of lien in respect of freight. The respondentia bond had been transferred to M'A. & Co. W., in order to defeat this bond, ordered C. to proceed to Hamburg instead of Falmouth; M'A. & Co. thereupon instituted a suit in the Admiralty Court on the bond, and the cargo was arrested by an order of that court:—Held, first, that as the cargo could not be carried to its destination by reason of the order of the Admiralty Court, C. had earned his freight, and had a lien on the cargo for freight, and that such lien was preferable to the claims under the respondentia bond. *Cargo ex Galam*, 2 Moore, P. C. C., N. S. 216; 33 L. J., Adm. 97; 10 Jur., N. S. 477; 9 L. T. 550; 12 W. R. 495.

Held, secondly, that the subsequent carrying of the cargo by C. was essential to making it available either for the holder of the bond or any one else, and was in the nature of salvage service; and that in a competition of liens, the shipowner, who has rendered a service of this description, is entitled to priority over the holder of a respondentia bond, who has done nothing, and whose money has contributed nothing towards forwarding the cargo to its destination. *Ib.*

5. MARSHALLING.

In what Cases.—Where there is a creditor on two funds, and another creditor on one only of those funds, the assets will be equitably marshalled, if it can be done without violating a rule entitled to preferential observance. *The Priscilla*, Lush. 1; 5 Jur., N. S. 1421.

Where, therefore, there are two bottomry bonds, the first in date on ship and freight only, and the other or last bond on ship, freight and cargo, and ship and freight are insufficient to discharge both bonds, the last bond, which is entitled to priority, must be paid out of ship and freight. *Ib.*

A vessel being at Constantinople, in want of repairs, the master, with the knowledge and approbation of the owner, borrowed money on bottomry. The bond was dated the 12th October, 1858, and was secured on the ship and freight. A second bond on the ship, freight, and cargo, dated the 11th December, 1858, was granted at Odessa; and a third, also on the ship, freight, and cargo, dated the 13th January, 1859, at Syra. The balance of the proceeds, arising from the sale of the ship and from the freight, was insufficient to discharge all the claims under these bonds:—Held, that, in order to leave a fund for the payment of the first bond, the court could not compel the owners of the cargo to contribute to the liquidation of the two last executed bonds, so long as the proceeds of the ship and freight were not exhausted. *Ib.*

Where there are several bonds, some binding the ship and freight, others the ship, freight, and cargo, the Court of Admiralty will marshal the assets, directing one claim to be satisfied from the cargo, and another from the ship and freight. *The Trident*, 1 Wm. Rob. 29.

6. CONDITION OF LOSS OR PAYMENT.

Abandonment of Voyage.—A bond becomes payable upon the abandonment of the voyage agreed upon in the bond. *The Heligoland*, Swabey, 491.

"Constructive Total Loss."—The master, in order to raise money for necessary repairs, hypothecated the ship and freight. The bottomry bond contained a clause which provided, that the obligation should be void if the obligors should pay, in consequence of the loss of the ship, such an average as by custom would have become due on the salvage, or if the ship should be utterly lost, cast away or destroyed, in consequence of the perils of the sea. The ship, on her homeward voyage, met with such bad weather as to be obliged to put into an intermediate port, in a damaged state, and after being surveyed was found unseaworthy, and sold, while existing in specie, for a sum less than the amount of the bond:—Held, first, that the doctrine of constructive total loss does not apply to a bottomry bond, as in the case of an insurance between insurers and insured, and the bondholder was entitled to the entire proceeds of the sale of the ship. *The Great Pacific*, 2 L. R., P. C. 516; 38 L. J., Adm. 45; 21 L. T. 38; 17 W. R. 933; 6 Moore, P. C. C., N. S. 151.

Held, secondly, that the clause in the bond did not apply when the ship remained in specie, though so much damaged that it would have cost more to repair her than she was worth. *Ib.*

Insurance on Constructive Total Loss.—The condition of a bottomry bond provided for its defeasance on payment of the amount of the bond, "or, in case of the loss of the ship or vessel, such an average as by custom shall have become due on the salvage, or if on the voyage the ship or vessel should be utterly lost, cast away, or destroyed." The ship having become a constructive total loss, the bondholder, by a decree in the Admiralty Court, obtained payment to him of the proceeds of the ship, which had been paid into court, and which were insufficient; the court holding that a bottomry bond was only discharged by payment or by an absolute total loss, and that the condition providing for defeasance on payment of such average as by custom should have become due, did not refer to the case of a constructive total loss. In an action by the bondholder on a policy of insurance upon the bond:—Held, that the doctrine of constructive total loss was not applicable to a policy of insurance on bottomry, and that the condition of defeasance did not apply to the case of a constructive total loss. *Bloomfield v. Southern Insurance Company*, 5 L. R., Ex. 192; 39 L. J., Ex. 186; 22 L. T. 371; 18 W. R. 810.

7. JURISDICTION OF ADMIRALTY COURT.

A bottomry bond given by a master, with the consent of the owner, upon a British ship, lying

in a British port, for a new voyage, cannot be sued upon in the Court of Admiralty; but it is otherwise if the ship was lying in a foreign port. *The Royal Arch*, Swabey, 269.

The court has jurisdiction in the case of a bottomry bond given by a British subject on the occasion of his purchasing a British ship abroad, and raising money for her outfit to return home and a new voyage. *The Heligoland*, Swabey, 491; 5 Jur., N. S. 1179.

The court has jurisdiction over bonds of respondentia as over bottomry bonds. *The Sultan*, Swabey, 504; 5 Jur., N. S. 1069.

8. PRACTICE.

Action on Bond.—In an action of bottomry the original bond must be brought in before the validity of the bond is pronounced for. *The Ilowena*, 37 L. T. 366; 26 W. R. 82.

Owners of Cargo—Persona standi.—Where the result of the suit mainly affected the owners of the cargo bottomried, the court allowed them to have a persona standi through the bondholder. *The Union*, Lush. 128; 30 L. J., Adm. 17.

Proceedings by Default—Reference—Cargo Owner.—The holder of a bottomry bond on ship, freight, and cargo, is, upon the conclusion of proceedings by default against ship and freight, entitled as of course to have the full freight due upon delivery of the cargo paid to him, in order to satisfy the sum secured by the bond, with costs; and the owner of the cargo, who has paid the freight into court, is not entitled to a reference of the amount due on the bond, notwithstanding that, before the execution of the bond, part of his cargo was sold by the master, and the proceeds applied to the ship's expenses. *The Gem of the Nith*, B. & L. 72.

Claim of Holder to Sum awarded for Loss of Freight.—Semble, where in an action for limitation of liability a sum of money is awarded as compensation for loss of freight to the owners of a vessel run down by the plaintiff's ship, the holder of a bottomry bond on the freight of the vessel run down is entitled to claim, in respect of the loan on bottomry, a portion of the sum awarded for loss of freight. *The Empusa*, 5 Adm. D. 6; 48 L. J., Adm. 36; 41 L. T. 383; 28 W. R. 263.

Proof of Good Faith.—In disputed cases of bottomry bonds the court expects that, where it is practicable, the master will, by his affidavit, shew affirmatively the good faith of his own transaction, and the circumstances relating to it. *The Faithful*, 31 L. J., Adm. 81.

Amount of Premium.—The court, judging the premium to be excessive, will refer it to the registrar and merchants to be reduced. *The Huntley*, Lush. 24.

Onus—Prima facie Validity.—Where the court has decreed the sale of a ship and cargo at the suit of a bottomry bondholder, whose right has not been questioned by the owner of the property, the bond must be taken to be prima facie valid, and the bondholder has a right to require any other claimant to the proceeds in the registry to prove his interest before he can be called on

to defend and maintain his own claim. *The India*, 32 L. J., Adm. 185; 9 Jur., N. S. 417; 9 L. T. 234; 11 W. R. 536.

Liability of Bail.]—When in a bottomry suit bail has been given generally to cover ship and freight, but the ship only is held to be pledged by the bond, the bail is only liable to the extent of the value of the ship at the time of release from arrest, and an inquiry will be directed to ascertain that value. *Smith v. Bank of New South Wales, The Staffordshire*, 4 L. R., P. C. 194; 41 L. J., Adm. 49; 27 L. T. 46; 20 W. R. 557; 8 Moore, P. C. C., N. S. 443.

Consent to Decree not Rescinded.]—Where a defendant in adequate possession of the facts has given his consent to a decree, pronouncing for the validity of a bottomry bond, the court will not rescind the decree, though the facts might possibly raise a valid defence, according to a decision pronounced subsequently to the decree. *The Glenburn*, B. & L. 62; 11 W. R. 685.

9. INTEREST RECOVERABLE.

Rate of.]—No particular rate of interest is essential, though when the ordinary or a low rate of interest is taken, it raises a suspicion that sea risk was not intended, and sea risk is essential to the jurisdiction of the court. *The Royal Arch*, Swabey, 269.

The defendants having paid into the registry, by order of the court, a sum of money, which proved larger than the amount finally pronounced to be due to the bondholder, the bondholder was nevertheless held entitled to the full ordinary interest upon the latter sum from the date of the bond becoming due. *The Edmond*, Lush. 211; 30 L. J., Adm. 123.

The rate of interest ordinarily payable upon a bottomry loan and the premium thereon after the safe arrival of the ship at the end of the risk is 4 per cent. per annum, and a provision in a bond entered into by the master of a ship providing for the payment of 10 per cent. per annum interest is not binding on the owners of ship or cargo, provided the provision was entered into without their knowledge. *The D. H. Bills*, 38 L. T. 786.

Premiums besides Interest.]—A bottomry bond on ship, freight, and cargo provided for payment of a bottomry loan, together with interest at 8 per cent., at or before the expiration of five days after the arrival of the ship at her port of discharge. The bond further provided that an additional premium of 10 per cent. on the loan should become payable if default was made in payment. The ship having arrived at her port of discharge, default was made in payment of the bond, and a suit was instituted by the bondholder against ship, freight, and cargo, to recover the amount of the loan and interest, and the additional premium of 10 per cent.:—Held, that the additional premium of 10 per cent. could not be enforced against the cargo, but that the bondholder was entitled to interest at 4 per cent. from the date when the bond became payable until payment. *The Sophia Cook*, 4 Adm. D. 30.

Bottomry Bond not providing for Payment of Interest.]—The master of a Danish vessel being without funds or credit at Hamburg, in order to

obtain necessaries to enable his vessel to proceed on a voyage to Africa and back to London, obtained a loan on the security of instruments by which he pledged his vessel and bound himself for the repayment of the sum advanced within six days after the arrival of the vessel in London. No stipulation was made for interest of any kind:—Held, in an action of bottomry instituted against the vessel, that the instruments were valid bottomry bonds, and that the holders were entitled to payment out of the proceeds of the vessel of the sum advanced, together with 4 per cent. interest from the time when the bonds became due. *The Cécilie*, 4 Adm. D. 210; 40 L. T. 200.

In a bottomry bond taken at Calcutta, blanks had been left where the rate of interest ought to have been expressed; the court pronounced for the bond, with such interest as the registrar should find to have been usual on such risks at the time and place the bond was taken. *The Change*, Swabey, 240.

10. COSTS.

Validity Admitted — Amounts Disputed.]—Where the bond is admitted to be valid, and referred to the registrar and merchants to report the amount due, the plaintiff is usually entitled to the general costs of the reference, but will be condemned in costs clearly occasioned by improperly persisting in claims which cannot be sustained. *The Kepler*, Lush. 201.

Foreigners Ignorant of the Law.]—Where the holders of a bond (foreigners) had acted solely under a misapprehension of English law, the court pronounced against the bond, but without costs. *The North Star*, 29 L. J., Adm. 73.

Arrest before Bond Payable.]—Where the holders of a bottomry bond, on ship and freight, payable seven days after the arrival of the ship, being apprehensive that her cargo would be discharged forthwith, and their security diminished, instituted a bottomry suit, after the arrival of the ship and before the expiration of the seventh day, and arrested the ship, the court, on the application of the owners of the ship, who had paid the amount of the bonds and interest into court, condemned the plaintiffs in costs. *The Eudora*, 4 Adm. D. 208; 48 L. J., Adm. 36.

XXI. AVERAGE CONTRIBUTIONS.

1. *Loss or Injury to Ship or Cargo.*
2. *Practice*, 1693.
3. *Jurisdiction*, 1693.

1. LOSS OR INJURY TO SHIP OR CARGO.

(See also INSURANCE.)

Where Insurance Effected.]—The fact of an owner having effected an insurance does not affect his right to recover general average. *Price v. Noble*, 4 Taunt. 123.

Contributions by Cargo Owner.]—An action may be maintained to recover a contribution in the nature of general average by one shipper of goods against another. *Dobson v. Wilson*, 2 Camp. 480.

Consignee not Owner.]—A consignee (not the owner) of goods, receiving them in pursuance of a bill of lading, whereby the shipowner agrees to deliver them to the consignee, by name, he paying freight, is not liable for general average, although he has had notice, before he received the goods, that they have become subject to that charge. *Scatfe v. Tobin*, 3 B. & Ad. 523.

Provisions do not Contribute.]—Provisions do not contribute to general average, even where the cargo of the ship consists only of passengers. *Brown v. Stapleton*, 4 Bing. 119; 12 Moore, 334.

Sale for Repairs.]—No claim for general average arises when the master has been obliged to sell part of the cargo for the purpose of executing repairs rendered necessary by ordinary perils of the sea. The claim for general average arises when part of the cargo is sacrificed to preserve the rest from impending peril. *Hallett v. Wigram*, 9 C. B. 580; 19 L. J., C. P. 281.

What Necessary to Establish Claim to.]—In order to establish a claim to general average against the owner of cargo, the shipowner must shew a common risk existing, and a voluntary sacrifice or an extraordinary expenditure incurred for the joint benefit of both ship and cargo. If, therefore, goods are landed from a stranded ship, and deposited in a place of safety, whence they may be shipped again in another vessel and carried to their destination, without greater expense to the owner of the goods, or deterioration to the goods themselves, so that it is indifferent to him by what ship they go forward, extraordinary expenses subsequently incurred in floating the stranded vessel do not constitute general average to which the cargo is bound to contribute. *Walthew v. Macrojan*, 5 L. R., Ex. 116; 39 L. J., Ex. 81; 22 L. T. 310—Ex. Ch.

Scuttling Ships to put out Fire.]—Damage to cargo by scuttling a ship to put out a fire is the subject of general average contribution. *Achard v. King*, 31 L. T. 647.

Custom excluding, not Valid.]—There is no valid custom excluding the loss from general average. *Id.*

The plaintiff chartered a ship from the defendant, and by the charterparty it was provided: "All questions of general average to be settled according to the custom of the London underwriters at Lloyd's." A fire broke out on board, the ship was scuttled to extinguish it, and the cargo was damaged thereby. The loss was adjusted as general average, and the plaintiff brought his action to recover from the defendant the ship's contribution. The judge directed the jury that the loss was general average according to law, and the question was whether there was a valid custom excluding such loss from general average. The jury found that no such custom existed, and the verdict was entered for the plaintiff. *Id.*

"British Custom"—Damage by Water used to extinguish Fire.]—It became necessary for the safety of the whole adventure to extinguish a fire on board a ship by means of water, and

the water caused damage to part of the cargo. The damaged goods were shipped pursuant to a bill of lading, which contained the following clause: "Average, if any, to be adjusted according to British custom." The usage among average stagers in England is, that goods thus damaged are not brought into account in an average adjustment:—Held, that the phrase "British custom" in the bill of lading referred to this usage, and that the goods damaged could not be deemed subject to general average. *Stewart v. West India and Pacific Steamship Company*, 8 L. R., Q. B. 362; 42 L. J., Q. B. 191; 28 L. T. 742; 21 W. R. 953—Ex. Ch.

Bark was shipped on board a general ship, under a bill of lading, from Santa Martha to London, by which average, if any, was to be adjusted according to British custom. When the ship was about to sail, a fire broke out in the forehold, and pumping water through the deck of the forecabin not being sufficient to extinguish the fire, a hole was cut in the side of the ship, and her fore compartment being thereby filled with water, the fire was extinguished. If this course had not been adopted the cargo on board would in all probability have been destroyed, and the ship most seriously damaged, if not rendered a total wreck. The bark was destroyed by the water poured into the ship. In an action for general average contribution in respect of the destruction of the bark it was found, in addition to the above facts, that it is the practice of British average adjusters to treat a loss so caused as not a general average loss:—Held, that the loss was, according to the general law of England, the subject of general average contribution, as a voluntary and intentional sacrifice of the bark made under pressure of imminent danger, and for the benefit and with the view to secure the safety of the whole adventure then at risk. *Id.*

Held, secondly, that the shipper, by the terms of the bill of lading, had made the admitted practice of British average adjusters part of the contract; and he was bound by it, although erroneous. *Id.*

Ship on Fire in Harbour—Water poured upon Cargo—Termination of Maritime Adventure.]—To pour water upon the cargo, pursuant to the master's orders, for the purpose of extinguishing a fire which has broken out in a ship's hold, is a general average act; and if the cargo is thereby injured, the owner is entitled to a contribution. Whilst the cargo remains on board a ship after her arrival at the port of destination, the maritime adventure is not terminated so as to absolve the owners of the cargo and the ship from mutual rights and liabilities. The defendants were the owners of the H., which, having arrived at her port of destination at the end of a voyage, unloaded about 1,300 tons of her cargo; about 100 tons remained on board. Whilst she was lying at a wharf, a fire broke out in her hold; and, in order to extinguish it, her master caused water to be poured into her, whereby some goods, forming part of the cargo and belonging to the plaintiffs, were damaged. The H. might have been scuttled and raised again; but if the fire had not been extinguished, she would have been in peril of partial destruction:—Held, that the defendants were liable to contribute by way of general average for the damage done to the plaintiffs' goods. *Whitecross Wire Company v.*

Savill, 8 Q. B. D. 653; 51 L. J., Q. B. 426; 46 L. T. 643; 30 W. R. 588; 4 Asp. M. C. 531—C. A.

Spars, &c., Burnt to keep Donkey-Engine at Work.—A ship sailed well equipped and manned for the voyage, having a donkey-engine on board and a reasonable supply of coals to work it for pumping purposes. The ship met with very heavy weather and sprang a leak, and in order to keep her afloat, it became necessary to use the engine for pumping, and the coals running short, the captain burnt with the coals the ship's spare spars and some of her cargo:—Held, that the sacrifice of the spars and cargo was general average. *Robinson v. Price*, 2 Q. B. D. 295; 46 L. J., Q. B. 551; 36 L. T. 354; 25 W. R. 469—C. A.

Loss of Tackle.—An action lies by a shipowner to recover from the owner of the cargo his proportion of general average loss incurred by sacrificing the tackle belonging to the ship for an unusual purpose, or on an extraordinary occasion of danger, for the benefit of the whole concern. *Birdley v. Prosser*, 1 East, 220.

If anything on board a ship, which is cut or cast away because it is endangering the whole adventure, is in such a state or condition that it must itself certainly be lost, although the rest of the adventure should be saved without the cutting or casting away, then the destruction of the thing gives no claim for general average. *Shepherd v. Kottgen*, 2 C. P. D. 585; 47 L. J., C. P. 67; 37 L. T. 618; 26 W. R. 120—C. A.

Mast Cut away—Question for Jury.—A ship being caught in a storm, portions of the rigging gave way to such an extent that the mainmast began to lurch violently; whereupon, fearing that the mast would rip up the decks and thereby endanger the safety of the ship, the captain ordered it to be cut away, which was done. In an action by the owner of the ship to recover from the owners of the cargo their proportion of general average loss incurred by the sacrifice of the mast, the judge left to the jury the following questions: first, Are you of opinion that the mast was virtually a wreck and gone at the time it went over? secondly, Do you find it was hopelessly lost? The jury answered both questions in the affirmative:—Held, that there had been no misdirection, and that substantially the right questions had been left to the jury. *Id.*

Expenses, &c., in Transshipping Cargo and Arranging for Sale.—A ship during her voyage from India to London was stranded on the coast of France. The shipowner dispatched his manager and other persons to take part in the necessary salvage operations and the whole of the cargo was saved, transhipped, and brought forward to London and the freight earned. Part of the cargo which could not be identified was sold by the shipowner by arrangement with the consignees through a broker, who received his brokerage. The shipowner incurred considerable trouble in chartering ships to carry on the cargo from France to London, and in sending out lighters and necessary appliances to France, and in the identification of the cargo, preparing for the sale, answering the inquiries of and arranging with the consignees. In the average statement a remuneration to the shipowner for "arranging for salvage operations, receiving

cargo, meeting and arranging with consignees, and receiving and paying proceeds, and generally conducting the business," was charged partly to general average, and partly as particular average on the several interests rateably, the average stater thinking that the amount was a reasonable remuneration to the shipowner for his services and for commission on the sale of unidentified cargo, and on disbursements:—Held, that under the circumstances the amount was improperly charged and could not be recovered, there being no contract on the part of the owners of the cargo to remunerate the shipowner for his services, a great part of which had been rendered with the object of earning his freight. *Schwartz v. Fletcher*, 3 Q. B. D. 418; 47 L. J., Q. B. 530; 26 W. R. 756.

Where a ship is compelled to put into port to repair damage occasioned by a general average sacrifice, the expenses of warehousing and re-shipping cargo, necessarily unloaded in order to repair, and the port and pilotage charges and other expenses on leaving the port, are the subject of a general average contribution. *Attwood v. Sellar*, 5 Q. B. D. 286; 49 L. J., Q. B. 515; 42 L. T. 644; 28 W. R. 604—C. A.

Sale of Cargo to avoid Arrest.—Where the master of a ship in a foreign port was arrested by process out of a court of justice, at the suit of the agent of the ship, for sums of money the latter had disbursed on his account, and the master not being able to raise money by other means, that he might procure his liberation and pursue the voyage, sold a part of the cargo:—Held, that the owner of the goods so sold had no right to a contribution in the nature of general average from the shippers of the other goods on board, which arrived safely at the port of destination. *Dobson v. Wilson*, Camp. 480.

Letting of Ship—Refitting.—If A. lets his ship to B. for a voyage, engaging to keep it in repair during the whole time, for which he is to receive freight on the return of the ship; and, for the safety of the ship, it becomes necessary during the voyage to put into a port to refit, the expense of refitting must be borne entirely by A.; and B. is not liable to contribute to it in proportion to his interest in the cargo, as for a general average. *Jackson v. Charnock*, 8 T. R. 509.

Right of Shipowner for Loss of Freight.—P. shipped a cargo of coals upon D.'s ship to be carried to S. and there delivered on payment of freight. A fire broke out spontaneously in the coals, and portions were thrown overboard, and the remainder so wetted and damaged by water poured upon them to extinguish the fire, that they were necessarily discharged, and sold at a port of refuge. Owing to no freight being payable there, they realized net a larger sum than if they had safely reached their destination; but the freight upon them was wholly lost:—Held, that the shipowner was entitled to a contribution in general average for the lost freight. *Pirie v. Middle Dock Company*, 44 L. T. 426. See per cur., in *Wright v. Marwood*, *infra*.

Loss of Cargo.—Semble, that there was no claim on account of the cargo; first, because there was no loss on account of it; secondly, because the vice in it was the cause of the sacrifice. *Id.*

General Principles as to Jettison.]—Where goods are jettisoned for the common good, the loss, as a rule, comes within general average, and must be borne proportionally "by those interested." To this rule there is an exception, viz., that deck cargo jettisoned is not entitled to general average contribution. To this exception, however, there are two exceptions, viz., that coasting vessels are without the exception, and also those cases where by custom the deck cargo is one customary in the trade and, perhaps, also from the port. It is said that there is a further exception, viz., where by agreement with the shipper the cargo is shipped on deck. We are of a different opinion. *Per cur.*, in *Wright v. Marwood, Gordon v. Marwood*, 7 Q. B. D. 62; 50 L. J., Q. B. 643; 45 L. T. 297; 29 W. R. 673; 4 Asp. M. C. 451—C. A.

Jettison of Ship's Stores.]—The owners of a ship's cargo are liable to contribution for ship's stores necessarily thrown overboard, after a vessel was captured, and while she was in the hands of an enemy. *Price v. Noble*, 4 Taunt. 123.

Jettison of Deck Cargo—Liability of Shipowner for.]—The plaintiffs shipped certain cattle as a deck cargo on board the defendants' vessel: during the voyage a storm arose, and owing to stress of weather the master jettisoned the deck cargo by throwing the cattle overboard. The act of jettison was proper and necessary on the part of the master for the safety of the defendants' vessel:—Held, that the plaintiffs could not recover from the defendants a general average contribution for the loss of the cattle. *Johnson v. Chapman* (19 C. B., N. S. 563) commented on. *Wright v. Marwood, supra*.

In consequence of a severe storm which a vessel encountered, her deck cargo of timber, which was lawfully stowed on deck according to the terms of the charterparty between the shipowner and the charterer, broke adrift, and knocked against the pumps, so that the captain was compelled, in order that the crew might work the pumps and to prevent damage to the bulwarks and pumps, and for the safety of the ship and all on board, to throw a portion of such cargo overboard:—Held, that such jettison was the subject of a general average contribution, it being both voluntary and to save all from the danger caused by the storm, which was common to the whole adventure. *Johnson v. Chapman*, 19 C. B., N. S. 563; 35 L. J., C. P. 23.

The proprietor of goods laden on the deck of a ship, according to the custom of a particular trade, is entitled to contribution from the shipowner for a loss by jettison. *Gould v. Oliver*, 4 Bing. N. C. 144; 5 Scott, 446; 3 Hodges, 307.

— "**At Merchant's Risk.**"—It was stipulated in a charterparty that the "ship should be provided with a deck cargo, if required, at full freight, but at merchant's risk:—Held, that the words, "at merchant's risk," excluded any right on the part of the charterers to general average contribution from the shipowners in respect of deck cargo shipped by the charterers and jettisoned. *Burton v. English*, 10 Q. B. D. 426; 52 L. J., Q. B. 386; 48 L. T. 730; 31 W. R. 566. Reversed, W. N. 1883, p. 219.

Average Adjustment at a Port of Refuge—

Pro rata Freight.]—The mere temporary suspension of the voyage by reason of the necessity of repairing the ship at a port of refuge does not, as between the shipowner and the owner of cargo, warrant an average adjustment at the intermediate port. *Hill v. Wilson*, 4 C. P. D. 329; 48 L. J., P. C. 764; 41 L. T. 412.

A ship sailed from Riga for Hull with a general cargo and was stranded, but was afterwards got off (part of the cargo having been washed out of her and part jettisoned) and towed into Copenhagen, where her cargo was discharged, and the ship, having been repaired at considerable expense, was sent on to Hull after a delay of about two months, with some of her cargo on board, other part having been sent on by the master in other vessels. The plaintiffs' goods were so much damaged as not to be worth sending on, and were (properly, but without the plaintiffs having an opportunity of exercising an option) sold at Copenhagen, and an average adjustment took place there according to Danish law, under which the plaintiffs were charged with pro rata freight from Riga to Copenhagen. In an action for the price realized by the sale at Copenhagen:—Held, that the shipowners were not entitled to deduct the general average expenses ascertained by the adjustment at Copenhagen, nor pro rata freight. *Id.*

Duty of Shipowner to get Average Statement.]

—A shipowner, where a general average loss has occurred, may be liable to an action for damages for delivering up the cargo without taking the necessary steps for procuring an adjustment of the general average and securing its payment. The plaintiffs shipped goods at Liverpool on board a steamer belonging to the defendants under a bill of lading, by which the defendants undertook to deliver the goods at the port of Montreal unto the Grand Trunk Railway, by them to be forwarded (upon the conditions before and after expressed) thence per railway to the station nearest to Toronto, &c., and among the conditions was the following: "The shipowner or railway company are not to be liable for any damage to any goods which is capable of being covered by insurance," &c. In the course of the voyage the plaintiffs' goods sustained damage which came under the heading of general average. The ship returned to Liverpool, and the cargo was discharged and handed over by the defendants to a company to be distributed and disposed of for the benefit of the parties concerned, without giving any assistance to the bailees, the underwriters, or the persons whose goods were damaged to get an average statement made out, or taking any steps to enable the plaintiffs to recover contribution:—Held, first, that the bill of lading did not relieve the defendants from contribution to general average; and, secondly, that they were liable to an action by the plaintiffs for their omission to take the necessary steps to secure an adjustment and payment of the general average. *Crookes v. Allen*, 5 Q. B. D. 38; 49 L. J., Q. B. 201; 41 L. T. 800; 28 W. R. 304.

Average Statement at Foreign Port—Expenses.]—An owner of a British ship may avail himself of a statement of average made at the port of delivery in a foreign country, according to the law thereof, so as to charge a British freighter of goods, under a charterparty made in

Britain, with the expenses of wages and provisions for the seamen incurred during the necessary detention of the ship at an intermediate port, although by the law of this country such expenses would not be recoverable as average. *Dalglish v. Davidson*, 5 D. & R. 6.

Not within Suing and Labouring Clause of Policy.—General average and salvage do not come within either the words or the object of the suing and labouring clause of a policy of marine insurance. *Aitchison v. Lohre*, 4 App. Cas. 755; 49 L. J., Q. B. 123; 41 L. T. 323; 28 W. R. 1.

Lien.—There is a lien for general contribution to individual loss by property thrown overboard for the safety of the ship. *Hallet v. Bousfield*, 18 Ves. 187.

A right to general average contribution from a ship after adjustment made gives the owners of the cargo no lien on the ship by the law maritime. *The North Star*, Lush. 45; 29 L. J., Adm. 73.

When a person has been employed by the master of a stranded vessel to do various acts for the purpose of saving the cargo, such person has a lien on the cargo for his charges, the services being in the nature of salvage, and the charges payable by particular average. *Hings-ton v. Wendt*, 1 Q. B. D. 367; 45 L. J., Q. B. 440; 34 L. T. 664; 24 W. R. 664.

2. PRACTICE.

Inspection of Documents.—In an action by a shipowner for contribution in respect of general average, the defendant is entitled to an inspection of the statement of the general average, but not of the documents from which it is drawn up. *Twissell or Tunzell v. Allen*, 5 M. & W. 337; 7 D. P. C. 496.

Fleeding Unseaworthiness.—In an action for contribution for an average loss, it is not sufficient to allege in a plea that the vessel was unseaworthy at the time of sailing, but that the average loss was occasioned by her being unseaworthy. *Schloss v. Heriot*, 14 C. B., N. S. 59; 32 L. J., C. P. 211; 8 L. T. 246; 11 W. R. 596.

Counter-claim before Adjustment.—Where to a claim for damage to cargo a counter-claim of general average is set up, it is not necessary that such general average should have been adjusted; but if the evidence supports the fact of a general average loss having been sustained, the amount, together with the amount of loss sustained through damage to the cargo, will be referred to the registrar and merchants to report. *The Oquendo*, 38 L. T. 151.

3. JURISDICTION.

The rule of the Court of Admiralty as to deciding upon questions of average is this: not that when a possessory right of lien arises incidentally before it, such right will be treated as a nullity; but that, when the court is called upon to enforce such a lien not depending upon possession, or to adjust the rights which grow out of it, the court will then refuse to interfere. *Cargo ex Galam*, 2 Moore, P. C. C., N. S. 216; 32 L. J., Adm. 97; 10 Jur., N. S. 477; 9 L. T. 550; 12 W. R. 495.

Semble, since the passing of the Judicature Acts the Admiralty Division has acquired a right to entertain a claim for a general average loss which the High Court of Admiralty did not possess. *The Oquendo*, 38 L. T. 151.

XXII. PORTS, PIERS, HARBOURS, LIGHTHOUSES, AND DOCKS.

1. Ports.

- a. Nature of.
- b. Tolls and Dues, 1695.

2. Piers, Harbours, and Lighthouses.

- a. Piers, User of, &c., 1697.
- b. Injury to Piers by Vessels, 1699.
- c. Obstruction to Harbours, 1701.
- d. Tolls, Dues, and Metages, 1703.

3. Docks.

- a. Reparation and Regulation, 1708.
- b. Tolls and Dues, 1710.
- c. Liability of Dock Companies, 1713.
- d. Duties of Dockmasters and Others, 1717.
- e. Rating of Docks and Piers.—See RATES AND RATING.

1. PORTS.

a. Nature of.

Creation.—A port may be created in modern times, with a right to receive a port duty from all who come within its limits. *Jenkins v. Harvey*, 1 Gale, 23; 5 Tyr. 326; 1 C., M. & R. 877.

The crown is entitled, except where vested rights would be interfered with, to create a port for the landing of goods, and to assign its limits, though the soil is in a subject; and such creation is a good consideration for the receipt of petty customs and port dues throughout the port so assigned. And such petty customs and port dues might in ancient times be granted away by the crown. *Exeter (Mayor) v. Warren*, 5 Q. B. 773; D. & M. 524; 8 Jur. 441.

The owners in fee of the manor of Whitstable, in an action for anchorage dues, claimed in respect of a vessel casting anchor on a certain anchorage-ground situate within the sea below low-water mark, adduced evidence that the tolls had been taken from time immemorial; that they kept buoys, beacons and lights to mark the bounds between the oyster beds and the anchorage-ground; that Whitstable, before and since the time of legal memory, had been mentioned in official documents as a port; and that in ancient times there was a place within the manor for the unloading of merchandize:—Held, that the anchorage dues had a legal origin, the existence of a port being established. However commodious a place may be for vessels, it will not therefore become a port, the establishment of which must be by authority of the crown; but evidence of traffic in respect of tolls of merchandize being taken, of a place being mentioned as a port in early documents, and of natural configuration favourable to the formation of a port, justify an inference of fact that a port did exist. *Foreman v. Whitstable (Free Fishers and Dredgers)*, 4 L. R., H. L. 266; 21 L. T. 804; 18 W. R. 1046.

Limits of Ports.—The powers of the Board of Trade under 16 & 17 Vict. c. 107 (Customs Con-

solidation Act, 1853), and 25 & 26 Vict. c. 69, s. 17 (the Harbours Transfer Act, 1862), to appoint ports and declare the limits, are not limited to revenue purposes only; nor are such powers confined to ports in their merely geographical sense. *Nicholson v. Williams*, 6 L. R., Q. B. 632; 40 L. J., M. C. 159; *S. C.*, nom. *Reg. v. Kingston-upon-Hull (Justices)*, *Nicholson v. Nicholson*, 19 W. R. 973.

Where, therefore, by an order of the Board of Trade, the limits of the port of Hull were extended and defined, and the sea between Flamborough Head and Spurn Point was placed within them, and persons were prohibited from taking ballast or shingle from certain parts of the shore so extended as the port of Hull:—Held, that a person so taking ballast or shingle from such parts was guilty of an offence within 54 Geo. 3, c. 159, s. 14. *Id.*

b. Tolls and Dues.

Nature of.]—A port duty *ex vi termini* implies a consideration for it. *Jenkins v. Harvey*, 1 Gale, 23; 5 Tyr. 326; 1 C., M. & R. 877.

Port Dues on "Coals exported from the Port"—What are.]—By the Tyne Coal Dues Act, 1872 (35 Vict. c. xiii.), the old coal dues are abolished, and the commissioners are empowered to levy dues, one penny per ton on "coals exported from the port:—Held, that, in the absence of anything in the act to the contrary, "exported from the port" must be taken to be used in its ordinary meaning of "carried out of the port;" and therefore included coals taken out of the port in a steamer to be consumed on board during a distant voyage. *Muller v. Baldwin*, 9 L. R., Q. B. 457; 43 L. J., Q. B. 164; 30 L. T. 864; 22 W. R. 909. See *Stockton and Darlington Railway Company v. Barrett*, 8 Scott, N. R. 641; 11 C. & F. 598; 7 M. & G. 870.

See also COALS.

On Vessel Trading Inwards, or Arriving in Ballast and Trading Outwards.]—An act provided that a vessel trading inwards to the port of Liverpool should pay dock rates, according to a fixed scale, proportioned to the distance of the port from which she was trading, and that a vessel arriving in ballast, but trading outwards, should pay in proportion to the distance of the port to which she was trading. A vessel that had discharged her cargo at a port in England and taken on board ballast, being about to sail to Liverpool for the purpose of loading a cargo for the West Indies, took on board a bale of cotton and a few other articles admittedly in order that she might pay dock rates as a vessel trading inwards from the port where she took on board such articles, and not as a vessel arriving in ballast:—Held, that she was a vessel arriving in ballast within the meaning of the act. *De Gartheig v. Mersey Docks and Harbour Board*, 37 L. T. 411.

Exemption—Return or Double Voyage.]—Under a clause in an act exempting ships "from the payment of the same port or toll duties more than once for the same voyage out and home, notwithstanding such ship or vessel might go out and return with a loading of goods or mer-

chandize:—Held, that a vessel having cleared out of port at Hull, with a cargo of goods for Mogadore, on the coast of Africa, which she discharged, and there took in another cargo for London, discharged the same at London, and took in a cargo for Hull, with which she arrived there, constituted two distinct voyages, and did not fall within the exemption. *Kingston-upon-Hull Dock Company v. Huntington*, 2 Chit. 597.

Newcastle-upon-Tyne — Sunderland — Primage.]—A charter of James 2 granted and confirmed to the corporation of the master, pilots and seamen of Newcastle-upon-Tyne, that all persons, as well subjects as strangers born, being owners of any goods, brought in any ship from beyond the seas into the River Tyne, or any member or creek belonging to the port of Newcastle-upon-Tyne, shall from time to time, as often as such goods shall be brought in, pay an ancient duty lawfully, usually and accustomedly paid to the corporation, called primage; that is to say, 2*d.* for every tun of wine, and all other goods, rated by the tun (fish killed and brought in by the Englishmen only excepted), and 3*d.* for every last of flax, and all other goods rated by the last, in manner following; that is to say, aliens and strangers-born, and all other such person or persons who with ships or vessels shall arrive within the port, or in any of the creeks or members, and not belonging to the same, before they depart with their ships or vessels from the port, or from the creeks, shall pay the duties for and in the name of primage; and every free merchant, and every other inhabitant of Newcastle, arriving with their ships or vessels within the river of Tyne, shall pay the duties, within ten days after the landing of the goods, upon lawful demand. The defendants were natives and merchants of Sunderland, which was a creek or member of the port of Newcastle-upon-Tyne. They brought their own goods from sea in their own ships, into Sunderland, and refused to pay the primage on such goods claimed by the corporation, who thereupon brought an action to recover it. On the trial the corporation put in the charter, and gave evidence of ancient and modern usage, that all persons, including those resident in Sunderland, and who being owners of goods brought them into Sunderland in ships from beyond sea, had paid primage:—Held, that the corporation was not precluded by the charter from claiming primage in respect of goods imported into Sunderland by Sunderland merchants; that the charter was not incompatible with such claim, and that evidence of usage was admissible in support of it. *Bradley v. Newcastle-upon-Tyne (Master, Pilots and Seamen)*, 2 El. & Bl. 427; 23 L. J., Q. B. 35; 18 Jur. 240—Ex. Ch.

"Owner" residing in London.]—Under the same charter:—Held, also, that a person who gratuitously landed, entered and warehoused goods for the owners, who resided in London, was an owner within the meaning of the charter, and liable to the dues. *Newcastle-upon-Tyne (Master, Pilots and Seamen) v. Hammond*, 4 Ex. 285; 18 L. J., Ex. 417.

Hull—Meaning of "Port"—Goole.]—The 14 Geo. 3, c. 56, s. 42, which gives the Hull Dock Company a tonnage on ships coming into or

going out of the Harbour of Kingston-upon-Hull and the company's basin or docks within the port of Kingston-upon-Hull, or unloading or lading any of their cargo within the port, must be construed as using the term port in the popular sense, and not as extending the burden of dock duties to places which, in point of local description, are without the port of Hull, as Goole, on the river Ouse. *Kingston-upon-Hull Dock Company v. Browne*, 2 B. & Ad. 43.

Evidence of Title.]—Where a party suing for port duties, as owner of a port, gave no other evidence of title than the continual enjoyment of a duty which the jury found to be unreasonable in amount:—Held, that he could not have a verdict for a less amount found by the jury to be reasonable. *Brune v. Thompson*, 4 Q. B. 543.

Keeping up a capstan and rope in a cove to assist boats in landing, and without which they could not safely land in bad weather, is a good consideration for a reasonable toll on all boats frequenting the cove, whether they used the capstan or not; and the custom to exact the toll is good, although the party claiming it is neither owner of the cove nor lord of the manor, nor were his predecessors shewn to have been such; but he and they had always been owners of the spot on which the capstan stood, and of an estate in the neighbourhood. *Falmouth v. George*, 5 Bing. 286; 2 M. & P. 457.

Claim for Anchorage Dues.]—A claim of an anchorage due cannot exist merely in respect of the use of the soil; it must be founded on proof that the soil of the claimant was originally within the precincts of a port or harbour, or that some service or aid to navigation was rendered by the owner of the soil who claimed the anchorage due. *Gann v. Free Fishers of Whitstable Company*, 11 H. L. Cas. 192; 20 C. B., N. S. 1; 35 L. J., C. P. 29; 12 L. T. 150; 13 W. R. 589. See also *Foreman v. Whitstable (Free Fishers of)*, *supra*.

Evidence of mere immemorial usage will not sustain such a claim. *Id.*

A liability to make compensation for actual injury done to the oyster beds by anchoring, is not to be confounded with a liability to toll for casting anchor in the soil itself. *Id.*

2. PIERS, HARBOURS, AND LIGHTHOUSES.

a. Piers, User of, &c.

Calling at.]—Steam-vessels plying between the River Itchen, at Southampton, and the Isle of Wight, are bound, under the Southampton Local Pier Act, to call at the Royal Pier at Southampton when requested by five passengers to do so. *Farrand v. Cooper*, 12 C. B., N. S. 283.

Right to Use.]—The plaintiff was the owner of the soil forming the bed of a navigable lake, and also of a pier which had been thereon erected wrongfully by a third person. The defendants, in common with the public, had the right of navigating the lake, and were the lessees, from the person who erected the pier, of the land adjoining that part of the lake where the pier was erected, and therefore had a right to embark and disembark, at the land leased by them, passengers using the defendants'

boats on the lake. The pier was maintained by the plaintiff, and from its position prevented the defendants from getting with their boats to the land leased by them when landing and taking on board passengers:—Held, that the defendants were justified in causing passengers to pass and repass over the pier between their boats and the land leased by them. *Marshall v. Ulleswater Steam Navigation Company*, 7 L. R., Q. B. 166; 41 L. J., Q. B. 41; 25 L. T. 793; 20 W. R. 144.

The city of London by licence granted a company permission to form a floating pier on the Thames, such pier to remain during pleasure, and to take tolls on all passengers landed at the pier. Under the powers conferred upon them by the Thames Embankment Act, 1862, the Board of Works took the floating pier from the company, and agreed to pay them a certain sum and to construct a new landing-stage in lieu of the old pier, and to appropriate it in perpetuity to the benefit of the company. The Thames Embankment Act, 1868, purported to give validity to this agreement. On a bill by the conservators of the Thames (in whom all the estate of the city of London in the bed, soil, and shores of the river had become vested by the Thames Conservancy Act, 1857) to restrain the company from continuing in possession of the landing-stage constructed in lieu of the old pier:—Held, that the company was entitled to the use of the pier only on sufferance, and at the pleasure of the conservators of the Thames; that the Board of Works had no power to convert the licence at pleasure into an irrevocable licence; and that the act which purported to give a validity to the agreement between the company and the Board of Works did not affect the rights of the conservators of the Thames. *Thames Conservators v. South Eastern Railway Company*, 24 L. T. 246.

Remedy in respect of.]—Held, also, that their proper remedy was by bill in equity, and not by ejectment. *Id.*

Right to Erect.]—By an act passed in 31 Hen. 8, the corporation of the city of Exeter was empowered to pluck down, dig, break, and cast up all and all manner of weirs, rocks, sands, gravel, and other lets and nuisances in the river Exe between the city of Exeter and the high sea, and further to do and make all other things requisite and necessary whereby ships, &c., might have their sure course and recourse in the said river to and from the city of Exeter, compensating the owners of the soil where such works should be made for injury done to the soil:—Held, that this act did not give the corporation any right to institute a suit to restrain the erection of a pier in the river, but only a right to abate nuisances on giving compensation. *Exeter (Corporation) v. Devon (Earl)*, 10 L. R., Eq. 232; 23 L. T. 382; 18 W. R. 879.

Held, also, that the pier did not interfere with or affect any property or privilege belonging to the corporation within the General Pier and Harbour Act, 1861, s. 14, and consequently that the consent of the corporation was not required for the erection of the pier. *Id.*

The right or privilege referred to in the General Pier and Harbour Act, 1861, s. 14, means a profitable right or privilege, one that confers a tangible benefit on the person or corporation

possessing it, and not a mere right to abate a nuisance on giving compensation, like that which the corporation of Exeter possessed under 31 Hen. 8. *Ib.*

Operation of Provisional Orders.]—In pursuance of a provisional order made by the Board of Trade under the General Piers and Harbours Act, 1861 (24 & 25 Vict. c. 45), duly confirmed by an act passed in 1874 (37 & 38 Vict. c. clxxxv.), the plaintiffs constructed a pier, commencing at the end of a narrow street, and by so doing prevented the public from getting to the sea shore from the end of the street without passing over a portion of the pier, for which they were obliged to pay a toll. Neither the provisional order nor the special act contained a reference to any right of way. The defendants contended that the public had a prescriptive right of way from the street to the shore, which must be taken away by express words, and that, at any rate, it was saved under ss. 11 and 14 of 24 & 25 Vict. c. 45. They therefore threatened to pull down certain gates put up at the end of the pier by the plaintiffs, who then brought this action for an injunction to restrain them from doing so :—Held, that, as the pier was built in accordance with statutory provisions, and as its existence was physically inconsistent with the alleged right of way, the right of way was abolished by necessary implication, and that the reservations contained in the 11th and 14th sections of 24 & 25 Vict. c. 45, did not apply, as they were inconsistent with the powers contained in the subsequent special act. *Yarmouth Corporation v. Simmons*, 10 Ch. D. 518; 47 L. J., Ch. 792; 38 L. T. 881; 26 W. R. 802.

Liability for Negligence causing Injury to Boat.]—The defendant, under a local act, constructed a pier and a landing-stage. The pier was a solid structure, which did not extend to low-water mark, but the landing-stage floated on the river, and was moored below low-water mark by anchors fixed in the bed of the river, a bridge being made to connect the landing-stage with the pier. Part of this landing-stage was beyond the limits marked on the deposited plans, but it, with its mooring anchors, received the approval of the admiralty. One of the mooring anchors to which the floating-stage was attached was insufficiently buoyed to indicate its position under the water, and thereby injured a boat, which, whilst lawfully navigating the river, and without any negligence of the owner of the boat, struck against such anchor :—Held, in an action for the injury to the boat, that the landing-stage and works were authorized by the act; but that there was a cause of action against the defendant for negligence in insufficiently buoying the anchor, which caused the injury to the boat. *Jolliffe v. Wallasey Local Board*, 9 L. R., C. P. 62; 43 L. J., C. P. 41; 29 L. T. 582.

b. Injury to Piers by Vessels.

By Stress of Weather.]—By the Harbours, Docks and Piers Act, 1847 (10 Vict. c. 27), the owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock or pier, or the quays or works connected

therewith; and the master or person having the charge of such vessel or float of timber, through whose wilful act or negligence any such damage is done, shall also be liable to make good the same. There is a proviso that nothing therein contained shall extend to impose any liability upon the owner, where the vessel is, at the time when the damage is caused, in charge of a compulsory pilot :—Held, that, in a case where the damage to the pier had been occasioned by a vessel, through the violence of the winds and waves, at a time when the master and crew had been compelled to escape from the vessel, and had, consequently, no control whatever over it, the owners were not liable. *River Wear Commissioners v. Adamson*, 2 App. Cas. 743; 47 L. J., Q. B. 193; 37 L. T. 543; 26 W. R. 217.

A liability imposed by statute is subject, no less than a liability at common law, to the exception that, in the absence of express words, no duty is imposed upon a person to make good a loss or damage occasioned, without his default, by causes which human agency is powerless to control. *Ib.*

Under the Harbours, Docks and Piers Clauses Act, 1847 (10 Vict. c. 27), s. 74, the owner of a vessel doing damage to the piers or works of a harbour is liable to make good the damage, although the accident is the result of inevitable accident from stress of weather, without any default of those in charge. *Dennis v. Tocell*, 8 L. R., Q. B. 10; 42 L. J., M. C. 33; 27 L. T. 482; 21 W. R. 170.

The owners of a pier, who are undertakers within the meaning of the Harbours, Docks and Piers Clauses Act, 1847, acquire, under s. 74, a maritime lien in respect of any damage done to their pier by a ship, and may proceed in rem to recover that damage in the Court of Admiralty, and the shipowners are debarred, by s. 74, from setting up the defence of inevitable accident. *The Merle*, 31 L. T. 447.

See *Romney Marsh Lords, Bailiffs, and Jurats v. Trinity House Corporation*, 7 L. R., Ex. 247; 41 L. J., Ex. 106—Ex. Ch.

Who may Recover for Damage caused to Pier.]

—When a limited company, duly constituted by a provisional order made under the General Piers and Harbours Acts, 1861 and 1862, as the undertakers of a pier, within the meaning of the Harbours, Docks and Piers Clauses Act, 1847, is voluntarily wound up, and its property sold by the liquidator, a purchaser of the pier has transferred to him both the property and the rights of the original undertaker, becomes the undertaker, within the meaning of the last-mentioned act, and can recover against a ship for damage done to his pier by that ship, although such damage is the result of inevitable accident. *The Merle*, 31 L. T. 447. *But see cases supra.*

Damaging Piers in Foreign Countries.]—The question of the liability of a shipowner, proceeded against in the English Admiralty Court, for an injury done by his ship to a pier, projecting into the sea, but attached to the soil of a foreign country, is governed by the *lex loci*, and not by English law. *The M. Moatham*, 1 Adm. D. 107; 46 L. J., Adm. 17; 34 L. T. 559; 24 W. R. 650.

When an English ship, by the negligence of her master and crew, ran into and damaged a pier on the coast of Spain, and the owners of the

pier proceeded against the ship for the damage in the Admiralty Court, and the shipowner pleaded that by the law of Spain a shipowner was not responsible for the damage occasioned by the negligence of his master and crew:—Held, that the plea was a good defence to the action. *Ib.*

c. Obstruction to Harbours.

Underwriter Paying Owner as for a Total Loss not Liable.—The harbour-master of a harbour constructed under a private act incorporating the Harbours Act, 1847 (10 & 11 Vict. c. 27), having incurred expense in removing an obstruction caused by part of a wreck, sought to recover it from the owner of the ship under s. 56. The underwriters, who had paid as for a total loss, were joined with the original shipowner as defendants:—Held, that the underwriters did not by such payment become the owners of the wreck for the purpose of liability to the harbour-master under this section, and that the original shipowner must bear the expense, the liability having attached to him as owner at the time of the happening of the casualty. *Eglinton (Earl) v. Norman*, 46 L. J., Ex. 557; 36 L. T. 888; 25 W. R. 656—C. A.

Liability of Owner of Wreck.—The D., in consequence of the sole default of her master and crew, had sunk in the Thames and had become a wreck, obstructing the navigation of the river. Her mate sent a message to the harbour-master at G. to inform him of the accident, who said that he would cause the wreck to be lighted. A few hours afterwards, the wreck not having been lighted, a vessel, without any default on the part of those on board her, came into collision with the wreck and sustained damage. An action of damage having been instituted on behalf of the owner of the damaged vessel against the owners of the D., the judge at the trial refused to admit the evidence shewing that the mate of the D. had sent a message to the harbour-master, and that the latter had promised to light the wreck:—Held, that the evidence was wrongly rejected, that the collision had not been caused by the negligence of the owners of the wreck, and that they were not liable for the damage done. *The Douglas*, 7 Adm. D. 151; 51 L. J., Adm. 89; 47 L. T. 502—C. A. Reversing 51 L. J., Adm. 55; 46 L. T. 488; 30 W. R. 692.

Sect. 96 of the Dublin Port and Docks Act (32 & 33 Vict. c. c.) enacts, that "the harbour-master or dockmaster may remove any wreck or other obstruction to the harbour, quays, docks, or other approaches to the same; and also any floating timber which impedes the navigation thereof; and the expense of removing any such wreck, obstruction or floating timber, shall be repaid by the owner of the same, and the harbour-master or dockmaster may detain such wreck, obstruction or floating timber for securing the expenses, and, on non-payment of such expenses on demand, may sell such wreck, obstruction or floating timber, and out of the proceeds of such sale pay such expenses, rendering the surplus, if any, to the owner on demand."—Held, that a personal liability is not thereby imposed on the owner in respect of the removal of a vessel which has been sunk in the harbour or in the approaches to the harbour, either by the act of

God, or through the negligence of a person not the owner, or for whose act the owner is not responsible. *The Edith*, 11 L. R., Ir. 270—C. A.

Duties of Commissioners.—Under 6 & 7 Will. 4, c. 117, the dues, and other moneys which the commissioners of Kingstown harbour were by statute empowered to receive from vessels frequenting the harbour, were directed to be applied, in the first place, in payment of the expenses of maintaining and regulating the harbour; and it was provided that if there should be any overplus, beyond what should be requisite for the purposes of that act, and earlier acts relating to the harbour, and recited in the preamble, such overplus should be applied in repayment of certain advances which the lord-lieutenant was authorized to make. One of these earlier acts directed that means should be used for the cleansing and deepening, and also for the improving of the harbour, and another directed the commissioners to proceed in the making, improving, and completing the harbour; but none of the acts relating to the harbour imposed in terms upon the commissioners the duty of removing accumulations or obstructions which had existed previously to their appointment. In an action against the commissioners for negligence, in allowing an accumulation of rubbish in the harbour, whereby a vessel was injured, they pleaded that the obstructions which caused the injury complained of were in the harbour before their appointment, and that the moneys statutorily receivable by them were applicable to certain specific works, and that they never had any moneys applicable under those acts to the removal of the obstructions complained of:—Held, a good answer to the action. *Campbell v. Hornsby*, 6 Ir. R., C. L. 37. See *S. C.*, in Ex. Ch., 7 Ir. R., C. L. 540.

Liability of Harbour Commissioners for not removing Obstructions.—Harbour commissioners cannot be sued for not cleansing, deepening or removing obstructions from the harbour, if they have not funds to enable them to do so. *Grant v. Sligo Harbour Commissioners*, 11 Ir. R., C. L. 190.

By act of parliament, 26 & 27 Vict. c. lxxxix., the harbour of B. was vested in the defendants, the limits were defined, and the defendants had jurisdiction over the harbour of P. and the channel of P. beyond those limits, for the purpose of, inter alia, buoying "the said harbour and channel," but they were not to levy dues or rates beyond the harbour of B. By 42 & 43 Vict. c. cxlvi., a moiety of the residue of light duties to which ships entering or leaving the harbour of P. contributed were to be paid to the defendants and to be applied by them in, inter alia, buoying and lighting the harbour and channel of P. A vessel was wrecked in the channel of P., which under the Wrecks Removal Act, 1877 (40 & 41 Vict. c. 16), s. 4, the defendants had power to, and did partially remove. The wreck not removed was not buoyed, and the plaintiff's vessel was in consequence wrecked:—Held, that the statutes imposed upon the defendants an obligation to remove the wreck from the channel, or to mark its position by buoys, and that, not having done so, they were liable in damages to the plaintiff. *Dormont v. Furness Railway Company*, 11 Q. B. D. 496; 52 L. J., Q. B. 331; 49 L. T. 134; 47 J. P. 711.

Obstruction on Land to Passage to.]—A local act enacted, that "if any person shall place on any quay, within ten feet of the quay head, or on any ground immediately adjoining to the haven, and within the space of ten feet from high-water mark, any goods, so as to obstruct the free and commodious passage through or over the same, every person so offending shall forfeit any sum not exceeding 5*l*." A boat builder placed three boats in a yard in his occupation, on the part immediately adjoining the river, and within the space of ten feet from high-water mark, so as to obstruct the passage, and was convicted in the penalty. There was no public right of passage through and over the yard.—Held, by Cockburn, C. J., Crompton and Blackburn, JJ. (dissentiente Wightman, J.), that the section applied only to cases where the public had a right of passage, and that the conviction could not be sustained. By Wightman, J., that the obstruction was prohibited in express terms, and that he was properly convicted. *Harrod v. Worship*, 1 B. & S. 381; 8 Jur., N. S. 153; 9 W. R. 865.

d. Tolls, Dues, and Metages.

Lighthouse Duties.]—British ships, in passing by the Eddystone and other lighthouses in the Channel, not touching at any place in Great Britain or Ireland, are not liable to pay the lighthouse duties to the Trinity House. *Trinity House (Master) v. Sorbie*, 3 T. R. 768.

Exemptions—Mail Packet.]—A post-office packet, hired by the postmaster-general, under a contract to carry mails and government despatches to and from Dover to Calais, entering the harbour of Dover on her return voyage, bringing no mail, but having on board despatches for the secretary at war, and also private passengers and their luggage, a carriage, and bullion, for passage and freight, the vessel, being the private property of the commander, was a vessel employed in his Majesty's service, and therefore exempt from the payment of the Dover harbour dues payable under 47 Geo. 3, c. 69, s. 6, which contained an exemption in favour of vessels belonging to his Majesty, or that might be employed in his service. *Hamilton v. Stow*, 1 D. & R. 274; 5 B. & A. 649.

Transport Chartered to Crown.]—Where a person chartered his ship to the commissioners of the transport service on behalf of the crown, to be employed as a transport, and the ship in the course of such employment made several voyages from Deptford to foreign parts and back.—Held, that by the terms of the charter-party, coupled with the nature of the service, a temporary ownership passed to the crown, so that the charterer, during the time of such service, was not to be considered as owner within the charters granted to the Trinity House, which impose lighthouse duties, and for buoyage and beaconage, on the masters and owners of ships. *Trinity House (Master) v. Clark*, 4 M. & S. 288. See *Smithett v. Blythe*, 1 B. & Ad. 509.

Material for Government Works.]—By a local act, in 1826, wharfage duties were authorized to be taken in respect of certain goods, including stone, which should be imported into a harbour, and the same were to be vested in the corporation of the borough, for the purpose of repairing,

improving, and maintaining the harbour, wharfs, &c., within the borough and town. There were no words in the act binding the crown to pay such duties, but there were provisions exempting the crown from liability in respect of coals imported into the port, for the use of his Majesty's steam-packets, and actually used on board the same, and also from the tolls to be taken for passing over a bridge connected with the harbour. Stones were brought by a barge, into the harbour, for the purpose of being used upon government works which were being carried on there, and which, if they had been brought by any private individual, would have been liable to the duties given by the act.—Held, that the crown was not liable to be called upon to pay such duties. *Weymouth (Mayor) v. Nugent*, 6 B. & S. 22; 34 L. J., M. C. 81; 11 Jur., N. S. 465; 11 L. T. 672; 13 W. R. 338.

Who Liable to Pay Shipper—Owner.]—A local act, incorporating a company, by s. 71 imposed certain river dues in respect of goods carried on the river Ribble, for every time of passing certain lines, without saying by whom they were to be paid. The 10 & 11 Vict. c. 27, which was incorporated with the special act, provides, by s. 42, that rates in respect of goods shipped or unshipped within the limits of the harbour, dock, or pier shall be paid, in case the goods are to be shipped, before shipment, or in case they were to be unshipped, before removal from the premises of the undertakers.—Held, in the case of coals which A. had sold to B., and contracted to deliver on board a ship to be provided by B., that even if s. 42 of the general act be applicable to dues under s. 71 of the special act, A. was not liable to the company for such dues, and that A. was not the shipper of coals, so as to be owner within the interpretation clause of the 10 & 11 Vict. c. 27. *Ribble Navigation Company v. Hargreaves*, 17 C. B. 385; 25 L. J., C. P. 97.

What Goods Liable—Gravel from Thames and Lea.]—The Trinity House has a right to the duty of ballastage of screened garden gravel, though not taken from the Thames; but it is doubtful whether gravel taken from the river Lea is within the jurisdiction of the Trinity House. *Trinity Corporation v. Staples*, 2 Chit. 689.

"Metals."]—An act for keeping in repair a harbour imposed duties enumerated in a schedule annexed on goods exported and imported. In the schedule, under the head "metals," certain duties were imposed on copper, brass, pewter and tin; and on all other metals not enumerated, for every 10*l*. value, 10*s*.—Held, that the latter words did not include gold and silver; and, therefore, that the commissioners were not entitled to demand for specie or bullion 10*s*. for every 10*l*. value. *Casher v. Holmes*, 2 B. & Ad. 592.

By Package or Weight.]—An act authorized harbour commissioners to charge a sum not "exceeding 1*s*." for every ton or less quantity than a ton, and for every package and parcel of goods, wares, merchandize, &c., exported or imported over the bars of certain rivers." Tin plates were exported, packed in wooden boxes for shipment, and such boxes formed and composed one entire

quantity or shipment in one vessel (under one bill of lading), and to the same consignee, and at a uniform rate of freight on all the tin plates so shipped, such freight being paid on the quantity of tons weight:—Held, that the commissioners were entitled to charge 1d. per package, and were not bound to charge 1d. per ton weight. *Jones v. Phillips*, 7 Ex. 85; 21 L. J., Ex. 7.

"Exportation."—The words "shipped for exportation" are not necessarily restricted to an exportation to foreign countries, but may mean exportation in its widest sense; that is, carrying out of port. *Stockton and Darlington Railway Company v. Barrett*, 11 C. & F. 590; 8 Scott, N. R. 641.

"Importation."—A local act imposed a duty on goods imported into or exported from the harbour of Berwick-upon-Tweed. The harbour extends from the bridge over the Tweed down the river to the sea. A person brought goods by sea into the harbour in a sea-going vessel, chartered for the voyage, and having first used the rings or posts erected by the harbour commissioners, in order to moor the vessel while her masts were being lowered, passed under the bridge and unloaded the goods 200 yards above the bridge:—Held, that the goods were not imported into the harbour, so as to be liable to dues. *Wilson v. Robertson*, 4 El. & Bl. 923; 24 L. J., Q. B. 185; 1 Jur., N. S. 755.

Goods Landed.—A corporation was empowered by a local act to levy tolls on all goods landed within their harbour. In pursuance of a practice which had continued for many years, stones brought along the coast into the harbour were shot from boats on to the shore, below high-water mark, and remained on the spot where they were deposited till they were shipped for exportation from the harbour:—Held, that the stones were not landed within the meaning of the act, and therefore that the corporation was not entitled to claim the toll on them. *Harvey v. Lyme Regis (Mayor)*, 4 L. R., Ex. 260; 38 L. J., Ex. 141; 17 W. R. 892.

Timber "Shipped or Unshipped."—Where a statute gave trustees appointed for the improvement of a navigable river and harbour power to charge dues on all timber "shipped or unshipped within the harbour or river":—Held, that, to attach a tow-rope to a log of timber or a number of logs loosely connected at one of the ends for the purpose of towing them, is not to "ship" those logs, and that to cast off the tow-rope is not to "unship" them. *Clyde Navigation Trustees v. Laird*, 8 App. Cas. 658—H. L. (Sc.).

Quære, whether a raft of logs so constructed as to be capable of being navigated can be said to be "unshipped" when on reaching its destination it is taken to pieces and landed. *Ib.*

By an act dated 1770, the Clyde trustees had power to charge rates on "all timber or wood either carried in boats or other vessels, or floated in and upon the said river Clyde within those points aforesaid" (that is above Dumbuck). By a statute in 1840 the Clyde trustees' jurisdiction was extended down the river to Newark Castle, and the duties were imposed by that act on "all goods carried or conveyed on the river." By the statute in force at present, dated 1858, all the

prior acts are totally repealed. By s. 75 the limits of the river are to include the whole channel or waterway forming the harbour, and the whole works within certain given limits, and the whole lands acquired for the purposes of such works, or occupied by the trustees in connection with the navigation of the said river. By s. 98 it is enacted that the trustees are to have power to levy on goods "shipped or unshipped" in the river or harbour the rates specified in the first and second columns of part 1 of schedule H. Schedule H. is headed "Rates on goods conveyed upon or shipped or unshipped in the river or harbour." In 1876 the trustees under their Act of 1858 sought to levy rates on timber in logs, which were taken out of the vessels importing them from abroad outside the jurisdiction of the trustees, and then floated or towed chained together over the old, shallow channel of the river, to storing ponds situate within the trustees' jurisdiction. In a note for suspension and interdict at the instance of the owners:—Held, that the word "river" as it occurs in s. 98 comprehended the whole waters of the Clyde, within the limits defined in s. 75, and cannot be restricted to those portions of the channel which have been artificially deepened; but that the statute of 1858 confers no authority on the trustees to levy rates on timber towed in the manner mentioned. *Ib.*

Tolls for Beaching Boats—Providing Accommodation for.—When the fishermen of a sea village had been immemorially accustomed to beach their boats in winter on ground adjoining the harbour, and where the proprietor had subsequently obtained a local act authorizing his levy of five shillings yearly for each boat beached, the fishermen's rights were enforced against him; and it was held, that he could not exclude the fishermen from the ground used for beaching without assigning to them other ground equally well adapted for the purpose. *Aiton v. Stephen*, 1 App. Cas. 456.

When an act authorizes the exaction of a toll, the accommodation for which the toll is authorized must be provided. *Ib.*

Company Liable to Pay Deficiencies in Income of Harbour and Pier Board.—A dock company was liable, under an act of parliament, to pay a harbour and pier board deficiencies of their income made up to a certain day in each year:—Held, that the board was bound to claim such deficiencies every year. *Southampton Dock Company v. Southampton Harbour and Pier Board*, 14 L. R., Eq. 595; 41 L. J., Ch. 832.

The board had power to reduce or alter their tolls:—Held, that, as against the company, they had no power to remit tolls on particular classes of goods. *Ib.*

The board had power to compound for tolls:—Held, that, as against the company they could not let the whole annual tolls. *Ib.*

Action to recover Rates paid under Invalid Regulations.—By several acts of parliament, all vessels entering into or leaving the Mersey docks were liable, according to the tonnage burden, and were compelled to pay certain fixed dues. By the Merchant Shipping Act, 1854, s. 26, whenever the tonnage of any ship has been ascertained and registered in accordance with the provisions of that act, the same shall thence-

forth be deemed to be the tonnage of such ship, and be repeated in every subsequent registry, unless any alteration is made in the form or capacity of such ship, or unless it is discovered that the tonnage of such ship has been erroneously computed; and in either of such cases such ship shall be re-measured, and the tonnage determined and registered according to the rules in that act contained. By s. 27, re-measurement may be made upon desire of the shipowner. By s. 29, the commissioners of customs are empowered to make certain modifications and alterations in the tonnage rules prescribed by the act. Under that section the commissioners of customs in 1860 made regulations, which had the effect of increasing the registered tonnage of the plaintiff's ships. In 1865, these regulations were, by a decision of a court of law, declared to be contrary to the act of parliament, and invalid. An action was brought to recover the excess of rates paid in accordance with these invalid regulations, over the amount which would have been due under the Merchant Shipping Act:—Held, that the action was not maintainable. *Moss v. Mersey Docks and Harbour Board*, 26 L. T. 425; 20 W. R. 700.

Metage.—A corporation was, under an act passed in 1839, entitled to the right to take dues in respect of vessels lading or unlading upon or from the wharves of the harbour; a subsequent act passed in 1868, giving the corporation additional powers, and conferring upon them the exclusive appointment and regulation of meters and weighers within the harbour, and incorporating the 81st and 82nd sections of the Harbour, Docks and Piers Clauses Act, 1847 (10 Vict. c. 27). The corporation thereupon made bye-laws for the appointment, government and payment of meters. In 1807, the corporation granted a lease to B. for 999 years of premises, in which there was a proviso that "all such goods, wares, and merchandize as shall be proved to be bona fide the sole property of B., his executors, administrators or assigns, who shall be legally and beneficially entitled to the premises when such goods, &c. shall be landed, shipped or unshipped, brought to, carried, or laden to, upon, or from certain premises in the harbour mentioned, shall be freed and discharged from all wharfage, crannage, petit customs and other duties usually paid at any time or times heretofore, or which at any times hereafter during the respective terms shall become due or payable to the corporation." A party claiming under B. unloaded a cargo of coals at the premises in the harbour, for his own use, and did not employ a corporation meter:—Held, that he was under no legal obligation to employ such meter. *Whiting v. Carpenter*, 24 L. T. 576.

By a charterparty it was agreed that a ship should load a cargo of oats and proceed to a safe port on the east coast of Great Britain, London inclusive, or a safe port in the English Channel, or to Havre, and there "deliver the same always afloat on being paid freight," at certain rates per quarter of oats discharged. "The cargo to be brought to and taken from alongside at charterer's expense and risk." The ship sailed to Rochester, and discharged her cargo within that port. The corporation of Rochester, as owner of the port, is entitled to an ancient fee, toll, due, or reward of 1d. per quarter upon corn brought by water to, and unloaded within the port, pay-

able by the person bringing such corn, for the weighing of the corn, or being ready and willing to weigh it. This due having been paid by the captain, the shipowners' agent brought an action in the county court to recover the amount from the consignees of the cargo as and for money paid for them at their request. Judgment was given for the plaintiff. On appeal, the court, being of opinion that the question of liability arising between the shipowners and consignees depended upon whether the due was in ancient times a payment for actual metage service done by the corporation before a cargo was put over the side of a ship, or afterwards, remitted the case to the judge in order that he might ascertain the fact:—Held, that (having regard to the terms of the charterparty), if the due in its origin was for metage to be performed on board, the shipowners must bear it; but, if the metage was to be done ashore, then the charge should fall on the consignees, who would in that case be liable to repay to the shipowners the amount disbursed for the same. *Woodham v. Peterson*, 25 L. T. 26.

Payment of Harbour Dues more than once a Year.—The 32 Geo. 3, c. lxxiv. s. 14, which exempted coasting vessels from payment of duty to Ramsgate harbour oftener than once in a year, included coasting vessels carrying only coal. *Shepherd v. Moore*, 1 H. & N. 125; 25 L. J., Ex. 264; 2 Jur. N. S. 617—Ex. Ch. And see 2 El. & Bl. 382; 22 L. J., Q. B. 377; 17 Jur. 1179.

3. DOCKS.

a. Reparation and Regulation.

Right to Moor.—The 63rd section of the Harbour, Docks and Piers Clauses Act (10 & 11 Vict. c. 27), which imposes a penalty upon the master of any vessel who shall, without permission of the harbour-master, moor the same in the entrance (or within the prescribed limits) of any dock or harbour, and who shall not remove the same upon notice, overrides and extinguishes all local and private rights of property therein. *Gardner v. Whitford*, 4 C. B., N. S. 665.

The assertion of such local or private rights does not exclude the jurisdiction of the justices under the act. *Id.*

Maintenance and Repair.—A dock company was required to make and maintain a new channel, with equal depth and breadth at the bottom, and with equal inclination of the sides to the former channel:—Held, that a duty was cast upon the company to repair generally the banks of the new course. *Reg. v. Bristol Dock Company*, 1 G. & D. 286; 2 Q. B. 64; 2 Railw. Cas. 599.

A dock company was authorized by its special act to make and maintain a dock and works connected therewith according to the levels defined in plans and sections deposited with the clerk of the peace. The dock communicated with the Thames by an artificial channel, through which the water was admitted. The sections shewed the retaining bank of the dock and channel at a uniform height of four feet above Trinity high-water mark. The level of the surrounding country was some feet below Trinity high-water mark, the river being kept from overflowing by means of a river wall 4 feet 2

inches above Trinity high-water mark. The company allowed its retaining bank to be at one point several inches below the level of 4 feet. In November, 1875, an extraordinary high tide took place, and the river rose to 4 feet 5 inches above Trinity high-water mark, in consequence of which the water in the dock overflowed the bank and damaged the property of a neighbouring landowner. The tide had never been known to rise so high before, but in March, 1874, it had risen to 4 feet above Trinity high-water mark. On that occasion there was a small overflow from the dock, but no damage was done to the neighbouring landowner. Previously to that the tide had never risen above 3 feet 4 inches, and the water had never overflowed from the dock.—Held, first, that the company was bound to keep its bank up to the level of 4 feet above Trinity high-water mark, and was liable to the plaintiff for breach of its statutory duty in not doing so. *Nitro-Phosphate and Odum's Chemical Manure Company v. London and St. Katharine Dock Company*, 9 Ch. D. 503; 39 L. T. 433; 27 W. R. 267—C. A.

Held, secondly, that, independently of the act, the dock company was bound as a riparian owner to keep the bank up to the level of 4 feet 2 inches, the height of the rest of the river wall, and that the company was liable to the plaintiff for negligence in not so doing. *Ib.*

Held, thirdly, that the extraordinary high tide of November, 1875, although an act of God, did not excuse the dock company from its liability; but that it ought to have an opportunity of shewing that the damage done by the act of God and the damage done through its negligence ought to be apportioned. *Ib.*

—**Contract for.**—A corporation constituted for the purpose of carrying on a particular trade, entered into a contract for cleansing and removing the filth and dirt accumulating in their docks and basins.—Held, that such a contract ought to have been under the corporation seal, as it was not a contract of a mercantile nature, nor was it with a customer of the company, nor was it of a character which created an impossibility that it should be under seal. *London Dock Company v. Sinnott*, 8 El. & Bl. 347; 27 L. J., Q. B. 129; 4 Jur., N. S. 70.

Raising or Destroying Vessels.—The Mersey Dock Acts Consolidation Act, 1858, 21 & 22 Vict. c. xcii., empowers the defendants to raise, destroy, &c., any "wrecks of vessels and any vessels that shall be sunk in any dock within the port of Liverpool," which may be an obstruction to the navigation, and, in case the master or owner of such vessel or other obstruction shall neglect to pay the charge of removing the same for the space of three days after demand, to sell the same, and out of the proceeds retain the expense incurred in raising, destroying, &c., "such wrecks or other obstructions," rendering the overplus to the person entitled to the same. A ship came into collision with another vessel and was sunk in the Mersey, within the port of Liverpool, having on board copper ore and other goods belonging to the plaintiffs. The defendants took possession of the wreck, which obstructed the navigation, and claimed the exclusive right of dealing with ship and cargo. A portion of the cargo (worth about 1,200*l.*) was raised by them from the wreck, at a

cost of 294*l.* 14*s.*, and they ultimately blew up and destroyed the hull of the vessel and the rest of the cargo. The expense incurred by them in removing the obstruction caused by ship and cargo was about 4,500*l.*—Held, that the defendants were not entitled to detain the plaintiffs' goods to indemnify themselves for the costs incurred in the destruction of the ship, of which the plaintiffs were not the owners. *Vician v. Mersey Docks and Harbour Board*, 5 L. R., C. P. 19; 39 L. J., C. P. 3; 21 L. T. 362.

—**Expenses, how Recoverable.**—A Humber conservancy act enabled commissioners, when any vessel was sunk in the Humber (on neglect of the owners), to appoint a person to raise or blow up the same, with powers to recover summarily the expenses from such owners. A vessel was sunk in the Humber, and, on the neglect of the two owners to raise her, the commissioners appointed a person to raise or blow her up. Whilst the works were in progress, one of the part owners died, leaving two executors. The attempts to raise having failed, the vessel was blown up, and proceedings were taken against the surviving part owner and the two executors of the deceased part owner, to recover the expenses incurred in endeavouring to raise the vessel, and in blowing her up.—Held, first, that it was for the justices to decide whether or not these expenses were properly incurred; and, secondly, that the justices had no power to include the executors in such order. *Wilson v. Carter*, 7 L. T. 676; 11 W. R. 337.

Bye-Laws, Validity of—Discharge of Cargo—Employment of Lumpers.—By 10 & 11 Vict. c. 27, s. 83, the undertakers authorized by any special act to construct a dock may from time to time make such bye-laws as they shall think fit for (amongst other purposes) regulating the shipping, unshipping, and removing of all goods within the limits of the dock, and for regulating the duties and conduct of all persons, as well the servants of the undertakers as others, employed in the dock. A dock company, who were the undertakers under a special act, made bye-laws that no lumpers should be allowed to work on board any vessel in the dock, but such as were authorized by the company, unless permission in writing had been previously obtained from the superintendent of the dock, and the servants of the company only should be allowed to work within the dock premises, whether on ship, lighter, or shore.—Held, that the bye-laws were in excess of the powers conferred upon the dock company by s. 83, and were therefore invalid. *Dick v. Badart*, 10 Q. B. D. 387; 5 Asp. M. C. 49; 48 L. T. 391; 47 J. P. 422.

b. Tolls and Dues.

Liability and Amount.—The 39 Geo. 3, c. lxi., s. 137, gives to the West India Dock Company certain rates and duties of all goods imported from the West Indies which shall be landed from on board any ship entering into and using the docks; which rates are directed to be "accepted for the use of the docks, and the quays, wharfs and cranes, and other machines belonging thereto, and the land-waiter's fees on account of such goods after being unshipped, and all charges and expenses of wharfage, landing, housing and weighing such goods, and of

such coöperage as the same may want after being unshipped, and all rent for warehouse room for twelve weeks, and all charges of delivering the same from the said warehouses." The latter words include a delivery of the goods into lighters in the dock, as well as an immediate delivery from the warehouses into land carriages placed under the cranes of the warehouses, although for the purpose of such delivery into lighters it is necessary to put the goods upon trucks in order to carry them across the quay, and afterwards crane them into the lighters. *Harden v. Smith*, 8 East, 16.

West India Ships—Stores—Necessaries.]—The statute giving to West India ships, which have discharged their homeward-bound cargoes in the docks of the West India Company, "the use of the light dock for a time not exceeding six months from the time of unloading, on payment of the tonnage duty of 6s. 8d. payable on the entrance of such ships into the import dock, does not entitle the owners to ship stores intended for the use of such ships as part of their outfit, over the wharfs of the light dock, without payment of wharfage and portorage, as in case of other goods shipped by way of merchandize on the outward-bound voyage: aliter, as to necessities intended for the present use of such ships while lying in the dock during the time allowed by the act. *Blackett v. Smith*, 11 East, 553.

Hull Dock—Port of Goole.]—Vessels taking in the whole or a part of their cargo in the port of Goole, and proceeding therewith to Hull, are liable to pay to the Hull Dock Company the tonnage duties of 2d. per ton under 42 Geo. 3., c. xci. s. 44. *Hull Dock Company v. Priestley*, 1 N. & M. 85; 4 B. & Ad. 178.

Vessels proceeding to Hull from a place above Goole (as Leeds), and not touching at Goole, but merely passing the entrances into the port of Goole, are not liable to tonnage duty. *Id.*

Goods of "Similar Nature, Value," &c.]—A company was empowered by an act to charge for the landing of goods in their dock, the several sums mentioned in the schedule annexed, and, for articles not therein particularized, such sums as should be equal to the sums affixed on goods "of a similar nature, package, value and quality," in the schedule. All the charges mentioned in the schedule were of small fixed sums, none being ad valorem except the charge for sculptured marble and marble slabs. At the end was a note, "Goods not included in the foregoing schedules to be charged in proportion to the rates therein specified, according to size and weight:—"Held, that the company was not entitled to make an ad valorem charge for the landing of goods not enumerated, or at all approaching, in "nature, value and quality," to any of those enumerated in the schedule. *Southampton Dock Company v. Hill*, 14 C. B., N. S. 243; 8 L. T. 280; 11 W. R. 646. Affirmed, 16 C. B., N. S. 567; 10 L. T. 462; 12 W. R. 800—Ex. Ch.

"Near the River Tyne."]—By a local act, a toll or tax of ½d. per chaldron was imposed upon the owners or lessees of "any collieries or coal mines near the river Tyne," for every chaldron of coals sold or delivered by them to be exported from or out of the river, and which shall be so exported; such toll to be collected or received at

the offices or places respectively where the contracts for the sale or delivery of such coals are usually made, in aid of the Tyne Keelmen's Charitable Fund. Since the formation of railways and docks, the services of the keelmen in the shipment of coals on the Tyne have become unnecessary, the coals being brought down to the wharfs or quays by railways, and shipped direct:—Held, that coals shipped on the Tyne from collieries "near" to the river were still liable to the payment; and that a colliery situate ten miles from the Tyne is "near the river Tyne," within the meaning of the act. *Tyne Keelmen v. Davison*, 16 C. B., N. S. 612.

Held, also, that coals brought for shipment to the Tyne by a public railway, from collieries which before the formation of the railway had always shipped their coals on the river Wear, to which they had been conveyed by private tramways from the collieries, were equally liable to the keelmen's dues. *Tyne Keelmen v. Elliott*, 16 C. B., N. S. 612.

Lien on Goods in Name of Broker for Charges.]—The Commercial Dock Company was created by a statute, and empowered to distrain and sell ships for non-payment of rates and charges due for dockage of ships, receiving, warehousing and storing goods, and if any owner, consignor or consignee of any goods or merchandize neglects or refuses to pay rates or charges, the company may detain the goods until paid, and, if removed before payment, may distrain any goods of the owner, consignor or consignee, and detain and sell the same, or may prosecute actions for those duties. The 10 & 11 Vict. c. 27, (Harbours, Docks and Piers Clauses Act, 1847,) s. 45, contains similar provisions, which were by a subsequent private act extended to the dock company. D. having purchased from the owners some timber stored at the Commercial Docks, and which was entered in the books of the company in the name of a broker, the company refused to transfer the timber into D.'s name, on the ground that the broker was indebted to them for rent and charges in respect of other goods standing in his name in the books of the company, although D. tendered to them the specific rent and charges due in respect of the goods purchased by him:—Held, first, that the statutes conferred on the company no right to do so. *Dresser v. Bosanquet*, 4 B. & S. 460; 32 L. J., Q. B. 374; 9 Jur., N. S. 458; 11 W. R. 840—Ex. Ch.

Held, secondly, that the company could not rely on any general lien to that extent by the common law, supposing that such existed, as the statutes must be taken to displace such right. *Id.*

Extent of Powers of Distress for Non-Payment of Rates.]—A dock company, by their act of incorporation, was empowered to receive for all goods deposited on their premises rates not exceeding those usually paid in the port of London for wharfage of such goods, and in case default was made in payment of the rates, the collectors or the company were to retain and sell the goods or any part of such goods, and out of the moneys thence arising to retain and pay the rates payable in respect of such goods, returning the overplus to the party entitled; and in case such goods shall be removed before the rates shall be paid, it shall be lawful for the company to take and distrain or sell any goods of the owner thereof in

manner before mentioned. Certain rates payable in respect of goods belonging to A. which had previously been removed from the premises of the company being unpaid, the company claimed to distrain other goods of A. then on the premises until payment of the rates due in respect of both these sets of goods. A. had applied to have the goods then on the premises delivered up to him, and was informed by the company that no more goods would be delivered to his order until his debt was paid or reduced:—Held, that the statute enabled the company to distrain and sell any goods in their possession for the recovery of rates payable in respect of other goods of the same owner. *Green v. St. Katharine Dock Company*, 19 L. J., Q. B. 53; 13 Jur. 1116.

Held also, that the above facts amounted to a distraining and detaining. *Id.*

Action to recover Rates paid under Invalid Regulations.]—By several acts of parliament, all vessels entering into or leaving the Mersey docks were liable, according to the tonnage burden, and were compelled to pay certain fixed dues. By the Merchant Shipping Act, 1854, s. 26, whenever the tonnage of any ship has been ascertained and registered in accordance with the provisions of that act, the same shall thenceforth be deemed to be the tonnage of such ship, and be repeated in every subsequent registry, unless any alteration is made in the form or capacity of such ship, or unless it is discovered that the tonnage of such ship has been erroneously computed; and in either of such cases such ship shall be re-measured, and the tonnage determined and registered according to the rules in that act contained. By s. 27, re-measurements may be made upon desire of the shipowner. By s. 29, the commissioners of customs are empowered to make certain modifications and alterations in the tonnage rules prescribed by that act. Under that section the commissioners of customs in 1860 made regulations, which had the effect of increasing the registered tonnage of the plaintiff's ships. In 1865, these regulations were, by a decision of a court of law, declared to be contrary to the act of parliament, and invalid. An action was brought to recover the excess of rates paid in accordance with these invalid regulations, over the amount which would have been due under the Merchant Shipping Act:—Held, that the action was not maintainable. *Moss v. Mersey Docks and Harbour Board*, 26 L. T. 425; 20 W. R. 700.

o. Liability of Dock Companies.

For Acts of Servants.]—The London Dock Company is liable for the negligence of their servants in unloading goods, although the company derives no profit from their labour. *Gibson v. Inglis*, 4 Camp. 72.

For Injuries to Vessels.]—Trustees incorporated for the purpose of constructing a dock, and who receive rates and have funds which they are bound to apply in maintaining and cleansing the dock, so that it may be in a fit state for vessels to enter, are liable for injury to a vessel caused by an accumulation of mud in the dock, of which by their servants they had the means of knowing, and were negligently ignorant. *Mersey Docks and Harbour Board v. Penhallow*,

7 H. & N. 329; 30 L. J., Ex. 329; 8 Jur., N. S. 486; 5 L. T. 112—Ex. Ch.

The owner of a cargo which was damaged by reason of the ship's stranding on a mud bank negligently left at the entrance of a harbour vested in the Mersey board by statute, sued the board for damage. The defence was, that the board acted under a statute; that they derived no personal benefit from the management of the docks; that they took no part personally in the management, but merely appointed servants and officers in discharge of their public duty; and that the negligence was not theirs, but was solely that of one of their servants:—Held, that the case of public statutory trustees, if not servants of the crown, did not differ from that of absolute owners levying tolls for their own benefit, and that the board was liable. *Mersey Dock Trustees v. Gibbs*, 11 H. L. Cas. 686; 35 L. J., Ex. 225; 12 Jur., N. S. 571; 14 L. T. 677; 14 W. R. 872.

— Opening Dock before Channel Clear.]

In an action by owners of a ship against the proprietors of a dock and tidal basin, made under the powers of an act, and for the use of which they were entitled to receive tolls, it appeared that the dock and basin were opened for public use on the 8rd of March, 1859. The basin opened into a river between two piers, distant 120 feet apart. In constructing the basin a bank was put across it for keeping out the water during the excavation. When the excavation was completed, the operation of cutting through the bank was commenced; and at the time of the accident to the ship, a channel seventy feet wide had been cleared through the bank opposite the middle of the space between the piers at the entrance of the basin. At the time when the dock was opened, the seventy feet channel had been excavated at about three feet six inches above the bottom of the rest of the basin, and the dredging of the channel was continued from that time until the plaintiff's ship went out. The ship, which was of 674 tons burthen, entered the dock on the 9th of March, and, having received a cargo, went out on the 19th of March, under the charge of a river pilot, and, whilst proceeding through the basin, grounded on the bank. The channel was not marked by buoys or otherwise. The pilot, who had taken a larger ship out on the 8th March, knew the state of the basin:—Held, first, that it was the duty of the proprietors of the dock to take reasonable care to make their dock and basin safe for navigation before they opened them to the public; and therefore they were liable for negligence in opening them before the channel had been well cleared. *Thompson v. North Eastern Railway Company*, 2 B. & S. 106; 31 L. J., Q. B. 194; 8 Jur., N. S. 991; 6 L. T. 127; 10 W. R. 404—Ex. Ch.

— Knowledge of Pilot.]—Held, secondly, that assuming the knowledge of the state of the basin by the pilot to be the knowledge of the owners of the ship, it was no excuse for the dock proprietors, inasmuch as they contended that the state of the basin was not such as to make it imprudent to take the vessel out; and the jury had negatived mismanagement on the part of those who had charge of the vessel. *Id.*

— Knowledge of Danger—Evidence of Negligence.]—By a local act for better preserving a harbour, trustees were appointed to carry the

act into execution. They might elect a harbour-master, who might direct any person, having the command of any vessel entering into or being within the harbour, to anchor and place the same in such situation within the harbour as he should direct. After the passing of the act some coals were shot into a berth in the harbour, which rendered it dangerous. The trustees at a board meeting having had notice of the state of the berth, gave directions to their clerk to have the coals removed, and the coals were accordingly partly, but not sufficiently, removed at their expense. After this the harbour-master, without the knowledge of the trustees, directed the plaintiff to place his vessel in the berth. He did so, and the vessel while lying there sustained damage in consequence of the berth being unsafe. The harbour-master knew that the berth had been unsafe and what had been done to it, but neither he nor the trustees knew that the berth continued unsafe when he directed the plaintiff to place his vessel in it:—Held, that there was no evidence to warrant a verdict against the trustees. *Metcalfe v. Hetherington*, 5 H. & N. 719; 8 W. R. 475—Ex. Ch.

Warranty of Depth of Channel.—The trustees of a dock, being about to open a new one under the authority of parliament, issued a notice addressed to shipowners, merchants, and others, describing the accommodation which their new dock would afford to shipping, and containing a statement that "the depth of water on the dock sill was twenty-six and twenty-three feet at the highest spring tides, and fifteen feet at the lowest neaps:—Held, that this amounted to a warranty that there was an available depth of water in the entrance channel approximating that mentioned in the notice; and that the trustees were responsible to the owners of a ship, who, trusting to the representation contained in the notice, entered the dock to load, and were delayed and put to expense in consequence of the insufficiency of water in the channel to enable her to complete her loading in the dock. *Williams v. Swansea Harbour Trustees*, 14 C.B., N. S. 845.

State of Dock—Admittance—Remoteness of Damage.—In an action for a breach of contract, in not admitting the plaintiff's ship into the defendants' dock, whereby she grounded when the tide ebbed, and was damaged, it appeared that the ship left in ballast a dry dock, where she had been repaired, and, in charge of a pilot, was towed by a steam-tug to the dock, where she arrived about high water. In consequence of the chain of the dock gate being broken, she could not be admitted. The captain was unacquainted with the navigation, and, considering that the ship was not sufficiently ballasted to go to sea, directed her to be anchored where she was. At the ebb of the tide she grounded and was damaged. There was conflicting evidence as to the state of the weather. The jury was asked, first, whether there was a place of safety to which the ship could have been taken before the tide ebbed? and, secondly, whose fault was it that she was not taken there? Upon the first question they returned no answer, being unable to agree, but replied to the second, that neither the captain nor the pilot was to blame:—Held, per Martin, B., that the damages were not too remote to be recovered by the plaintiff. Per Pollock, C.B.,

Channell, B., and Pigott, B., that the finding of the jury was not sufficient to enable them to come to a conclusion, and that there must be a new trial. *Wilson v. Newport Dock Company*, 1 L. R., Ex. 177; 35 L. J., Ex. 97; 12 Jur., N. S. 233; 14 L. T. 230; 14 W. R. 558; 4 H. & C. 232.

For Injuries to Goods—Stowing Wines and Spirits in Docks.—The rate table of a dock company contained the following provisions: "Wines and spirits (rum and British spirits excepted) landed in the docks will be chargeable with the following rates: . . . The company will not be responsible for deficiencies on wines or spirits imported in casks not made of oak, nor on spirits exceeding 20 per cent. overproof; but is answerable for deficiencies in quantity on those contained in other casks housed with the company, beyond one gallon per cask for each year or part of a year the goods shall remain in their custody, provided such deficiencies be claimed of the company within six months after delivery, and shall be satisfactorily established by the Customs' gauge on landing and delivery. . . . Rates and charges on rum. . . . When rum is imported in casks made of proper oak, the company engages to be responsible for deficiencies in measure, which shall exceed one gallon per cask for each year," &c.:—Held, in an action for loss of brandy housed with the company, that, under the above provisions, they would not be liable for a diminution in alcoholic strength, though exceeding one gallon per cask, the deficiency contemplated being a deficiency in actual bulk; but that if such diminution was caused by their negligence, they were liable, apart from contract. *Lamare v. London and St. Katharine Docks Company*, 39 L. T. 330.

Delay to Persons Using Swing Bridge.—A dock company having a swing bridge on a public highway, is bound, in the passing of vessels, to use all reasonable means (both as to the number of men employed and number of ships passed at a time) to prevent unnecessary delay; and if they do not do all which can be expected of reasonable men, and if any one is obstructed in consequence, such obstruction will render them liable for the injury sustained. *Wiggins v. Bodington*, 3 C. & P. 544.

For Injuries to Visitors.—A dock company provided gangways from the shore to the ships lying in their dock, the gangways being made of materials belonging to the company and managed by their servants. The plaintiff went on board a ship in the dock at the invitation of one of the ship's officers, and, while he was on board, the servants of the company, for the purposes of the business of the dock, moved the gangway, so that it was, and to their knowledge, insecure. The plaintiff, in ignorance of its insecurity, returned along it to the shore, the gangway gave way, and he was injured:—Held, that there was a duty on the company towards the plaintiff to keep the gangway reasonably safe, and that he was entitled to recover damages from them for the injuries he received. *Smith v. London and St. Katharine Docks Company*, 3 L. R., C. P. 326; 37 L. J., C. P. 217; 18 L. T. 403; 16 W. R. 728.

See also NEGLIGENCE.

Injury to Adjoining Landowner.]—A dock company was authorized by act of parliament to construct and maintain a dock and works according to the levels defined in deposited plans. The sections shewed the retaining bank of the dock and channel connected with the main stream at a uniform height of four feet above high-water mark. The level of the surrounding country was some feet below, and was protected by a bank four feet two inches above that mark. The company allowed its bank to be at one point several inches below the authorized elevation. An unusually high tide occurred, and the water in the dock rose and flooded the adjacent country:—Held, that the company were liable for breach of their statutory duty in not keeping up the wall to the elevation authorized in their plans; that, independently of the statutory obligation, there was a common law duty incumbent on them to maintain their defences at the same height as the rest of the river wall, and that the extraordinary high tide, although an act of God, did not excuse the company. *Nitro-Phosphate and Odam's Chemical Manure Company v. London and St. Katharine Dock Company*, 9 Ch. D. 503; 39 L. T. 433; 27 W. R. 267—C. A.

d. Duties of Dockmasters and Others.

Dockmasters—Discretion of—How Exercised.]

—A dockmaster is invested with a discretion to be exercised for the benefit of all the ships in the harbour, and the master of a vessel is therefore bound to obey the dockmaster, and to assist in the removal of his ship, even though if the interests of the ship alone might be considered the removal was injudicious. *The Excelsior*, 2 L. R., Adm. 268; 37 L. J., Adm. 54; 19 L. T. 87.

— **Action against.]**—In an action against a harbour-master for loss of the cargo of a foreign merchant vessel through her heeling over upon taking the ground in the harbour, it being admitted that the master brought her in, in order to take the ground; and that being sharply built, she could not safely do so, unless there was mud of sufficient depth and strength to support her; and the case for the owner of the vessel being that at a certain spot there was such mud, but that she took the ground before she could get there, owing to there not being sufficient depth of water for a vessel of her draught:—Held, that the question of negligence on the part of the harbour-master would depend upon the knowledge or information he had of the build and draught of the vessel; and that in the absence of knowledge on his part, it was the duty of the captain to inform him; and that, as it was materially misrepresented to him by the captain, he was not responsible for the result. *Lloyd v. Iron*, 4 F. & F. 1011.

Duty of Master of Ship—Damage—Liability.]

—When a ship is moored in dock, it is generally the duty of her master to keep on board a sufficient crew to protect the vessel against ordinary risks. A ship after having been moored in a dock, was subsequently, by order of the dockmaster, removed to another part from which, by the negligence of her master and his disobedience of the dockmaster's orders, she broke loose and damaged the docks:—Held, that the ship was liable for the damage. *The Excelsior*, *supra*.

XXIII. JURISDICTION, PRACTICE, AND PROCEDURE.

1. Jurisdiction.

- a. Admiralty Division of High Court.
- b. County Courts, 1724.
- c. Other Courts, 1729.

2. Practice and Procedure.

- a. Practitioners, 1731.
- b. Writ and Appearance, 1732.
- c. Bail, Arrest, Sale, and Possession, 1735.
- d. Proceedings in Actions, 1744.
- e. Particulars, 1749.
- f. Discovery, 1750.
- g. Assessors, 1752.
- h. Reference to Registrar, 1752.
- i. Decrees and Orders, 1754.
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- l. Execution, 1760.
- m. Appeal.
 - i. To Court of Appeal, 1760.
 - ii. To Privy Council, 1761.
 - iii. From County Court, 1763.

1. JURISDICTION.

a. Admiralty Division of High Court.

General Maritime Law.]—There is a general maritime law administered alike by English and foreign courts, having admiralty jurisdiction, distinct from the municipal laws of nations. *The Patria*, 3 L. R., Adm. 436; 24 L. T. 849.

Generally, the Court of Admiralty is governed by the civil law, the law marine, and the law merchant. *The Neptune*, 3 Hagg. 135.

Whether the court has or has not jurisdiction, depends upon the subject-matter. *Menetone v. Gibbons*, 3 T. R. 267.

It has cognisance of an hypothecation-bond given in the course of a voyage, though executed on land and under seal. *Id*.

So it has jurisdiction over the question of freight, claimed by a neutral master against the captor, who has taken the goods as a prize. *Smart v. Wolff*, 3 T. R. 323.

So it has, in a cause of possession, jurisdiction to take a ship from a wrong-doer, and deliver her over to a person claiming as the right owner. *Blanshard, In re*, 2 B. & C. 244; 3 D. & R. 177.

Matters within Counties.]—The Admiralty had no jurisdiction in cases of contracts and matters done within the bodies of counties, either by land or by water. *Ross v. Walker*, 2 Wils. 264. Nor for running foul of and breaking a vessel in the river Thames, and in the body of the county of Kent. *Velthusen v. Ormsley*, 3 T. R. 315.

On High Seas and Foreign Rivers.]—The Admiralty jurisdiction of England extends over British ships, not only when they are sailing on the high seas, but also when they are in the rivers of a foreign territory, at a place below bridges, where the tide ebbs and flows, and where great ships go. *Reg. v. Anderson*, 1 L. R., C. C. 161; 38 L. J., M. C. 12; 19 L. T. 400; 17 W. R. 208; 11 Cox, C. C. 198.

And see also CRIMINAL LAW (*Jurisdiction*).

In Cases when Damage done by Negligence though no Collision.]—If through the negligence

or misconduct of those on board a vessel another vessel receives or does damage, the owners of the wrong-doing vessel would be liable in the Court of Admiralty for the damage, even though there was no collision between the two vessels. *The Industry*, 3 L. R., Adm. 303; 40 L. J., Adm. 26; 24 L. T. 446; 19 W. R. 728.

The *Blue Bell*, coming up the channel to Hartlepool on a dark morning, was compelled suddenly to port her helm by reason of the *Industry* being discovered across the fairway of the channel without any light exhibited; in consequence of this manœuvre the *Blue Bell* took the ground, and though her anchor was let go, dragged it and drove against the town wall of Hartlepool, suffering damage:—Held, that the court had jurisdiction to entertain the suit, and that a good ground of action was disclosed. *Ib.*

Two Proceedings for Same Matter—Estoppel.]

—To an action for an injury to a vessel by a collision in the Thames, the defendant pleaded that the merits in respect of the demand by the action sought to be enforced, had been tried and determined, and proceedings, to which the plaintiff and the defendant were parties, had been had in the Admiralty Court, and that the merits upon which the plaintiff sought to recover were thereby tried, and, after due proceedings had and taken in that court, and in due form of law, determined by that court in favour of the defendant, and it was held and adjudged by the court that the collision occurred through the negligence of the plaintiff and not through the negligence of the defendant:—Held, that the plea was no answer, inasmuch as it did not shew upon the face of it that the Admiralty court had jurisdiction over the matter. *Harris v. Willis*, 15 C. B. 710; 24 L. J., C. P. 93.

A. brought an action for freight. After action, the assignees of the freight, to whom it had been assigned on a bottomry bond for necessary repairs while the ship was in a foreign port, commenced proceedings against the defendant in the Admiralty court. That court issued a monition to the defendant to pay the freight into court. He did so, and then pleaded to the action the proceedings in the Admiralty court and the payment of the freight into court:—Held, that the plea was a good answer. *Place v. Potts*, 5 H. L. Cas. 383; 24 L. J., Ex. 225.

A suit having been brought in rem, in which the proceeds of the res are insufficient to satisfy the claim, a separate suit in personam may be brought to recover the remainder. *The Pet*, 17 W. R. 899.

A claim for personal injury done by a ship was referred to arbitration, with a condition reserving the claimant's rights and remedies in case the award should not be performed. The arbitrator awarded a sum of money which had not been paid:—Held, that the claimant had not barred himself of his right to sue in the Admiralty court. *The Sylph*, 2 L. R., Adm. 24; 37 L. J., Adm. 14; 17 L. T. 519.

Salvage services had been rendered to a vessel by several sets of salvors off Ramsgate. The owners of the vessel summoned a meeting of the Commissioners of Salvage for the Cinque Ports, to adjudicate on the matter. No notice of the intended meeting was given to any of the salvors, and it was proved that it was not usual to give any such notice. At the meeting of the commissioners one set of salvors was unrepresented,

but it was proved that they were aware of the meeting, and were at hand. The commissioners made an award upon the whole matter. The salvors so unrepresented refused to accept their share of the money awarded, and brought their action in the Admiralty court:—Held, that the award was no bar to the action, the plaintiffs not having been parties to the first decision. *The Elise*, Swabey, 436.

Torts.]—The court has original jurisdiction over torts committed on the high seas, and therefore over a collision on the high seas where the vessel doing the damage was a keel, or a vessel without masts, usually propelled by a pole. *The Sarah*, Lush. 549.

But a suit to recover damages for a tort committed in a foreign country will not lie, if no such remedy is given by the English law. *The Halley*, 2 L. R., P. C. 193; 37 L. J., Adm. 33; 18 L. T. 879; 16 W. R., 998.

Action in rem to enforce Judgment of Foreign

Tribunal of Commerce.]

—The plaintiffs brought an action and obtained judgment in the tribunal of commerce at Lisbon against the captain and owners of a British ship for damages for injury caused by a collision with the plaintiffs' ship. The Portuguese courts recognize no distinction between actions in personam and actions in rem. The defendants' ship having come into a British court the plaintiffs commenced an action in rem against the ship, claiming to enforce the judgment of the Portuguese court against it, and arrested the ship:—Held, that the action in the Portuguese court was a personal action, and that the writ in the present action and all proceedings under it must be set aside, the court having no jurisdiction to enforce a judgment in a personal action by proceedings in rem. *The City of Mecca*, 6 Adm. D. 106; 50 L. J., Adm. 53; 44 L. T. 750—C. A.

Recognition of Maritime Lien by Courts.]

All civilized nations recognize the validity of maritime lien, and will enforce it when it has been declared by a foreign court; but it is essential that it should appear from the proceedings of the foreign court that the object of the suit was the sale of the ship, and not a personal remedy against the captain or owners. *The Bold Buccleugh* (7 Moo. P. C. 267) considered. *Ib.*

In Suits for Loss of Life.]

—The Court of Admiralty has jurisdiction over claims by personal representatives of persons who have lost their lives by damage done by a ship, and the fact that the deceased were foreigners does not affect this jurisdiction. *The Explorer*, 3 L. R., Adm. 289; 40 L. J., Adm. 41; 23 L. T. 604; 19 W. R. 166.

Under 24 Vict. c. 10, s. 7, which enacts that the High Court of Admiralty "shall have jurisdiction over any claim for damage done by any ship," the Court of Admiralty has not jurisdiction in a suit instituted by the relatives of persons drowned by the sinking of a ship run down by another ship. *Smith v. Brown*, 6 L. R., Q. B. 729; 40 L. J., Q. B. 214; 24 L. T. 808; 19 W. R. 1165.

To Award against Foreign Ships—Damages

for Loss of Life.]—The Admiralty Court has jurisdiction in rem against a foreign ship in re-

spect of a claim for damages for loss of life caused by collision with a British ship. *The Franconia* or *Jeffrey v. Owners of The Franconia*, 2 Adm. D. 163; 46 L. J., Adm. 33; 36 L. T. 640; 25 W. R. 796—C. A.

To Arrest Mail Packet belonging to Foreign State.—A packet conveying mails and carrying on commerce which belongs to the sovereign of a foreign state and is officered by officers commissioned by him, comes within the category of vessels which are exempt from process of law. *The Parlement Belge*, 5 Adm. D. 197; 42 L. T. 273; 28 W. R. 642—C. A. Reversing 4 Adm. D. 129; 48 L. J., Adm. 18; 40 L. T. 222; 27 W. R. 692.

The immunity of a public ship is not lost by her being used subordinately and partially for trading purposes. *Id.*

To Decree Possession of Foreign Vessels.—A plaintiff in an action in rem claimed to be the sole owner or mortgagee of a foreign vessel against which the suit was brought, and to be entitled to have possession of the same decreed to him. The defendants appeared under protest, and delivered a petition on protest alleging, as the fact was, that the plaintiff and defendants were foreigners resident abroad, and praying the court to pronounce against its jurisdiction. The consul of the foreign state where the ship was registered was desirous that the court should entertain the suit, and *prima facie* evidence was given at the hearing that by a decree of a competent court of such foreign state possession of the vessel had been transferred to the plaintiff:—Held, that the court would not decline to exercise jurisdiction in the suit. *The Evangelistria*, 46 L. J., Adm. 1; 25 W. R. 255.

A plaintiff, a foreigner, purchased of the defendant one-fourth share of a ship. At the time of the purchase she was a British ship, but the defendant, a foreigner, subsequently procured a register for her as a foreign ship. In a suit by the plaintiff for possession, the court, upon the foreign consul refusing to interfere, declined to entertain the suit, which was dismissed, with costs, but not damages. *The Agincourt*, 2 Adm. D. 239; 47 L. J., Adm. 37.

Necessaries.—The court has jurisdiction to entertain a claim against a foreign ship to recover payments made to enable the master of the ship to supply her with necessaries while lying in a British colonial port. *The Anna*, 1 Adm. D. 253; 46 L. J., Adm. 15; 34 L. T. 895—C. A. And see further, OWNERS (*Liability for Necessaries*), *supra*.

Collision between British and Foreign Vessel, Law Applicable in Case of.—In an action in personam, brought by the owners of a British vessel against the owners of a Spanish vessel to recover damages caused to the British vessel by collision with the Spanish vessel on the high seas, the defendants pleaded that they were Spanish subjects, and that if there was any negligence on the part of those in charge of the Spanish vessel it was negligence for which the master and crew alone, and not the defendants, were liable according to the law of Spain:—Held, bad on demurrer. *The Leon*, 6 Adm. D. 149; 50 L. J., Adm. 59; 44 L. T. 613; 29 W. R. 916.

In Prizes of War.—The Court of Admiralty has no original jurisdiction in matters of booty of war. Its jurisdiction is derived solely from 3 & 4 Vict. c. 65, and Orders in Council issued in pursuance of that statute. *Banda and Kirwee Booty, In re*, 4 L. R., Adm. 436; 44 L. J., Adm. 41; 33 L. T. 332.

The matter of the Banda and Kirwee booty had been by order in council referred to the court to determine the persons entitled to share, and in what proportions, and as to costs. Certain moneys, the proceeds of the booty, had, as alleged, not been paid to the parties who had been declared by the court entitled to the booty:—Held, that the order in council gave the court no power to order that these moneys should be brought into court for distribution, and that, therefore, the court had no jurisdiction to make such an order. *Id.*

Breach of Contracts.—Semble, that the Court of Admiralty has jurisdiction to proceed in rem against a ship for breach of contract, within the meaning of the Admiralty Court Act, 1861 (24 Vict. c. 10), s. 6, although that breach is committed by one of the part owners of the ship only (the master), and for which the other part owners would not be responsible. *The Emilien Marie*, 44 L. J., Adm. 9; 32 L. T. 435.

—Under Admiralty Court Act, 1861, s. 6.]—The general words of the Admiralty Court Act, 1861, s. 6, "any claim . . . for any breach of contract on the part of the owner, &c. of the ship," have relation to the contract in the bill of lading. *Dapneto v. Wyllie, The Pierre Superiore*, 5 L. R., P. C. 482; 43 L. J., Adm. 20; 50 L. T. 887; 22 W. R. 777.

A ship under charter to proceed to certain ports in England, for orders to discharge at a port in England or on the Continent, entered Falmouth with her cargo for orders, and was ordered to discharge at Bremen, where she did discharge her cargo. She then sailed for Cardiff, where she was arrested by process of the Admiralty Court:—Held, that inasmuch as the cargo was deliverable at a port in England, and as the ship with her cargo had entered such a port for orders, the cargo had been "carried into a port" in England within the meaning of the above section, *Id.*

The Admiralty Court Act, 1861, s. 6, does not confer a maritime lien. It only gives to the Court of Admiralty jurisdiction to entertain a suit either in personam or in rem by arrest of the ship whenever it comes within reach of process. The arrest cannot avail against any valid charge on the ship, nor against a bona fide purchaser. *Id.*

The Admiralty Courts Act, 1861, being intended to remedy a grievance, by amplifying the jurisdiction of the English Court of Admiralty, ought to be construed liberally, so as to afford the utmost relief which the fair meaning of its language will allow. *Id.*

A ship was chartered to proceed to a port abroad and there take in cargo. The charterers instituted a suit against the ship, and in their petition alleged that the master of the ship improperly refused to proceed with the ship to the agreed port of loading, and proceeded with her to another port:—Held, that such conduct on the part of the master did not constitute a breach of duty or breach of contract within the

Admiralty Court Act, 1861, s. 6, and that the court had no jurisdiction to entertain any claim for damages arising therefrom. *The Dannebrog*, 4 L. R., Adm. 386; 44 L. J., Adm. 21; 31 L. T. 759; 23 W. R. 419.

Part Owners—Restraint—Bail for Safe Return.—The court has jurisdiction to arrest a vessel in an action of restraint at the suit of a part owner holding a minority of shares, notwithstanding that the vessel is about to proceed on a voyage approved of by a majority of the part owners, and is being employed under a charter entered into by the ship's husband, appointed to act on behalf of all the owners. *The Tulca*, 5 P. D. 169; 29 W. R. 123. See further, sub tit. OWNERS, *supra*.

Upon Arrest of Ship.—Upon the arrest of a ship within the High Court of Admiralty's jurisdiction, the power of the court extends to acts done on the high seas, and to places within the British dominions abroad. *The Peerless*, 18 Moore, P. O. C. 484; Lush. 103.

Not a Court of Equity.—The court, although influenced by equitable considerations, is not a court of equity, so as to allow matters, foreign to the issue, to be introduced in order that complete justice may be done between the parties; it follows rather in its pleadings and practice the courts of common law. *The Don Francisco*, Lush. 468; 31 L. J., Adm. 14; 5 L. T. 460.

Will follow Decisions of other Courts.—The Admiralty Court, being a court of law and equity, will follow the decisions of the courts of law and equity in deciding questions under the bankruptcy law. *The Heart of Oak*, 21 L. T. 727.

Restriction—Onus.—Where the ancient jurisdiction of the court is restricted by act of parliament, the burden is on those who wish to avail themselves of the restriction to give full proof of the circumstances (e. g. the distance of three miles from the shore) which lay the ground for the restriction, and in case of doubt the court will not consider its jurisdiction ousted. *The Argo*, Swabey, 112.

Cinque Ports.—The court has a concurrent jurisdiction within the boundaries of the jurisdiction of the Cinque Ports; and this remains unaltered by 17 & 18 Vict. c. 104, s. 460. *Maria Luisa*, Swabey, 67; 2 Jur., N. S. 264.

Staying Common Law Actions.—In an action for loss of goods shipped on board a vessel, the court refused to stay proceedings on the ground that the Court of Admiralty had made an order, in a suit for determining the liability of the shipowners, declaring that they were entitled to limited liability, and ordering that all actions or suits pending in other courts in relation to the subject-matter of such suits should be stopped. *Milburn v. London and South-Western Railway Company*, 6 L. R., Ex. 4; 40 L. J., Ex. 1; 23 L. T. 418; 19 W. R. 105.

Prohibition.—The Court of Admiralty, although it possesses by statute in certain cases some of the powers of a superior court, is an inferior court, to which prohibition will lie. *James*

v. London and South-Western Railway Company, 7 L. R., Ex. 287; 41 L. J., Ex. 186; 27 L. T. 382; 21 W. R. 25—Ex. Ch. (Decided before the Judicature Acts.)

A prohibition would go to the court, in a suit there for seamen's wages, if the agreement was special or under seal. *Hewce v. Napier*, 4 Burr. 1944.

Courts of Admiralty and courts of prize are all liable to the controlling authority which the courts of Westminster Hall have from time to time exercised for the purpose of preventing them from exceeding the jurisdiction given to them; the general ground of prohibition being an excess of jurisdiction when they assume to act in matters not within their cognizance. *Grant v. Gould*, 2 H. Bl. 69, 100.

If a Court of Admiralty proceeds in a question where it has no jurisdiction, the court will grant a prohibition without imposing any terms. *Velt-hasen v. Ormsley*, 3 T. R. 315.

After an action for freight had been commenced by a shipowner against a charterer, a monition issued from the Court of Admiralty, requiring him to bring the freight into that court, in a suit there by the holder of a bottomry bond on the ship. The charterer pleaded to that suit, paid in the money, and the cause stood for hearing. The court refused a prohibition; though it was suggested that the suit in the Admiralty Court was brought by collusion between the holder of the bottomry bond and the charterer, to deprive the plaintiff in the action of his freight. *Place, In re*, 8 Ex. 704; 22 L. J., Ex. 241; 17 Jur. 328.

Claim for Demurrage.—See XVI. DEMURRAGE.

Claim against Pilot for Negligence.—See XVII. PILOTS AND PILOTAGE.

To Decide as to Title.—See XI. SALE AND MORTGAGE.

Suits for Limitation of Liability.—See XVIII. COLLISION.

General Average Loss.—See XXI. AVERAGE CONTRIBUTIONS.

Salvage.—See XIX. SALVAGE AND TOWAGE.

Bottomry.—See XX. BOTTOMRY AND RESPONDENTIA.

b. County Courts.

Right to Costs depends on Amount Recovered, not on Amount Claimed.—An action was brought in the Queen's Bench, in which an amount less than the sum of 300*l.* was claimed in the particulars of demand for damage by collision, and a further sum not exceeding 300*l.* for salvage services, and further sums for depreciation in value of ship and for demurrage. The causes of action arose within the district of a county court having admiralty jurisdiction. The defendant paid 254*l.* 12*s.* 10*d.* into court in respect of the claim for damage by collision, which the plaintiff accepted in full satisfaction, and entered a nolle prosequi as to the rest:—Held, that the superior courts of common law at Westminster were superior courts within s. 9, and that the right to costs depended upon the amount recovered and not the amount in the particulars

of demand, and that the plaintiffs were therefore not entitled to costs. *Hewitt v. Cory*, 5 L. R., Q. B. 418; 39 L. J., Q. B. 279; 22 L. T. 666; 18 W. R. 954.

Held, also, that no suggestion of the facts necessary to shew that a county court had jurisdiction over the district where the cause of action arose was required to be entered on the record. *Ib.*

County Courts Act, Section 7, 1868—Repeal.]

—Sect. 7 of the County Courts Admiralty Jurisdiction Act, 1868, which deprived a plaintiff of and also rendered him liable to be condemned in costs, where in an action brought in a superior court, which might by that act be tried by a county court having admiralty jurisdiction, he did not recover a sum exceeding what a county court had by that act jurisdiction to try without agreement, is repealed by the effect of Ord. LV. of the Judicature Act, 1875. *Tenant v. Ellis*, 6 Q. B. D. 46; 50 L. J., Q. B. 143; 43 L. T. 506; 29 W. R. 121.

Collisions with Barges.—The 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51, do not give the county court, which has an admiralty jurisdiction under those acts, jurisdiction to try cases of damage by collision between vessels of a different class from those over which the Court of Admiralty has jurisdiction, and therefore a county court is not empowered by those acts to try a question of collision between barges propelled by oars only. *Eccard v. Kendall*, 5 L. R., C. P. 428; 39 L. J., C. P. 234; 22 L. T. 408; 18 W. R. 892.

Where Amount of Suit is less than 300*l.*—A county court, to which admiralty jurisdiction is given by 31 & 32 Vict. c. 71, has admiralty jurisdiction over a claim, not exceeding 300*l.*, for damages for negligence, causing a collision between a barge and a ship in a river, within the body of a county forming part of its district. *Purkis v. Flower*, 9 L. R., Q. B. 114; 43 L. J., Q. B. 33; 30 L. T. 40; 22 W. R. 239.

Therefore, when an action was brought in respect of such a claim for a collision in the Thames, in which, after judgment in default of a plea, the damages were assessed, on a writ of inquiry, at 15*l.*, and no certificate was given that the cause was a proper one to be brought in the superior court, the plaintiff was held not entitled to the costs of the action under 31 & 32 Vict. c. 71, s. 9. *Ib.* See also *Flower v. Bradley*, *post*, col. 1727.

In pursuance of s. 9 of 31 & 32 Vict. c. 71, application may be made to the Court of Admiralty for an order to institute in that court proceedings that might have been taken without agreement in a county court, and the Court of Admiralty will, if it sees fit, make such order. *The Bengal*, 3 L. R., Adm. 14.

An action of damage was instituted in the Admiralty Court in a sum exceeding 300*l.* It was admitted that the defendant's ship was to blame, and that the damage sustained by the plaintiff's ship exceeded 300*l.* The defendant proved by affidavit that he was entitled to have his liability limited to a sum less than 300*l.*, and a tender of less than 300*l.* was accepted by the plaintiff.—Held, that the suit was not a proceeding which the plaintiff might, without agreement, have taken in a county court; and that

the above section did not disentitle the plaintiff to costs. *The Young James*, 3 L. R., Adm. 1; 21 L. T. 397; 18 W. R. 52.

When a suit has been commenced in the Court of Admiralty for an amount within the county court jurisdiction, the plaintiff cannot obtain an order for leave to proceed so as to relieve him from liability for costs. *The Loretta*, 40 L. J., Adm. 50; 24 L. T. 447.

—Waters not Part of High Seas.]—A

collision occurred in a dock connected with the River Thames by channels provided with gates and locks. An action was brought in a county court having admiralty jurisdiction in respect of damages arising out of the collision. On an application for a prohibition:—Held, that the claim was within the Admiralty Court Act, 1861, s. 7, and that the county court had jurisdiction. *Reg. v. City of London Court (Judge of)* or *Kerr*, 8 Q. B. D. 609; 51 L. J., Q. B. 305; 30 W. R. 566.

Breach of Charterparty.—The 2nd section of the County Courts Admiralty Jurisdiction Amendment Act, 1869, gives the county courts jurisdiction in cases of claims arising out of charterparties or other agreements for the use or hire of ships, although the Admiralty Division may have no original jurisdiction in such cases. *Cargo ex Argos*, *infra*, followed. *Simpson v. Blues* and *Gunnestad v. Price*, *infra*, disapproved. *The Alina*, 5 Ex. D. 227; 49 L. J., Adm. 40; 42 L. T. 517; 29 W. R. 94—C. A.

Demurrage.—By 32 & 33 Vict. c. 51, s. 2, it is enacted, that "any county court appointed, or to be appointed, to have admiralty jurisdiction, shall have jurisdiction, and all powers and authorities relating thereto, to try and determine the following causes:—1. As to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of any goods in any ship . . . provided the amount claimed does not exceed 300*l.*:"—Held, that this section gives the county court jurisdiction in cases of claims arising out of charterparties or other agreements for the use or hire of ships, although the Court of Admiralty may have no original jurisdiction in such cases. *Gaudet v. Brown*, *Cargo ex Argos*, 5 L. R., P. C. 134; 42 L. J., Adm. 1; 28 L. T. 77; 21 W. R. 420.

The County Court Acts (31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51) do not give a county court, appointed to have admiralty jurisdiction under those statutes, a jurisdiction which the Court of Admiralty never possessed; therefore, such county court has no jurisdiction to entertain a suit for damages for breach of a charterparty, nor a suit for payment of freight and demurrage. *Simpson v. Blues*, *The Madge Wildfire*, 7 L. R., C. P. 290; 41 L. J., C. P. 121; 26 L. T. 697; 20 W. R. 680.

A claim for demurrage is not within the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), s. 2, which only gives jurisdiction to county courts to try and determine causes which are within the jurisdiction of the Admiralty Court. *Gunnestad v. Price*, *Fullmore v. Wait*, 10 L. R., Ex. 65; 44 L. J., Ex. 44; 32 L. T. 492; 23 W. R. 470. Approving *Simpson v. Blues*, *supra*, and dissenting from *Cargo ex Argos*, *supra*.

Necessaries.]—When a cause of necessities is instituted in a county court, and is transferred to the Court of Admiralty, and the petition shews the claim to be based on a bottomry bond (the county court having no jurisdiction over bottomry bonds), the court will reject the petition. *The Elpis*, 4 L. R., Adm. 1; 42 L. J., Adm. 43; 27 L. T. 664; 21 W. R. 576.

County courts exercising admiralty jurisdiction cannot, as such, entertain a claim for necessities supplied either to a vessel in her own port, or when an owner of the vessel is domiciled in this country. *The Dowse*, 3 L. R., Adm. 135; 39 L. J., Adm. 46; 22 L. T. 627; 18 W. R. 1008.

The Court of Passage has not a more extensive jurisdiction as to any claim for necessities than that exercised by the Court of Admiralty. *Id.*

Action for, Supplied to British Ship where Owners Domiciled in Great Britain.]—A county court having admiralty jurisdiction has no greater jurisdiction in respect of a claim for necessities than that possessed by the Admiralty Division of the High Court, and consequently cannot entertain an action for necessities supplied to a British ship, the owners of which are domiciled in Great Britain. *The Dowse* (3 L. R., Adm. 135) followed. *The Alina* (5 Ex. D. 227) distinguished. *Allen v. Garbutt*, 6 Q. B. D. 165; 50 L. J., Q. B. 141; 29 W. R. 287; 4 Asp. M. C. 520, n.

Against Pilot for Negligence.]—An action against a pilot for collision damage caused to a barge by a vessel under his charge is not an "admiralty cause" within the meaning of 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51, which confer admiralty jurisdiction upon county courts. *Flower v. Bradley*, 44 L. J., Ex. 1; 31 L. T. 702; 23 W. R. 74.

Salvage.]—A county court having admiralty jurisdiction under the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), has jurisdiction, under s. 3, in claims for salvage wherein the property salvaged does not exceed 1,000*l.*, or in the alternative where the amount claimed does not exceed 300*l.* *The Glanibanta*, 2 Adm. D. 45; 46 L. J., Adm. 45; 36 L. T. 27; 25 W. R. 513.

The word "or" in s. 3, sub-s. 1, must be read as indicating the alternative. *Id.*

A salvage suit was instituted in the Court of Admiralty in a sum exceeding 300*l.*; the value of the property was less than 1,000*l.*:—Held, that the court had jurisdiction to entertain the suit. *The Empress*, 3 L. R., Adm. 502; 41 L. J., Adm. 32; 25 L. T. 885; 20 W. R. 553.

Wages.]—A county court has no jurisdiction in admiralty over a claim for a master's disbursements, and therefore, in an action for master's wages and disbursements in the High Court, a certificate under the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), is not necessary to entitle a successful plaintiff to his costs, although he recovers less than 150*l.*, the limit of the county court jurisdiction over wages under s. 3. *The Dictator*, 38 L. T. 947.

The words "any claim for wages" in s. 3 of the County Courts Admiralty Jurisdiction Act, 1868, include a claim for damages for wrongful dismissal by the master of a vessel engaged under a special wages agreement. *The Blessing*, 3 Adm. D. 35; 38 L. T. 259; 26 W. R. 404.

Damage to Cargo—Agreement for Carriage of Goods in Ship—Owner Domiciled in England.]—The county courts have jurisdiction in admiralty to entertain cases up to the amount of 300*l.*, where damage to cargo is caused by, and the claim arises out of, an agreement made in relation to the carriage of goods in a ship, notwithstanding that an owner or part owner of the ship is domiciled in England or Wales. The County Court Admiralty Jurisdiction Amendment Act, 1869, is not limited to cases in which the High Court of Admiralty had jurisdiction at the time. *The Rona*, 7 Adm. D. 247; 51 L. J., Adm. 65; 46 L. T. 601; 30 W. R. 614; 4 Asp. M. C. 520.

Transfer to Admiralty Division.]—Where a necessities action against a ship in the City of London Court has proceeded to judgment by which a sale of the ship is ordered, and subsequently another action is commenced in the High Court by material-men having a possessory lien upon the ship, and an appearance has been entered to the action in the City of London Court by the plaintiffs in the High Court, the sale will be stayed, and the City of London Court action transferred to the High Court upon the application of the plaintiffs in the High Court. *The Immacolata Concezione*, 8 Adm. D. 34; 47 L. T. 388; 31 W. R. 642; 4 Asp. M. C. 593.

The Court of Admiralty may transfer to itself an admiralty or a maritime cause pending in a county court, notwithstanding that the suit may relate to matters over which the Court of Admiralty has not original jurisdiction. *The Swan*, 3 L. R., Adm. 314; 40 L. J., Adm. 8; 23 L. T. 633; 19 W. R. 424.

Towage.]—A tug having entered into a contract to tow a ship from A. to B. for a specified sum, the ship, during the performance of, the agreed towage, was injured by collision, and the tug was detained nearly three days in attendance on the ship. In an action of towage instituted by the owner of the tug in a county court, and transferred to the Admiralty Division:—Held, that it had no jurisdiction to award, in addition to the sum agreed to be paid for towage, any remuneration for the delay. *The Hjennett*, 5 Adm. D. 227; 49 L. J., Adm. 66; 42 L. T. 514.

Wreck, Receiver of, in another District.]—Semble, that a county court of one district has no jurisdiction over the receiver of wreck in another district. *The John Evans*, 43 L. J., Adm. 9; 30 L. T. 306.

Jurisdiction to Restrain Proceedings in Court of Admiralty.]—A debtor to the estate of a bankrupt seized in the Vice-Admiralty Court at Sierra Leone a vessel which formed part of the bankrupt's estate, for a debt claimed to be due to him for necessities supplied to such ship, and thereupon the trustee in the bankruptcy obtained an interim injunction from the County Court of Manchester, in which the bankruptcy proceedings had been instituted, to restrain the debtor from prosecuting his suit in the Vice-Admiralty Court at Sierra Leone; and, pending the continuance of such injunction, issues were directed by the judge of such county court to be tried before him as to whether he had a lien on such ship for necessities. Upon an application by the debtor for a prohibition to prohibit such

county court proceedings:—Held, that the county court judge had jurisdiction under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71, s. 72), to grant the injunction and to try such issues, if he deemed it expedient to do so for the purpose of doing complete justice or making a complete distribution of the bankrupt's property, and that if such court was improperly exercising its jurisdiction in the matter the remedy of the debtor was by appeal to the Court of Appeal in Bankruptcy. *Halliday v. Harris*, 9 L. R., C. P. 668; 43 L. J., C. P. 350; *Harris v. Halliday*, 30 L. T. 680; 22 W. R. 756.

c. Other Courts.

High Courts in India.—Observations on the admiralty jurisdiction of the High Courts in India. *The Brinkilda*, 4 Asp. M. C. 461; 45 L. T. 389—P. C.

Colonial Vice-Admiralty Courts.—It may be presumed that the procedure in the Vice-Admiralty Court of Victoria is so far analogous to that in the maritime courts of Great Britain and Ireland, that a shipwright of Melbourne would be entitled to arrest a British ship and detain her until his legal demands upon her were satisfied. *The Staffordshire*, 25 L. T. 137.

A Vice-Admiralty Court has no jurisdiction under 24 & 25 Vict. c. 24, s. 10, to entertain a suit for necessities supplied at a port out of the possession, that is, the British possession, in which the court is established. *The Albion*, 27 L. T. 723.

The 17 & 18 Vict. c. 104, applies to the colonies; and by s. 191, a master has a lien for his wages in the Vice-Admiralty Court, whatever may be the municipal law of the colony. *The Rajah of Cochin*, Swabey, 473.

Vice-Admiralty courts abroad had only the ordinary jurisdiction exercised by the Court of Admiralty before the 3 & 4 Vict. c. 65; they could not therefore try causes of title to ships. *The Australia*, Swabey, 480—P. C.

The Vice-Admiralty courts abroad have no authority, upon the mere petition of the captain of a ship bound on a foreign voyage, to decree the sale of such a ship reported upon survey to be seaworthy or repairable, so as to carry the cargo to its place of destination, but at an expense exceeding the value of the ship when repaired. *Reid v. Darby*, 10 East, 143.

The Vice-Admiralty Court at Hong Kong had only the ordinary admiralty jurisdiction possessed by admiralty courts previously to the passing of the 3 & 4 Vict. c. 66; it had no jurisdiction to entertain a suit for possession for the purpose of trying a ship. *Lapraik v. Burrows*, 13 Moore, P. C. C. 132.

By an order in council, s. 15, passed in pursuance of 2 Will. 4, c. 51, the Vice-Admiralty Court has jurisdiction to entertain a suit brought by any number of seamen, not exceeding six, to recover their wages. The Merchant Shipping Act, 1854, s. 189, does not take away such right of suit so long as the total aggregate amount claimed by such seamen exceeds 50*l*. Where, in a suit brought by six seamen in the Vice-Admiralty Court, the judge found that a total amount of 203*l*. 19*s*. 8*d*. was due to them, partly for wages, and partly for wrongful dismissal, but that the amount due to each was less than 50*l*.:—Held, that, under the above rule and section,

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the judge was wrong in dismissing the suit for want of jurisdiction, and that a decree for 203*l*. 19*s*. 8*d*. should be made. *Phillips v. Highland Railway Company, The Ferret*, 8 App. Cas. 329; 52 L. J., P. C. 51; 48 L. T. 915; 31 W. R. 869—P. C.

Decree of the Vice-Admiralty Court of Sierra Leone in a proceeding in rem for breach of the revenue laws of the colony, condemning the goods seized, and the owners in penalties, reversed by the committee, so far as the penalties were concerned, with costs, it appearing that though the claim of the owner of the goods was rightly rejected, because he failed to comply with the rule of the Vice-Admiralty Court requiring security for costs, yet that such rule did not apply, so far as regarded the penalties, against which he was entitled to be heard in the court below without giving any such security. *George v. Reg.*, 1 L. R., P. C. 389; 4 Moore, P. C. C., N. S. 287.

An appeal from a decree of the Vice-Admiralty Court of Sierra Leone, restoring property seized for breach of the custom laws, but without damages or costs, the judge below being of opinion that there was probable cause for the seizure, was dismissed by the Judicial Committee with costs, on the ground that it appearing from the evidence that there was probable cause for the seizure, the judge of the Admiralty Court was justified in refusing to decree damages and costs to the appellants, the owners of the goods seized. *Wilson v. Reg.*, 1 L. R., P. C. 405.

Appointment of Deputy Judge.—The Chief Justice for the time being for Sierra Leone may lawfully appoint a deputy judge of the Vice-Admiralty Court of that colony. *Rolet v. Reg.*, 1 L. R., P. C. 198; 12 Jur., N. S. 715; 15 W. R. 233; 4 Moore, P. C. C., N. S. 41.

Practice.—The form of preliminary acts in use in the Admiralty Division of the High Court in collision cases should be used in similar cases in the Vice-Admiralty Courts. *The Norma*, 35 L. T. 418—P. C.

In collision causes in the Vice-Admiralty Courts witnesses should, as far as possible, be examined *vivâ voce* before the court, not upon written interrogatories before an officer of the court prior to the hearing. *Id*.

Consular Courts.—The consular court at Constantinople possesses a jurisdiction in rem, in cases of collision between British and foreign ships; but although that court has such jurisdiction, it does not involve the administration of the common law of England. *Papayanni v. Russian Steam Navigation and Trading Company*, 2 Moore, P. C. C., N. S. 162.

Court of Passage—Suit against Pilot.—A ship by compulsion of law in charge of a duly licensed pilot in the river Mersey, came into collision with and damaged another vessel. The owners of the damaged vessel instituted an admiralty suit against the pilot in the Court of Passage:—Held, that the Court of Passage had not jurisdiction to entertain the suit as an admiralty suit. *The Alexandria*, 3 L. R., Adm. 574; 41 L. J., Adm. 94; 27 L. T. 565.

Claim for Necessaries.—The Court of Passage has not a more extensive jurisdiction as

to any claim for necessities than that exercised by the Court of Admiralty. *The Douce*, 3 L. R., Adm. 135; 39 L. J., Adm. 46; 22 L. T. 627; 18 W. R. 1008.

— **Appeal from.**—The appeal from the Court of Passage of Liverpool exercising admiralty jurisdiction is under the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 26, and security for costs must be given before the instrument of appeal is lodged. *The Ganges*, 5 Adm. D. 247; 43 L. T. 12—C. A.

From the decision of the Court of Passage in an Admiralty cause, an appeal lies to the Court of Admiralty. *The Douce*, 3 L. R., Adm. 135; 39 L. J., Adm. 46; 22 L. T. 627; 18 W. R. 1008.

2. PRACTICE AND PROCEDURE.

a. Practitioners.

Lien.—A proctor has the same lien for his costs as an attorney has on sums of money decreed by the court to be paid. *The Araminta*, Swabey, 81.

Where proceeds are in court the court is competent to take notice of a previous lien after a garnishee order has been obtained. *The Jeff Davis*, 2 L. R. Adm. 1; 17 L. T. 151.

Where, in a suit for master's wages, upon a counter-claim for purchase-money of shares in the vessel (contracted to be purchased) being set up by the owner, a reference to the registrar and merchants resulted in a balance being found against the master:—Held, that the solicitors for the master were entitled under 23 & 24 Vict. c. 127, s. 28, to a charge upon such shares for their costs. *The Philippine*, 1 L. R., Adm. 309; 16 L. T. 34; 15 W. R. 462.

After payment of the amount awarded for salvage and costs, the defendant's proctor has against the property salvaged a lien in priority to average expenses or necessities incurred since the salvage. *The Soblemstein*, 1 L. R., Adm. 293; 36 L. J., Adm. 5; 15 L. T. 393; 15 W. R. 591.

A plaintiff having obtained a decree for payment by the defendant of a sum of money and costs, he paid part of the sum to the judgment creditors of the plaintiff, under the authority of two garnishee orders. The plaintiff's attorneys had a lien for their costs at the time the orders were made, but no notice had been given to them previously to the application for the orders, nor was the existence of their lien mentioned to the judge who made the orders:—Held, that the defendant ought to have caused notice to be given to the attorneys, or ought to have apprised the judge of the existence of their lien before the orders were finally made, and that the payment under the orders was not a valid satisfaction of the judgment of the court. *The Leader*, 2 L. R., Adm. 314; 18 L. T. 767.

The freight and proceeds of sale of a ship were insufficient to pay the following claims:—first, solicitor's costs of successfully defending the ship in the first action, for breach of contract; second, necessities supplied before and after the first suit; third, money advanced to pay harbour dues, &c.; fourth, wages of master, also part-owner:—Held, that the solicitor's lien had priority to the necessities supplied after but not to those furnished before the institution of the first suit, and to the claim for wages, but not to the claim for moneys advanced for harbour dues.

The Heinrich, 3 L. R., Adm. 505; 41 L. J., Adm. 68; 26 L. T. 372; 20 W. R. 759.

Solicitors for defendants in a salvage suit against a foreign ship, who are entitled to a charge upon the ship or the proceeds thereof for their costs and expenses incurred in the preservation of the property, do not take priority of the claim of the foreign government, who, on the abandonment of the ship by her owners, are entitled by the provisions of their code to a lien upon the ship or the proceeds for the expenses of sending back the ship's crew to their own country. *The Licietta* (No. 2), 8 Adm. D. 209; 52 L. J., Adm. 81; 49 L. T. 411.

Exhibition of Proxies.—A proctor in the Admiralty Court is not usually required to exhibit a proxy, but if called upon for a proxy, he satisfies the law by stating the name of the party for whom he is authorized to appear. *Harvey v. Eugene (Owners)*, 41 L. J., Adm. 17; *The Eugene*, 4 L. R., P. C. 8; 25 L. T. 516; 20 W. R. 551; 8 Moore, P. C. C., N. S. 189.

In the Vice-Admiralty Courts proctors are not bound to do more than this under rule 40 of the Vice-Admiralty Rules and Regulations, unless upon a strict order of the court. *Ib.*

The production of a proxy, purporting to be duly signed and sealed, but without proof of the handwriting of those who appear to have subscribed the instrument, is a *prima facie* compliance with an order to produce a proxy, and throws the onus of disproving its authenticity on the opponents. *Ib.*

An objection to a suit on the ground of the non-production of a proxy is a preliminary objection, to be raised on motion, and not on protest, and the utmost a court can do where such proxies are produced is to stay proceedings until further information can be obtained. *Ib.*

Changing Solicitors.—A suit was instituted against a vessel, and an appearance entered by a firm of solicitors on behalf of the owner. A sum of money was paid into court in lieu of bail, and the solicitors thereupon procured the release of the vessel, and incurred costs in defending the suit on behalf of the owner. Whilst the suit was pending, and before any sum had been paid to the firm of solicitors on account of such costs, another firm of solicitors entered a second appearance in the same suit on behalf of the same defendant. On an application on behalf of the firm of solicitors by whom the first appearance had been entered, the court made an order setting aside the second appearance, and condemned the defendant in the costs of the motion. *The Oneiza*, 4 L. R., Adm. 36; 27 L. T. 632.

b. Writ and Appearance.

Issue and Service of Writ of Summons against Foreign Owners.—A ship sailing under a foreign flag, and belonging to a foreign company established abroad, came into collision with, and did damage to, an English ship on the high seas. The owners of the English ship applied for leave to issue a writ of summons, of which notice should be given out of the jurisdiction, claiming compensation for the damage against the foreign company. Leave refused. *Smith, In re, City of Mecca, In re*, 1 Adm. D. 300; 45 L. J., Adm. 92; 35 L. T. 38; 24 W. R. 903.

The phrase, "within the jurisdiction," used in

R. S. C. 1876, Ord. XI. r. 1, means territorial jurisdiction. *Ib.*

The ordinary courts of this country have no jurisdiction over acts done by foreigners on the high seas below low-water mark; consequently, Ord. XI. r. 1, does not warrant an order for the service of a writ on a foreigner residing abroad, in respect of a cause of action arising at sea below low-water mark, though within three miles of the English coast. *Harris v. Owners of the Franconia*, 2 C. P. D. 173; 46 L. J., C. P. 363.

The court will not exercise jurisdiction over a foreign river, if the parties are foreigners and the subject-matter of the action is of doubtful cognizance by the court. *The Ida*, Lush. 6.

Issue of Writ in Admiralty for Claim within Jurisdiction of County Court.—When there are circumstances rendering it advisable that an action which a county court has jurisdiction to try under the County Courts Admiralty Jurisdiction Act, 1868, s. 3, should be commenced in the High Court, such as the necessity for a commission abroad, the court will grant leave for a writ to issue under 31 & 32 Vict. c. 71, ss. 3, 9, though the cause of action may be of less amount than the limit of the county court jurisdiction. *Ellis v. General Steam Navigation Company*, 38 L. T. 570.

In such a case notice of the order made by the court should be given when the writ is served. *Ib.*

The court, in pursuance of the provisions of 31 & 32 Vict. c. 71, s. 9, will, should it think fit, grant an order for instituting proceedings before it, which might have been taken without agreement in the county court. *The Bengal*, 21 L. T. 727.

Writ in Personam, Setting aside—Misdescription of Address.—A shipowner, residing and carrying on business in Scotland, having been described on the face of a writ of summons for service within the jurisdiction, sued out against him in an action of damage in personam, as "of the city of London," applied before service of the writ and after a cross action of damage in respect of the same collision had been instituted on his behalf that the writ should be set aside. The court refused the motion. *The Helenslea*, *The Catalonia*, 7 Adm. D. 57; 4 Asp. M. C. 594; 51 L. J., Adm. 16; 47 L. T. 446; 30 W. R. 616.

Refusal of Consolidation Order before Service of Writ.—The court will refuse to consolidate cross actions of damage in personam where there has been no service of the writ in the principal action. *The Helenslea*, *The Catalonia*, 7 Adm. D. 57; 4 Asp. M. C. 594; 47 L. T. 446; 30 W. R. 616.

Election of Remedies in Rem or in Personam.—When there is a remedy both in personam and in rem, a person who has resorted to one of these remedies may, if he does not get thereby full satisfaction, resort to the other; but if a person has resorted to one of these remedies, and has recovered full compensation, and such compensation has been paid, no further proceedings can be taken. *Yeo v. Tatem*, *The Orient*, 3 L. R., P. C. 696; 40 L. J., Adm. 29; 24 L. T. 918; 20 W. R. 6.

Writ in Rem.—Ord. IX. r. 10, as to service of writs of summons in admiralty actions in rem

are to be strictly followed. *The Marie Constance*, 37 L. T. 366.

Service of a writ of summons on the captain on board, and nailing the warrant of arrest on the mast, are not sufficient notice of a suit in rem against the ship to all whom it may concern. *Ib.*

Appearance.—When a proceeding in rem is instituted in the Admiralty Court to enforce a maritime lien, it is wholly immaterial to whom the res belongs. The owner or other person interested may intervene to defend the suit, but the court deals with the res only, and it is the res and not the owner that is liable in the suit. *The Mullingar*, 26 L. T. 326.

Appearances in Local Registry.—When a cause in rem has been instituted in the Liverpool district registry of the Court of Admiralty, the owners of the ship proceeded against, if resident out of the limits of the Liverpool district, may appear in the London registry of the Admiralty Division of the High Court of Justice, but the præcipe to enter an appearance must contain a recital of the institution of the cause in the Liverpool district registry of the Court of Admiralty, shewing the title under which the cause was entered at Liverpool. *The General Birch*, 33 L. T. 792; 24 W. R. 24.

Appearance under Protest to Jurisdiction.—A defendant in an admiralty action desiring to object to the jurisdiction of the court, may enter an appearance under protest, in accordance with the practice in force in the High Court of Admiralty before the coming into operation of the Judicature Acts. *The Vinar*, 2 Adm. D. 29; 25 W. R. 453—C. A. Affirming 35 L. T. 782; 25 W. R. 379.

A collision took place at sea, about ten miles from the South Stack Lighthouse, between an American and a Spanish vessel. Both vessels sunk in consequence of the collision, and the owners of the American vessel applied in the registry for leave to issue a writ for service out of the jurisdiction in an action to recover compensation for the loss of their vessel, against a British subject resident in Spain, who was alleged to be one of the owners of the Spanish vessel. The registrar having granted the necessary leave, the writ was issued and service was effected on the defendant in Spain. Thereupon an appearance under protest was entered on his behalf. Afterwards, on these facts being brought before the judge of the Admiralty Court, the court ordered the action to be dismissed.—Held, on appeal, that the order was right. *Ib.*

An action of co-ownership was instituted on behalf of a foreigner against a foreign vessel. On the vessel being arrested an appearance under protest was entered for another foreigner, who applied that the action should be dismissed. It appeared that the representative of the state to which the ship belonged declined to interfere, and the court dismissed the action with costs. *The Agincourt*, 2 Adm. D. 239; 47 L. J., Adm. 37. Semble, the practice of the Court of Admiralty with regard to pleadings on protest is still in force in admiralty actions in the High Court of Justice. *The Evangelistria*, 46 L. J., Adm. 1; 25 W. R. 255.

Petitions on Protest.—When a petition on

protest is filed on the ground of want of jurisdiction, before the plaintiff's petition setting forth the particulars of his damage, the petition on protest ought to state the facts which shew want of jurisdiction. *Daputo v. Wyllie, The Piece Superiore*, 5 L. R., P. C. 482.

Effect of Appearance—Jurisdiction.]—Substantive objections to the jurisdiction entertained after absolute appearance. *The Ida*, Lush. 6.

An absolute appearance once given, cannot be recalled. *The Blakeney*, Swabey. 428.

Formal objections to jurisdiction not allowed to be taken after an absolute appearance given. *The Bilbao*, Lush. 149; 3 L. T. 338.

Where the court has no jurisdiction, the defendant is not prejudiced in his claim for damages by having appeared absolutely. *The Eleonore*, B. & L. 185; 33 L. J., Adm. 19; 9 L. T. 397; 12 W. R. 218; *S. P., The Empire Queen*, 3 Ir. Eq. R. 71.

An objection to the jurisdiction may be taken at any time during the progress of the cause. *The Mary Ann*, 34 L. J., Adm. 73; 12 L. T. 238.

Cross Actions.]—Where on a collision between an English and a foreign vessel cross actions were brought by the owners of the two vessels, and in the action by the English vessel, the foreign vessel did not put in an appearance:—Held, that the court could not stay the action brought by the foreign vessel until she had entered an appearance in the action against her. *The Heart of Oak*, 29 L. J., Adm. 78.

Signing Judgment in Default.]—Proceedings by default in admiralty actions in rem are regulated by the practice which prevailed in the Court of Admiralty immediately before the passing of the Judicature Act, 1875. *The Polymede*, 1 Adm. D. 121; 34 L. T. 367; 24 W. R. 256.

Order XXIX. r. 2, as to signing judgment in default of pleading, does not apply to proceedings in rem. When in an action in rem for a liquidated sum for necessities supplied, the defendant makes default in delivering his statement of defence, the plaintiff cannot at once sign final judgment, but must bring the case on for hearing before the judge upon affidavit. *The Sfactoria*, 2 Adm. D. 3; 35 L. T. 431; 25 W. R. 62.

Affidavit of Service.]—The affidavit of service required to be filed in the registry before proceedings can be taken to obtain judgment by default in an action in rem must have the original writ in rem annexed to it. *The Eppos*, 49 L. T. 604; 32 W. R. 154.

Citation.]—In a cause between co-owners, under 24 & 25 Vict. c. 10, s. 8, the court granted a citation in personam on the defendant, and a monition on the London Dock Company to bring in freight detained by them under a stop-order from the defendant. *The Meggie*, 1 L. R., Adm. 77.

c. Bail, Arrest, Sale, and Possession.

Bail—Suits for Possession.]—In suits for possession the Court of Admiralty can take bail. *The Ecangelistria*, 46 L. J., Adm. 1; 25 W. R. 255.

—Conditional—Offer by Mortgagee refused.]

—A mortgagee, although entitled to intervene in a cause in rem for equipment and repair, is not entitled to claim a release of the vessel upon giving bail conditioned to pay the claim of the material men, in the event of its being held to have priority over the mortgage. *The Acacia*, 41 L. T. 564.

Discharge of.]—Bail given to answer judgment in a cause where the appearance is under protest will not be discharged on account of a change in the indorsement on the writ of summons, which renders the protest of no avail. *The City of Mecca*, 44 L. T. 750.

By whom given.]—A ship's husband and managing owner caused a bail bond to be given in the Admiralty Court, in the names of his co-owner and himself, in a suit for a collision, and the suit terminated in favour of the plaintiffs, and the bail were called upon to pay damages, interest and costs:—Held, that the co-owner was responsible to the bail for the money so paid. *Barker v. Highley*, 15 C. B., N. S. 27; 32 L. J., C. P. 270; 10 Jur., N. S. 391; 9 L. T. 228; 11 W. R. 968.

Where the interests are distinct, separate bails should be given. *The Royal Arch*, Swabey, 269. Sureties to a bail bond must not be partners. *The Corner*, B. & L. 161; 35 L. J., Adm. 16; 12 L. T. 62.

Amount.]—The bail is only liable to the extent of the value of the ship and freight, and not for the full amount of the damage done, even though bail may have been given for a sum beyond the value of the ship and freight. *The Duchesse de Brabant*, Swabey, 264.

Reducing.]—Where, in an action against the ship, bail was given for the amount claimed, and a great proportion of this claim was not recoverable, the court ordered the bail to be reduced to an amount sufficient to cover the rest of the claim and costs. *The Chieftain*, 32 L. J., Adm. 106; 9 Jur., N. S. 388; 8 L. T. 120; 11 W. R. 537.

Enlarging.]—An appellant will not be required to enlarge any security which he gave as defendant in the Court of Admiralty to answer judgment and costs in that court notwithstanding such security has proved insufficient for that purpose. *The Helene*, *infra*.

Objection to Sufficiency.]—A vessel released from arrest upon a bail bond taken before a commissioner in the country, and signed by two persons in partnership, ordered to be re-arrested, notwithstanding the twenty-four hours' notice of the bail tendered had been given to the plaintiff's agent in London, the plaintiff's solicitor in the country having within that time given to the defendant's solicitors formal notice of objection to the bail. *The Corner*, B. & L. 161; 33 L. J., Adm. 16; 12 L. T. 62.

The objection to the bail having proved to be unfounded, the plaintiff was condemned in costs and damages. *Id.*

Caveat Release.]—Where a caveat release is entered and groundless objections are taken to the sufficiency of bail, the party entering the caveat will be condemned in damages and costs.

The Don Ricardo, 5 Adm. D. 121; 49 L. J., Adm. 28; 42 L. T. 32; 28 W. R. 431.

The omission of the plaintiff's country solicitor to order by electric telegraph a caveat release to be entered, does not mount to negligence. *The Corner*, *supra*.

— **Cross Actions.**—By 24 & 25 Vict. c. 10, s. 34, when bail to answer judgment has been given by the defendant in the principal cause, the same party, when plaintiff in a cross-action, may obtain a similar security, notwithstanding that he may be resident within the jurisdiction of the court. *The Cameo*, Lush. 408; 5 L. T. 773.

— **To answer Counter-claim.**—Where, in a damage action, the ship proceeded against is not arrested, and the plaintiffs do not require bail to be given, the defendants cannot compel the plaintiffs to give security to answer a counter-claim in the action under the provisions in the Admiralty Court Act, 1861 (24 & 25 Vict. c. 10), s. 34, although they voluntarily give bail. *The Aine Holme* (No. 1), 4 Asp. M. C. 591; 47 L. T. 307.

The power of the Admiralty Division under s. 34 of the Admiralty Court Act, 1861, to order an action to be stayed until bail has been given to answer a cross-action or counter-claim, does not extend to making an absolute order to give bail; and in a damage action in which the plaintiffs had discontinued after the defendants had counter-claimed, the court refused to enforce an order, made by the registrar, to give bail to answer such counter-claim. *The Alexander*, 48 L. T. 797.

Form of Bond.—A bail bond to lead the supersedeas of an arrest, signed before a commissioner by the sureties simply, without the addition of their descriptions and addresses, is good. *The Tamarac*, Lush. 28.

The form of a bail bond appointed to be given in the Admiralty Court by the Rules of 1859, to answer judgment with costs, does not receive a new interpretation from 24 & 25 Vict. c. 10, s. 33, and does not extend to cover the costs of an appeal. *The Helene*, B. & L. 425; 13 W. R. 931; 3 Moore, P. C. C., N. S. 240; 35 L. J., Adm. 1.

Arrest of Ship and Freight.—When a suit has been instituted against a vessel, and bail has been given for an estimated amount to cover damages and costs, and the damages recovered and the costs taxed are a larger sum than the bail given, and there has been no carelessness on the part of the plaintiffs, the court will issue a writ for the re-arrest of the ship to satisfy the costs and will direct the writ to the marshal for execution. *The Freedom*, 3 L. R., Adm. 495; 41 L. J., Adm. 1; 25 L. T. 392.

A vessel under charterparty as to both her outward and homeward cargo, whilst on the outward voyage came into collision with another vessel:—Held, that the freight for the homeward voyage was liable to arrest for the damage. *The Orpheus*, 3 L. R., Adm. 308; 40 L. J., Adm. 24; 23 L. T. 855.

If a ship is arrested for ship and freight, a party shewing a *prima facie* right to freight is entitled to a release of the ship on giving bail. *The Ringdove*, Swabey, 310.

When an admiralty cause, instituted in rem

against a ship, has been transferred from a county court to the Court of Admiralty, and no bail has been given in either court, and the ship is already under the arrest of the High Court in other suits, the High Court will order the issue of a caveat to prevent her release, in case the other causes should be withdrawn. *The Rio Lima*, 28 L. T. 775.

When a ship, already under the arrest of the court, is arrested in an admiralty cause instituted in a county court, the plaintiff knowing of the previous arrest, and that cause is afterwards transferred to the High Court, the possession fees charged by the high bailiff in respect of the county court arrest will not be allowed by the High Court upon taxation of the plaintiff's costs. *The Rio Lima*, 4 L. R., Adm. 157; 43 L. J., Adm. 4; 29 L. T. 157; 22 W. R. 303.

Where a vessel is arrested in an out port, and not by the marshal of the court, the detention fees are to be paid by the arresting party, though successful in the cause. *The North American*, Swabey, 466.

In an appeal by a plaintiff from a county court in a cause in rem, in which there was a decree for the defendant, and the ship had in consequence been released, the Court of Admiralty, on an ex parte application of the plaintiff, ordered a warrant to issue for the detention of the ship, and, as the ship proceeded against was a foreign one, did not require notice of the intention to arrest to be given to the defendant. *The Freir*, *The Albert*, 44 L. J., Adm. 49; 32 L. T. 572; *S. P.*, *The Miriam*, 43 L. J., Adm. 35; 30 L. T. 537.

The arrest of a vessel by the Admiralty Court is a sequestration within the meaning of the Companies Act, 1862, s. 163. *Australian Direct Steam Navigation Company, In re*, 20 L. R., Eq. 325; 44 L. J., Ch. 676.

When causes of necessaries and wages had been instituted against a ship in the Court of Admiralty, and other causes of necessaries in a county court against the same ship, and the latter had been transferred after decree made to the Court of Admiralty for the purpose of enforcing the decrees, the ship being under the arrest of that court, the latter court ordered all the causes to be referred to the registrar and merchants to report the amount due thereon. *The Turliani*, 32 L. T. 841.

Seemingly, that where a ship is under the arrest of the Court of Admiralty, and causes are also instituted in the county court against the ship, she should not be arrested by the county court, as it is not probable that the ship will be removed out of the jurisdiction of the county court without satisfaction of the several claims, within the meaning of the County Courts Admiralty Jurisdiction Act, 1868, s. 22. *Ib.*

Where a ship is arrested for a specific demand, the amount cannot be referred to the registrar, unless it appears that something in any event is due. *The West Friesland*, Swabey, 456—P. C.

— **Motion of Charterer.**—A registered part owner of a vessel who, from other circumstances, appears to be only a mortgagee, is not entitled to arrest the vessel for bail for safe return. *The Innisfallen*, 1 L. R., Adm. 72; 35 L. J., Adm. 110.

— **Lien for Damages—Laches.**—In March, 1866, a French vessel having come into collision

with an English vessel, the master of the French vessel gave in satisfaction of the damage a bill of exchange for 82l. 5s., payable on her arrival at her destined port of Scotland. The French vessel, instead of proceeding there, went to France, where she was sold by the syndics of her owner's estate. In December, 1867, the vessel again came to England, and was arrested for the damage:—Held, that the lien for damage was not lost by laches or the subsequent sale of the vessel. *The Charles Amelia*, 2 L. R., Adm. 330; 38 L. J., Adm. 17; 19 L. T. 429; 17 W. R. 624.

Where a ship is arrested on a specific demand before a reference of accounts to the registrar and merchants can be made, it must be shewn to the court that something is due, although the actual amount may be the proper subject of inquiry. The practice differs from a reference by a court of equity on an unsettled account, where the court directs an account to be taken, leaving it to be shewn by the result on which side the balance lies. *Van Hasselt v. Sack*, 13 Moore, P. C. C. 185.

Malicious Arrest.—A collision took place at sea. The vessel causing the damage got away. From the appearance of a vessel in port, the owners of the damaged vessel caused her to be arrested to answer an action for damages. The vessel seized was a foreign vessel, and in consequence of the owner having no funds in this country, she was detained for some months before she was released on bail. The plaintiffs failed in identifying the vessel seized as being the one causing the damage, and the Admiralty Court dismissed the action with costs, refusing to award damages. Such decree affirmed on appeal, there being no evidence of mala fides or crassa negligentia which might imply malice on the part of the plaintiffs in arresting the ship, such arrestment being necessary, and the foundation of the action in the Admiralty Court, the proceedings being in rem. *The Exangelismor*, Swabey, 378; 12 Moore, P. C. C. 352.

Where in a cause of collision between two vessels, foreign owned, the value of the vessel that was found solely to blame, and of her freight, was not sufficient to satisfy the damages, the court discharged the cargo from an arrest which had been made on the ground of the deficiency (even though the owner of the ship was also the owner of the cargo), with satisfaction for all loss caused by the detention. *The Victor*, 29 L. J., Adm. 110.

Damages.—Where an arrest was made without notice of claim, and for a sum disproportionate to the value of the vessel and the services rendered, the court awarded damages. *The Eleonore*, 33 L. J., Adm. 19; 9 L. T. 397; 12 W. R. 218.

Where it appeared upon affidavits that the plaintiffs were mistaken as to the identity of the vessel proceeded against, and the defendants offered to disclose the real wrongdoer, the court refused to accede to an application to extend the security to be given by the plaintiffs to meet the costs, if unsuccessful, so as to cover the damages caused by the wrongful arrest. *The Peri*, 32 L. J., Adm. 46.

A vessel having been arrested in a cause of damage, and the suit having been dismissed with costs, the plaintiff obtained leave to detain her

for twelve days, that he might have time to consider whether he would appeal. On the thirteenth day the vessel was released:—Held, that the defendant was entitled to damages for the twelve days' detention. *The Cheshire Witch*, B. & L. 362; 11 L. T. 350.

No claim for demurrage or detention of a ship under warrant of arrest issued by the unsuccessful promoters of a salvage suit can be allowed in the absence of mala fides or malicious negligence. *The Strathnaver*, 1 App. Cas. 58; 34 L. T. 148—P. C.

Appraisements.—A vessel which had been saved was valued by a receiver of wreck at less than 1,000l. The salvors obtained an order for a commission of appraisement, but did not execute it, and after three weeks gave notice that they proceeded no further in the suit:—Held, that they might, within four days of obtaining the order, have ascertained the value, and that therefore they must be condemned in damages for detention of the vessel during the rest of the three weeks. *The Margaret and Jane*, 2 L. R., Adm. 345; 38 L. J., Adm. 38; 20 L. T. 1017; 17 W. R. 1064. See also cases ante, col. 1667.

The owner of a ship arrested in a damaged suit alleged the value of the ship to be one-fifteenth less than it was afterwards shewn to be upon a commission of appraisement obtained by the plaintiffs: the amount claimed by the plaintiffs was less than the sum for which the owners were willing to give security; but, assuming the claim to be sustained, the costs would extend the claim greatly beyond that sum:—Held, on a motion by the plaintiffs to condemn the defendants in the costs of the appraisement, that the proper order was that the costs should be costs in the cause. *The Rapid*, 18 W. R. 150.

An appraisement by order of the court is binding on both parties. Appeal by an owner to have the property sold, and the value so determined, rejected. *The R. M. Mills*, 3 L. T. 513; *S. P.*, *Cargo ex Venus*, 1 L. R., Adm. 50; 12 Jur., N. S. 379; 14 W. R. 460.

Effect on Priorities of Material Men.—The possessory lien of material men is not determined by the arrest of the vessel by warrant of the High Court of Admiralty in a suit for equipment and repair. *The Acacia*, 42 L. T. 264.

Release.—When a part owner of a ship institutes a suit against the ship claiming as against his co-owner an account and a sale of the ship, a mortgagee holding a mortgage, which would not be satisfied by a sale of the ship, is entitled, on intervening in the suit, to a release of the ship and to his costs from the time of his claiming the release. *The Eastern Belle*, 33 L. T. 214.

The Court of Chancery appointed certain persons receivers of a freight, which, before they had obtained possession, was arrested in a suit in the Court of Admiralty. Upon motion, in the latter court, on behalf of the receivers, release decreed, but without costs. *The Bloomer*, 11 L. T. 46.

In a cause of restraint the charterer of the vessel, if he has a substantial interest in the question before the court, is entitled to intervene in the suit. *The Innisfallen*, 1 L. R., Adm. 72; 35 L. J., Adm. 110.

A vessel having been arrested in a cause of restraint between co-owners, the court, on a motion by the charterer, to whom the vessel had been let for a voyage, ordered her release, it appearing that the alleged co-owner was only a mortgagee. *Ib.*

— **What Bail—Value.**—A wrong-doing vessel was arrested in a cause of collision, having been herself injured in the collision. She was then repaired, and her value was materially increased by the repairs:—Held, that she was only liable to the extent of her value at the time when she was arrested, and that she ought to be released on bail to that amount being given. *The St. Olaf*, 2 L. R., Adm. 360; 38 L. J., Adm. 41; 20 L. T. 758; 17 W. R. 748.

— **Cargo.**—Cargo consigned to Hamburg was shipped on board a barque which came into collision with a ship off Cornwall. The barque put into Plymouth, and was with her cargo arrested there, and remained under arrest. The consignees of the cargo declined to accept it at Plymouth, and the barque was subsequently held to blame for the collision. The court decreed a release of the cargo, without costs. *The Flora*, 35 L. J., Adm. 15; 14 L. T. 192.

Cargo on board a ship to blame for a collision can only be arrested to obtain payment of the freight due to the shipowner; and therefore, if no freight has accrued, the court will decree a release of the cargo. *Ib.*

A vessel was arrested in a cause of collision. At the time of the collision she had a cargo on board; at the time of the arrest a portion only of such cargo remained on board. The vessel and cargo belonged to the same owner:—Held, that the freight due upon the whole cargo must be paid into court, before the portion on board at the time of the arrest could be released. *The Hecoliff*, 2 L. R., Adm. 363; 38 L. J., Adm. 56; 20 L. T. 886; 17 W. R. 745.

— **Delay.**—The defendants having occasioned great delay and extra expense, so that the amount in which the action had been entered proved insufficient to cover the amount pronounced to be due to the plaintiff, with his costs of suit, the court ordered that the ship should not be released from arrest until payment of the plaintiff's claim and costs should have been made. *The Helen*, 14 W. R. 502.

— **Re-Arrest of Ship.**—A cause of damage to cargo was instituted against a foreign ship in 500*l.* The owners of the ship appeared in the cause, bail was given in 500*l.*, and the ship was released. The cause proceeded to hearing, and the court condemned the defendants in damages and costs. The damages were assessed at 452*l.* 2*s.* 8*d.*, and the costs of the plaintiffs in the suit were taxed at 432*l.* 10*s.* 3*d.* The defendants paid to the plaintiffs 500*l.* and denied their liability to pay any further sum. Afterwards the ship being within the jurisdiction, the court, upon the application of the plaintiffs, ordered a writ to issue directing the marshal to arrest the ship for the payment of the balance of costs due to the plaintiffs. *The Freedom*, 3 L. R., Adm. 495; 41 L. J. Adm. 1; 25 L. T. 392.

In a suit in rem in a county court, the ship having remained under arrest during the suit,

the judge dismissed the suit and the plaintiff appealed. Held, that he was entitled to a warrant from the Court of Admiralty to re-arrest the ship. *The Miriam*, 43 L. J., Adm. 35; 30 L. T. 537; *S. P., The Frvir, The Albert*, 44 L. J., Adm. 49; 32 L. T. 572.

— **Discretion.**—The jurisdiction, which the court undoubtedly possesses, to order a second arrest in respect of the same cause of action, should be cautiously exercised. *The Flora*, 35 L. J. Adm. 14; 14 L. T. 191.

An application for such arrest should generally be made to the court itself. *Ib.*

— **Sale—Practice to ascertain Priorities.**—Sale of vessel by decree of the High Court of Admiralty restrained in order to ascertain the respective priorities of material men and mortgagees before appraisement and sale, such priorities to be ascertained by petition and answer in the High Court of Admiralty. *Hamilton v. Harland, The Acacia*, 41 L. T. 741—C. A.

— **Sale of Ship—Proceeds of.**—When there are several claimants against the proceeds of a vessel in the registry, and she has been sold at the suit of one, the costs of such sale will be paid before all claims, as such sale was for the benefit of all. *The Panthea*, 25 L. T. 389.

In a cause of collision, the ship having been released from arrest upon bail given in the full sum in which the cause was instituted, cannot be re-arrested by the plaintiff to answer his damages, if, after the ordinary decree and reference, they prove to exceed that sum, and if the ship has been sold by the court in another action, brought by other parties, the court cannot order the proceeds of the ship to be applied to satisfy such damages, or interest, or costs of the first action. *The Wild Ranger*, B. & L. 84.

Where a ship has been sold by order of the court, and the proceeds are in the registry, such proceeds are not money belonging to the owners of the ship under 1 & 2 Vict. c. 110, s. 12, nor a debt owing to them under 17 & 18 Vict. c. 125, s. 61. *Ib.*

Where, after judgment against a ship in a damage action where bail has been given and the ship released, judgment is given against the same ship in a necessities action, in which the ship is sold and the proceeds of the sale of the ship paid into court, the plaintiffs in the damage action cannot be paid out of the proceeds, to the prejudice of other claimants still having maritime liens upon the proceeds. *The Falk*, 4 Asp. M. C. 592; 47 L. T. 308.

— **Default Action—Sale before Judgment.**

—Where in a salvage action, in which no appearance had been entered, it was alleged upon affidavit that the ship and cargo were daily deteriorating in value, and that large expenses were being incurred in respect of the charge of the property, and that the plaintiffs had been in communication with the owners as to a sale, the court, on motion by the plaintiffs prior to decree, ordered an appraisement and sale of the property. *The Anna Helena* (No. 1), 5 Asp. M. C. 61; 48 L. T. 681.

— **Appraisement—Private Contract.**—In an action for master's wages and disbursements, where the ship proceeded against was subject to

other claims by mortgagees and material men, the court upon motion, no opposition being offered, ordered an official appraisal of the ship to be made, and the ship to be sold by the marshal by private contract for a sum of money not less than the appraisal, upon proof that the mortgagees assented to such sale, and that notice of the motion had been served upon all the claimants. *The Planet*, 49 L. T. 204.

Sale and Unlivery of Cargo.—Order made, on application of the respondents in a pending appeal, for unlivery of the cargo and sale of a mortgaged ship, the unlivery and sale of which had been decreed by the Court of Admiralty. *The Jeff Davis*, 5 Moore, P. C. C., N. S. 25; 2 L. R., P. C. 19.

Attachment of Funds in Registry.—A fund lying in the registry of the court cannot be attached by process of foreign attachment out of the Mayor's court of London. *The Albert Crosby*, Lush. 101.

Injunction to restrain Removal of Ship sold Abroad.—An Englishman entered into a contract abroad with a foreigner for the purchase of a ship, then on her homeward voyage to Cork, the purchaser to take possession of the ship immediately after the delivery of the homeward cargo at any place whither she might be ordered. The ship was ordered to Sunderland, where she discharged her cargo. On a motion by the purchaser for an injunction to restrain the removal of the ship from Sunderland:—Held, that substituted service on the captain in charge of the vessel was sufficient, and that the court had jurisdiction to restrain the removal of the ship pending the suit. *Hart v. Herwig*, 8 L. R., Ch. 860; 29 L. T. 47; 21 W. R. 663.

Prohibition from dealing in Shares.—The Court of Probate, as a division of the High Court of Justice, to which the jurisdiction formerly exercised by the Court of Chancery has been transferred by the Judicature Act, s. 16, has power to issue an order prohibiting the dealing in any share of a ship for a time and on conditions to be named therein, and the registrar of shipping, on being served with such order, or an official copy thereof, must obey the same. *Nicholas v. Dracachis*, 1 Adm. D. 72; 45 L. J., Adm. 45; 24 W. R. 461.

Possession.—The Court of Admiralty will not dispossess the equitable owner of the moiety of a ship at the instance of the legal owner of more than a moiety. *The Victoria*, Swabey, 408; 5 Jur., N. S. 204.

The court inclines against dispossession, and requires the plaintiff's claim to be clearly proved. *Id.*

The court had, even when its jurisdiction was more restricted, authority to decree possession of a vessel to the owner, who had been deprived of it by force, violence or fraud. *The Beatrice*, otherwise *The Rappahannock*, 36 L. J., Adm. 9.

In a cause of possession by an owner of the greater part of a vessel, the master, owning the remaining part, is not entitled to retain possession of the vessel upon an offer of security to the amount of his co-owner's interest. *The Kent*, Lush. 495.

Possession Fees.—When an admiralty suit is instituted in a county court against a vessel which is under the arrest of the Court of Admiralty, it is unnecessary, so long as the vessel remains under such arrest, for the officer of the county court to incur expense in placing a person in possession, and a double set of possession fees will not be allowed. *The Rio Lima*, 4 L. R., Adm. 157; 43 L. J., Adm. 4; 29 L. T. 517; 22 W. R. 303.

— **Bail.**—In suits for possession the Court of Admiralty can take bail. *The Ecangelistria*, 46 L. J., Adm. 1; 25 W. R. 255.

d. Proceedings in Actions.

Parties.—A minor sues by proxy. *The Albert Crosby*, Lush. 44.

— **Assignment of Cause of Action.**—In a suit for building and equipping a vessel, the defendant pleaded that the plaintiffs' claim vested in their trustee under a composition deed; and the plaintiffs in their reply alleged that they assigned the causes of action before the execution of the deed, and that the suit was brought in their names as trustees for the assignee:—Held, that the assignment of the causes of action carried with it all rights of action, which though inchoate at the time might subsequently become complete. *The Wasp*, 1 L. R., Adm. 367; 16 L. T. 854.

Lien—Enforcing, &c.—The proper mode of enforcing a maritime lien on a vessel belonging to a company which has been ordered to be wound up, is by a proceeding in the winding-up, and not by a proceeding in rem in the Admiralty Court. *Australia Direct Steam Navigation Company, In re*, 20 L. R., Eq. 25; 44 L. J., Ch. 676. See also cases under previous heads in this Title.

Right of Beginning.—Where it appeared on the pleadings in a cause of damage by collision that at the time of the collision the plaintiff's vessel, a fishing smack, was riding attached to her nets, and stationary with a single white light exhibited, but one of the charges made against her by the defendants in their answer was that she improperly neglected to exhibit the lights required by the Sea Fisheries Act, 1868, two lights—one over the other:—Held, that as it must be implied that the neglect to exhibit such lights contributed to the collision, the plaintiff ought to begin. *The Bottle Imp*, 42 L. J., Adm. 48; 28 L. T. 286; 21 W. R. 600.

In a cause of collision, where the defendants plead inevitable accident alone, it lies upon the plaintiff to shew a *prima facie* case of negligence against the defendants, and the plaintiffs must therefore begin. *The Abraham*, 28 L. T. 775.

In a cause of damage the defendant, by his pleading, made no charge of negligence against the plaintiff, but denied generally the averments in the petition, and pleaded inevitable accident:—Held, that the plaintiff ought to begin. *The Benmore*, 4 L. R., Adm. 132; 43 L. J., Adm. 5; 22 W. R. 190.

In a damage suit the practice of the court requires the plaintiff to begin, notwithstanding that the defendant raises no other defence than

that of inevitable accident. *The Otter*, 4 L. R., Adm. 203; 30 L. T. 43; 22 W. R. 557.

Where there are rival salvors the salvor who first enters his suit has the right to begin, unless special circumstances are shown. *The Morocco*, 24 L. T. 598.

Discontinuance.—The plaintiffs in an action of co-ownership having obtained an order requiring the defendant to deliver up the certificate of registry of the ship to them, before delivering a statement of claim wholly discontinued the action without leave of the court. The defendant thereupon applied to have the action dismissed with costs:—Held, that the action must be dismissed, and that, under Ord. XXIII. r. 1, he was entitled as of right to all the costs of the action. *The St. Olaf*, 2 Adm. D. 113; 46 L. J., Adm. 74; 36 L. T. 30—C. A.

Staying Proceedings during Pendency of Two Suits.—When a plaintiff in a cause of damage has commenced two actions; one, first in order of date, in the Court of Admiralty of Ireland, and a second in the High Court of Justice in England, he will not be allowed to proceed with the latter until he has abandoned proceedings in the former. It is not sufficient that he is desirous of abandoning proceedings in the former, and that he is not allowed to do so by the Irish Court; such refusal should be corrected by appeal. *The Cattarina Chiazzaro*, 1 Adm. D. 268; 45 L. J., Adm. 105; 34 L. T. 588.

When a collision has occurred between two vessels, each belonging to foreign owners not resident within the jurisdiction of the court, and one of the vessels has been arrested in a cause of damage in rem, but the other has, in consequence of the collision, become a total wreck and cannot be arrested, the court may, on a cause in personam being properly instituted on behalf of the owners of the vessel arrested against the owners of the vessel which cannot be arrested, stay the proceedings in the principal cause in rem until security is given to answer judgment in the cross cause in personam. *The Charkieh*, 4 L. R., Adm. 120; 42 L. J., Adm. 70; 29 L. T. 404; 22 W. R. 63.

Damage to Cargo—Limitation of Liability.—Where owners of cargo have recovered judgment in a collision action brought by them, and the owners of the ship carrying the cargo subsequently bring an action against the same ship to recover damages in respect of the same collision, and the damages in both actions would exceed the value of the defendant's ship at 8l. per ton, and the damage in the cargo action alone would not exceed that amount, the court will not stay proceedings in the cargo's action until after judgment in the ship's action, on the ground that without such stay the defendants have to institute a limitation of liability action, which would be unnecessary if the defendants obtained judgment in the ship's action. *The Alne Holme* (No. 2), 4 Asp. M. C. 593; 47 L. T. 309.

Lis Alibi Pendens.—In an action of damage in personam by the owners of the ship G., against the owners of the ship P., it appeared that a cause of damage in rem relating to the same collision had, prior to the proceedings in this court, been instituted by the owners of the P. against the G. in a vice-admiralty court

abroad, and was then pending. The court, on the application of the owners of the ship P., stayed the proceedings in this court until after the hearing of the cause in the vice-admiralty court abroad. *The Peshawur*, 8 Adm. D. 32; 52 L. J., Adm. 30; 48 L. T. 796; 31 W. R. 660.

Consolidation of Causes.—The court will, where it is convenient to do so, order one of several consolidated causes to be referred to the registrar separately. *The Helen R. Cooper*, 3 L. R., Adm. 339; 40 L. J., Adm. 46.

When judgment has been given in one of two suits, the court cannot order the two suits to be consolidated. *The Demetrius*, 3 L. R., Adm. 523; 41 L. J., Adm. 69; 26 L. T. 324; 20 W. R. 761.

The court will, in the exercise of its discretion, make such order for consolidation as it considers will meet the justice of the case, and protect the interest of the suitors. *The Vildosala*, *The Emerald*, *The Satellite*, *The Toiler*, 42 L. T. 95.

Evidence in prior Suit when admitted.—The court cannot, except by consent, order that evidence in one suit that has been heard, shall be admitted as evidence in a subsequent suit. Two suits in rem by the owners of two ships which came into collision were instituted, and judgment had been given. An application that the evidence in those suits be admitted in a suit in personam by the owners of cargo on board of one of the ships was refused. *The Demetrius*, *supra*.

Amendment of Proceedings.—To entitle a party to amend an error in a decree, the mistake should be brought to the notice of the court with the utmost possible diligence. An application to alter a decree five months after the decree was made was rejected. *The Orient*, 39 L. J., Adm. 10; 21 L. T. 762.

The court will, before the hearing, allow the amount in which the cause was instituted to be increased. *The Maander*, B. & L. 29; 6 L. T. 400.

Præcipe.—In a cause of collision after their vessel had been arrested and released on bail, the defendants admitted their liability and consented to a reference. The court afterwards, under special circumstances, granted leave to the plaintiff to amend the præcipe to institute, by increasing the amount in which the suit was instituted. *The Johannes*, 3 L. R., Adm. 127; 39 L. J., Adm. 41; 23 L. T. 26.

In a præcipe to institute the cause the plaintiffs stated the suit as one of damage to cargo, and the affidavit to lead warrant alleged that they had sustained damage by breach of duty and breach of contract. After the arrest of the ship, and appearance entered on behalf of her owners, leave to amend by striking out of the præcipe to institute the words "damage to cargo," and substituting the words "breach of duty and breach of contract on the part of the master and crew," granted on payment of the costs occasioned by the misstatement in the præcipe. *The Princess Royal*, 3 L. R., Adm. 27; 39 L. J., Adm. 29.

The præcipe to institute an action having been by mistake entered in a smaller sum than that intended, the defendant's ship was arrested and bailed in that sum. On the mistake being discovered before the hearing of the cause, the court

gave permission (on payment of costs occasioned by the mistake) for the precept to be amended, and the ship to be re-arrested. *The Hero*, B. & L. 447; 13 W. R. 927.

— **Preliminary Act.**—The defendants in a cause of damage applied to the court when the cause was called on for hearing, and before any evidence had been taken, for leave to amend a statement in their preliminary act, and to make a similar amendment in the answer. The court allowed the amendment to be made in the answer, but refused to allow any amendment to be made in the preliminary act. *The Frankland*, 3 L. R., Adm. 511; 41 L. J., Adm. 3; 25 L. T. 889; 20 W. R. 592.

The court will refuse to allow a mistake in a preliminary act to be amended, even though the application for an amendment be made before the hearing of the suit and be supported by affidavit. *The Miranda*, 7 Adm. D. 185; 51 L. J., Adm. 56; 47 L. T. 447; 30 W. R. 615; 4 Asp. M. C. 595.

An application to amend a mistake in a preliminary act must be made immediately upon discovery, and must be supported by affidavit. *The Vortigern*, Swabey, 518.

— **Pleadings.**—When the court orders a pleading to be amended without naming a time within which the amendment is to be made, and there is unnecessary delay in making the amendment, the proper course is for the other party to apply to the court for a peremptory order. *The Justyn*, 11 W. R. 44.

Where a long delay had taken place through misapprehension or neglect in amending a replication, in accordance with the direction of the court, but no application had been made for a peremptory order specifying a time within which the amendment was to be made, the court refused to strike out the amended replication. *Ib.*

Form of Pleadings.—Pleadings should be so framed as to assist not only the party in his statement of the case, but also the court in investigating the truth between the litigants; the defendant in a collision cause cannot rely on a simple negative, but must state the circumstances relating to the collision. *The Why Not*, 2 L. R., Adm. 265; 38 L. J., Adm. 26.

To a petition alleging that the Margaret had been for some time close-hauled on the starboard tack, and that the Why Not on the port tack came into collision with her, the answer admitted that the latter was close-hauled on the port tack, and alleged that the Margaret was seen on the port tack, distant about a mile:—Held, that the defendants were bound also to allege what was subsequently done on board the Why Not, and before the collision, and the mode of the collision. *Ib.*

In a suit for damage to cargo, the petition ought in general to state, so far as is practicable, the cause to which the plaintiff attributes the loss or damage. *The Helene*, B. & L. 415.

The rule, that a party seeking redress for an injury can only recover secundum allegata et probata, applies only to cases where the averments alleged in the pleadings are material to the issue raised. *The Alice and Rosita*, 2 L. R., P. C. 214; 38 L. J., Adm. 20; 19 L. T. 753; 17 W. R. 209; 5 Moore, P. C. C., N. S. 300.

Where, therefore, in a case of collision caused by a vessel drifting and driving down upon another at anchor in the same anchorage, though the relative bearing of the two vessels previously to the collision was incorrectly pleaded and alleged by the vessel proved to be entitled to redress:—Held, that the vessels not being in motion, their previous relative bearing when at anchor was not a material fact to the issue, namely, which vessel caused the collision, as to render the actual proof of the damage of no avail, and so entitle the offending party to the benefit of the rule. *Ib.*

The pleadings should be so framed as, if necessary, to enable an examiner to elicit in evidence all the facts of the case. *The Claus Thomassen*, 32 L. J., Adm. 106; 9 Jur., N. S. 388; 8 L. T. 121; 11 W. R. 538.

In answer to a suit for damage to cargo, it is not sufficient to allege that the damage was caused by accidents and perils by the bill of lading excepted. The defendant must specify the particular accidents or perils. *The Hakon Adelsteen*, 43 L. J., Adm. 9.

In a cause of damage to cargo, the plaintiffs alleged that the oil-cake was not delivered in good order according to the terms of the bill of lading, and also that there was a breach of the contract in the bill of lading, or that the damage was caused by the negligence or breach of duty of the master or crew:—Held, that they were not bound to set forth the particular acts or the character of the negligence which caused the damage. *The Freedom*, 2 L. R., Adm. 346; 38 L. J., Adm. 25; 20 L. T. 229, 1018; 18 W. R. 48.

In a cause of damage, where the evidence is taken before an examiner, the rule applies, that if it is intended to rely upon a defence of inevitable accident, such defence must be in terms distinctly raised on the pleading. *The E. Z.*, 33 L. J., Adm. 200; 10 L. T. 790.

— **Since Rules of Supreme Court, 1883.**—A statement of claim in a salvage action was drawn in the Form No. 6 of Appendix C. to the Rules of the Supreme Court, 1883; on motion by the defendants under Ord. XIX. r. 7, for a further and better statement of claim or particulars:—Held, that the plaintiffs must deliver a fuller statement of claim, and that in salvage actions a fuller form than that given in Appendix C, No. 6, should generally be followed. *The Isis*, 8 Adm. D. 227; 53 L. J., Adm. 14; 49 L. T. 444; 32 W. R. 171.

— **Admissions in.**—Where the answer does not deny the truth of the preceding allegation, but draws a conclusion from it, it must be taken to admit the truth of the allegation. *The Peerless*, 30 L. J., Adm. 89; Lush. 103—P. C.

Admission by pleading extends to matters of fact, but not of law. *Ib.*

Counter-claim.—Under the Judicature Act and rules, the defendant, where he admits his liability for the damage done by a collision, but claims to have his liability limited to 8l. or 15l. per ton of his vessel under the Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), s. 54, can so claim by counter-claim instead of by instituting a separate suit for limitation of liability. *The Clutha*, 45 L. J., Adm. 108; 35 L. T. 36.

Application to amend statement of defence

by adding counter-claim at trial, refused. *The Leon*, 6 Adm. D. 151.

Default of Pleading.—Ord. XXIX. r. 2, does not apply to proceedings in an admiralty action in rem where no statement of defence has been delivered. In such a case the practice prevailing in the High Court of Admiralty immediately before the coming into operation of the Judicature Acts, must be followed. *The Sfactoria*, 2 Adm. D. 3; 35 L. T. 431; 25 W. R. 62; *S. P., The Polymede*, 1 Adm. D. 121; 34 L. T. 367; 24 W. R. 256.

Third Party—Tow and Tug.—In an action for damage by collision brought by a vessel at anchor against a vessel in tow of a tug, the owners of the tug were made third parties under Ord. XVI. r. 18, as the defendants claimed to be indemnified by the owners of the tug against the plaintiffs' claim on the ground that the improper navigation, if any, was that of the tug. An application for directions under Ord. XVI. r. 21, was subsequently made, and the plaintiffs thereupon asked that the third parties should be dismissed from the action on the ground that the plaintiffs would be embarrassed by the proceedings between the defendants and the third parties:—Held, that the third parties must be dismissed, as under the circumstances questions would probably arise between them and the defendants by which the plaintiffs might be embarrassed, as they were different from those upon which the action between the plaintiffs and defendants would turn. *The Bianca*, 8 Adm. D. 91; 52 L. J., Adm. 56; 48 L. T. 440; 31 W. R. 954; 5 Asp. M. C. 60.

e. Particulars.

Rules same as in Queen's Bench Division—Damage to Cargo.—The rule as to giving the opposite party particulars of any general allegation in pleadings ought to be the same in the Admiralty as in the Queen's Bench Division. Where, therefore, in an action in the Admiralty Division by cargo owners against shipowners for delivery of cargo in a damaged condition, the statement of claim alleged that the damage was not occasioned by any of the excepted perils mentioned in the bill of lading under which the cargo had been shipped, but was occasioned by the defective condition of the vessel or by the negligence or breach of duty of the defendants or their servants, it was held that the defendants were entitled to particulars of the defects rendering the vessel not fit to carry the cargo. *The Rory*, 7 Adm. D. 117; 51 L. J., Adm. 73; 46 L. T. 757; 4 Asp. M. C. 537—C. A.

In a case instituted under the Admiralty Court Act, 1861, s. 6, to recover for damage caused to a cargo of wheat in sacks, the plaintiff in his statement of claim pleaded that the sacks had been delivered in a wetted, damaged, and deteriorated condition, and that many of them had been cut open and started, whereby further damage had been caused to the cargo. On an application on behalf of the defendants, who admitted their liability in respect of the damage caused by the sacks having been cut open, the court ordered the plaintiff to give particulars of the number of sacks cut open and the damage resulting therefrom. *The Wetterhorn*, 34 L. T. 587; 24 W. R. 323.

When a ship was totally lost in a collision, the court, contrary to the practice of the court, made an order, in an action by the shipowners against the vessel doing the damage, for particulars of the plaintiff's claim to be delivered to the defendants. *The N. P. Neilsen*, 34 L. T. 588; 24 W. R. 324.

f. Discovery.

(See also DISCOVERY.)

Documents—Before Judicature Acts.—In an action in rem against a foreign ship whose owners are resident abroad, the court will make an order for discovery of documents against such owners, but will always allow a reasonable time for making the affidavit of documents. *The Emma*, 34 L. T. 742.

To obtain discovery of documents, the affidavit in support of the application must allege some one particular document to be in the possession of the party from whom discovery is sought. *The Cordelia*, 23 L. T. 776.

Inspection.—The court, where a motion is made for leave to inspect documents without a previous application to the person in possession, will condemn the party moving in costs of the motion. *The Memphis*, 3 L. R., Adm. 3; 21 L. T. 727.

In an action by the owner of cargo against a shipowner, he alleged damage in consequence of a collision with another ship, caused by the defendant's negligent navigation. A compromise of cross-suits in the Admiralty Court in respect of the collision had been entered into by the respective owners of the two ships:—Held, that the plaintiff had a right to inspect the terms of this compromise. *Hutchinson v. Glover*, 1 Q. B. D. 138; 45 L. J., Q. B. 120; 33 L. T. 605; 24 W. R. 185. Affirmed, 33 L. T. 834—C. A.

Upon an application for inspection of documents, the court will order them to be brought into the registry, and after perusal of them decide whether or not the application should be granted. *The Macgregor Laird*, 1 L. R., Adm. 307; 36 L. J., Adm. 10; 15 W. R. 262.

In a suit for damage to cargo, it is no answer to a claim for production of letters with reference to the shipment of the cargo that those letters disclose the private secrets of their owners. *The Don Francisco*, Lush. 468; 31 L. J., Adm. 205; 6 L. T. 133. See also cases ante, col. 1605.

Of Vessel.—The court has power to order an inspection of a vessel by Trinity Masters, and will direct that they be attended by the proctors, and a viewer on behalf of each party. *The Germania*, 37 L. J., Adm. 59; 19 L. T. 20.

An inspection to ascertain whether the lights carried by a ship were such as the regulations require, ought to be made at night. *The Germania*, 21 L. T. 44—P. C.

Interrogatories—Striking out.—Interrogatories administered in a collision action, and relating to the circumstances of the collision, will not be struck out under r. 3 of the Rules of the Supreme Court of November, 1878, as scandalous or unreasonably or vexatiously exhibited, because the information sought to be obtained through them would for the most part be afforded by the preliminary acts. *The Radnorshire*, 5 Adm. D.

172; 49 L. J., Adm. 48; 43 L. T. 319; 29 W. R. 476.

In an action of damage by collision, interrogatories which seek to obtain information given in the preliminary act of the party interrogated are inadmissible, and will be struck out on the application of the party sought to be interrogated. *The Biola*, 34 L. T. 185; 24 W. R. 524.

— **Before Judicature Acts.**—The plaintiffs applied for leave to deliver interrogatories to the defendant. The application was founded upon an affidavit of the plaintiffs and their solicitor, stating that the deponents believed that they would derive material benefit in the cause from the discovery which they sought, and that there was a good cause of action upon the merits. The interrogatories asked, whether any and what documents relating to the cause were in possession of the defendant. The defendant opposed the application upon the ground that the court ought not to grant leave to deliver interrogatories for the discovery of documents without an affidavit by the plaintiffs of their belief that some document, to the production of which the plaintiffs were entitled, was in the possession or power of the defendant. The court overruled the objection, and granted the application. *The Minchaka*, 3 L. R., Adm. 148; 23 L. T. 747; 19 W. R. 304.

In answer to interrogatories the defendant stated upon affidavit, "I am personally wholly unacquainted with the facts . . . and am unable to answer any of them from my own knowledge, save as hereafter appears."—Held, that the affidavit was insufficient, and that she was bound to answer according to her information and belief. *Ib.*

On an application for leave to interrogate a party to a cause as to what documents relating to the cause were in his possession, such application not being supported by any affidavit that any such document was in his possession:—Held, that the application might nevertheless be granted. *Ib.*

The court has power to order interrogatories to be administered to a defendant before the plaintiff has filed his petition. *The Murillo*, 28 L. T. 374.

When a cause of collision was instituted in personam against an owner of a ship, and he entered an appearance, alleging himself to be "improperly sued as one of the owners" of the ship, the court allowed interrogatories to be administered by the plaintiff to him for the purpose of ascertaining the ownership before the petition was filed. *Ib.*

The court will allow interrogatories to be administered rather in accordance with the practice of the courts of equity than of common law; and the principle by which the court will be governed is, that the interrogatories should be such as tend bona fide to support the case of the party seeking to administer them, and to favour a complete inquiry into the truth of the issue which the court has to decide. *The Mary* or *Alexandra*, 2 L. R., Adm. 319; 38 L. J., Adm. 29; 18 L. T. 891.

On objection by a defendant to interrogatories tendered in a cause of possession, that his answers to them might subject him to penalties under the Foreign Enlistment Act:—Held, that the interrogatories should be administered, but that if the defendant stated upon his oath his belief

that an answer to any particular interrogatory would subject him to such penalties, he should not be compelled to answer it. *Ib.*

g. Assessors.

Duty of Judge.—The duty of Trinity Masters, sitting as assessors, is to assist the judge in questions of nautical skill. In case of a difference of opinion between the judge and the assessors, the judge is not at liberty to act upon any inferences which they may draw from the evidence, except they accord with his own. It is the duty of the judge to decide the case on his own responsibility. *The Magna Charta*, 25 L. T. 512.

The judgment is that of the judge, and he may decide in accordance with the advice of one or more of the assessors or not, as he thinks fit. *The Philotaxe*, 37 L. T. 540.

Nautical assessors summoned under the County Court Admiralty Jurisdiction Act, 1868, to attend at the hearing of an admiralty action tried by a county court judge, are present merely to advise the judge, and the judge ought to decide the case in accordance with his own opinion as to the law and merits of the case. *The Aid*, 6 Adm. D. 84; 50 L. J., Adm. 40; 44 L. T. 843; 29 W. R. 614.

Where the court is assisted by Trinity Masters, sitting as assessors, evidence of expert witnesses on questions of nautical skill and seamanship will not be allowed. *The Kirby Hall*, 8 Adm. D. 75; 48 L. T. 797; *S. P.*, *The Earl Spencer*, 32 L. J. 370; 23 W. R. 661.

What Evidence Admitted.—When the court is assisted by nautical assessors evidence of experts on questions of nautical science and skill may properly be rejected. *The Sir Robert Peel*, 43 L. T. 364—C. A.

Practice as to.—Semble, that where two assessors disagree, the court can call in a third, and, after submitting the evidence already given to him, have the case re-argued before the three assessors. *The Philotaxe*, *supra*.

In an action of wages which involved questions as to the state of machinery of a steamship, engineer assessors were summoned to assist the court. *The Marina*, 29 W. R. 580.

h. Reference to Registrar.

In what cases.—It is not an inflexible rule of practice that all questions of damage should be referred to the registrar and merchants. Therefore when the question of consequential damages was distinctly raised by the pleadings, and the court, assisted by Trinity Masters, was admittedly the best tribunal to determine the issues so raised, the court ruled that evidence with respect to such issues might be given at the hearing, and that it would itself decide them, and not refer them to the registrar and merchants. *The Maid of Kent*, 6 Adm. D. 178; 50 L. J., Adm. 71; 45 L. T. 718; 29 W. R. 897; 4 Asp. M. C. 476.

A reference will not be ordered when the court can itself satisfactorily dispose of the question. *The Eleonore*, 33 L. J., Adm. 19; 9 L. T. 397; 12 W. R. 218.

Objections to, and Appeals from, Report.—

A French fishing brig of 142 tons, employed in the cod fishery off the banks of Newfoundland, came into collision on the 6th of July, 1881, with an Italian barque, and in consequence of the collision was compelled to put into port for repairs, but, her repairs having been completed, returned to the fishing ground before the close of the fishing season. In an action of damage instituted on behalf of the owners of the brig against the barque, the court pronounced the barque solely to blame for the collision, and referred the question of damages to the registrar and merchants. At the reference the plaintiffs claimed 1,200*l.* for demurrage of their vessel from the date of the collision to the 26th of August, 1881, the date of her return to the fishing ground; and of the amount so claimed, the registrar, by his report, allowed the plaintiffs 880*l.* as the loss sustained by the interruption of their fishing. The defendants moved the court in objection to the report:—Held, that the motion must be dismissed. *The Risoluto*, 8 Adm. D. 109; 52 L. J., Adm. 46; 48 L. T. 909; 31 W. R. 657.

Upon appeal from the report of the registrar and merchants, the court will not admit additional evidence unless satisfied that such evidence could not by proper diligence and application have been produced before the registrar and merchants. *The Thuringia*, 41 L. J., Adm. 20; 25 L. T. 605.

An affidavit in support of a motion for leave to produce further evidence, where the object is to vary the evidence already given, should be clear and precise as to the witnesses it is proposed to call, and the nature of their testimony. *Ib.*

An affidavit of a witness, who is not tendered for cross-examination, and who deposes to a fact material to the inquiry before the registrar and merchants, should be filed before the hearing. *Ib.*

On an appeal from a report of a registrar and merchants, new evidence is admissible. *The Newport*, Swabey, 317.

When a cause has been referred to and heard by the registrar and merchants, it is competent to the judge, in considering the report thereon, in his discretion, to admit fresh evidence. *H. M. S. Flying Fish*, B. & L. 436; 34 L. J., Adm. 113; 12 L. T. 619—P. C.

In a cause of limitation of liability arising out of a collision, where, the fund in court being insufficient to satisfy the claims against it, a reference has been made to the registrar and merchants to assess the damages as to time and rate, the court will review the registrar's report and correct it, if it should appear that any portions of the report are founded on what the court deems to be an erroneous view of the evidence. *The City of Buenos Ayres*, 25 L. T. 672.

On appeal from a report of the registrar disallowing a claim for total loss in a cause of damage by collision:—Held, that the master of the plaintiff's vessel was not justified in abandoning her after the collision. Report confirmed with costs. *The Thuringia*, 41 L. J., Adm. 44.

Report of registrar amended on motion by adding items for which no vouchers had been produced at the reference. *The Englishman*, 38 L. T. 756.

On appeal from a report of the registrar and merchants, no objection can be made before the court to an item which was not questioned be-

fore them. *The Princess Helena*, 30 L. J., Adm. 137.

An objection to the registrar's report cannot be heard on motion, except by consent. *The Edmond*, Lush. 211.

In an appeal from his report, the court will not allow a party to set up a case which he did not endeavour to establish at the reference. *The Glenmanna*, Lush. 115.

The court will not interfere with the report of registrar and merchants, unless it is fully convinced that they are in error. *The Clyde*, Swabey, 23.

Costs on what Amount.—Where a plaintiff in a reference in a collision action withdraws a large item of his claim at the reference, and not before, and he recovers less than two-thirds of the amount originally claimed, but more than two-thirds of the amount which remains after his withdrawal of the above item, the original amount of his claim before withdrawal is the claim upon which costs are to be given, and he is not entitled to his costs. *The Eilean Dubh*, 49 L. T. 444.

Masters' Wages.—The rule obtaining in references in causes of collision, that if the registrar strikes off more than one-third of the plaintiff's claim, the plaintiff shall be condemned in the costs of the reference, does not apply to a reference in a cause of master's wages; but the court will decide equitably according to the circumstances of the particular case. *The Lemuella*, Lush. 147; 30 L. J., Adm. 1.

Upon a report by the registrar in a cause of master's wages, the court will not determine the incidence of the costs of the reference by any fixed rule, but according to circumstances of the case. *The William*, Lush. 199.

Costs of Reference.—See *infra*.

1. Decrees and Orders.

Priority.—The rule that the court will give priority to the suitor who first obtains a decree applies only as between claimants in pari conditione. *The Markland*, 3 L. R., Adm. 340; 24 L. T. 596.

Varying.—Where in a suit in rem, a decree has been made per incuriam for the payment of money out of the proceeds in court to satisfy the claim of the plaintiff, the court may, before the money has been paid, revoke or vary the decree. *Ib.*

Rescinding or Setting aside.—Fraud sufficient to set aside in the Court of Admiralty the decree of a competent court of Vice-Admiralty, must be fraud in procuring the decree. *The Justyn*, 6 L. T. 553.

By Consent.—Final as well as interlocutory decrees and orders may be obtained by consent, without an order of the judge in person, but the consent must be express. *The Buenos Ayres*, 17 W. R. 627.

The court refused an application to rescind a decree pronouncing for the validity of a bottomry bond, founded upon an affidavit by the defendants' solicitor that there was a good defence on the merits, the decree having been pronounced

with the consent of the defendants. *The Glenburn*, B. & L. 62; 11 W. R. 685.

j. Motions.

Costs of.—The court will not give the costs of appearing to consent to a motion where the party appearing is not in any way prejudiced by the motion. *The Achilles*, 25 L. T. 605.

Affidavits.—The adjournment of the hearing of a motion for the convenience of counsel does not preclude the parties making the motion from filing and using a further affidavit. *The Thuringia*, 41 L. J., Adm. 20; 25 L. T. 605.

k. Costs.

Certificate for.—The defendants in an action for damage, before any statement of claim had been delivered, admitted their liability for the damage, and by consent the question of amount was by an order of court referred to the registrar and merchants to report thereon. At the reference before the registrar the plaintiffs claimed as damages 295*l.* 18*s.* 1*d.* The registrar reported to the court that there was due to the plaintiffs 199*l.* 18*s.* 6*d.* Afterwards they moved the judge to condemn the defendants in the costs of the action and of the reference. Evidence was given on affidavit in support of the motion to the effect that the plaintiffs at the time their action was instituted were liable to a claim for salvage in respect of services rendered to their vessel after the collision, and that subsequently and before the reference 60*l.* had been paid and accepted in settlement of such claim:—Held, that the court had jurisdiction to certify that the case was a fit case to be tried before it, and that the proper order to be made was that the plaintiffs should have the costs of the action, but that each party should bear their own costs of the reference. *The Williamina*, 3 Adm. D. 97.

Since the Judicature Acts it is not necessary to obtain a certificate to enable a plaintiff to recover his costs in an action in the High Court, where such action is within the admiralty jurisdiction of the county court, but not within its common law jurisdiction. *The Englishman*, 38 L. T. 756. See also *The Naomi*, *infra*.

Costs in Cross Causes of Damage.—In cross causes of damage the defendants in the principal suit alleged various defences, and established only the defence of compulsory pilotage. The court refused to apportion the costs, so as to allow the plaintiffs the costs of the defences they had established. *The Schwan*, *The Robert Morrison*, 4 L. R., Adm. 187; 43 L. J., Adm. 18; 30 L. T. 537; 22 W. R. 743.

Separate Appearance at Trial.—Where a party obtains leave to appear separately at the trial, he does so subject to his costs being disallowed. *The Longford*, 6 Adm. D. 67; 50 L. J., Adm. 28; 44 L. T. 254; 29 W. R. 491.

Liability of Co-Plaintiffs.—Immunity of a co-plaintiff from costs does not create a like immunity for the remaining co-plaintiffs. In the Admiralty Court each co-plaintiff is severally liable for the whole of the costs. *The Leda*, 32 L. J., Adm. 53; 9 Jur., N. S. 208; 9 L. T. 864; 11 W. R. 302.

Proof of Documents.—The plaintiffs, in a collision suit, considering the statements contained in depositions made by the crew of the defendants' ship before a receiver of wreck damaging to the plaintiffs' case, subpoenaed the receiver of wreck to produce the original depositions at the hearing of the cause, and did not call upon the defendants to admit copies. The receiver of wreck obeyed the subpoena. The court pronounced the defendants' vessel alone to blame, and condemned the defendants in the costs of suit. The registrar disallowed the costs of the subpoena and the expenses of the attendance of the receiver of wreck. On motion to review the taxation, the court refused to interfere with the decision of the registrar. *The Cromwell*, 3 L. R., Adm. 316.

Costs of Reference.—It is within the discretion of the registrar to order that all the costs of a reference shall be borne by the defendants, though more than one-fourth of the plaintiff's claim be disallowed. *The Amelia*, 23 L. T. 544; 19 W. R. 216.

When more than one-third of the claim is struck off at a reference by the registrar and merchants, the court will consider itself bound by the rule of practice as to costs, and condemn the plaintiff in the costs of the reference, notwithstanding hardship in the particular case. *The Englishman*, 38 L. T. 756. See also *The Williamina*, *supra*.

A ship was damaged by another outward bound, and the owners of the injured vessel, in the bona fide belief that their damage was greater than it actually was, instituted a suit in the Court of Admiralty and arrested the ship for a large amount, but accepted bail and released the ship at once on ascertaining their actual damage; the defendants admitted liability, and the damage was referred to the registrar; the claim made by the plaintiffs was a little over 300*l.*, but the registrar reduced the amount claimed by more than one-third, and made no report as to costs. On application by the plaintiffs, the court certified for the costs of suit, under the County Courts Admiralty Jurisdiction Act, 1868, but condemned the plaintiffs in the costs of the reference. *The Naomi*, 32 L. T. 836; 23 W. R. 387.

Where, in an action of damage, the defendant sets up a counter-claim relating to the collision in respect of which the action is brought, and both ships are held to blame, and a reference is ordered to ascertain the amount of damage sustained by each ship, each party is, as a general rule, entitled to the costs of establishing his claim before the registrar, provided that not more than one-fourth of his claim has been disallowed. *The Mary*, 7 Adm. D. 201; 48 L. T. 28; 31 W. R. 298; 5 Asp. M. C. 33.

Tender in Salvage Suit.—Where a tender in a salvage suit is pronounced for, the usual practice is to condemn the plaintiffs in the costs incurred since the time of tender, but this practice is not invariable, and where the court is of opinion that the tender is not a liberal one, it will, in its discretion, make no order with regard to such costs. *The Lotus*, 7 Adm. D. 199; 47 L. T. 447; 30 W. R. 892; 4 Asp. M. C. 595. See also *ante*, col. 1664.

Form and Sufficiency of Tender.—A tender

which does not contain an offer to pay costs must specify the grounds upon which the defendant contends the plaintiff is not entitled to costs. *The Thracian*, 3 L. R., Adm. 504; 41 L. J., Adm. 71; 25 L. T. 889; 20 W. R. 380.

Damage caused by Inevitable Accident.—A sailing ship in a gale drove from her anchors across a sand, and her rudder was so damaged as to render the ship unmanageable; in this condition she came into collision after sunset with a brig at anchor. At the time of the collision the ship had her anchor light exhibited and no other light. In an action of damage by the owners of the brig against the ship it was held that the collision was occasioned by inevitable accident, and that the ship, in the circumstances of the case, was not to be deemed in fault for not carrying side lights or the three red lights prescribed by Article 5 of the Regulations for Preventing Collisions at Sea, and that the suit ought to be dismissed without costs. *The Buckhurst*, 6 Adm. D. 152; 51 L. J., Adm. 10; 46 L. T. 108; 30 W. R. 232. See also cases ante, cols. 1582, 1616.

Defence of Compulsory Pilotage.—In an action of damage, if the only defence is that the collision was caused by the negligence of a pilot taken by compulsion of law, the defendants, if successful in establishing this defence, are entitled to costs. *The Juno*, 1 Adm. D. 135; 45 L. J., Adm. 106; 34 L. T. 741; 24 W. R. 902.

In an action in the Exchequer Division for damages arising out of a collision of two ships, the defendant succeeded on the ground alone of compulsory pilotage:—Held, not a sufficient reason for depriving the defendant of costs. *General Steam Navigation Company v. London and Edinburgh Shipping Company*, 2 Ex. D. 467; 47 L. J., Ex. 77; 36 L. T. 743; 25 W. R. 694.

The rule of the Court of Admiralty, that, where the defendants succeed on a plea of compulsory pilotage, no costs are to be given, also holds good in the Court of Appeal. *The Daioz*, 47 L. J., Adm. 1; 37 L. T. 137—C. A.

The Admiralty Division will adhere to the practice of the High Court of Admiralty as to costs in cases of compulsory pilotage. *The Princeton*, 3 Adm. D. 90; 47 L. J., Adm. 33; 38 L. T. 260. See also cases ante, col. 1534.

Taxation.—In an outport bill brought into the registry for taxation by a proctor who acted as proctor for parties in a cause, charges were made for work done in the cause by a notary at an outport. The notary was neither a proctor, an attorney, nor a solicitor. A portion of the work for which these charges were made was work connected with the preparation of briefs and affidavits in the cause, and was such as is usually done by solicitors. The charges for this portion of the work the court disallowed. *The City of Brussels*, 4 L. R., Adm. 194.

On a taxation between solicitor and client of the costs of a cause, objections were taken on behalf of the client to charges occasioned by the postponement of the trial and the amendment of the pleadings, on the ground that the postponement of the trial and the amendment of the pleadings had been rendered necessary by the negligence of the solicitor; the registrar refused to disallow the items, on the ground that it was not within his province as taxing master to inquire into the question of negligence:—Held,

that the ruling of the registrar was right. *The Papa de Russie*, 3 Adm. D. 160.

Upon disallowance of a fee to counsel for advising as to the admissibility of a plea, the court reviewed the registrar's taxation, and directed the allowance of the fee and the costs attendant thereon. *The Rouen*, 31 L. J., Adm. 132; 6 L. T. 508.

The costs of an issue, upon which he is unsuccessful, may be taxed against a party, though successful in the suit. *The Laurel*, 33 L. J., Adm. 17; 9 L. T. 457.

Costs of Witnesses.—The expenses of detaining a witness will not be allowed, unless it can be shown that his detention was absolutely necessary to insure his attendance as a witness, and was not for any other purpose, c. g. merely to watch the proceedings in a suit. *The Bahia*, 1 L. R., Adm. 15; 11 Jur., N. S. 1008; 14 W. R. 411.

A master's expenses, at the rate 1*l.* per week, allowed from the arrest of the vessel in March, 1863, to July, 1864, when the defendant applied to have the cause put off. *Id.*

A party in a cause is not bound, to examine any of his witnesses before the hearing; and if judgment is given in his favour with costs, he is in general entitled, with respect to seamen who are reasonably detained by him as necessary witnesses, to the expenses of maintaining them to the time of the hearing. *The Karla*, B. & L. 367; 13 W. R. 295.

In the case of the witnesses being foreign seamen, a reasonable charge incurred for agency or interpretation may be allowed. *Id.*

In estimating the allowance and compensation for loss of time in the case of a seaman detained to give evidence, the rate of wages is a fair criterion. *The Olive*, Swabey, 292.

The expenses of material and necessary witnesses may be allowed, though they may not have been called at the trial. *The Biddick*, 38 L. J., Adm. 24.

Enforcing Payment.—In a suit for wages brought by a master a tender was made, and, after some delay, accepted. The registrar taxed the costs of the party suing, and his report of the taxation, although objected to, was confirmed. Proceedings were then taken in the Court of Exchequer, under 17 & 18 Vict. c. 125, ss. 61, 65, to attach these costs in the hands of the party from whom they were due, and ultimately such party was compelled to and did pay them over to the judgment creditors of the master. The proctor for the master having received due notice of these proceedings, but having taken no steps to oppose them:—Held, that the Court of Admiralty was bound by the order of the Court of Exchequer, and could no longer enforce payment of costs against the mortgagee in possession of the vessel, the party proceeded against. *The Olive*, 5 Jur., N. S. 445; Swabey, 423.

Security to Answer Judgment—Staying Proceedings.—The steamship *Batavier* and the steamship *Charkieh* came into collision in the Thames. Both sustained damage, and the *Batavier* sunk, and became a total loss. The owners of the ships were foreigners residing abroad. A suit in rem was instituted against the *Charkieh* by the owners of the *Batavier*. A cross suit in

personam was afterwards instituted by the owner of the Charkieh against the Batavier. On application made on behalf of the owner of the Charkieh, the court ordered the proceedings in the case against the Charkieh to be stayed until security had been given by the owners of the Batavier to answer judgment in the cause instituted against them. *The Charkieh*, 4 L. R., Adm. 120; 42 L. J., Adm. 70; 29 L. T. 404; 22 W. R. 63.

Security to answer Counter-claim—Bail.]—

Where in a damage action the ship proceeded against is not arrested, and the plaintiffs do not require bail to be given, the defendants cannot compel the plaintiffs to give security to answer a counter-claim in the action under the provisions in the Admiralty Court Act, 1861 (24 & 25 Vict. c. 10), s. 34, although they voluntarily give bail. *The Alne Holme* (No. 1), 4 Asp. M. C. 591; 47 L. T. 307.

The power of the Admiralty Division under s. 34 of the Admiralty Court Act, 1861, to order an action to be stayed until bail has been given to answer a cross-action or counter-claim, does not extend to making an absolute order to give bail; and in a damage action in which the plaintiffs had discontinued after the defendants had counter-claimed, the court refused to enforce an order, made by the registrar, to give bail to answer such counter-claim. *The Alexander*, 48 L. T. 797.

When the owners of a ship which has sunk, and the owners of the cargo laden on board her, join in an action against another ship for damages sustained by collision, the court will order the claim by the owner of the ship to be dismissed, unless security for the counter-claim is given, but will allow the owner of cargo to proceed without security. *The Carnarvon Castle*, 38 L. T. 736; 26 W. R. 876—C. A.

Security for Costs—In what Cases.]—In a suit instituted in 450l. for recovery of wages by German seamen against a German ship, the court ordered the plaintiffs to give security for costs in 130l. *The Zufall*, 44 L. J., Adm. 16; 32 L. T. 571; 23 W. R. 328.

Where a plaintiff has recently executed a deed of assignment of all his property to an assignee, he will be required to give security for the costs of suit, unless he satisfy the court that he is solvent. The fact that he is carrying on business is not sufficient proof of his solvency. *The Lake Megantic*, 36 L. T. 183.

Foreigners.]—A foreign government suing must give security for the costs of the suit. *The Beatrice*, otherwise *The Rappahannock*, 36 L. J., Adm. 10.

A defendant is not bound to give security for costs, even though, from the circumstances of the case, it may happen that the burden of proof of the issues in the case lies upon him. *Id.*

Plaintiffs beyond the jurisdiction of the court, in a cause of possession, though liable to give security for costs, will not be required, as a general rule, to give security for damages. *The Mary or Alexandra*, 1 L. R., Adm. 335; 16 L. T. 98.

The master of a foreign ship suing for his wages will be required to give security for costs. *The Franz et Elize*, Lush. 377.

It is in the discretion of the court to allow the

mate of a foreign vessel, though not domiciled in England, to prosecute an action for wages without giving security for costs. *The Don Ricardo*, 5 Adm. D. 121; 49 L. J., Adm. 28; 42 L. T. 32; 28 W. R. 431.

Where, in a suit against the owners of a foreign vessel for damage done in collision, the owners had filed a petition for a limitation of their liability to the value of their vessel, the court ordered them to give security for costs. *The Wild Ranger*, 31 L. J., Adm. 206; 6 L. T. 164.

In a suit by foreigners against an English vessel for collision, the court refused to order the plaintiff to give security for damages as well as for costs. *The Peri*, 8 Jur., N. S. 1230; 11 W. R. 44.

Of Counter-claims.]—Foreigners resident out of the jurisdiction who have intervened as defendants in an action of collision in rem instituted on behalf of foreign plaintiffs by whom security for costs has been given, must, if they seek relief by way of counter-claim, give security for the whole costs of the action. *The Julia Fisher*, 2 Adm. D. 115; 36 L. T. 257; 25 W. R. 756.

In an action and cross-action, if the proceedings are in personam, and the ship has not been arrested nor bail given in the principal cause, the court cannot stay the proceedings in the cross-action until the plaintiff in the principal cause has given security for costs as defendant in the cross-cause. *The Amazon, The Osprey*, 36 L. J., Adm. 4.

Costs of Appeal.]—See APPEAL, *infra*.

1. Execution.

As to claims to goods or chattels taken in execution under process of the Admiralty Court, see 24 & 25 Vict. c. 10, s. 16.

The Admiralty Court has no power of levying execution upon a defendant's goods and chattels, to satisfy a judgment of the court. *The Victor*, Lush. 72. But see 24 & 25 Vict. c. 10, s. 15.

m. Appeal.

i. To Court of Appeal.

When it Lies.]—An appeal will not lie from a refusal by the judge of the Admiralty Division to allow, under 31 & 32 Vict. c. 71, s. 27, an appeal from a county court judgment to be prosecuted. *The Amstel*, 2 Adm. D. 186; 37 L. T. 138; 26 W. R. 69—C. A.

Leave.]—In cases raising important points of law, the court will give leave to appeal to the Court of Appeal where, on a proper construction of the acts governing appeal, such leave is necessary. *The Rona*, 4 Asp. M. C. 520; 45 L. T. 601; 30 W. R. 614.

Principle of Court in dealing with Decisions appealed against.]—When the judge of the court below has come to a conclusion of fact after hearing witnesses, the Court of Appeal will not, except in cases of extreme pressure, reverse his decision; but where the decision of the court does not depend upon the credibility of the witnesses, but on the inferences from the evidence drawn by the judge, his decision may, even with-

out such pressure, be reversed by the Court of Appeal. *The Glannibanta* and *The Transit*, 1 Adm. D. 283; 34 L. T. 934; 24 W. R. 1033—C. A.

The Court of Appeal will not reverse a judgment of the Court of Admiralty which has been arrived at after hearing witnesses and on their credibility. *The Sisters*, 1 Adm. D. 117; 34 L. T. 338—C. A.

The reasons for judgment of the county court judge, as well as for that of the High Court, should be before the Court of Appeal when a further appeal is allowed to that court. *The Swallow*, 36 L. T. 231—C. A.

When the Court of Admiralty has given no opinion on a question, which in the opinion of the Court of Appeal is a vital one in the cause, the Court of Appeal will decide that question on the evidence before them. *The C. M. Palmer* and *The Larnax*, 29 L. T. 129.

In Claims for Salvage as to the Quantum.]—
See XIX., SALVAGE.

Security for Costs.]—The Court of Appeal refused to direct a defendant who had appealed from a judgment of the Admiralty Division, although his ship had been arrested and released on bail, and although he had obtained a stay of execution pending the appeal, to give security for the costs of the appeal. *The Victoria*, 1 Adm. D. 280; 34 L. T. 931; 24 W. R. 596—C. A.

Costs of.]—Costs not allowed when the Court of Appeal reversed the decision of the court below in an appeal for which permission was necessary. *The Swallow*, 36 L. T. 231—C. A.

Semble, that in successful admiralty appeals the appellants will have the costs of the appeal. *The Swansea v. The Condor*, 4 Adm. D. 115; 48 L. J., Adm. 33; 40 L. T. 442; 27 W. R. 748—C. A.

Though in appeals as to the amount of salvage the Privy Council generally did not give a successful appellant his costs of the appeal, such appeals under the Judicature Act form no exception to the general rule that a successful appellant is entitled to his costs. *The City of Berlin*, 2 Adm. D. 187; 47 L. J., Adm. 2; 37 L. T. 307; 25 W. R. 793—C. A.

ii. To Privy Council.

Time for, from Vice-Admiralty Court.]—The time for appealing from the judgment of a vice-admiralty court is governed strictly by the rules and regulations made by order in council, June 27, 1832. *The Brinhilda*, 4 Asp. M. C. 461; 45 L. T. 389—P. C.

—Excuse for Delay.]—Where the time for appealing from a vice-admiralty court has expired, owing to a delay by counsel in advising on the success or failure of such appeal, such delay being caused by counsel's waiting for the decision of another appeal pending before the Privy Council, which decision it is reasonably possible may throw light on the appeal to be advised upon, such apology may, in the absence of circumstances to destroy its effect, induce the committee to allow the prosecution of the appeal under 26 & 27 Vict. c. 24, s. 23. *Cassanova v. Reg.*, 1 L. R., P. C. 116; 12 Jur., N. S. 127; 14 W. R. 617.

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—From Admiralty Courts.]—The time for appealing from any court of admiralty jurisdiction is limited to fifteen days by the practice of the court. *The Brinhilda*, *supra*.

An appeal from the High Court of Admiralty asserted after ten, but before fifteen days from the sentence, was in time. *Laird v. Brownlie*, Lush. 424; 1 Moore, P. C. C., N. S. 31; 8 Jur., N. S. 1067; 10 W. R. 794.

A plaintiff in one of two cross-suits for damage arising out of a collision, lodged an appeal within fifteen days of the decree, but did not give to the defendants notice thereof till after the expiration of fifteen days from the date of the decree. On a petition by the defendants for leave to lodge a cross appeal:—Held, first, that the 24 Hen. 8, c. 12, s. 7, which provides, that appeals shall be made by the parties aggrieved within fifteen days after judgment, is confined to causes cognizable in the ecclesiastical courts. *The Florence Nightingale*, 1 Moore, P. C. C., N. S. 42; 8 Jur., N. S. 1067; 6 L. T. 765; 10 W. R. 794.

Held, secondly, that the limitation of the time of appealing from a decree of the High Court of Admiralty to fifteen days depends not upon legislative enactment, but upon long-established practice. *Ib.*

The Judicial Committee is not precluded either by statute or by practice from recommending an extension of the time in which an appeal may be made in cases which call for such indulgence. *Ib.*

When it Lies.]—In any admiralty or vice-admiralty cause the right of appeal to the Privy Council is peremptory by any proceedings being taken by the appellant under the decree to be appealed from. *The Brinhilda*, *supra*.

An offer by a defendant out of court to pay the plaintiff a specific sum and costs, made after judgment pronouncing the defendant liable in general damages, does not perempt his right of appeal. *Laird v. Brownlie*, *supra*.

—Interlocutory Matters.]—Before 24 & 25 Vict. c. 10, s. 30, there was no appeal from an interlocutory order, which was a mere grievance; but the cause being appealed on the merits, the party might bring the grievance to the notice of the superior court. Failing to do so, the party was held to adopt the interlocutory order; and, upon the cause being remitted, was estopped from moving the court to rescind such order. *The William Hull*, Lush. 25.

Adduction of Fresh Evidence.]—A special libel of appeal, with allegation and responsive allegation, pleading new matter, admitted by the Court of Appeal, and evidence taken thereon. *The Newport*, Swabey, 317.

An allegation pleading facts noviter ad notitiam perventa, admitted by the appellate court, and evidence taken viva voce thereon. *Dionissis v. Reg.*, 3 Moore, P. C. C., N. S. 181.

On a motion for leave to adduce fresh evidence before the hearing of an appeal, it appeared that the evidence might have been adduced at the hearing in the court below, if application had been made to postpone the hearing for that purpose, but that no such application was made. The committee, therefore, refused to admit further evidence, and dismissed the motion, with costs. *The Scindia*, 1 L. R., P. C. 241; 35 L. J., P. C. 53; 12 Jur., N. S. 534.

3 L

Semble, where an objection is taken to the exclusion of evidence by the judge of the Admiralty Division, the proper course is to apply for a new trial on that ground, and not to tender the evidence afresh in the Court of Appeal. *The Sir R. Peel*, 43 L. T. 364—C. A.

Principles of Dealing with Judgment or Decree appealed against.]—Where a disputed fact, involving nautical questions, is raised by an appeal, as in a case of collision, the court will not reverse the decree appealed from, unless conclusively satisfied that the decree is wrong, even though the court may entertain doubts as to the finding of the Admiralty Court. *Bland v. Ross, The Julia*, 14 Moore, P. C. C. 210; Lush. 224.

The court must be satisfied that the decree is founded on some substantial mistake, either in law or fact. *General Iron Screw Company v. Moss*, 15 Moore, P. C. C. 122.

Although there may be considerable doubt in the estimate taken by the court, in respect of the evidence of the witnesses upon questions of nautical skill, yet, considering the advantage that court has with the assistance of the Trinity masters, the appellant court must be satisfied that the court below was wrong, to justify a reversal of such finding. *Dean v. Mark*, 2 Moore, P. C. C., N. S. 453.

Though the Judicial Committee will not lay down any exclusive rule as to appeals from judgments of the Court of Admiralty, upon questions which are entirely of fact, yet they are most reluctant to come to a conclusion different from that of the judge of the court below, merely on a balance of testimony: the judge having had the opportunity of seeing and testing the conduct and demeanour of the witnesses. *The Alice and The Princess Alice*, 2 L. R., P. C. 245; 38 L. J., Adm. 5; 19 L. T. 678.

Security for Costs.]—In a proceeding in rem, a bail bond given in court below only covering the costs in that court, the appellants, who were foreigners, were called upon to give security for the costs of the appeal; the Court of Appeal will not, however, entertain any question as to uncovered costs in the court below. *The Hélène*, B. & L. 425; 3 Moore, P. C. C., N. S. 240; 35 L. J., Adm. 1; 13 W. R. 931.

Costs—When given.]—When in a cause of collision the appellant was found in the court below solely to blame, and condemned in the whole damage, and the Court of Appeal found both parties to blame, and divided the damage, costs of appeal were given. *The Fyenoord*, 1 Swabey, 374.

Where both parties appeal from a sentence, pronouncing both to blame, and the sentence is affirmed, no costs of the appeal are given. *The North American*, 1 Swabey, 358.

Material mistakes in respect to certain facts in evidence occurred in the summing up of the judge. The committee, though it sustained the decree appealed from, under the circumstances affirmed the judgment without costs. *General Iron Screw Company v. Moss*, 15 Moore, P. C. C. 122.

iii. From County Court.

When it Lies.]—Cross causes of damage heard together in a county court are, as to the right of

appeal, to be considered distinct. *The Elizabeth*, 3 L. R., Adm. 33; 39 L. J., Adm. 53; 21 L. T. 729.

The plaintiffs in a cause of damage in a county court claimed 100*l.*, and recovered an amount under 50*l.*:—Held, that no appeal lay to the Court of Admiralty. *Ib.*

The County Courts Admiralty Jurisdiction Act, 1868, s. 27, provides that the judge of the Court of Admiralty may, on sufficient cause being shewn to his satisfaction, allow an appeal from a final decree or order of a county court in an admiralty cause to be prosecuted, notwithstanding that the instrument of appeal has not been lodged in the registry of the Court of Admiralty within ten days from the date of the decree or order appealed from:—Held, that an application for leave to appeal under this section was rightly made to the judge of the Court of Admiralty sitting as a judge of the High Court of Justice. *The Two Brothers*, 1 Adm. D. 52; 45 L. J., Adm. 47; 33 L. T. 792; 24 W. R. 112.

No appeal lies from the decision of a county court in a salvage cause where there is a tender of less than 50*l.* and that tender is upheld, the amount tendered being the amount “decree or ordered” within the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 31. *The Fyenoord*, 34 L. T. 918.

A plaintiff claiming an amount not exceeding 50*l.* in an admiralty cause in a county court, is precluded from appealing from the decision of the court by s. 31 of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71). *The Falcon*, 3 Adm. D. 100; 47 L. J., Adm. 56; 38 L. T. 294; 26 W. R. 696.

By a decree of the City of London Court an action of damage instituted in that court in the sum of 30*l.* was, after having been heard on the merits, dismissed with costs. The plaintiff appealed. At the hearing of the appeal the respondent objected to the jurisdiction of the court to entertain the appeal. The court dismissed the appeal on the ground that as the appellant, if successful, could not have recovered more than 30*l.* in the action, he was precluded from appealing by the County Courts Admiralty Jurisdiction Act, 1868, s. 31. *Ib.*

The restriction as to amount due applies only to appeals by defendants. *The Doctor Van Thunnen Tellow*, 20 L. T. 960; 17 W. R. 899.

Leave to Appeal.]—As a general rule the Court of Admiralty will not grant permission to appeal from a decree or an order of the court made on appeal from a county court except in cases where the law is doubtful, or where the facts are such as to leave a substantial doubt on the mind of the court whether the conclusion at which it has arrived is right, or where the pecuniary interest involved is large. *The Samuel Laing*, 3 L. R., Adm. 284; 39 L. J., Adm. 42; 22 L. T. 891.

Leave to set down an appeal from a county court judge in admiralty, which could not be set down without leave, was refused by the judge of the Admiralty Division. On appeal from this decision, the Court of Appeal held they had no jurisdiction to interfere. *The Amstel*, 47 L. J., Adm. 11; 37 L. T. 138—C. A. See also *The Rona*, ante, col. 1760.

Extension of Time.]—The power of extending the time for appealing from a decree or order of a county court in an admiralty suit, conferred

on the judge of the Court of Admiralty by the County Courts Admiralty Jurisdiction Act, 1868, s. 27, may, since the coming into operation of the Judicature Act, 1873, be exercised by the judge of the Court of Admiralty sitting as a judge of the High Court of Justice. *The Two Brothers*, *supra*.

Security for Costs.—Upon appeal from a county court to the Court of Admiralty, security for the costs of the appeal must be given in the county court, and not in the Court of Admiralty. *The Forest Queen*, 3 L. R., Adm. 299; 40 L. J., Adm. 17; 23 L. T. 544; 19 W. R. 167.

Judge's Notes on Appeal.—In an appeal to the Court of Admiralty from a county court where there is a conflict between the transcript of the notes of evidence and the judgment taken by a shorthand-writer in the county court, and the county court judge's own notes, the version given by the county court judge must be accepted as binding; and if the county court judge alters the shorthand-writer's notes so as to correspond with his own version, the Court of Admiralty will order the alteration so made to be carried into effect in the printed copies of the appendix. *The Railwaite Hall*, 30 L. T. 233.

In the absence of the judge's notes of evidence, the Court of Admiralty on the appeal allowed a witness to be examined who had given evidence in the court below. *The C. S. Butler*, 31 L. T. 549; 23 W. R. 113.

Evidence on Appeal.—The court may order witnesses to be examined *vivâ voce* at the hearing of a cause of appeal from the county court. But such order will not be made except under special circumstances. *The Busy Bee*, 3 L. R., Adm. 527; 26 L. T. 590; 20 W. R. 803.

Wherever there is a probability of an appeal, notes of the evidence given in the county court should be taken by a reporter duly appointed according to the provisions contained in the rules for regulating the admiralty jurisdiction of the county court. *Ib*.

Fresh Evidence on Appeal.—The Court of Admiralty is very cautious as to admitting fresh evidence at the hearing of an appeal from the county court, and will not do so unless the principles of justice require the admission of such evidence. *The Moorsley*, 29 L. T. 663.

Semble, that surprise is a ground for the admission of fresh evidence. An application for admission of evidence refused on the ground that there was no surprise shewn. *Ib*.

XXIV. INQUIRIES BY BOARD OF TRADE AND MARINE BOARDS.

Naval Inquiry into Conduct of Captain.—When an inquiry is instituted under the Merchant Shipping Acts into the conduct of a captain, the court may proceed with the inquiry, although the Board of Trade has no charge to make against the captain. *Minto*, *Ex parte*, 35 L. T. 808; 25 W. R. 251.

Marine Boards—Jurisdiction.—A local marine board appointed to inquire into a charge of alleged misconduct against the master or mate of a vessel, has a discretionary power as to granting

summonses for witnesses for the defence. *Reg. v. Collingridge*, 34 L. J., Q. B. 9; *S. C.*, *Reg. v. Local Marine Board of London*, 12 W. R. 1109.

—Witnesses.—It is a proper course for such court before granting the summonses to inquire who the witnesses are and what they are expected to prove, and to refuse the summonses in respect of any witness who can only speak to matters clearly irrelevant. The witnesses summoned for the defence are witnesses of the court, and their expense is to be borne not by the defendant but by the public. *Ib*.

Perjury before.—Wilful and corrupt false swearing before a local marine board lawfully constituted, upon a matter material to an inquiry then being lawfully investigated by them in pursuance of 17 & 18 Vict. c. 104, is perjury, and indictable as such. *Reg. v. Tomlinson*, 2 L. R., C. C. 49; 36 L. J., M. C. 41; 12 Jur., N. S. 945; 15 L. T. 188; 10 Cox, C. C. 323.

XXV. WRECK COMMISSIONER'S INQUIRIES.

Decision of Judge given in open Court—Reasons.—The decision given by the judge after an investigation into a casualty dealing with the certificate of an officer must be given in open court, but need not be accompanied by reasons, and if he gives reasons the officer is not entitled to a copy of the shorthand-writer's notes of those reasons, for the purpose of an appeal. *The Kestrel*, 6 Adm. D. 182; 4 Asp. M. C. 433; 45 L. T. 111; 30 W. R. 182.

Jurisdiction to suspend Master's Certificate.—The jurisdiction to suspend the certificate of the master of a ship has not been extended by the Merchant Shipping Act, 1876 (39 & 40 Vict. c. 80), ss. 29, 32, to cases not within ss. 242 and 432 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104); and therefore where an inquiry into the stranding of a ship where no damage has been done is held by a wreck commissioner under s. 32 of the later act, he has no jurisdiction upon such inquiry to suspend the certificate of the master of the stranded ship. *Story*, *Ex parte*, 3 Q. B. D. 166; 47 L. J., Q. B. 266; 38 L. T. 29; 26 W. R. 329.

A shipping casualty must be actually caused or contributed to by the master to enable the court of inquiry to suspend his certificate. *The Arizona*, 5 Adm. D. 123; 49 L. J., Adm. 54; 42 L. T. 505; 28 W. R. 704—C. A.

An error of judgment on the part of the master of a vessel at a moment of great difficulty and danger does not amount to a wrongful act or default, within the meaning of the 242nd section of the Merchant Shipping Act, 1854, so as to justify the suspension or cancellation of the master's certificate. *The Famenoth*, 7 Adm. D. 207; 48 L. T. 28; 5 Asp. M. C. 35.

—Appeal.—Where a court of inquiry into a shipping casualty, held under the 8th part of the Merchant Shipping Act, 1854, orders the suspension of a master's certificate, in pursuance of the powers given by the 242nd section of the same act, and the 23rd section of the Merchant Shipping Act, 1862, the Court of Appeal, having jurisdiction under the Shipping Casualties In-

vestigations Act, 1879, will on appeal consider the evidence on which the judgment of the court of inquiry proceeded, and will reverse the judgment if the evidence is insufficient to justify the suspension of the certificate. Where a court of inquiry ordered a master's certificate to be suspended, and the only ground on which the decision could be supported was that serious damage to a ship had been caused by the wrongful act or default of the master, within the meaning of s. 242 of the Merchant Shipping Act, 1854, sub-s. 2, and on appeal it appeared to the Court of Appeal that there was no evidence that the damage had been caused by the wrongful act or default of the master, the Court of Appeal reversed the decision, and restored to the master his certificate. *The Arizona, supra*.

Appeal from—Who may.]—A shipowner, who has appeared as a party at the hearing of an investigation under the Merchant Shipping Acts into the circumstances attending the loss of a ship owned by him, has no right of appeal, notwithstanding that the tribunal investigating the case has given a decision suspending the certificate of the master of the ship and condemning the shipowner in costs. *The Golden Sea*, 7 Adm. D. 194; 51 L. J., Adm. 64; 47 L. T. 579; 30 W. R. 842; 5 Asp. M. C. 23.

The wreck commissioner having been requested to hold an investigation into the loss and abandonment of a British ship, found that the loss of the ship was due to certain improper ballast taken on board her at an English port having been converted into mud by mixture with the water made by her during the voyage, and so choking the pumps that they could not be used, whereby the ship foundered, and for these wrongful acts and defaults suspended the certificate of the master of the ship for three months. The master appealed. The Probate, Divorce, and Admiralty Division being of opinion that the evidence before the wreck commissioner established that the master had authority from his owner to provide ballast for the vessel without restriction as to price, and had been aware of the character of the ballast which she had taken on board, and that the carrying of such ballast contributed to her loss, dismissed the appeal with costs. *Id.*

— Fresh Evidence on Appeal.]—On a shipping casualty appeal where it is desired to adduce fresh evidence at the hearing of the appeal, application for leave to do so should be made to the Court of Appeal by motion prior to the hearing of the appeal. *The Famenoth*, 7 Adm. D. 207; 48 L. T. 28; 5 Asp. M. C. 35.

— Procedure on Appeal.]—The court when hearing an appeal will look to the report and the annex thereto. Observations on the admission of fresh evidence on appeal and on the admissibility of evidence of experts where the court is assisted by assessors. *The Kestrel, supra*.

— Costs.]—Where, on an appeal under the Shipping Casualties Investigations Act, 1879, the decision of the wreck commissioner, suspending the certificate of a master, was affirmed, but the Court of Appeal recommended that the Board of Trade should shorten the time for which the certificate had been suspended, the parties to the

appeal were left to bear their own costs of the appeal. *The Kestrel, supra*.

The court below having suspended the certificate on the invitation of the Board of Trade, the Court of Appeal ordered the Board of Trade to pay the costs of the appeal. *The Arizona, supra*.

On a successful appeal the Board of Trade, having appeared in support of the decision appealed from, were directed to pay the costs of the appeal. *The Famenoth, supra*.

XXVI. SHIP-BROKERS AND AGENTS.

1. COMMISSION AND EMPLOYMENT.

Commission, whether Contingent.]—A shipbroker is entitled to 5l. per cent. on the gross freight of a ship, though payment of a part is contingent on the arrival of the vessel home. *Roberts v. Jackson*, 2 Stark. 225.

The actual earning of freight under a charterparty is not a condition precedent to the right of the shipbroker to his commission for procuring the execution of the charter. *Hill v. Kitching*, 3 C. B. 299; 15 L. J., C. P. 251.

A., a shipbroker, procured a charterparty to be made between B., a shipowner, and C., under which the owner contracted to bring home a cargo of guano, and the merchant agreed to pay freight at the rate of 4l. 15s. per ton, to be reduced to 4l. 12s. 6d. if the ship did not arrive off Cork or Falmouth on or before a given day. There was no express engagement on the part of C. to ship a cargo:—Held, that A. was entitled to recover from B. upon a quantum meruit for his procuring the charter to be executed, without shewing the arrival of the vessel on or before the day mentioned, and notwithstanding only a very small quantity of guano had been shipped, and a small amount of freight actually earned; that the amount of compensation due to him was a question for the jury; and that, in estimating such compensation, they were properly guided by evidence of what was customary in similar cases. *Id.*

If a broker charters ships, at a commission of 2½ per cent. on their outward freight, and the like on their homeward freight, and the charterparty makes it contingent what the amount of freight shall be, the broker cannot sue for any sum till the contingency is determined. *Winter v. Mair*, 3 Taunt. 531.

— Actions for.]—It is no answer to an action by a broker for commission for procuring freight, that the charterparty procured was such, that, if the charterer failed to obtain certain licences, the voyage would be illegal. *Haines v. Bush*, 5 Taunt. 521; 1 Marsh. 191.

When two brokers are referred to in advertisements by a shipowner, and one of them procures the cargo and receives the freight, and the other pays the charges for clearing out the ship, the latter must share the commission with the former, and cannot by usage of trade maintain an action against the shipowner. *Hall v. Benson*, 7 C. & P. 711.

— When Earned.]—To enable a broker to recover a commission on the sale of a ship, the mere fact of his having introduced the purchaser to the seller will not be sufficient; but, if it appears that such introduction was the foundation on which the negotiation proceeded, the parties

cannot afterwards, by agreement between themselves, withdraw the matter from the broker's hands and deprive him of his commission. The broker will be entitled to his commission, if he was, up to a certain time, the agent or middleman between the parties, although the contract was afterwards completed without his instrumentality or interference. *Wilkinson v. Martin*, 8 C. & P. 1.

The usage is, that when a broker has brought the captain of a ship and a merchant together, and they by his means enter into some negotiation as to the intended voyage, the broker is entitled to commission, if a charterparty is effected between them for that voyage, even though they may employ another broker to prepare the charterparty, or may write the charterparty themselves. *Burnett v. Bouché*, 9 C. & P. 620.

If a broker is authorized by both parties, and, acting as the agent of each, communicates to the merchant what the shipowner charges, and also communicates to the shipowner what the merchant will give, and he names the ship and the parties, so as to identify the transaction, and a charterparty is ultimately effected for that voyage, this broker is entitled to his commission; but if he does not mention the names so as to identify the transaction, he does not get his commission to the exclusion of another broker, who afterwards introduces the parties personally to each other. *Id.*

A shipbroker employed to sell a ship which, when put up for sale, was bought in, is not entitled to a commission on the sale. *Mestaer v. Atkins*, 1 Marsh. 76; 5 Taunt. 381.

A shipbroker who has procured a bargain for the hire of a vessel is, by usage in the city of London, entitled to a certain commission on the amount of freight if the contract is perfected, but not otherwise. *Read v. Rann*, 10 B. & C. 438.

Even where the contract is not completed through the act of the owner. *Broad v. Thomas*, 7 Bing. 99; 4 M. & P. 732; 4 C. & P. 338.

Shipbrokers were employed by shipowners to procure charterers for certain ships. The brokers introduced the owners to another firm of brokers, and negotiations were commenced at the office of the last-named firm with L. for the chartering of these ships. The negotiations with L. came to nothing; but L., from the knowledge thus acquired, informed M. that the owners had a ship in want of a charterer, and M. became the charterer of this ship of theirs. In an action by the brokers to recover their commission from the shipowners on the charter of this ship:—Held, that their services in the transaction were too remote. *Gibson v. Crick*, 1 H. & C. 142; 31 L. J., Ex. 304; 6 L. T. 392; 10 W. R. 525; *S. C.*, at nisi prius, 2 F. & F. 766.

Where by the terms of a charterparty a vessel is let for an indefinite period, and the voyage is general, the shipbroker who lets the vessel is entitled to claim commission as for a voyage of that description, and not for a specific voyage on bonds. *Holl v. Pincent*, 6 Moore, 228.

Custom—Rights of Agents—China Trade.—A declaration on a charterparty stated that it was agreed between the owner of the ship Maggie, and charterers, that "the ship should load a cargo in London and proceed to Hong Kong and deliver the same, the ship to be consigned to the

charterers' agents in China, free of commission on that charter;" that according to the custom of merchants in London, when a ship chartered in London for China is agreed to be consigned to the charterers' agents, whether consigned free of commission on that charter or not, it is the right and duty of such agents to procure a charter or a cargo for the ship, and they are entitled to be paid the usual brokers' commission on the amount of freight payable under such charter, unless excluded by special contract; but in case the owners procure a charter or cargo for the ship, without any default of the consignees, the consignees are entitled to the brokers' commission on any freight payable under such charterparty, unless such right is excluded by special contract; that the ship arrived in China, and the owners' agents as consignees performed their duty free of commission on the outward voyage, and were ready to procure a charter or a cargo for Hong Kong; that the charterer did not permit them to procure such charter or cargo, but, without the default of the owners' agents, himself procured a cargo. Breach, non-payment by the charterers of any commission on the cargo:—Held, that the parol evidence of the mercantile usage was not admissible to vary the terms of the charterparty. *Phillipps v. Briard*, 1 H. & N. 21; 25 L. J., Ex. 233.

— Notice of Names of Vessels.—The defendants, London merchants, employed a broker at Liverpool to purchase some wool. The broker negotiated a sale by the plaintiff to the defendants of certain bales deliverable at Odessa, "the name of the vessels to be declared as soon as the wools were shipped." In this transaction, the broker acted for both the plaintiff and the defendants. By the custom of Liverpool, where a contract contains a stipulation that notice of an event should be given by the vendor to the vendee, it is usual for the vendor to give the notice to the broker, who communicates it to the vendee:—Held, that the defendants were bound by such usage, and therefore that a notice by the plaintiff to the broker of the names of the vessels on which the wools were shipped was a performance of that stipulation, although the broker omitted to communicate them to the defendants. *Graves v. Legg*, 2 H. & N. 210; 26 L. J., Ex. 316; 3 Jur., N. S. 519—Ex. Ch.

— Proof.—In order to prove a custom, it was proposed to ask a broker, "What is the custom with regard to payment of brokers' commission when the broker introduces another broker to a shipowner, which shipowner substantially negotiates with one of the brokers introduced?"—Held, that this question was rightly disallowed. *Gibson v. Crick*, *supra*.

Payment on Behalf of Ship.—A broker, who had received money for the shippage of goods on account of the owners of the ship, offered to pay it to the captain, who was also managing owner, by a cheque. This the captain declined, preferring that the broker should open a credit for him at a bank in New Brunswick in favour of H., which the broker did. The bank accordingly paid H. 250*l.*, for which H. gave a bill, drawn by him in favour of the bank upon the broker, who accepted and paid it when due. The broker having sued the co-owners for the balance of his account:—Held, that this was a good pay-

ment of 250*l.* by the broker, and binding on the co-owners. *Anderson v. Hillies*, 12 C. B. 499; 21 L. J., C. P. 150; 16 Jur. 819.

— **Lien.**—Shipbrokers have no lien on the certificate of registry for advances made by them to the owner for the use of the ship. *Gibson v. Ingo*, 6 Harc. 112.

2. LIABILITIES.

In Forwarding.—On a bailment to a shipping agent to forward goods, an action for not safely carrying and delivering is not maintainable. *Platzoff v. Le Bean*, 4 F. & F. 545.

Duty to Examine Goods.—The defendant, who carried on business at B., and had acted there as agent for the plaintiffs, who were merchants at L., in the shipment of iron to Germany, wrote to the plaintiffs proposing to them to purchase a quantity of scrap iron, describing it as of a specified quality. The plaintiffs desired to have an offer of cost and freight to Rotterdam. The defendant stated the price, but his inability to make an offer as to freight, as he had then no ship available, but expressed his conviction that he should shortly be able to find a ship. Before the plaintiffs closed with the offer, the defendant proposed a ship for the conveyance of the iron. The plaintiffs accepted the purchase, but objected to the ship as too small to take the whole cargo, desiring the defendant to look out for another. Thereupon he, as agent for both parties, entered into and accepted the contract of sale, and transmitted it to the plaintiffs. He afterwards engaged a vessel to convey the iron, received the same, and caused it to be shipped, assuring the plaintiffs that the cargo was considered a first-rate description of scrap iron. The profit of the defendant was derived from commission from the seller and from the shipowner:—Held, that the defendant was not liable for damages on account of the iron shipped being inferior to the description in the contract, inasmuch as no obligation to see to the quality of the iron arose on the employment of the defendant as shipping agent, there being no evidence of usage, nor of an engagement by him, that he should do so. *Zwischenbart v. Alexander*, 29 L. J., Q. B. 236; 6 Jur., N. S. 1198; 8 W. R. 661. Affirmed, 1 B. & S. 234; 30 L. J., Q. B. 254—Ex. Ch.

Brokers acting as Owners.—Shipbrokers, not being owners of a particular ship, though they were of others, having issued advertisements and tickets announcing the times of sailing, and describing the ships as their "line;" evidence was given that if they were owners the announcements would be in the same form:—Held, that it was for the jury to say whether the parties had held themselves out as owners, or had acted only as agents. *Simpson v. Young*, 2 F. & F. 426.

Warranty of Authority.—In an action against a broker who had professed, on behalf of the owner of a ship, to charter her to the plaintiffs, not having authority so to do, and who had requested them to charter themselves some other ship, and they having chartered a much larger ship at a higher freight:—Held, that they could not recover from the broker more than the difference of freight on the tonnage of the former

ship, if they could have procured one of similar size, or had neglected to give the broker notice of the substituted ship, so that he might use the surplus freight. *Mitchell v. Kahl*, 2 F. & F. 709.

Pilotage Dues.—The fees to which pilots who are carried to sea against their will or beyond their distance are entitled, under 17 & 18 Vict. c. 104, s. 397, are not "pilotage dues" for which shipbrokers are liable under s. 363. *Morteo v. Julian*, 4 C. P. D. 216; 48 L. J., N. C. 126; 41 L. T. 71.

SIMONY.

See ECCLESIASTICAL LAW.

SLANDER.

See DEFAMATION.

SLAVERY AND SLAVE TRADE.

Status and Condition of Slaves.—Slavery is of such a nature that it is incapable of being introduced into this country, on any reasons, moral or political, and can be no farther considered in this country than as is supported by positive law. *Somerset v. Stewart*, Loft, 1.

Where negroes in a state of slavery in a colony of Spain escaped from their master's plantation, and took refuge and were received on board a British ship of war, whilst she was stationed at an island captured by his Majesty's arms from the United States, in time of war; and after notice given to the officers commanding on the station, that they were runaway slaves, the officers carried them to and left them at a British colony:—Held, that an action would not lie in this country by a British subject, who claimed the slaves as his property, against the officers for harbouring and detaining such negroes; although, by the *lex loci* whence they escaped, slavery was permitted and tolerated. *Forbes v. Cochrane*, 3 D. & R. 679; 2 B. & C. 448.

— **Action by.**—No action lies by a slave, coming to this country and continuing his service, for wages on an implied contract. *Alfred v. Fitzjames (Marquis)*, 3 Esp. 3.

— **Contract by.**—An infant slave in the West Indies executed an indenture, by which he covenanted to serve B. for a certain term of years as his servant, and B. covenanted to do certain things on his part; B. then came to England with the slave: in an action against A., who had seduced him from the service of B., A. was not permitted to allege that the contract was void as being made by an infant and a slave, for the court held that the effect of such a

contract might be the manumission of the slave; and, consequently, that it was for his own benefit; and, being for his own benefit, that it was, at most, only voidable by the infant himself. *Keane v. Boycott*, 2 H. Bl. 511.

Trading and Trafficking in.—A foreigner who is not prohibited from carrying on the slave trade by the laws of his own country, may, in an English court of judicature, recover damages which may have been sustained by him in respect of a wrongful seizure by a British subject of a cargo of slaves on board a ship employed by him in carrying on the African slave trade. *Madrazo v. Willes*, 3 B. & A. 353. See *Farmer v. Legg*, 7 T. R. 186.

An American ship was fitted out in the port of Liverpool, and sent to the coast of Africa, in 1806, on a joint adventure for trafficking in slaves. An English ship was sent at the same time, by the same parties, with arms and ammunition, to be at the disposal of the supercargo of the American ship; security having been given to the Admiralty that they were to be expended on trade on the coast of Africa. On the arrival of the two ships in the River Congo, the arms and ammunition were transhipped on board the American ship, which was thereupon seized by a British privateer, and ultimately condemned as contraband:—Held, that the whole transaction was illegal, and that no action for contribution or account, in regard thereto, could be maintained by any of the parties concerned against the others. *Stewart v. Gibson*, 7 C. & F. 707.

British subjects, domiciled in Great Britain, being possessed of slaves in the Brazils, where the purchase and holding of slaves are lawful, contracted with a Brazilian subject domiciled in the Brazils, to sell them to him, to be used and employed there. Some of the slaves had been purchased by the English subjects in the Brazils, after 5 Geo. 4, c. 113, but before 6 & 7 Vict. c. 98, for the purpose of being employed; and these were employed in the working of mines there, of which they were the proprietors; the rest of the slaves were the offspring of those first mentioned, and were in their possession before the passing of the last act:—Held, that the contract might be enforced here, there being nothing in the statutes to prohibit a contract by a British subject for the sale of slaves lawfully held by him in a foreign country, where the possession and sale of slaves are lawful. *Santos v. Illidge*, 8 C. B., N. S. 861; 29 L. J., C. P. 348; 6 Jur., N. S. 1348; 8 W. R. 705—Ex. Ch.

A naval commander, stationed on the coast of Africa, with instructions to suppress the slave trade, was requested by the governors of Sierra Leone to obtain the liberation of two British subjects, detained as slaves at the Gallinas by the son of the king of that country, and in effecting that object to use force, if necessary. He accordingly proceeded to the Gallinas with an armed force, and having landed at Dombocorro, took military possession of a barracoon belonging to the plaintiff, who was a Spaniard, carrying on the slave trade at the Gallinas. He then communicated with the king of the country, and the two British subjects having been released, the commander concluded a treaty for the abolition of the slave trade in that country. In execution of this treaty, he fired the barracoons of the plaintiff, and carried away his slaves to Sierra Leone,

where they were liberated. Some of the plaintiff's goods used in the slave trade were claimed by the king as forfeited, and delivered up to him; other goods were destroyed. These proceedings having been communicated to the Lords of the Admiralty, and the Secretaries of State for the Foreign and Colonial Departments, they respectively, by letter, adopted and ratified the act of the commander:—Held, first, that the plaintiff had a property in his slaves, and might maintain trespass for their seizure, the slave trade not being piratical by the law of nations, and it not appearing that Spain had passed any law abolishing the slave trade, pursuant to the treaty embodied in 6 & 7 Will. 4, c. 6. *Buron v. Denman*, 2 Ex. 167.

Held, secondly, that the ratification of the commander's act by the ministers of state was equivalent to a prior command, and rendered it an act of state, for which the crown was alone responsible. *Id.*

The provisions of the 5 Geo. 4, c. 113, are not confined to acts done by British subjects in furtherance of the slave trade in England or the British colonies, but apply to acts done by British subjects in furtherance of that trade in places not part of the British dominions. *Reg. v. Zulueta*, 1 C. & K. 215.

Desertion by Sailor—Defence that Captain threatened to Sell him as a Slave.—To an action for work as a seaman, a plea, that the work was done after the passing of the 7 & 8 Vict. c. 112, in respect of a voyage from San Francisco to this kingdom; and that he, before the time of doing the work, had engaged himself to serve as a seaman on board a British merchant ship, for a voyage which, during the doing of the work, was continuing, and the plaintiff, whilst such seaman, deserted. Replication, that the plaintiff was a negro; that negroes are bought and sold as slaves in divers states of the United States; that whilst the plaintiff was serving on board the captain threatened to sell him as a slave to citizens of the United States; that San Francisco is situated in one of the United States, to wit, California; and that the plaintiff had just and reasonable grounds for believing, and did believe, that the captain, on the arrival of the ship at San Francisco, meant to carry his threat into execution; and, in order to prevent the captain from selling him as a slave, he deserted:—Held, bad. *Edward v. Trevellick*, 4 El. & Bl. 59; 2 C. L. R. 1605; 24 L. J., Q. B. 9; 1 Jur., N. S. 110.

Pleading.—A declaration upon a contract, dated 25th September, 1834, whereby the plaintiff, in consideration of a sum of money, sold and transferred all right, title and interest in and to the services and labour of 153 apprenticed labourers, to the defendant on behalf and to the use of his plantations, with a warranty of quiet possession of the services of such apprenticed labourers, according to law; and the defendant engaged to pay to the plaintiff the money by instalments, with interest; and in case of failure in payment of any of the instalments, the plaintiff should be entitled to reclaim, and the services of the apprenticed labourers should revert to the plaintiff, the defendant remaining liable for the payment of such sums as should be due for the value or hire of the labour during such period as he should have received the services of the apprenticed

labourers. Breach, non-payment of two instalments. Plea, that while the apprenticed labourers were in the service of the defendant, under the terms of the sale and agreement, an ordinance was made by the governor of the colony, by which it was enacted, that all persons who, on the 1st August, 1838, should be holden within British Guiana as prædial apprenticed labourers, should, after that date, be discharged from the remaining term of their apprenticeship; and that during the time that their services could by law be had and received, defendant paid all instalments:—Held, that the declaration was good, and that it was not to be intended that the contract upon which it was founded was made concerning apprentices in England. *Mittelholzer v. Fullarton*, 6 Q. B. 989; 9 Jur. 334—Ex. Ch.

— **Evidence as to.**—In order to convict a party who is charged with having employed and loaded a vessel for the purpose of slave trading, it is not necessary to shew that the vessel which carried out the goods was intended to be used for bringing back slaves in return; but it will be sufficient if there was a slave adventure, and the vessel was in any way engaged in the advancement of the adventure. *Reg. v. Zuluta*, 1 C. & K. 215.

Where a party living in London was charged with having chartered a vessel and loaded goods on board for the purpose of slave trading, held, that slave-trading papers, found on board the vessel when she was seized in foreign parts, but not traced in any way to the knowledge of such party, were not admissible against him. *Ib.*

As proceedings under the laws for the suppression of the slave trade are penal, the offence charged being a criminal offence, the onus probandi is upon the seizers to establish that the law has been infringed. *The Laura*, 2 Moore, P. C. C., N. S. 181; 13 L. T. 133; 13 W. R. 369.

Offences against the Slave Trade Acts may be established by circumstantial evidence; but the circumstances must be such as to satisfy a reasonable mind that the suspicion as to the character of the vessel is well founded. *Ib.*

Where articles of merchandize usually employed for the purpose of the slave trade, but capable of being employed for lawful commerce, are found on board a vessel seized on suspicion of being so employed, it is not sufficient to consider merely of what the cargo of the vessel accused of being implicated in the unlawful trade consists, but all the circumstances of the case, and more especially the locality in which the vessel may be found, must be taken into consideration. *Ib.*

Condemnation of Ships for Trafficking.—It is necessary, to justify a condemnation imposing forfeiture and penalties for a breach of the 5 Geo. 4, c. 113, that it be shewn, as regards the ship, that she was employed in contravention of the object of that act, and that she was employed with the knowledge of the owner, and as to the shippers, that the goods had been shipped by them wilfully and knowingly for the purpose of being employed in the slave trade. *The Newport*, Swabey, 317; 11 Moore, P. C. C. 155.

An Italian merchant ship was seized by an officer (acting unofficially) in the harbour of Sierra Leone, under the impression that she was a slaver, and had violated the provisions of the

5 Geo. 4, c. 113. The master applied to the Vice-Admiralty Court of Sierra Leone for the release of his ship, and for damages and costs for its detention:—Held, that the seizure of the vessel was quite unjustifiable, and that the master ought to recover damages and costs for its detention. *The Ricardo Schmidt*, 1 L. R., P. C. 268; 36 L. J., P. C. C. 3; 12 Jur., N. S. 895; 4 Moore, P. C. C., N. S. 121.

A native of the Ionian Islands purchased an American ship, and, upon a declaration that he was a British subject, obtained from the British consul at Cuba a provisional registry of the ship as British. The ship was afterwards seized and condemned for a breach of the Slave Trade Acts. Upon a preliminary objection taken on appeal to the jurisdiction of the court below, on the ground of the national character of the owner of the ship and cargo:—Held, first, that the registry, flag, and pass of a ship carry with them the presumption that they are true and correct, and that the owner was estopped from proving that he was not a British subject, and consequently that the registry of the ship was void. *The Laura*, 2 Moore, P. C. C., N. S. 181; 13 L. T. 133; 13 W. R. 369.

Held, secondly, that even if he could have established that the registry was void, and the ship not entitled to claim the protection of any flag or nation, yet that the ship was, by 2 & 3 Vict. c. 73, liable to be adjudicated upon by a vice-admiralty court for a violation of the Slave Trade Acts. *Ib.*

— **Seizure of Portuguese Ship in Harbour—Condemnation of Seizor in Costs for not taking into Consideration surrounding Circumstances.**—

—The O., a Portuguese vessel, was seized on the 5th of December, 1876, whilst lying at anchor in the harbour and port of F., in Sierra Leone, as liable to be forfeited for offences committed against the provisions of 5 Geo. 4, c. 113, and 36 & 37 Vict. c. 88 (the Slave Trade Act, 1873), but was subsequently released by the court on it appearing that she was not engaged in the slave trade, but was chartered and intended to carry free immigrants:—Held, on appeal, that the seizor was rightly condemned in costs and damages. Although certain articles on board (shackles, an extraordinary number of empty casks, an extraordinary quantity of rice and mats) are included among the equipments which are declared to be *prima facie* evidence of a vessel being engaged in the slave trade, both by the treaty between England and Portugal, carried into effect by 6 & 7 Vict. c. 53, and by the Slave Trade Act, 1873; yet the seizor having had the means from the surrounding circumstances and from the ship's papers of informing himself of the true character of the vessel, and the true condition of the men on board who were alleged to be slaves, had no reasonable grounds for the suspicion that the vessel was engaged in or fitted out for the purpose of the slave trade. *Reg. v. Casaca*, 5 App. Cas. 548; 49 L. J., P. C. 41; 43 L. T. 290; sub nom. *The Ovarense*—P. C.

— **Obligation of Seizor to justify his Acts.**—The obligation upon a seizor to justify the seizure under the Slave Trade Acts of a vessel plainly engaged in bona fide trade within a harbour is a very strict obligation. *Ib.*

The Ricardo Schmidt (1 L. R., P. C. 268; 4 Moore, P. C. 121) approved. *Ib.*

— **What is Justification.**]—A reasonable suspicion that the alleged slaves had been kidnapped on board with the object of carrying them as free labourers, and not of consigning them to slavery, would not have justified the seizure and detention of the vessel. *Id.*

— **Treaty with Portugal, Effect of.**]—According to the true construction of the Portuguese treaties, the consent on the part of Portugal that certain articles mentioned in the first schedule to the Slave Trade Act, 1873, when found on board a Portuguese vessel, shall be considered as *prima facie* evidence of her being engaged in the slave trade relates only to vessels on the high seas, and does not extend to vessels in a foreign port or foreign territorial waters. The 4th section, therefore, of the act cannot be extended to a Portuguese vessel lying in British waters. *Id.*

— **Kidnapping Act — Liability of Naval Officer for Seizure of Vessel.**]—By the Kidnapping Act, 1872, s. 3, vessels carrying native labourers of the South Sea Islands, not being part of the crew, must have a licence; by s. 6, vessels carrying native labourers without a licence are subject to the provisions of s. 16; by s. 9, to detain or confine a native for the purpose of removing him from one place to another is declared to be felony; by s. 16, any vessel suspected upon reasonable grounds of committing an offence against the 9th section may be detained; by s. 20, no damages shall be payable and no officer shall be responsible for the detention or seizure of a vessel in pursuance of the act. Before the passing of the Kidnapping Act, 1872, the plaintiff's vessel sailed on a voyage to the South Sea Islands for the purpose of fishing; her master hired native labourers, and after the fishing was over the vessel was engaged in carrying the natives home when she was seized by a man-of-war, of which the defendant was commander. At the time of the seizure the defendant *bona fide* believed that there was reasonable ground for suspecting that an offence had been committed against the act:—Held, no action would lie against the defendant. *Burns v. Nowell*, 5 Q. B. D. 444; 49 L. J. Q. B. 468; 43 L. T. 342; 29 W. R. 39; 44 J. P. 828—C. A.

Bounties.]—The governor of a colony is the person to whom the general management of the colony is intrusted, and therefore is the person entitled to the bounties which are payable in respect of a seizure of slaves, even though he is absent from the colony at a time when the seizure is made. *Anon.*, 32 L. J., Adm. 189; 9 Jur., N. S. 1254.

A Queen's ship, which is authorized to capture slave ships, being in sight during the chase and capture by another ship of war of a vessel equipped for the slave trade, is entitled to share as joint captor in the tonnage bounties awarded under 1 & 2 Vict. c. 47, unless the *animus capiendi* is clearly rebutted. *Anon.*, B. & L. 370.

SMOKE.

See NUISANCE.

SODOMY.

See CRIMINAL LAW.

SOLICITOR.

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X. CHANGE OF SOLICITORS, 1966.

XI. DEATH OF SOLICITOR IN THE CAUSE, 1968.

XII. UNQUALIFIED PRACTITIONERS, 1969.

XIII. POWER OF ATTORNEY.—*See* POWER OF ATTORNEY—PRINCIPAL AND AGENT.

I. ARTICLED CLERKS.

1. PERSONS CONTRACTING.

Who may take an Articled Clerk.—An attorney whose name is on the 1s. roll of one of the superior courts of Westminster pursuant to 11 Geo. 4 & 1 Will. 4, c. 70, s. 16, is a practising attorney in Wales under 6 & 7 Vict. c. 73, s. 3, and may take an articled clerk, and make the affidavit required by s. 8. *Davies or Davis, Ex parte*, D. & M. 463; 1 D. & L. 892; 5 Q. B. 564; 13 L. J., Q. B. 146; 8 Jur. 288.

Who may be Clerks.—A person who holds a situation, and receives a salary from government, as surveyor of assessed taxes, is not *sui juris* to enter into a contract for service as an articled clerk; and where a person so situated was articled to an attorney, and nominally served him for five years, retaining his situation under government all the time, and then commenced practising as an attorney, the court ordered him to be struck off the rolls. *Taylor, In re*, 6 D. & R. 428; 4 B. & C. 341.

An attorney having, by mere collusion, and with intent to secure the business arising from the prisoners, taken one of the turnkeys of the King's Bench prison for his articled clerk, the articles were cancelled in court. *Fraser's case*, 1 Burr. 291.

2. SERVICE UNDER ARTICLES.

Date of Execution.—The service is reckoned as from the date of the execution, and not from the day of the date of the articles; consequently the clerk cannot be admitted till he has served

five years from the day of the execution. *Angel, Ex parte*, 4 Jur. 656.

A clerk and M.A. was articled on the 8th of May, 1858, for three years "from the date thereof."—Held, that such service was not completed until after 8th of May, 1861. *Anon.*, 9 W. R. 639.

Service must be under Written Articles.—

An articled clerk must not only be bound for five years, and serve five years, but the service itself must be under written articles. *Adams, Ex parte*, 4 Ch. D. 39; 46 L. J., Ch. 42; 35 L. T. 751; 25 W. R. 54.

Supervision of Master—What Sufficient.—

In deciding whether the service of an articled clerk has been sufficiently subject to the supervision of the master, the court will not lay down any general rule, but take into consideration the peculiar circumstances of each particular case. *Duncan, In re*, 5 B. & S. 341; 33 L. J., Q. B. 190; 10 Jur., N. S. 939; 10 L. T. 337; 12 W. R. 752.

A clerk, having been a managing clerk for several years previously to entering into articles, and also a person of mature age, renders the control and supervision of his master less necessary than in the case of a young man just entering on the profession. *Id.*

Under 2 Geo. 2, c. 23, the clerk must have actually served the five years; and the statute was not complied with by the clerk serving part of the time with another attorney with his master's consent, and the rest of the time with his master. *Hill, Ex parte*, 7 T. R. 456.

Where a clerk has been articled to one of the members of a firm, and he covenanted to serve him, a service with a partner, for three months after the decease of the master, before an assignment was effected, is not service under the articles, although the partner was a party to the articles, and such months will not count. *Dalton, Ex parte*, 9 D. P. C. 110; 4 Jur. 1187.

Examination—Service entitling Clerk to be Examined.—

An articled clerk to an attorney served under the articles for two years and seven months, and afterwards, with the assent of the attorney, left the service, with the intention of serving the rest of his time under assignment to another firm. This arrangement was not carried out, and after an absence of about six years, the clerk went into fresh articles with the original attorney, and served for a period which, with the former service, amounted to more than five years:—Held, that his service under the first articles could not be coupled with his service under the second articles, and that he was not entitled to go up for examination. *Austin, Ex parte*, 28 L. T. 121; 21 W. R. 390.

When a clerk who had articled himself for three years was absent by reason of illness for sixteen months, and afterwards served thirteen months:—Held, that he could not be examined, and must enter into fresh articles for six months. *Digby, Ex parte*, 45 L. J., Ch. 692.

A clerk was articled in September, 1870, for five years, and served up to October, 1873, when he was assigned to another solicitor for fifteen months. At the expiration of that period he returned to his first master, and served him under the original articles until the expiration of the five years in September, 1875. It having been

decided that the fifteen months could not be counted, the clerk continued to serve his first master under a parol contract of service until November, 1876, when he applied to be admitted to the final examination:—Held, that he might be examined, but that he must enter into fresh articles for a period of fifteen months before he could be admitted. *Adams, Ex parte*, 4 Ch. D. 39; 46 L. J., Ch. 42; 35 L. T. 751; 25 W. R. 54.

A clerk, having a connexion of his own, derived from a former master, articulated himself to a solicitor, and managed the business introduced by him under an arrangement with the solicitor that he should draw 150*l.* a year out of the profits, and the rest be retained to form the solicitor's share of the capital of a partnership which was to be entered into between them upon the clerk's becoming admitted. On an application by the clerk to be admitted to the final examination:—Held, that he had so far complied with the requirements of the statute as to service, as to be entitled to present himself for examination. *Joyce, Ex parte*, 4 Ch. D. 596; 46 L. J., Ch. 295; 25 W. R. 340.

A clerk was articulated to his father in April, 1872, for the term of five years, and attended the office regularly for that time; but from Michaelmas, 1875, to Michaelmas, 1876, his father was absent from ill-health, and business was practically suspended, although the office remained open:—Held, that he might be allowed to go in for his final examination in April, 1877, but must enter into fresh articles for a year and serve under them before he could be admitted. *Fereday, Ex parte*, 46 L. J., Ch. 504.

The examiners of attorneys rejected a candidate, on the ground of insufficient service, it appearing that while articulated, he had acted as agent to an insurance office, and that the attorney to whom he was articulated was himself acting as clerk to another attorney. The latter fact was disputed. The court refused the motion by the candidate to refer the examination to a judge, that he might decide upon the qualification, the jurisdiction, on an appeal of this kind, being vested in all the judges. *Carr, Ex parte*, 3 Q. B. 447.

But the attorney under whom the former service took place having since died, the court ordered that the clerk should be articulated to another attorney for the residue of his term of service, without assignment. *Ib.*

Where an articulated clerk, serving with a practising barrister under 1 & 2 Geo. 4, c. 48, s. 2, had been unable to serve the last nine days of his time, owing to dangerous illness, but after his recovery had served more than the nine days with the same barrister, he was allowed to be examined for his admission. *Vaughan, Ex parte*, W., W. & D. 46; 1 Jur. 21.

A clerk, before the expiration of ten years' service, entered into articles for five years, under which, after the expiration of the ten years, he served for a period of three years:—Held, that he was entitled to be examined and admitted under 23 & 24 Vict. c. 127, s. 4, although he was only fifteen years of age when he entered the service of the attorney. *Anon.*, 37 L. J., Q. B. 82; 16 W. R. 340; *S. C., Sherry, Ex parte*, 3 L. R., Q. B. 164; 17 L. T. 471; 9 B. & S. 115.

Time of Service under fresh Articles and Assignments—Addition of former Service.]—

When a clerk had served two years under his articles, and then ceased to serve any longer, and the articles expired, and he then desired to enter into fresh articles, and obtain the previous consent of the court to such two years' service being computed in the period of service under such new articles; the court refused such consent, leaving it open, however, to him to apply to have such period computed when he should have served a sufficient time under the new articles. *Trenchard, Ex parte*, 21 L. T. 638.

In October, 1856, a son was articulated to his father, an attorney, and duly served for two years; when, becoming out of health, he was recommended by his medical attendants to follow some more active occupation, and his father obtained him a commission in the army in June, 1859. In 1870, his health being re-established, he sold out of the army, and entered into fresh articles with his father early in 1871, and duly served up to May, 1874. An application was then made that the two years under the original articles might be allowed to be reckoned as part of the five years' service under the fresh articles:—Held, that the facts amounted to a virtual cancellation by mutual consent of the first articles; and the case therefore came within 6 & 7 Vict. c. 73, s. 13, and that the application might be granted. *Trenchard, Ex parte*, 9 L. R., Q. B. 406.

An articulated clerk who had served under articles for five years, all but five months, was then absent for five months and seventeen days on account of ill-health. On his return at the end of the five months he passed his final examination and applied for his certificate, but was required to enter into fresh articles for five months:—Held, that an order for his admission as if he had served the full period of five years could not be made, nor a prospective order for his admission after service for the remaining period without entering into fresh articles. *Marshall, Ex parte*, 22 W. R. 754.

An articulated clerk, who has served under his articles for three of the term of five years, was then absent from illness for eleven months, but on his return served to the end of the term of his articles, and passed his final examination:—Held, that an application for his admission as though he had served the full term of five years could not be granted, but that he might be allowed to complete his term by serving for a further period of eleven months. *Moses, Ex parte*, 9 L. R., Q. B. 1; 43 L. J., Q. B. 13; 29 L. T. 420; 22 W. R. 57.

An articulated clerk was at his own request assigned, during the articles, to an attorney for fifteen months, at the expiration of which time he returned to his original master, and continued to serve him up to the end of the term:—Held, that such period of fifteen months could not be reckoned as a portion of the five years required by 6 & 7 Vict. c. 73, ss. 6, 12. *Adams, Ex parte*, 10 L. R., Q. B. 227; 44 L. J., Q. B. 102; 32 L. T. 454; 23 W. R. 594.

W. was articulated in 1861 to R., a solicitor, for five years, but left him after two years' service, the articles with R.'s consent being considered as cancelled. In 1864, he was re-articled to R. for the remaining three years, and under these new articles he continued in his service for two years, when he left on account of ill-health and under medical advice. In 1869, he was assigned and re-articled by R. to, and served with, L. for the remaining one year. An application by him that

the several periods of service under the three articles might be reckoned as constituting the full five years' service, was granted, it being held that both the first and second articles had been cancelled by mutual consent, within s. 13 of 6 & 7 Vict. c. 73. *Williamson, Ex parte*, 4 Ch. D. 581; 46 L. J., Ch. 624; 35 L. T. 695.

An articled clerk having during his articles lost a great portion of his time by service to other attorneys not under articles, allowed after the expiration to enter into fresh articles for such period as would make up the time lost. *Hayward, In re*, 11 W. R. 67.

A clerk served his articles for four years six months and twenty-four days. He was then absent, either serving in the militia or holding the appointment of a supernumerary surveyor of taxes until after the expiration of his articles, when he returned to the attorney to whom he had been articled, and served for five months and six days, but not under a contract in writing:—Held, that the service for the latter period was insufficient; but he was allowed to enter into fresh articles to complete the five years. *Smith, Ex parte*, 1 El. & El. 928; 28 L. J., Q. B. 263; 5 Jur., N. S. 515; 32 L. T., O. S. 135; 7 W. R. 451.

But where the time of the articles had expired, and the service under them had not been complete, the court refused an application for leave to enter into fresh articles and to serve under them to complete the service under the original articles: overruling thus far, *Smith, Ex parte, supra*. *Keddie, Ex parte*, 4 B. & S. 993; 34 L. J., Q. B. 136; 11 Jur., N. S. 503; 11 L. T. 625; 13 W. R. 290.

Where a clerk had been articled to his father, an attorney, for three years, and was afterwards assigned to A., and served under the articles and assignment for two years one month and twenty-three days, and then went to America, where he remained for nearly four years, when he returned and resumed service with A., the court allowed him to enter into fresh articles with A. for the remainder of the term of three years, the service under the whole articles and assignment to count. *Thomas, In re*, 11 W. R. 341.

During more than three of the five years for which he was bound, the service of a clerk had been given to the attorney to whom he was articled, and he afterwards bound himself to another attorney and served him for two years:—Held, that his service under the first articles could not be coupled with his service under the second. *Taylor, In re*, 4 B. & C. 341; 6 D. & R. 428.

If, during the five years, an articled clerk has been absent two months, by consent of his master, at his father's house, and at the end of the five years has served two additional months, he will be entitled to admission. *Hubbard, Ex parte*, 1 D. P. C. 438; S. P., *Frost, Ex parte*, 3 D. P. C. 322; 1 H. & W. 111.

A clerk, whose service was interrupted by illness, and who was absent for a period of two years on account of his health, was nevertheless allowed to be considered as having sufficiently served under his articles. *Anon.*, 9 L. T. 324; S. P., *Beddoe, Ex parte*, 12 L. T. 711; 13 W. R. 871; *Mattheus, Ex parte*, 1 B. & Ad. 160.

Where the time of the articles had not expired, and there had been a suspension of service under them by reason of illness, the court discharged them and allowed the clerk to enter into fresh articles with the same master for the residue of

the time necessary to complete the five years' service. *De Fias, Ex parte*, 4 B. & S. 992; 34 L. J., Q. B. 7; 11 Jur., N. S. 13.

A clerk having served a part of his time, was compelled by illness to relinquish service for upwards of a year, at the end of which period, having recovered, he resumed service, and moved the court that the period of his illness should be reckoned as actual service. At the time of the application, the full period of five years from the date of the articles had not expired. The court refused the application, as being premature. *Rogers, Ex parte*, 34 L. J., Q. B. 136; 11 Jur., N. S. 504.

Where a clerk, on the death of his master, continued with the surviving partner for the residue of the five years, and also for nine months in addition; but an interval of nine months had elapsed between the death and the assignment of his articles by the executors, the court allowed him to be examined. *Johnson, Ex parte*, 1 W., W. & H. 404; 2 Jur. 966.

Where a clerk, in consequence of his master's death, had not served during a certain period of five years, but after the expiration of the five years served an additional time equal to the period of his non-service, the court allowed him to be examined. *Tomkins, Ex parte*, 6 D. P. C. 3; W., W. & D. 569.

Agreement to Assign—Not Executed.—An articled clerk, upon an agreement that an assignment should be executed, left his master's service, and went into that of his own father, who was also an attorney. The assignment was not executed for six months, but during the whole period he was employed bona fide as clerk by his father:—Held, that the service under the agreement for the assignment was a service within 6 & 7 Vict. c. 73, s. 3, and that, having duly served the residue of the term, he was entitled to admission. *Brutton, Ex parte*, 23 L. J., Q. B. 290; 18 Jur. 580.

A clerk, duly articled, served a portion of his time with his master; it was then agreed that he should be assigned to another attorney for the residue of his term. On this understanding the clerk left his first master, and went into the service of the second master. From circumstances over which the clerk had no control, the assignment to the second master was not executed for about eight weeks after his entering the second master's service. The clerk served under the assignment for the residue of the term:—Held, that the interval between entering the second master's service and the execution of the assignment could not be reckoned as service under the articles within 6 & 7 Vict. c. 73, s. 12. *Harrison, Ex parte*, 44 L. J., Q. B. 103; 23 W. R. 635.

Interval between Death of Master and Assignment of Articles.—An attorney, dying pending the service, the clerk continued to attend regularly at the office, and conducted the business until its transfer to a successor, to whom also the articles were assigned:—Held, that the period which intervened between the death of the first master and the assignment of the articles to the second, was not to be reckoned in the computation of the five years' service required by 6 & 7 Vict. c. 73, s. 12. *Wallis, Ex parte*, 2 B. & S. 416; 31 L. J., Q. B. 176; 8 Jur., N. S. 913; 6 L. T. 242.

Graduates of Universities.]—In order to enable a graduate of the universities named in s. 7 of 6 & 7 Vict. c. 73, to be admitted an attorney after three years' service, he must have taken his degree before being bound by articles. *Bradford, Ex parte*, 1 El. & El. 417; 28 L. J., Q. B. 138; 5 Jur., N. S. 648; 32 L. T., O. S. 254; 7 W. R. 188.

A gentleman who had taken the degree of bachelor of arts at Cambridge articulated himself to an attorney for three years, but served only two months, and abandoned the contract. After the expiration of the three years mentioned in the original articles he was assigned to another attorney, with whom he served two years and ten months:—Held, that as the original articles had expired previously to the assignment, the service under the assignment was not a service within the terms of 1 & 2 Geo. 4, c. 48, s. 1. *Unthank, Ex parte*, 2 M. & P. 453.

Where an applicant to be admitted an attorney while under articles, by medical advice and with the consent of his master, went to sea, and, after a lapse of five months, entered as a student at Harvard University, in the United States, where he diligently pursued the study of the law for seven months, and then returned to the completion of his articles, but he served only five years, including the period of his absence, the court allowed him to be examined, in order to be admitted an attorney. *Cross, Ex parte*, 2 D., N. S. 692; 12 L. J., Q. B. 138; 7 Jur. 67.

A clerk after four years' service went to the university, and remained until he had obtained the degree of B.A. In the meantime his articles expired, but on application to the court he was allowed to enter into fresh articles, quantum valeat. *Gardner, Ex parte*, 8 L. T. 315.

A member of the University of Edinburgh, who has not taken the degree of M.A., but has been enrolled on the general council by virtue of 21 & 22 Vict. c. 83, s. 6, is not entitled to be admitted an attorney after three years' service under articles. *Stewart, Ex parte*, 7 L. R., Ex. 202; 41 L. J., Ex. 76; 20 W. R. 493.

A clerk, having taken a B.A. degree, was articulated for three years, two of which he served with his master, eight months with the London agent, and four months with a special pleader; he then passed his examination:—Held, that he might be admitted after serving four months with an attorney, and receiving a certificate of his examination, the examiners to be at liberty to sign the certificate at once, but such certificate to be stayed until the service was completed. *Earle, Ex parte*, 1 B. C. C. 180; 17 Jur. 440.

Service without passing Preliminary or other Examination.]—A gentleman had successfully passed the middle-class examinations of Oxford and Cambridge, which, however, were not included in the regulations of the judges, and he was thereupon articulated for a term of four years, which term he duly served:—Held, that the articles were invalid; and the court refused to permit him upon entering into fresh articles to have the advantage of his four years' previous service under the former articles. *Jones, Ex parte*, 22 L. T. 300.

Period of Pupilage to Conveyancer.]—On an application by an articulated clerk to be admitted as an attorney it appeared that, upon the execu-

tion of the articles and without any service under them, he became pupil to a conveyancer and continued so for more than a year. Upon the expiration of his pupilage the articles were assigned to another attorney, and he served under that and subsequent assignments for more than four years:—Held, that a year of the pupilage was equivalent to a year's service under the articles, and that he was entitled to admission. *Anon.*, 25 L. T. 161; 19 W. R. 780.

An Articled Clerk cannot Perform any other Office during Articles.]—An articulated clerk cannot perform any office or employment whatever during the terms of service under 23 & 24 Vict. c. 127, s. 10, even when such employment is in no way inconsistent with and in no respect interferes with the service under his articles, and where the services are performed at night or by deputy. *Greville, Ex parte*, 9 L. R., C. P. 13; 43 L. J., C. P. 58; 29 L. T. 542; 22 W. R. 160.

An articulated clerk held during the term of his articles the office of vestry clerk. It was shewn that the duties of the office had not interfered with the due performance of his duties under his articles or with his legal studies:—Held, nevertheless, that he had contravened the provisions of 23 & 24 Vict. c. 127, s. 10, by holding an office or an employment other than that of clerk to the attorney to whom he was articulated. *Ib.*

— Except out of Office Hours.]—An articulated clerk performing all his master's business may, at leisure hours, work for wages with another attorney. *Blunt, Ex parte*, 2 W. Bl. 764. See *Hill, Ex parte*, 2 W. Bl. 957.

— Or under Peculiar Circumstances.]—The 23 & 24 Vict. c. 127, s. 10, prohibits an articulated clerk, during his term of service, from holding any office or engaging in any employment whatsoever other than the employment of clerk to the attorney with whom he is articulated. P., during his articles, was appointed steward of a manor by his mother, who had a life interest in the property, which at her death would be divisible between him and his sisters. He at once appointed a deputy to discharge the duties; but on three occasions he attended, with his principal's consent, courts of the manor to admit tenants and take surrenders, with the view of becoming acquainted with the duties of steward of the manor in which he and his family were interested:—Held, that the service was, under these peculiar circumstances, sufficient. *Peppercorn, Ex parte*, 1 L. R., C. P. 473; 35 L. J., C. P. 239; 12 Jur., N. S. 761; 14 W. R. 693; 1 H. & R. 487.

So where an applicant, while under articles, discharged the duties of auditor of a poor-law union, which occupied him for a very inconsiderable period of time, and to which he never gave any attention until after the usual office hours of his master:—Held, that that occupation did not render the service insufficient. *Llewellyn, Ex parte*, 2 D., N. S. 701; 12 L. J., Q. B. 138; 7 Jur. 377.

To more than One Member of Firm.]—A clerk may be articulated to more than one member of a firm. *Holland, In re*, 7 L. R., Q. B. 297; 41 L. J., Q. B. 141; 26 L. T. 289; 20 W. R. 756.

Managing Clerks.]—A clerk who, having

served ten years, enters into articles for three years, under 23 & 24 Vict. c. 127, s. 4, is entitled to the privileges afforded by that section, notwithstanding there may have been an unexpired interval between the termination of his former service and the date of his articles; and the court directed the examination of an articled clerk, although seven years had elapsed between the two services. *Vosper, Ex parte*, 4 B. & S. 901; 33 L. J., Q. B. 113; 10 Jur., N. S. 724; 12 W. R. 374.

It is not necessary that a clerk applying to be admitted under 23 & 24 Vict. c. 127, s. 4, should produce a certificate from his master that he has served faithfully, honestly and diligently during the ten years. If the master refuses the certificate, such service may be proved by other means. *Rigby, Ex parte*, 11 L. T. 671.

Vote—Absence of Articled Clerk during Service—Not Constructive Residence.]—By 2 & 3 Will. 4, c. 45, s. 31, which makes provision for freeholders voting for a city being a county of itself, no freeholder shall be registered in any year "unless he shall have resided for six calendar months next previous" to a certain day in such year, within such city. During part of the prescribed period of six months, a freeholder who had a bedroom kept for his exclusive use in his father's house within such a city was absent, serving under articles to a solicitor in London:—Held, that, being bound by the articles, he could not be deemed to have had either the liberty or intention to return to the room whenever he liked, and therefore had not "resided" within the city for the required time within the meaning of the act. *Ford v. Drew*, 5 C. P. D. 59; 1 Colt. 1; 49 L. J., C. P. 172; 41 L. T. 478; 28 W. R. 137; 44 J. P. 58.

Gaining a Settlement.]—An articled clerk to an attorney may, by being bound and inhabiting in a parish, gain a settlement therein as an apprentice under 3 Will. & M. c. 11, s. 8. *Clapham v. St. Pancras*, 2 El. & El. 742; 29 L. J., M. C. 146; 6 Jur., N. S. 700.

3. STAMPING ARTICLES.

Service under Unstamped Articles—When Computed from—Where Clerk has not been Guilty of Negligence.]—When articles have not been stamped within six months from their execution, but have been subsequently stamped under 19 & 20 Vict. c. 81, s. 3, and the clerk has served under them from their execution, the court will allow a subsequent enrolment of them, to count from the date of the execution, provided there has been no negligence or default on the part of the clerk. *Norton, Ex parte*, 26 L. J., Q. B. 24.

Where the delay had been caused by some accidental omission, and by the closing of the office on a holiday, the court allowed the time to run from the day of execution. *Appleton, In re*, 11 W. R. 35.

The court will only permit articles of clerkship to be enrolled *nunc pro tunc*, and the service thereunder to be computed from the date of their execution (the duty and penalty under 19 & 20 Vict. c. 81, s. 3, being paid), where the omission to stamp them at the proper time has been the result of some accident or unforeseen circumstance. The mere disappointment of some

vague hope or expectation of obtaining the means of paying the duty in time will not be received as an excuse for a non-compliance with the statute. *Darville, Ex parte*, 2 L. R., C. P. 244; 36 L. J., C. P. 133; 15 L. T. 537; 15 W. R. 352.

A clerk in 1848 entered into articles, not in the usual form, with 1*l.* stamp duty only thereon. The court allowed the articles to be enrolled, and the service to count from the date of the articles, as there did not appear to be any speculation on the part of the clerk, and the omission arose from circumstances over which he had no control. *Forest, Ex parte*, 35 L. J., Q. B. 131; 12 Jur., N. S. 499; 14 L. T. 285; 14 W. R. 607.

A clerk had been articled to his father, and served the five years, without his knowledge that the articles were not stamped. An affidavit of the father stated, that having before the articles been subject to much pecuniary loss and pressing expenses, and a diminution of professional income, on account of the changes in the law and personal and family affliction, he was, at the time of the articles, without the means to pay the stamp duty; and that he had not articled his son speculatively, but with the intention of ultimately stamping and enrolling the articles. The Treasury having directed the commissioners of inland revenue to stamp the articles upon payment of the duty and penalty, and the articles having been stamped accordingly:—Held, that they might be enrolled, and the service under them computed from the date of their execution. *Herbert, Ex parte*, 1 B. & S. 825; 31 L. J., Q. B. 33; 8 Jur., N. S. 615; 5 L. T. 579; 10 W. R. 211.

Articles, the service under which has been fully completed, but where payment of the stamp duty was not made at the date of the execution, nor at any time afterwards during the service, such non-payment clearly, to the satisfaction of the court, arising, not from a preconceived plan to wait and see how the clerk articled might turn out, but from the absence of means to defray the expense of duty, may be made valid, and the service reckoned from the date of the execution, on payment of the stamp duty and penalty. *Bishop, Ex parte*, 9 C. B., N. S. 150; 30 L. J., C. P. 48; 7 Jur., N. S. 243; 3 L. T. 323.

The court will permit the service under unstamped articles of clerkship to be reckoned from their date, where the omission to pay the duty at the proper time was the result of an emergency which may be justly inferred to have been unforeseen by the party. *Breden, In re*, 12 C. B., N. S. 351; 31 L. J., C. P. 321; 9 Jur., N. S. 176; 6 L. T. 494; contra, in *Q. B.*, 2 B. & S. 649; 31 L. J., Q. B. 184; 8 Jur., N. S. 937; 6 L. T. 455.

An articled clerk applied to stamp his articles within six months of execution, being misled by the words of the Stamp Act, 1870, s. 43, but the Inland Revenue Board refused to affix the stamp except upon payment of a penalty. The clerk subsequently paid the penalty and the duty, but, in consequence of his mistake in the law, he was prevented from enrolling the articles within the requisite time. The court allowed the service to be reckoned from the date of the articles instead of from the day of filing the affidavit required with the enrolment. *Hayward, Ex parte*, 29 L. T. 422.

The court will allow the service under articles

to be computed from their date, notwithstanding the stamp duty thereon has not been paid within the proper period, provided the failure to pay it has arisen from some unforeseen circumstance over which the clerk had no control. Therefore, where the failure had arisen from the non-payment of a debt due to the clerk, which he had a reasonable expectation to obtain in time, the excuse was held sufficient. *Sayer, In re*, 10 L. R., C. P. 569; 44 L. J., C. P. 307, n.; 32 L. T. 728. But see *S. C.*, 32 L. T. 560; 23 W. R. 595.

— **Delay must be Accounted for.**—The court will not order articles to be enrolled and the service to count from the time of the execution, where the articles have been stamped after the six months on payment of a penalty, unless the delay in payment of the duty is satisfactorily accounted for. *Edwards, Ex parte*, 32 L. J., C. P. 213; 10 Jur., N. S. 17; 8 L. T. 360; 11 W. R. 754.

The court will not allow articles to be enrolled *nunc pro tunc*, and the service under them to be reckoned as from their date, where there has been an omission to cause them to be stamped within the time required by law—even though the Treasury has accepted the stamp duty with a penalty, unless it is shewn that the omission has been the result of some unforeseen emergency, or of the failure of some just expectation. The mere disappointment of a vague hope will not suffice. *Jones, Ex parte*, 14 C. B., N. S. 301.

Where articles have not been stamped within the required time, and are stamped afterwards, on payment of the penalty, the court, both for the purpose of protecting the revenue, and for ensuring the respectability of those who are to become attorneys, should, before the service under the unstamped articles is allowed to reckon, be satisfied that the circumstances are such as to account for the omission to pay the duty and enrol the articles in due time. *Wilson, Ex parte*, 4 B. & S. 889; 33 L. J., Q. B. 89; 10 Jur., N. S. 469; 12 W. R. 841; *S. P., Belk, Ex parte*, 2 H. & C. 737; 33 L. J., Ex. 73; 10 Jur., N. S. 348; 9 L. T. 516; 12 W. R. 316.

— **Sufficiency of Excuse for Delay.**—The court will only allow articles to be enrolled *nunc pro tunc*, and the service under them to be reckoned as from their date when the omission to stamp has been the result of some unforeseen and special occurrence. But the mere promise of a brother to pay the stamp duty out of a legacy is insufficient. *Bryan, Ex parte*, 32 L. T. 568.

The mere failure to obtain payment of a debt due to the clerk at the time of his entering into articles, so as to enable him to pay the stamp duty and enrol the articles and affidavit within the time limited by the statute, is not such a disappointment of a reasonable expectation that he would be prepared with the money in due time as will induce the court to allow the articles to be enrolled *nunc pro tunc*. *Banyard, Ex parte*, 10 L. R., C. P. 638; 44 L. J., C. P. 305; 32 L. T. 729.

— **When Delay is Intentional.**—Where the stamping had been intentionally delayed, the court refused to interfere and allow the service to be computed from the date of the articles, although there did not appear to be any

improper motive for the delay. *Welsh, Ex parte*, 27 L. J., Q. B. 213; 3 Jur., N. S. 1218.

R. entered into articles on the 10th January, 1871. His father, being advised that the articles could be stamped and enrolled within six months from their execution, did not pay the stamp duty immediately. Before the end of the six months he suffered heavy losses in his business and became unable to pay the stamp duty till January, 1874, when they were stamped. The clerk had served the whole time and had no means of his own to pay the stamp. An application to allow, under these circumstances, the articles to count from the date of their execution was refused. *Roth, Ex parte*, 29 L. T. 885; 22 W. R. 329.

Articles Stamped for County Palatine of Lancaster.—The court will (in the absence of special reasons to the contrary) allow service under articles stamped for the County Palatine of Lancaster to count as service, if the articles are afterwards stamped for service here. *Hogg, Ex parte*, 11 L. T. 598; 13 W. R. 315.

Stamping a Condition precedent to applying for "Enrolment nunc pro tunc."—To entitle a clerk, whose articles, through excusable omission, have not been enrolled, to apply to the court to have them enrolled *nunc pro tunc*, he must have had them properly stamped and have paid the penalty (if any), and until this is done the court will not make any order upon the subject. *Sewell, Ex parte*, 8 L. T. 331; 11 W. R. 673.

— **Notice to Incorporated Law Society.**—Before granting an application that the service of a clerk under unstamped articles may be computed from their date, and not from the time of enrolment, the court will require notice of the application to be given to the Incorporated Law Society, in order that an opportunity may be afforded of investigating the truth of the statements upon which the application is founded. *Blades or Blaydes, Ex parte*, 44 L. J., C. P. 115; 32 L. T. 33; 23 W. R. 312.

4. ENROLMENT AND REGISTRATION OF ARTICLES.

Nunc pro tunc—No Default on Part of Applicant.—Where, through the neglect of a clerk of an agent, explained and accounted for, no neglect nor default being imputable to the applicant, the articles were not filed at the time of execution, the court allowed them to take effect from their date. *Harria, In re*, 11 W. R. 36.

So, where articles were, by a mere slip, not filed within six months, the court relieved the clerk from the effect of the error. *Follett, In re*, 30 Beav. 629.

The affidavit of the due execution of articles was filed within six months of their execution by the clerk, but not within six months of their execution by his master:—Held, that it was filed within due time. *Legett, Ex parte*, 3 Jur., N. S. 1219.

A. was articled to an attorney, and served two years, when he was assigned over to his own father, an attorney. His father's memory became impaired, and he died within six months of the assignment, never having made the affidavit. The court permitted the assignment to be enrolled, upon satisfactory evidence being given of the

facts which should have been contained in the affidavit. *Lee, Ex parte*, 8 W. R. 541.

— **Inadvertence of Clerk.** — Where an assignment of articles had not been registered within the prescribed time, the court refused permission to register such assignment nunc pro tunc, although it was sworn that the omission had occurred through inadvertence, and that the last Indemnity Act omitted the provision in former acts curing such omissions. *Cunningham, Ex parte*, 8 Jur. 405. See 7 & 8 Vict. c. 86, ss. 1, 2.

A clerk having inadvertently omitted to enrol the assignment of his articles within the period prescribed, the court directed the service under the assignment to be computed from the date of its execution, instead of the period of its enrolment. *Cunningham, Ex parte*, 9 Jur. 109.

An articled clerk had neglected to file the necessary affidavit within six months; but the omission had arisen from inadvertence only:—Held, that this was not a sufficient ground for relieving him. *Benson, In re*, 10 Beav. 435.

Delay caused by Articles being sent to India to be Executed. — Articles were sent to Bombay to be executed by the father of the clerk; the father executed the deed on the 1st of January, 1853, and put in the date. The articles were sent to England, and on the 16th of February, 1853, executed by the clerk and the attorney:—Held, that the date from which the time of making and filing the affidavit was to count was from the 16th of February, 1853. *Anon.*, 27 L. J., Q. B. 184.

Duty of Attorney to Enrol. — It is the duty of an attorney to enrol the articles of his clerk, and where he had omitted to do so the court dismissed a claim to foreclose a mortgage given to secure the premium. *Dufaur v. Sigel*, 4 De G., Mac. & G. 20.

When Articles Lost, Stolen or Destroyed (see 2 & 3 Vict. c. 33, s. 9). — The court will allow a copy of articles to be enrolled where the original articles are lost. *Chapman, Ex parte*, 3 D. P. C. 562; *S. P., Beckenden, Ex parte*, 1 H. & W. 193; *Clarke, Ex parte*, 3 B. & A. 610.

The court allowed a copy to be enrolled nunc pro tunc, upon an affidavit that the indenture had been stolen (with other property) from the house of the person in whose hands it was deposited. *Nash, Ex parte*, 6 Scott, N. R. 695; 5 M. & G. 696.

So where articles had been destroyed by fire, the court allowed a verified copy to be enrolled, and an affidavit of execution to be filed, although more than the time allowed had elapsed since execution. *Briggs, Ex parte*, 1 D. & L. 94.

Searching Books of Enrolment. — A person has no right to search the book of affidavits, kept in pursuance of 6 & 7 Vict. c. 73, s. 11, more than once in a day without fee; and for taking copies of entries therein, a fee of 6d. is due. *Heming, Ex parte*, 9 Jur. 900.

Unstamped Articles. — See *ante*, col. 1790.

5. ASSIGNMENT AND DISCHARGE.

Where Master Absconds, or is Convicted of Felony. — Where an attorney has absconded, his

clerk may obtain a discharge from his articles, and further articles may be enrolled without an assignment of the original articles. *Cartley, Ex parte*, 12 L. J., Q. B. 98; *S. P., Hancock, Ex parte*, 2 D., N. S. 54; 6 Jur. 949; *Cartmel, Ex parte*, 6 Jur. 950.

The court will order service of the rule for that purpose to be made by sticking it up in the office of the court. *Williamson or Wilkinson, Ex parte*, 9 D. P. C. 320; 5 Jur. 24.

So where a party was articled to an attorney, who was subsequently convicted of forgery, and sentenced to transportation for life, the court granted a rule absolute in the first instance to discharge the clerk from his articles. *Anon.*, 8 Jur. 848.

Where a clerk is articled to a master who absconds and sails for America, previously making an assignment of his property, and of the articles of the applicant, to another attorney, his town agent, the court, though it will grant a rule to shew cause why the applicant should not be discharged from his articles, yet will not make it a part of the rule that 40l. paid to his first master should be paid over to the applicant by such town agent. *Curnley, Ex parte*, 2 D., N. S. 945; 7 Jur. 767.

— **Or becomes Insane.** — The father of a clerk having become, from mental alienation, incapable of instructing his son, and of continuing his practice, the court directed the articles to be discharged, and allowed the applicant to be articled to another attorney. *Allen, Ex parte*, 8 Jur. 1169; *S. P., Darbell, Ex parte*, 6 D. P. C. 505; 1 W., W. & H. 174.

— **Or Dies.** — An articled clerk was assigned to an attorney who died intestate, and no administrator had been appointed: the court granted a rule to enable the clerk to assign himself to another attorney for the residue of his term. *Lewis, Ex parte*, 2 D. & L. 130; 13 L. J., Q. B. 261; 8 Jur. 539.

By Mutual Consent. — Where an articled clerk, under age, obtains a writership in India, and his father as well as the attorney joins with him in an application to vacate the articles, the court will grant the motion. *Anon.*, 3 Jur. 652.

6. RETURN OF PREMIUM.

Refusal of Solicitor to take back Runaway Clerk. — The court ordered an attorney, who had refused to take back an apprentice who had run away from his service, on the ground of misconduct, and with whom a premium had been given, to return to the parents of such apprentice a part of such premium. *Prankerdt, Ex parte*, 3 B. & A. 257.

Clerk Articled to Firm—Death of Partner. — A party was articled to one of two attorneys in partnership, and paid a premium, and acted as clerk to the two partners for two months, when the attorney to whom he had been articled died; the court ordered the surviving partner to refund a portion of the premium. *Bayley, Ex parte*, 9 B. & C. 691; 4 M. & R. 603; *S. P., Haden, Ex parte*, 1 W., W. & H. 321; 2 Jur. 873; *Bennett, Ex parte*, W., W. & D. 210.

— **Dissolution of Partnership.** — A partner-

ship between two solicitors was dissolved by consent unconditionally; a bill was subsequently filed for a return of premium:—Held, that there was no foundation for such a claim. *Lee v. Page*, 30 L. J., Ch. 857; 7 Jur., N. S. 768; 9 W. R. 754.

Death of Clerk.—The court refused to order an attorney to repay any portion of a premium of 200 guineas received by him with an articulated clerk, who died within a month after he was articulated. *Thompson, In re*, 1 Ex. 864.

— **of Solicitor.**—An attorney to whom a clerk had been articulated died before the articles expired:—Held, that a court of equity had jurisdiction to entertain a claim for the return of a part of the premium, and that such claim constituted a debt payable out of the assets of the attorney, in an administration suit. *Hirst v. Tolson*, 2 Mac. & G. 134; 2 H. & T. 359; 19 L. J., Ch. 441; 14 Jur. 559.

Ward of Court desiring to Change his Profession.—A ward was articulated to a solicitor, under the direction of the Court of Chancery, and a premium of 300 guineas was paid. Subsequently the ward desired to change his profession, and proposals were accordingly, with that object, brought before the judge in chambers. The solicitor was served with notice of the proceedings, and attended. An order was made, by which the articles were ordered to be cancelled, and 100*l.*, part of the premium, directed to be returned by the solicitor. There was no allegation of misconduct on the part of the solicitor:—Held, that the court had no power to direct the return of any part of the premium. *Craven v. Stubbins*, 34 L. J., Ch. 126; 10 Jur., N. S. 1189; 11 L. T. 402; 13 W. R. 208.

Note not Negotiable given instead of Premium—Negotiated by Solicitor.—Where an attorney received a promissory note from the father of a clerk articulated to him, as his fee for taking him, on an undertaking that the note should not be negotiated until the expiration of a certain period, and he negotiated it contrary to his undertaking, the court compelled him to take it up. *Gardner, Ex parte*, 2 D. P. C. 520.

7. CONTRACTS RESTRAINING COMPETITION WITH MASTERS.

Motion to Restrain Clerk—When Refused.—A solicitor's clerk, employed at a yearly salary, and who was allowed at the same time to keep his name up at a separate house in the same town as his employer and to practise for himself, having had disputes with his employer, suddenly left him without notice, and set up entirely for himself at the house he had been in the habit of using as his office. A motion to restrain him from so practising was, under the circumstances, refused. *Shepherd v. Nere*, 22 W. R. 725.

Validity of.—The defendant bound himself to a London solicitor by articles for a term, and covenanted that he would not at the expiration of the term, or at any time thereafter, either solely, or jointly with, or as agent for, any other person or persons, directly or indirectly practise the business of an attorney or solicitor

within the city of London, or the counties of Middlesex or Essex, nor directly or indirectly act as such attorney or solicitor for any client or clients of the plaintiff, or any partner or partners of the plaintiff, or for any person or persons who should have been a client or clients of the plaintiff, or any partner or partners of the plaintiff, at any time during the term. At the expiration of the term the defendant having commenced business on his own account in Southwark:—Held, that the restriction was not unreasonable, and that the defendant's acting for a petitioner in the London Court of Bankruptcy was a breach of the covenant. *May v. O'Neill*, 44 L. J., Ch. 660.

II. ADMISSION AND RE-ADMISSION.

1. EXAMINATION AND ADMISSION.

Calculation of the Three Days.—Three days' notice must be given to the master, exclusive of the day on which the notice is given, and of the first day of the term to which it relates. *Prangley, In re*, 4 A. & E. 781; 6 N. & M. 421; 2 H. & W. 65.

Sunday will reckon as one day. *Bumps, Ex parte*, 5 D. P. C. 713; W., W. & D. 350.

Under special circumstances, the court will allow the name of a person to be introduced into the master's list on the first day of term, although the notices have not been given "three days at the least before the commencement of the term." *Blunt, Ex parte*, 5 D. P. C. 231.

The 15th April, which, by 11 Geo. 4 & 1 Will. 4, c. 70, s. 6, is constituted the first day of Easter Term, falling on Easter Sunday, a delivery three days before the 18th April, of the notices for the admission of an attorney, was sufficient. *Bayley, Ex parte*, 6 D. P. C. 516; 1 W., W. & H. 175; 2 Jur. 326.

Erroneous or Irregular Notices—Inaccuracy as to Name.—Where a second christian-name of both master and clerk was omitted in the articles of clerkship, and the notice of intention to apply for admission described the parties by such second christian-name, the court allowed the admission, on having an affidavit of the identity of the parties. *Croft, Ex parte*, 5 N. & M. 58; 1 Har. & W. 375.

So where the clerk's christian-name has been incorrectly stated, the court will allow the notice to be corrected. *Dukes, Ex parte*, 7 D. P. C. 605; 2 W., W. & H. 44.

Where the notice of admission was given with a view to admission in Easter Term, but by mistake the name of the person with whom he resided was inserted instead of the name of the party to whom he was articulated, the court, on an affidavit of the mistake, and denying any intention to evade the inquiry, allowed him to be admitted on the same notice on the last day of Trinity Term. *Clarke, In re*, 4 N. & M. 709; 3 A. & E. 72; 1 H. & W. 141.

— **As to Service of Articles.**—A notice erroneously stated that the clerk had served his time with B., when in fact he had been originally articulated to B.'s partner, with whom he served three years, and on whose death he was assigned to B.:—The court allowed an amendment. *Collins, Ex parte*, 6 D. P. C. 495; 1 W., W. & H. 173; 2 Jur. 842.

— **As to Place of Residence.**—An amendment allowed in a notice for admission of an attorney by inserting his place of residence. *Jones, Ex parte*, 3 A. & E. 74.

— **As to Service of Notice.**—Where the due notices have been given at the master's office, an accidental omission of the notice to the Law Society may be excused on application to the court. *Rowland, Ex parte*, 3 Jur. 1193.

A notice of application to be admitted one of the attorneys of C. P., having by mistake been left at the chambers of one of the judges of K. B. instead of the lord chief justice of C. P., the court allowed the applicant to be admitted, on an affidavit declaring the fact. *Lambert, Ex parte*, 3 M. & P. 269.

Upon an application for the re-admission of an attorney, the court will not dispense with the notice required to be stuck up in the office of the chief justice. *Tucker, In re*, 9 D. P. C. 661.

So where the notice had been stuck up five days before the commencement of the term, and the application was made on the first day of term, the court refused to grant the rule. *Id.*

A notice was, by the inadvertence of an agent's clerk, given in the books of the chief justice, but not in the books of the other judges of the court: immediately on its being discovered, the notices were given:—Held, that the party might be admitted on the last day of the term. *Woolwright, Ex parte*, 4 D. P. C. 274; 1 H. & W. 517.

Intentional Omission of Notice.—If an articulated clerk intentionally omits to give the notice and cause the entries to be made as required by Reg. Gen., H. T. 1853, r. 5, for the proper period before the term in which he proposes to be admitted, the court will not assist him by allowing such notice to be given and entries made subsequently. *Cumberland, Ex parte*, 10 L. R., Q. B. 138; 44 L. J., Q. B. 73; 23 W. R. 180.

When Rule as to Notice will be Relaxed.—Under special circumstances the court allowed an articulated clerk, who had passed his examination, to give his notices at the end of the term preceding that in which he might be admitted an attorney, instead of giving the notices three days before its commencement as required by Reg. Gen., H. T. 1853, r. 5. *Taylor, Ex parte*, 44 L. J., C. P. 65; 31 L. T. 883.

A party who has been prevented by illness from being admitted as an attorney on the last day of a term, pursuant to the notices, will be allowed to be admitted the next term. *Thompson, Ex parte*, 1 W., W. & H. 33; 2 Jur. 34.

But a person who cannot be admitted in the term for which he has given notice, on account of being obliged to leave London by the sudden death of a relative, cannot be admitted the next term, but may give fresh notices for the following term. *Gwynne, Ex parte*, 2 W., W. & H. 45; 3 Jur. 199.

The court allowed an attorney to be admitted without a full term's notice, where all the other requisites had been complied with, and it appeared to be essential to his interests in his profession that he should sail for India before the regular time of notice should expire. *Hancock, In re*, 4 A. & E. 779; 2 H. & W. 99.

Where a party had given regular notice of his intention to apply to be admitted as an attorney on the first day of Hilary Term, and it appeared

that, on the second day of Michaelmas Term, an offer of partnership from the London agents of the firm to which he was articled had been made, provided he could get admitted by the last day of that term, the court, on motion on the fourth day of Michaelmas Term, ordered, that, on his giving fresh notices, referring to the former notices and the present rule, he should be examined, and, if of ability, admitted the last day of that term. *Cunliffe, Ex parte*, 3 D. & L. 548; 15 L. J., Q. B. 41; 9 Jur. 942.

The court allowed an attorney to be admitted without a term's notice, when it was sworn, that he had, since the time at which such notice could have been given, received an advantageous offer of partnership, which he would be unable to accept, unless the application should be granted. *Estcourt, In re*, 8 Jur. 985.

Where it appeared that an articulated clerk gave, three days before Easter Term, the requisite notices for admission in Trinity Term; that he was examined in Trinity Term; then obtained a certificate of fitness, and immediately afterwards accepted the situation of a clerk to a firm of attorneys; and, believing that he might be admitted in the ensuing Michaelmas Term without fresh notices, failed to be admitted in Trinity Term, the court, on a motion being made early in Michaelmas Term, allowed him to give the requisite notices for admission on the last day of Michaelmas Term. *Udall, In re*, 8 Jur. 1007.

Where an applicant had been examined in Michaelmas Term, 1840, and obtained his certificate, and before the expiration of that term was entered of the Middle Temple as a law student, and with a view of being called to the bar, and immediately afterwards became the pupil of a conveyancer, with whom he remained twelve months, and subsequently of an equity draughtsman, with whom he remained eighteen months; and a proposition was then made to him to enter a London firm of attorneys as junior partner from the 1st of January, 1844; the court, under the circumstances, and as there had been a continued application to legal studies, allowed the applicant, on the 20th of November, to give notice of his intention to apply for admission on the first day of Hilary Term. *Guteris, Ex parte*, 7 Jur. 1039.

Renewal of Notice.—An articulated clerk gave the proper notices for examination and admission as an attorney in Easter Term. He passed his examination in that term, but did not apply for admission, nor did he renew his notices pursuant to the rule of Hilary Term, 1853:—Held, upon an application in Trinity Term to be allowed to renew the notices, so that he might be admitted during that term, that the rule was positive, and that the court would not dispense with it. *Hay, Ex parte*, 41 L. J., Q. B. 375; N. C. Anon., 7 L. R., Q. B. 587.

A clerk, who, as his articles expired on the 23rd of August, 1863, was entitled to be examined in Trinity Term, erroneously construed 23 & 24 Vict. c. 127, in connexion with the rules, as entitling him to be admitted during Trinity Term; and, as required by the rules, three days at least before Easter Term, gave and entered the notices required for that purpose. Having, during Trinity Term, been examined and obtained his certificate, and discovered that he was not entitled to be admitted till Michaelmas

Term, as it was too late for him to give and enter fresh notices, an application by him to have the notices already given amended and treated as fresh notices, in order for his admission in Michaelmas Term, was granted. *Saffery, In re*, 11 W. R. 779.

Certificate of Fitness.—Where an article clerk had been examined, and had obtained his certificate of fitness from the examiners in Trinity Term, 1841, and did not take any further steps to procure his admission as an attorney, and did not, within the next term, apply for an extension of the time during which his certificate should run, the court, in Michaelmas Term, 1842, held that the operation of the certificate had ceased, and refused to make an order for its renewal. *Bromley, Ex parte*, 2 D., N. S. 388; 12 L. J., Q. B. 98; 6 Jur. 993.

The court has not power to extend the time during which the certificate of examination for admission to practise as an attorney should be in force; the extension must be by order of a judge. *Younge, Ex parte*, 13 Q. B. 663.

Where a party applied to the court for such extension after the time had expired, alleging that he had two years ago given the usual notices for admission and passed his examination, but had then gone abroad on account of ill-health; that the time had elapsed while he was abroad and detained by continued illness; that, before leaving England, he had been unacquainted with the necessity for enlarging the time, and, therefore, made no application for the purpose; and that he was negotiating for reception into a partnership, but the negotiation might be frustrated if his admission were delayed; the court, on the last day of term, allowed him to give notice and be examined for the purpose of admission during the next term. *Id.*

Although a person desirous of being admitted an attorney has already passed one examination, but failed to obtain his certificate from the examiners, he must give a fresh term's notice to the examiners if he intends to apply again to be examined. *Henry, Ex parte*, 1 P. & D. 71; 8 A. & E. 745; 1 W., W. & H. 585; 2 Jur. 920.

Deposit of Articles.—Where the original deed of assignment of articles of clerkship had been in mistake annexed to, and filed with, the affidavit of such assignment, the court permitted the examiners to receive an office copy of the assignment, and to proceed to the examination of the applicant as if the original had been produced to them; and directed also that the certificate of the master of the court, that the original assignment was so filed, should be deemed sufficient on granting the judge's fiat for the admission of the applicant as an attorney. *Buckle, Ex parte*, 2 D., N. S. 476; 7 Jur. 558.

So where, in consequence of his master absconding, the clerk was unable to procure his articles, he was admitted without their production. *Nicholls, Ex parte*, 2 D., N. S. 423.

Where articles expired on the 1st of June, and the time at which they ought to have been deposited at the hall of the Law Society had ended on the 30th of May, and the day of examination was the 5th of June, the court, on the 2nd of June, ordered the articles to be received. *Cooper, Ex parte*, 5 D. P. C. 703; W., W. & D. 348.

Sending Answers to Questions.—Where the delay on the part of a clerk, in sending in the answers, has been caused by the unexpected absence of the attorney, with whom the articles were served, the court will allow them to be sent in nunc pro tunc. *Lyons, Ex parte*, 6 D. P. C. 517; 1 W., W. & H. 174.

Where a clerk had omitted to send in his answers to the questions within the time limited by the examiners, in consequence of his agent omitting to transmit them in sufficient time, the court allowed him to send in the answers subsequently, the agent paying the costs of the application. *Holland, Ex parte*, 5 D. P. C. 681; W., W. & D. 349; 1 Jur. 432.

Where an attorney to whom an article clerk has served part of his time has absconded, the court will allow him to be examined without producing the usual testimonials from him as to service. *Carr, Ex parte*, 1 D., N. S. 565; 6 Jur. 194.

When Clerks will be Admitted for Examination.—The court will, under special circumstances where a clerk proposes to practise abroad only, allow him to be examined before the expiration of his articles. *Twynnam, Ex parte*, 8 D. P. C. 293; 3 Jur. 1124; *S. P., Fulcher, Ex parte*, 8 D. P. C. 614; 4 Jur. 435.

The examiners ought not to refuse to examine a clerk on the ground that there is a doubt as to the validity of his service under his articles. *Masterman, Ex parte*, 6 Scott, 782; 7 D. P. C. 156; 5 Bing. N. C. 70; *S. P., Smithers, In re*, 1 Arn. 423; *Bebb, In re*, 3 Jur. 24.

The Law Society has been in the habit of examining article clerks in the term in which their articles expire, even though they expire on a day subsequent to that on which the examination is held. A. entered into articles of clerkship, which expired two days after the last day of term. On an application for a rule directing the examiners to admit him to be examined, on the ground that the attorney to whom he was article clerk was compelled by ill-health to take a partner at once, and was desirous of taking A. into partnership, the court directed him to be examined *de bene esse*. *Thomas, Ex parte*, 8 W. R. 522.

Service entitling Clerk to be Examined.—*See ante*, col. 1780.

Admission of Infants.—The court will not admit an infant as an attorney. *Evans, Ex parte*, 1 W., W. & H. 34; 2 Jur. 47; *S. P., Cragg, Ex parte*, 6 D. P. C. 256.

Except perhaps in very urgent circumstances. *Steele, Ex parte*, 33 L. J., Q. B. 326; 10 Jur., N. S. 1254; 12 W. R. 956.

But where he has served the full period of five years, and he will become of age a few days after the term, he may be examined for the purpose of being admitted the following term. *Tobbs, Ex parte*, 9 D. P. C. 151; 1 W. P. C. 16; 4 Jur. 1014; *S. P., Boussfield, Ex parte*, 9 D. P. C. 616; 5 Jur. 772.

Period of Clerkship expiring in Vacation.—Where a clerk was article clerk on the 31st January, 1857, to serve "for five years next ensuing the date thereof":—Held, that he could not be admitted on the 31st January, 1862, but might be (under s. 12 of 23 & 24 Vict. c. 127) by a judge

on the following day. *Ellis, In re*, 5 L. T. 686.

Seem, that a judge has not power out of term to admit an attorney, except where such power is expressly given by statute. *Steele, Ex parte*, 33 L. J., Q. B. 326; 10 Jur., N. S. 1254; 12 W. R. 956.

Oaths on Admission.]—An attorney may be admitted on taking the oath of allegiance and the oath to demean himself truly and honestly under 6 & 7 Vict. c. 73, s. 18, 19. *Cornroodan Tyabjee, In re*, 28 L. J., Q. B. 22; 4 Jur., N. S. 1108.

But he cannot practise in England without taking the oath substituted for the oaths of allegiance, supremacy, and abjuration, by 21 & 22 Vict. c. 48, s. 1. *Ib.*

In Inferior Courts.]—Attorneys of the superior courts are entitled, by virtue of 6 & 7 Vict. c. 73, s. 27, to be admitted to inferior courts of law. *London (Mayor) v. Reg. (in error)*, 13 Q. B. 1; 17 L. J., Q. B. 330; 13 Jur. 33—Ex. Ch.

In Counties Palatine.]—An application to admit and enrol an attorney of the courts of the county palatine of Durham, under 6 & 7 Vict. c. 73, s. 45, as an attorney of the superior courts at Westminster, may be made in court. *Patrick, Ex parte*, 1 D. & L. 696; 13 L. J., Q. B. 90; 7 Jur. 993.

Articles entered into with an attorney of the Common Pleas of the Duchy of Lancaster, who was also an attorney of the Queen's Bench, and which were inadvertently stamped with the 60l. stamp required in order to entitle an attorney to practise in the Common Pleas of the Duchy of Lancaster, instead of the 80l. stamp required to entitle him to admission to practise in the courts of Westminster Hall, were allowed to be enrolled on payment of the extra 20l., on an affidavit that the omission was not made with the intention of evading the extra duty. *Watson, In re*, 11 W. R. 730.

A person admitted an attorney of the court of the county palatine of Durham before 23 & 24 Vict. c. 127, was entitled to be admitted an attorney of the Queen's Bench without giving a term's notice. *Watson, Ex parte*, 30 L. J., Q. B. 1; 6 Jur., N. S. 1077; 3 L. T. 267; 9 W. R. 13.

Where a clerk entered into articles for the purpose of being admitted in the Common Pleas of the county palatine of Lancaster, and before those articles expired resolved to be admitted an attorney of the Court of Queen's Bench, and thereupon paid the higher duty; the court, upon being satisfied that he had acted *bonâ fide*, permitted his service under his original articles to be computed. *Hogg, Ex parte*, 11 L. T. 598; 13 W. R. 315.

In Wales.]—An attorney, duly admitted of the Exchequer under 11 Geo. 4 & 1 Will. 4, c. 70, may, on the production of his admission in the Court of Exchequer, or an official certificate thereof, to the master, be enrolled an attorney of the Q. B. without motion in court. *Roberts, Ex parte*, 1 D. & L. 829; 6 M. & G. 1049; 7 Scott, N. R. 1002; 13 L. J., Q. B. 151; 8 Jur. 83.

Changing Name on Roll after Admission.]—

Where an attorney had changed his name by royal licence, the court allowed the roll to be amended by substituting the new name for the old. *Benthall, Ex parte*, 6 M. & G. 722; 7 Scott, N. R. 407; 1 D. & L. 747; contra, *Hayward, Ex parte*, 5 Scott, 712.

Where an attorney made an affidavit that for family reasons, and no other, he was desirous of changing his name, the court directed the master to indorse the proposed alteration on the roll of attorneys, although no royal licence had been obtained for the purpose. *Gimlet, In re*, 7 L. T. 562; 11 W. R. 210.

So where an attorney has signed the roll, if he afterwards alters his name, and is desirous of being recognized by such altered name, the court, on being satisfied that the application is *bonâ fide*, will allow the entry of such change to be made on the roll. *Daggett, Ex parte*, 1 L., M. & P. 1; *S. P., Moses, Ex parte*, 19 L. J., Q. B. 345; 15 Jur. 153.

The court permitted an attorney, admitted in the Queen's Bench and Exchequer by the name of "Thomas James Moses," to sign the roll of the Common Pleas by the name of "Thomas James" on the production of his admission in the Queen's Bench, upon an affidavit of the circumstances under which he had changed his name, and that the Queen's Bench and Exchequer had permitted the entry of his name in their rolls to be so altered. *James, Ex parte*, 9 C. B. 221; 1 L., M. & P. 4; *S. C.*, 5 Ex. 310; 19 L. J., Ex. 272.

On an application of an attorney to be allowed to substitute the name of "J. Heaton D." on the roll in the place of "J. D.," the court refused to alter the roll, but directed the master to make a memorandum on the roll opposite his name, stating that he was known by the name of "J. Heaton D.," and that the memorandum was made by rule of court. *Dearden, In re*, 5 Ex. 740; 1 L., M. & P. 666; 20 L. J., Ex. 80.

An attorney who desires to change his name should apply to the court, and not to a judge at chambers. *Anon.*, 11 W. R. 780.

2. RE-ADMISSION.

Generally.]—The court will not re-admit an attorney who has discontinued practice for thirty years. *Billings, Ex parte*, 5 D. P. C. 395; 2 H. & W. 327.

Where an attorney had practised seven years, and had been off the roll twenty-seven years, during which time he had not been engaged in the law, but then became a managing clerk in the office of an attorney, who answered to his capacity as a lawyer, the court allowed him to be re-admitted. *Brabant, Ex parte*, 7 D. P. C. 622; 2 W., W. & H. 46; 3 Jur. 1152.

The court will not re-admit an attorney who has discontinued practice for forty years, even though he has been employed occasionally as writing clerk in the office of various attorneys, generally as agent and rent-collector, in the intermediate time between the period of his ceasing to practise and the application to be re-admitted. *Budge, Ex parte*, 2 D., N. S. 682; 12 L. J., Q. B. 187; 7 Jur. 581.

After having been Struck off the Roll—For Misconduct.]—A person convicted of a conspiracy to extort money by means of a libel is not a fit person to be on the rolls of the court as an attorney; and the court will not entertain a

motion for his re-admission. *Hawden or Haddone, In re*, 9 D. P. C. 970; 5 Jur. 508.

In 1847, A. was found guilty of forgery, but judgment was respited, on the ground that the judge had received evidence which was inadmissible; viz., admissions which A. had been compelled to make when under examination as a witness in an action; and he in consequence received a free pardon. In 1849 he was struck off the roll for perjury made in an affidavit of increase. The court refused, in 1856, to re-admit him, although he produced very strong affidavits and testimonials as to his conduct since 1849. *Garbett, In re*, 18 C. B. 403.

An attorney having been struck off the roll in E. T. 1859, for misappropriating to his own use money received from a client for a particular purpose, the court, in H. T. 1865, allowed his name to be restored to the roll on affidavits of numerous attorneys as to his good character and conduct during the interval. *Robins, In re*, 34 L. J., Q. B. 121; 11 Jur., N. S. 504.

When an attorney has been struck off the roll for a fraudulent misappropriation of moneys of a client intrusted to him for investment, it is a condition precedent to his being restored that he should have made full restitution, or, at least, all the restitution in his power. *Poole, In re*, 4 L. R., C. P. 350; 38 L. J., C. P. 216; 17 W. R. 735.

An attorney who has been struck off the roll may be re-admitted. *Rees v. Greenwood*, 1 W. Bl. 222.

— **At his own Request.**—It is a matter of course to restore to the roll an attorney who has been struck off at his own request, if no opposition is made by the Law Society after notice served on it. *Walsh, In re*, 10 Ir. R., C. L. 165.

An attorney, who had been struck off the roll by his own desire, was re-admitted at the expiration of fifteen years, without paying any fine or arrears of duty. *Calland, Ex parte*, 2 B. & A. 315.

Where an attorney, struck off the roll on his own application, was afterwards called to the bar, the court refused to give him leave to be again put upon the roll. *Cole, Ex parte*, 1 Dougl. 114.

The same honour and the same integrity which are essential to the character and position of a barrister are also necessary to the character and position of an attorney. *Pyke, In re*, 6 B. & S. 703; 34 L. J., Q. B. 121; 11 Jur., N. S. 504.

An attorney, whose name was struck off the roll at his own request, was called to the bar, and afterwards disbarred on the charges of participating by previous agreement in the profits of an attorney, and in one particular case of having acted both as counsel and attorney. After a lapse of twenty years he applied for leave to be re-admitted an attorney. The court refused, unless he could satisfy the court by the testimony of trustworthy persons (especially members of the profession) that his conduct and character had been unimpeached and unimpeachable in the meantime; but afterwards dispensed with this requirement on his shewing that he could not obtain such testimony in consequence of his having lived during that period in complete retirement. *Ib.*

Practice on—Affidavits.—Afterwards, upon

renewal of the application, supported by affidavits that he had lived a secluded life with his family since he was disbarred, and was, therefore, unable to furnish the required affidavits, but furnished a list of his different abodes, and the dates of his residence at each (such affidavits being filed two months previously to the renewed application), the court ordered his re-admission without examination. *Pyke, In re*, 34 L. J., Q. B. 220; 11 Jur., N. S. 860.

An attorney was re-admitted, although a copy of the affidavit on which the application was founded had not been left at the chambers of the chief justice. *Makinson, Ex parte*, 18 C. B. 661. See also *Tucker, In re, ante*, col. 1795.

Renewal of Certificate.—See next sub-heading.

III. CERTIFICATE.

Stamp—Attendance of Country Solicitor at a Taxation in London—"Practising."—By 33 & 34 Vict. c. 97, s. 59, every person who "acts or practises" in any court as a solicitor without having in force at the time a duly-stamped certificate shall forfeit 50*l.*, and shall be incapable of maintaining any action or suit for the recovery of any fee on account of any act or proceeding done or taken by him in any such capacity. By the schedule the certificate, if such person "practises or carries on his business" within ten miles from the General Post Office of the City of London, is of a certain amount; and if he practises or carries on his business beyond the above-mentioned limits, is of a less amount. A solicitor, with a country certificate, and whose offices were at Birmingham, came up on a retainer and attended the taxation of a bill of costs within the ten-mile radius:—Held, that he did not, by this one transaction, act or practise in London within the meaning of the statute. *Horton, In re*, 8 Q. B. D. 434; 51 L. J., Q. B. 309; 45 L. T. 451; 30 W. R. 102; 46 J. P. 293.

Country Solicitor—Practising in Dublin.—Where an application was made on behalf of a plaintiff to stay the taxation of the defendant's costs, in an action tried in Dublin, in 1863, on the ground that M., the defendant's attorney, had taken out a certificate to enable him to practise as a country attorney, for 1863, for which he paid 6*l.*, being the amount required to be paid by a country practitioner not ordinarily carrying on his business in the city of Dublin for more than forty days in the year, and where it appeared that though M. lived altogether in the country in the year, yet that his entire business was carried on in the superior courts, and attended to by a town agent in Dublin:—Held, that an attorney living in the country, whose ordinary business was transacted in Dublin, should pay a city licence. *Keegan v. Mowlds*, 10 L. T. 822.

Renewing.—Where an attorney, who had ceased to practise and renew his certificate for several years, gave the notices provided for by the rules, whereby he would have been at liberty to have renewed his certificate in vacation, and applied to the court to be permitted to renew his certificate at once, on the ground (explained) that it was of great importance to him to be at once so permitted: the court refused the appli-

cation, as the permission sought would entirely defeat the object of the rule. *Barnes, Ex parte*, 2 B. C. Rep. 156; 5 D. & L. 294.

The court will, in urgent cases, dispense with the rule, provided it appears that there has been no neglect in the applicant to give as long notices as were in his power, and that the notices so given afforded a reasonable time for inquiry into his conduct since his admission. *Webb, Ex parte*, 4 D. & L. 641; *S. P., Weymouth, Ex parte*, 5 D. & L. 60; 2 B. C. Rep. 102.

A party who has been admitted an attorney and solicitor, and taken out his certificate as such, and afterwards ceased to take out his certificate and to practise, and who has obtained an order of the Master of the Rolls for the renewal of his certificate as a solicitor in Chancery, cannot be allowed, on the mere authority of the order of the Master of the Rolls, to renew his certificate in the Queen's Bench without the usual notices. *Seewood, Ex parte*, 8 Jur. 404.

The court will make an order authorizing the registrar to issue a certificate to an attorney, whose London agent had omitted to take it out for the last and present year (the money and instructions having been forwarded to him for that purpose), on payment of the arrears of duty, without obliging him to give any notices. *Gude, Ex parte*, 1 D. & L. 675; 7 Jur. 1016.

— **Where Applicant has been Guilty of Misconduct.**—But the court refused to allow an attorney to take out his certificate, where he had been found guilty on an indictment for a conspiracy, and had been sentenced to and had undergone eighteen months' imprisonment, although the motion was unopposed, and the fact appeared only on his own affidavit, and he swore he was not guilty of the offence, and it had occurred eighteen years back, since which time he had been engaged as law clerk in the offices of several attorneys. *Grey or Gray, Ex parte*, 5 D. & L. 275; 12 Jur. 119.

An attorney, whilst uncertificated, had placed his name upon briefs for counsel at quarter sessions, and upon his shewing that he had on those occasions acted gratuitously, and from motives of kindness, was allowed to renew his certificate upon payment of three years' back duty and a fine. *Taylor, In re*, 16 Jur. 728.

— **Non-Production of, under 23 & 24 Vict. c. 127, s. 21.**—A solicitor who, by a slip, neglected to produce his certificate to the registrar within a month, as required by 23 & 24 Vict. c. 127, s. 21, was relieved from the consequences, and it was ordered that the certificate should take effect from the time of stamping the same. *Smith, In re*, 33 Beav. 248.

— **When Examination will be Required.**—A solicitor who did not take out a certificate for eleven years on account of ill-health, but kept up his legal studies and pursuits, was allowed to renew his certificate without examination. *Elton, In re*, 37 L. J., Ch. 482; 17 L. T. 487; 16 W. R. 323.

Where an attorney, admitted in 1823, had ceased in 1832 to take out his certificate in consequence of his becoming a farmer and grazier, the court would not allow him to be re-admitted in 1844 without an examination. *Bray, Ex parte*, 2 D. & L. 9; 13 L. J., Q. B. 240; 8 Jur. 475.

An attorney had been admitted thirty-nine years ago, but had not practised, and had, in the intermediate time, and till the period of the application, acted as a magistrate and commissioner. The court refused to re-admit him, but allowed him to be re-examined, and to give his notices for the term next ensuing. *Robinson, Ex parte*, 2 D. & L. 9; 13 L. J., Q. B. 240; 8 Jur. 621.

A solicitor, who had ceased to take out his certificate in 1853, with the intention of being called to the bar, which he had abandoned, was allowed to renew his certificate without undergoing an examination in 1863. *Sewell, In re*, 32 Beav. 475.

An attorney who has ceased to practise for twelve years must pass his examination in the regular way before he will be permitted to renew his certificate. *Anon.*, 16 Jur. 222.

Uncertificated Solicitor—Position of.—The 6 & 7 Vict. c. 73, s. 26, only disables an uncertificated attorney from suing for fees, rewards or disbursements for any business, matter or thing done by him as an attorney or solicitor, in some suit or proceeding in one of the courts mentioned in the act, and not for business done, which had no reference to such suit or proceedings. *Greene v. Reece*, 8 C. B. 88; *S. P., Richards v. Suffield*, 2 Ex. 616; 6 D. & L. 22; 17 L. J., Ex. 362; 12 Jur. 731.

An attorney cannot recover for business done, unless he has obtained a certificate, which was in force for the period the work was done. *Brunswick (Duke), Ex parte, Croul, In re*, 4 Ex. 492; 19 L. J., Ex. 112; 13 Jur. 1058.

An objection that an attorney was not duly certificated with a properly-stamped certificate, at the time when certain work was done by him for his client, and cannot therefore recover his costs in respect of such work by reason of 6 & 7 Vict. c. 73, s. 26, comes too late if made after taxation of costs by the master, and made to the court in the first instance. *Fullalove v. Parker*, 12 C. B., N. S. 246; 31 L. J., C. P. 239; 8 Jur., N. S. 1078; 6 L. T. 353; 10 W. R. 581.

A bill of costs having been referred to taxation, items were objected to before the master, on the ground that the attorney, at the time those items were incurred, was uncertificated; and the master disallowed them:—Held, that the master acted rightly in disallowing the items. *Angell, In re*, 6 D. & L. 144.

If an uncertificated attorney acts as an attorney, his acts are valid as regards other persons, though he cannot maintain an action for the costs of business done while he is without a certificate. *Holdgate v. Slight*, 2 L., M. & P. 662; 21 L. J., Q. B. 74.

Where A. and B. delivered a bill in their joint names for business done as attorneys, and the master disallowed a part of the bill, on the ground that B. was not a certificated attorney during a portion of the time to which the bill referred, the court, on affidavit that B.'s name was used at the request of friends, but that he was really not a partner with A., allowed A. to deliver a fresh bill in his own name only for the items so disallowed. *Matchett v. Parkes*, 9 M. & W. 767; 1 D., N. S. 924.

Application to strike out an appearance entered by an attorney after the determination of his certificate for the current year, and before payment of the duty on his fresh certificate, but,

after it had been issued, refused with costs. *Sparling v. Brereton*, 2 L. R., Eq. 64; 35 L. J., Ch. 461; 12 Jur., N. S. 330; 14 L. T. 166.

A solicitor who has been duly admitted and enrolled, but who has neglected to take out his annual certificate in proper time, is nevertheless competent, while uncertificated, to bind a client ignorant of the want of the certificate, as between such client and third persons. *Ib.*

See also *post*, XII.

IV. ARTICLES OF PARTNERSHIP.

When Void—Under Sale of Offices Act.—S., an attorney, entered into articles of partnership with the defendant, by which, after reciting that S. held many offices, clerkships and stewardships of manors, it was agreed that the defendant should enter into partnership with S. in the business of an attorney, and that the emoluments from the offices, clerkships and stewardships held by S. should be considered partnership property, and be distributable accordingly; and if S. should die during the partnership, the defendant should be interested in one moiety of the partnership business, and his executors should be entitled to the profits of the remaining moiety. At the time of the agreement S. was clerk of the peace for a liberty, clerk to the magistrates, clerk to the commissioners of land and assessed taxes, clerk to the commissioners of sewers, clerk to the deputy-lieutenants, steward of certain manors and coroner for the liberty:—Held, that the articles of partnership were not void, as being in contravention of the Sale of Offices Acts (5 & 6 Edw. 6, c. 16, and 49 Geo. 3, c. 126). *Sterry v. Clifton*, 9 C. B. 110; 19 L. J., C. P. 237; 14 Jur. 312.

—As against Public Policy.—An agreement between two solicitors in partnership that one of them should continue to carry on the business under their joint names, and should be entitled to all the profits, and should grant to the other partner an annuity of 300*l.* during the life of his mother, and in the event of his dying in the lifetime of his mother, should pay to his widow an annuity of 100*l.* during the remainder of his mother's life, and should indemnify him against all liability in respect of his name being used, and that the partnership should cease on the death of the mother of the retiring partner:—Held, not to be void as against public policy, but to be a valid and binding agreement. *Aubin v. Holt*, 2 K. & J. 66; 25 L. J., Ch. 36.

Goodwill—Meaning of.—Articles of partnership between London solicitors provided, that either partner might retire, and that in that case the continuing partner should pay the retiring partner for his share and goodwill the fair marketable value, and the retiring partner should not practise within one hundred miles of the General Post Office, but should use his best endeavours to promote the interests of the existing partners:—Held, that the goodwill must be taken to mean only the interest which the retiring partner would have had if he had remained in the partnership till the expiration of it by effluxion of time. *Austin v. Boys*, 2 De G. & J. 626; 27 L. J., Ch. 714; 4 Jur., N. S. 719.

Goodwill in general means the chance of being able to keep a business connected with the place

where it has been carried on, but it is in this sense inapplicable to the business of solicitors. *Ib.*

Between Solicitor and Unqualified Practitioner.—An agreement by a solicitor to give to an unqualified party a share of profits arising from business, in which he was employed through the intervention of the latter, is not illegal; and even if illegal, the client could not deduct from the solicitor's bill of costs the amount agreed to be paid by him to such unqualified person. *Gordon v. Dalzell*, 15 Beav. 351; 21 L. J., Ch. 206; 16 Jur. 186.

What forms Part of Partnership.—*Prima facie*, the emoluments derived from offices of a clerkship to the guardians of a union do not fall within the ordinary description of profits of an attorney. *Collins v. Jackson*, 31 Beav. 646.

The profits of the offices of clerkship to poor-law guardians, of superintendent registrar of births, deaths and marriages, treasurer of a turnpike trust, stewardship of a manor, treasurership of a charity and receivership of tithes, at a fixed salary, form part of a partnership between solicitors. *Ib.*

Death of Partner—Election as to Payments on.—A deed of partnership for life between two solicitors contained a covenant that on the death of either the survivor should, during the joint lives of himself and the widow of the deceased partner, pay such person or persons as the deceased partner should appoint, an annuity of 200*l.* per annum, or one-fourth of the annual profits of the survivor, as the survivor should elect, and also provided for the admission, on certain conditions, of a son of the deceased partner into the partnership business. One of the partners, by an antenuptial settlement, made shortly after the execution of the partnership deed, exercised the power of appointment in favour of his wife, and several years afterwards died greatly indebted to the firm. The survivor continued to practise as a solicitor for some years, and realized profits by his business, if estimated without regard to the former business, but they were insufficient to make good the outstanding liabilities of the late partnership, and he became bankrupt without having made any payment to the widow of the deceased partner, or electing between the two modes of payment mentioned in the articles:—Held, that the assignees were entitled to make the election. *Harper, Ex parte*, 1 De G. & J. 180; 26 L. J., Bk. 74; 3 Jur., N. S. 724.

Held, secondly, that on their electing not to pay the annuity, the widow had no provable demand, the business carried on by the survivor being, according to the true construction of the deed, a continuation of the partnership, and the payments made on account of the partnership being properly set off against the profits of the sole business. *Ib.*

V. PRIVILEGES.

Practising and Acting as Advocates.—Where, at a trial before an under-sheriff, an attorney opened the case as an advocate for the plaintiff, cross-examined the defendant's witnesses, and addressed the jury in reply, and then tendered himself and was admitted as a witness to dis-

prove the defendant's case, a verdict so obtained for the plaintiff was set aside. *Stones v. Byron*, 4 D. & L. 393; 1 B. C. Rep. 248; 16 L. J., Q. B. 32; 11 Jur. 44. But see contra, *Cobbett v. Hudson*, 1 El. & Bl. 11; 22 L. J., Q. B. 11; 17 Jur. 488.

A., being charged by the plaintiff with an assault committed in turning him out of premises in which he had agreed to sell wine on commission under an agreement with J., an attorney appeared for A., and stated that J. had sufficient reasons for determining the agreement, and that he had been plundered by the plaintiff to a frightful extent:—Held, that no action lay against the attorney for the words so uttered by him in defence of his client. *Mackay v. Ford*, 5 H. & N. 792; 29 L. J., Ex. 404.

An attorney acting as an advocate has the same privilege as counsel. *Ib.*

See also cases under DEFAMATION.

— **In Court of Arches.**—By 39 & 40 Vict. c. 66 (which, by s. 1 may be cited as the Legal Practitioners Act, 1876), s. 2, it shall be lawful for any certificated solicitor of the Supreme Court to appear as a proctor in the provincial courts of Canterbury and York.

A respondent in a cause of appeal in the Arches Court could not before this statute appear by a solicitor of the Supreme Court of Judicature who was not also a proctor of the Arches, duly qualified and admitted according to the practice of that court. *Crisp v. Martin*, 1 P. D. 302.

Sale of Books and Papers of Solicitor on Bankruptcy.—The sale of the books of a solicitor who had been adjudicated a bankrupt is not authorized by 24 & 25 Vict. c. 134, s. 137, and, therefore, where a sale by auction of the book debts and books of a firm of solicitors had been directed by the assignees:—Held, to be improper, on the ground that the affairs of the clients of the bankrupts might be made public. *Roberts, Ex parte, Holden, In re*, 33 L. J., Bk. 8; 10 Jur., N. S. 28; 9 L. T. 469; 12 W. R. 183.

As to Arrest—When about to Leave the Country.—An attorney who is about to leave the country is not privileged from arrest. *Thompson v. Moore*, 1 D., N. S. 283; 5 Jur. 1009; *S. P., Flight v. Cook*, 1 D. & L. 174; 13 L. J., Q. B. 78.

— **For Contempt of Court.**—Disobedience by a solicitor to an order of court made against him as an officer of the court is a contempt of a criminal nature, and an attachment granted to enforce compliance with the order of court is process of a punitive and disciplinary character; and therefore no privilege from arrest exists or can be claimed against the execution of the attachment. Privilege from arrest for contempt of court, where it otherwise exists, can be claimed in respect of attendance as an advocate at a police court as well as at any other court, although the proceedings at the police court consist merely of a preliminary inquiry on a charge of felony. F. was a solicitor, and an order was made at chambers that he should deliver up certain documents and should pay the sum of 10*l.* and certain costs. This order was made against F. as an officer of the

court. F. delivered up the documents, but he did not pay the sum of 10*l.* or the costs. An order for the attachment of F. for contempt of court was thereupon made at chambers. F. then paid the sum of 10*l.*, but he did not pay the costs. He was arrested under the attachment, whilst he was on his return to his offices from a metropolitan police court, where he had been as advocate attending to defend certain persons at a preliminary inquiry on a charge of treason-felony:—Held, that he was not entitled to be discharged from custody on the ground of privilege from arrest, the attachment having been granted for a contempt of a criminal nature. *Freston, In re*, 11 Q. B. D. 545; 52 L. J., Q. B. 545; 49 L. T. 290; 31 W. R. 804—C. A.

— **Whilst Professionally Engaged.**—An attorney of the Queen's Bench was arrested whilst he was attending in his professional character as an attorney in a county court. On an application to discharge him, on the ground that he was privileged, which was resisted on the ground that he had not shewn that he had signed the roll of the county court, which it was contended was necessary under 6 & 7 Vict. c. 73, s. 27:—Held, that he had made out a prima facie case of privilege, and that he was therefore entitled to his discharge, as no answer had been given to it. *Clutterbuck v. Hulls*, 4 D. & L. 80; 1 B. C. Rep. 165; 14 L. J., Q. B. 310; 10 Jur. 1082.

An attorney is privileged from arrest while in attendance at the master's office taxing costs, as well as returning therefrom. *Hope, In re*, 9 Jur. 856.

An attorney of the Queen's Bench, who was not admitted of the Common Pleas, while in attendance at the master's office of the latter court, on an appointment obtained by his client, for the purpose of changing him as his attorney, was arrested returning from such appointment:—Held, that he was privileged from arrest, and that the fact of his not being legally entitled to the costs was a question for the master, but could not operate against his discharge. *Ib.*

An attorney arrested while in attendance on an arbitration in his professional capacity, and entitled to his privilege, does not waive his right to be discharged by delaying to apply for such discharge for twenty-three days, where the situation of the other party has not been changed. *Webb v. Taylor*, 1 D. & L. 676; 8 Jur. 39.

A solicitor, while on his way to attend judge's chambers, to attend a summons, is privileged from arrest. *Jewitt, In re*, 33 Beav. 559; 33 L. J., Ch. 730; 10 Jur., N. S. 814; 10 L. T. 256; 12 W. R. 945.

An attorney, not engaged for either of the parties in a cause, but merely attending as the professional adviser of bail put in in the Mayor's Court for the purpose of dissolving an attachment, is not privileged from arrest, while going to or returning from the registrar's office for that purpose. *Jones v. Marshall*, 2 C. B. N. S. 615; 26 L. J., C. P. 229; 3 Jur., N. S. 916.

An attorney is not privileged from arrest in going to attend a client in a court in which he has not been admitted to practise. *Price v. Clutterbuck*, 1 F. & F. 379.

To entitle an attorney to privilege from arrest

he must shew that he is actually practising at the time; a solitary instance of employment at an election will not suffice. *Anon.*, 4 M. & P. 810; 1 D. P. C. 208.

Where an attorney defendant claims a privilege from arrest *eundo*, it must clearly appear that he left home for the purpose of attending the court. *Strong v. Dickinson*, 5 D. P. C. 86; 1 M. & W. 488; 2 Gale, 83.

A solicitor, who had retired from practice, was taken on an attachment for non-payment of costs in a chancery suit, whilst returning from attending an appeal in the House of Lords, as agent for the appellant:—Held, that he was entitled to be discharged, and that the order for his discharge might be made either by the Court of Chancery or by the House of Lords. *Att.-Gen. v. Skinners Co.*, 8 Sim. 377.

— **Does not Extend to Managing Clerk.**—The managing clerk of an attorney is not privileged from arrest while going to attend before a judge at chambers, on business of his master. *Phillips v. Pound*, 7 Ex. 881; 21 L. J., Ex. 277; 16 Jur. 645.

As to Venue—When Suing.—The privilege of an attorney, suing in person, to lay and retain the venue in Middlesex is not affected by the Common Law Procedure Act of 1852, or Reg. Gen., H. T. 1852, r. 18; and, consequently, the defendant cannot, under any circumstances, change the venue in such an action. *Grace v. Wilmer*, 6 El. & Bl. 982; 26 L. J., Q. B. 1; 3 Jur., N. S. 64.

An attorney, when plaintiff, may lay and retain the venue in Middlesex. *Pye v. Leigh*, 2 W. Bl. 1065.

But he has no privilege of laying and retaining the venue in London. *Bradshaw v. Barton*, 7 D. P. C. 329; 1 W., W. & H. 417; 2 Jur. 990.

An attorney appearing by another loses his privilege. *Harrington v. Page*, 2 D. P. C. 164; *S. P.*, *Dowless v. Timms*, 3 D. P. C. 707.

In order to retain the venue in Middlesex, it is not necessary that he should state in the declaration that he sues as an attorney. *Cutts v. Surridge*, 4 D. & L. 373; 16 L. J., Q. B. 2; *S. P.*, *Williams v. Powell*, 10 Jur. 966.

Where an attorney, by the mistake of his agent, laid the venue in the country, instead of Middlesex, the court refused to amend by changing it to Middlesex. *Lewis v. Shelley*, 2 Marsh. 426; 7 Taunt. 146.

— **When Sued.**—When a defendant, he has no privilege with respect to the venue whatever. *Yeardley v. Roe*, 3 T. R. 573; *S. P.*, *Pope v. Redfearne*, 4 Burr. 2027.

As to Visiting Clients in Prison.—Attorneys are entitled to be admitted to the interior of the K. B. prison when they have occasion to go there for the benefit of clients confined in the prison, or when they are sent for by such clients. *Jones, In re*, 1 N. & M. 128; *S. C.*, nom. *Mataule*, *Ex parte*, 4 B. & Ad. 365.

VI. DUTY AND AUTHORITY OF.

1. RETAINER.

Written or Verbal.—Though not absolutely necessary, yet in common practice, an attorney

ought, before commencing an action, to take a written direction from his client for so doing. *Queen v. Ord*, 3 C. & P. 349; *S. P.*, *Lord v. Kellett*, 2 Mylne & K. 1.

The retainer of a solicitor need not be in writing, but if he neglects taking the precaution, and, his retainer being afterwards questioned, there is nothing but assertion against assertion, he must bear the costs of the risk he thus undertakes. *Wiggins v. Peppin*, 2 Beav. 403.

What Amounts to.—If an attorney is employed by a person to act for him, after an award has been made against him, and he is also desired to do what is needful, he is thereby warranted to carry the whole award, so far as it respects his client, into effect, though his immediate business was to do but part of it. *Dawson v. Lawley*, 4 Esp. 65. And see *Anderson v. Watson*, 3 C. & P. 214.

It is not sufficient for a lessee to have instructed his own solicitor, and that solicitor to have handed over the work to lessor's solicitor. *Ipsitone Park Colliery Company, In re, Brough's claim*, 18 W. R. 285.

An attorney, who was the ordinary attorney for a borrower, also acted in the matter of a particular loan for the lender, but did not make any charge against the lender for his services. The security he took was not sufficient:—Held, that he was properly charged as an attorney acting on the retainer and employment of the lender, and was in that character liable to an action for damages for the loss suffered through the insufficiency of the security. *Donaldson v. Haldane*, 7 C. & F. 762.

Contract by Company to Employ.—In a declaration against a company a count alleged, that, in consideration that the plaintiff had agreed to become the permanent attorney and solicitor of the company, and to act as such, for reward, the company promised the plaintiff to retain and employ him as such permanent attorney; and that, in pursuance of the agreement, the company in fact retained and employed him, and the plaintiff acted, and had always been ready and willing to act, as the permanent attorney of the company; and alleged, for breach, that the company wrongfully, and without any just or reasonable cause for so doing, discharged him from being or acting as such attorney:—Held, that the count was not supported by proof of a resolution of the directors, that the plaintiff be appointed permanent solicitor to the institution; the word "permanent" denoting, in such resolution, no more than a general employment, as contradistinguished from an occasional or special employment. *Elderton v. Emmens*, 4 C. B. 479; 16 L. J., P. C. 209; 11 Jur. 612. *See next case.*

A count that it was agreed by and between the plaintiff and a company that from a certain day the plaintiff, as the attorney and solicitor of the company, should receive a salary of 100*l.* per annum in lieu of rendering an annual bill of costs, and should for such salary advise and act for the company on all occasions in all matters connected with the company, with certain exceptions. That the said agreement being so made, in consideration that the plaintiff had, at the request of the company, promised the company to perform the same in all things on his part, the company promised to perform the

same in all things on their part, and to retain and employ him as such attorney and solicitor on the terms aforesaid, and alleged, for breach, that the company, disregarding the promise and agreement, did not nor would continue to retain or employ the plaintiff as such attorney or solicitor on the terms aforesaid, but wrongfully, and without any reasonable cause, dismissed and discharged him from such employment and retainer, and thence hitherto refused to retain or employ him as such attorney or solicitor:—Held, that the count was good after verdict, for that it sufficiently alleged an agreement by the company, creating the relation of attorney and client, and a promise to continue that relation for at least a year. *Emmens v. Elderton (in error)*, 13 C. B. 495; 4 H. L. Cas. 624; 18 Jur. 21.

A solicitor had a retainer to act generally for a company, and also a special retainer to conduct a chancery suit on behalf of the company. Being employed by another client to go to America, he collected information on behalf of the company in furtherance of their suit, but without special instructions from the company to do so. On his return to England, he reported to the company what he had done, and they made use of the information he had obtained. He afterwards took three journeys to Paris to conduct negotiations for a compromise of the same suit without instructions from the company, but with the knowledge of some of the directors, and on two of them he was accompanied by the chairman:—Held, that, under the special circumstances of the case, the solicitor was entitled to charge the company for his professional services in America, and also for his professional services and expenses on his journeys to Paris. *Snell, In re*, 5 Ch. D. 815; 36 L. T. 534; 25 W. R. 736—C. A.

By an act, incorporating a railway company, power was given to the directors to appoint and displace any of the officers of the company:—Held, that the appointment of an attorney to the company under this power need not be under seal. *Reg. v. Cumberland (Justices)*, 5 Railw. Cas. 332; 5 D. & L. 431; 17 L. J., Q. B. 102; 12 Jur. 1025.

—**Articles of Association.**—Articles of association contained a clause in which it was stated that the plaintiff should be solicitor to the company, and should transact all the legal business of the company, including parliamentary business, for the usual and accustomed fees and charges, and should not be removed from his office, unless for misconduct. The articles were signed by seven members of the company, and were duly registered, and the company incorporated under the Companies Act, 1862. The plaintiff acted as solicitor to the company for some time, but ultimately the company ceased to employ him and employed other solicitors. The plaintiff brought an action against the company for breach of contract in not employing him as solicitor to transact their legal business on the terms of the articles:—Held, that the articles of association were a matter between the shareholders inter se, or the shareholders and the directors, and did not create any contract between the plaintiff and the company. *Eley v. Positive Government Security Life Assurance Company*, 1 Ex. D. 88; 45 L. J., Ex. 451; 34 L. T. 190; 24 W. R. 338—C. A. Affirming 1 Ex. D. 20; 45 L. J., Ex. 58; 33 L. T. 743; 24 W. R. 252.

By Corporations.—The retainer or appointment of an attorney by a corporation must be by its common seal. *Arnold v. Poole (Mayor)*, 5 Scott, N. R. 741; 2 D., N. S. 574; 4 M. & G. 860; 12 L. J., C. P. 97; 7 Jur. 653.

Where an attorney, who was town clerk of a municipal corporation duly appointed under seal, acted also as attorney of the corporation in various suits at law and in equity, although his proceedings as such attorney were directed, recognized and acknowledged by the resolution of the town council:—Held, that there being no appointment under seal, he could not recover the amount of his bills of costs from the corporation of the business which he had transacted on behalf of that body. *Id.*

Business was done for a corporation by an attorney, whose appointment was not under seal. After several bills had been delivered for business done by him as such attorney, and also for costs incurred by him as town clerk, he received payments on account, which, in the absence of any specific appropriation by the corporation, he appropriated at the time to the discharge of certain bills, upon which, for the reason above stated, he could have maintained no action:—Held, that, inasmuch as his claim on those bills was just and an equitable claim, though, from the absence of a contract under seal, they could not be made the subject of an action, the appropriation so made by him could not be called in question. *Id.*

The retainer of an attorney by a corporation to conduct the opposition to a bill in parliament is an act which must be done by it under its common seal. *Sutton v. Spectacle Makers Company*, 10 L. T. 411; 12 W. R. 742.

A resolution by a corporation to retain an attorney to take steps in opposition to a rule nisi obtained against the corporation to assess compensation for the dismissal of an officer, coupled with an order that the return should be filed, is a sufficient authority to him to defend the return to the writ of mandamus. *Reg. v. Lichfield (Town Council)*, 10 Q. B. 534; 16 L. J., Q. B. 333; 11 Jur. 888.

The mayor and assessors of a borough, having refused to revise the list of burgesses of certain parishes within the borough, on the ground that they had not been published within the time prescribed by the 5 & 6 Will. 4, c. 76, s. 15, and having rejected certain notices of claim and objections, on the ground that they had not been personally delivered to the town clerk, the parties thus disfranchised obtained writs of mandamus to compel the succeeding mayor and assessors to hold another court to revise the lists. The corporation, under their seal, retained an attorney to defend them against these proceedings, but the defences substantially failed:—Held, that he was entitled to maintain an action against the corporation for his costs incurred under the retainer; and that, inasmuch as there was nothing to shew that the defence was unjustifiable or improper, the expenses were chargeable on the borough fund. *Lewis v. Rochester (Mayor)*, 9 C. B., N. S. 401; 30 L. J., C. P. 169; 7 Jur., N. S. 680; 3 L. T. 300; 9 W. R. 100.

By Next Friend.—Where a person lends his name as the next friend of an infant plaintiff, and, for the purpose of complying with the rules of the Court of Chancery, signs a retainer to an attorney to conduct the suit, although he does not further interfere in the matter, and the at-

torney receives his instructions from third parties, the next friend is liable on his retainer for the costs, unless he displaces this *prima facie* liability by clear proof that the attorney acted on the credit of other persons. *Hawkes v. Cottrell*, 3 H. & N. 243; 27 L. J., Ex. 369.

— **Right of Infant against Solicitor.**—Where an infant, suing by *prochein ami*, has obtained judgment for damages and costs, which have been paid to the attorney appointed by the *prochein ami* to conduct the suit for him, he may maintain an action against such attorney to recover the amount as money received for his use. *Collins v. Brook*, 5 H. & N. 700; 29 L. J., Ex. 255; *S. C.*, nom. *Brook v. Collins*, 6 Jur., N. S. 999—Ex. Ch.

By Infant.—An infant, who has no property of her own to settle, may contract with a solicitor for the preparation of a marriage settlement by her intended husband, under which proper provision is made for her benefit, as such may be considered a necessary suitable to her estate and condition. *Helps v. Clayton*, 17 C. B., N. S. 550; 34 L. J., C. P. 1; 10 Jur., N. S. 1148; 11 L. T. 476; 13 W. R. 161.

By Married Women.—A solicitor, before instituting proceedings for a client, especially on behalf of a wife against her husband, is bound to ascertain how the facts stand, and whether there is a reasonable expectation that the proceedings will be successful. *Baylis v. Watkins*, 2 De G., J. & S. 91; 33 L. J., Ch. 300; 10 Jur., N. S. 114; 9 L. T. 741; 12 W. R. 324.

An attorney had been employed by a wife (while she was for just cause living apart from her husband) to resist a *habeas corpus* which the husband had procured to be issued to recover from her the possession of their child, aged over seven years, and now sought to recover from the husband the costs of the proceedings, averring specially that the wife was living separately from her husband, on account of his cruelty; that the work was done upon the retainer of the wife, and at her request, and that it was necessary for the purpose of maintaining her rights:—Held, that, upon the facts alleged, the attorney was not entitled to recover. *Maoreddy v. Taylor*, 7 Ir. R., C. L. 256—Ex. Ch. Reversing *S. C.*, 6 Ir. R., C. L. 336; 20 W. R. 252.

A wife is entitled to pledge her husband's credit for all the costs as between solicitor and client reasonably incurred by her in respect to the institution and prosecution of a divorce suit against her husband. *Ottaway v. Hamilton*, 3 C. P. D. 393; 47 L. J., C. P. 725; 38 L. T. 925; 26 W. R. 783—C. A. Affirming 47 L. J., C. P. 424.

A solicitor employed by a wife to prosecute a divorce suit against her husband, which terminated in a decree absolute for a dissolution of the marriage, had his costs in the suit taxed, as between party and party, in the Divorce Court. He then sued the husband for costs incurred before but in reference to the institution of the suit; extra costs in the suit as between solicitor and client, disallowed on the taxation as between party and party; and the extra costs, as between solicitor and client, of rectifying the wife's marriage settlement after decree nisi, these costs having been allowed on taxation as between party and party:—Held, that the wife

could pledge her husband's credit for, and the solicitor was entitled to recover, such of the costs included in all the three classes as had been reasonably incurred. *Id.*

By Surveyors of Highways.—The retainer of a surveyor of highways, if given in an ordinary manner, makes him responsible for all attorney's business done under it, although done after the expiration of his term of office. *Champ v. Stokes*, 6 H. & N. 683; 30 L. J., Ex. 242; 7 Jur., N. S. 607.

Continuous or Interrupted.—The retainer and employment of a solicitor in such a matter as a bankruptcy, an administration, or a winding-up, do not constitute an entire contract so as to deprive the solicitor of his right to payment, except for costs out of pocket, till the whole matter is completed, and successive bills of costs in such a matter are not necessarily to be treated as one bill brought down to the date of the latest delivery. *Hall and Barker, In re*, 9 Ch. D. 538; 47 L. J., Ch. 621; 26 W. R. 501.

Therefore, where solicitors had been retained to act for a trustee in bankruptcy, and also to protect the interests of a creditor, who subsequently by arrangement with the other creditors took over the bankrupt's estate, and they delivered a bill of costs up to a certain date, with an intimation that there were then and would still be some further items, and delivered a second bill of costs incurred after the date to which the first bill came down; on an application by the creditors to tax both bills, more than twelve months after the delivery of the first:—Held, that they must be treated as separate bills, and that the second bill only could be taxed. *Id.*

Joint or Several.—Two executors in a suit gave a joint retainer to a firm of solicitors. In the course of the proceedings it was certified by the chief clerk that one executor, who had since died insolvent, was indebted to the testator's estate:—Held, that the surviving executor was entitled to be paid out of the estate all the costs for which he was liable, and that the costs incurred for the deceased executor in taking the account of his debt must be set off against the sum found due from him. *Watson v. Row*, 18 L. R., Eq. 680; 43 L. J., Ch. 664; 22 W. R. 793.

Three petitioners retained the same solicitor in an application to wind up a company. The order was made, and subsequently two of the petitioners severed, and obtained an order of course at the Rolls to change their solicitor:—Held, that the two had no right to act separately, and the order to change solicitors must be discharged. *Norwich and Norfolk Provident Permanent Building Society, In re*, 22 W. R. 854.

To determine the liability for costs of co-plaintiffs in a suit the court will look into the transaction to see whether the contract, though joint in form, was intended by the parties to be joint and several; and such intention may be presumed from the circumstances. *Furlong v. Scanlan*, 9 Ir. R., Eq. 202.

Therefore where C. was employed to conduct a partition suit on the joint retainer of M. & S., co-plaintiffs with equal rights as tenants in common, there being no special contract, and it appeared that the benefit of the partition would

enure to each of them severally :—Held, that the liability for costs was several as well as joint, and that C. might prove against M.'s assets for the amount. *Ib.*

Separate retainers were given to an attorney by the defendant and two other persons, as defendants in a chancery suit, to conduct their defence ; but a joint appearance was entered, and a joint answer put in ; one set of counsel only was employed, to whom one set of briefs was delivered, and joint affidavits were made, and joint consultations obtained, the defence throughout being conducted as a joint defence. In an action by the attorney to recover the whole costs of the chancery suit from the defendant, the only defence set up at the trial was a special agreement by the attorney that the defendant should not be liable for any of the costs of the suit, which agreement, however, the jury negatived. Thereupon, at the suggestion of the judge that it was unnecessary to go into evidence of the reasonableness of the charges, inasmuch as the bill would be taxed in the usual way, a verdict was entered for the plaintiff for the amount of his bill, subject to taxation. Upon the bill, which consisted entirely of chancery charges, coming before the common-law master, he referred it, under 6 & 7 Vict. c. 73, s. 42, to a chancery taxing-master, who accordingly taxed the whole bill at a certain sum ; but apportioned and allotted one-third part only of such sum as against the defendant for his proportionate share of the whole. That apportionment the common-law master, on the bill coming back to him for his allocatur, repudiated, and taxed the whole bill at the total sum taxed by the chancery master, and for that amount judgment was signed by the plaintiff :—Held, on a rule to review the common-law master's taxation, that the view taken by him was right, and the plaintiff was entitled to recover the whole of his costs from the defendant ; for, though the retainers were separate, there was evidence, if the case had gone to the jury on that point, that they had merged into one joint liability ; and not having raised the question of separate liability at the trial, it was not open to the defendant, nor competent to the chancery master, to raise it on taxation. *Burridge v. Bellew*, 32 L. T. 807.

There is no difference in the law, as administered in a court of equity and as administered in a court of common law, with regard to the question of the joint or separate liability of several defendants. The rule is the same in both courts. If there are separate contracts with the attorney, each defendant is liable for his own share only of the costs, and if the contract is joint, then each is liable for the whole. *Ib.*

In a suit by a shareholder against the directors, secretary and the company to restrain an action for calls, to be relieved of his shares on the ground of misrepresentation in the prospectus, and to be indemnified by the directors, the defendants, having all appeared by A., the same solicitor, put in a joint and several answer, signed by one counsel, and joined in their defence, signed three separate retainers to A., all in the following terms : "You having up to the present time conducted the defence of this suit on behalf of all the defendants, and, in pursuance of their instructions in that behalf, we the undersigned do hereby confirm such instructions, and request you to continue such defence, and to take such steps as you may consider neces-

sary in the matter :"—Held (affirming the taxing-master's decision), that the retainers were separate and not joint, and that the assets of the company (in liquidation) were liable for one-ninth only of the costs. *Allen, In re, Davies v. Chatwood*, 11 Ch. D. 244 ; 48 L. J., Ch. 358 ; 40 L. T. 358 ; 27 W. R. 485.

Where an attorney is retained jointly by several parties to defend a suit against each, the delivery of a bill of costs to one is sufficient to entitle him to maintain a joint action against all for his costs. *Oxenham v. Lemon*, 2 D. & R. 461 ; *S. P., Finchett v. How*, 2 Camp. 276 ; *Crowder v. Shee*, 1 Camp. 437.

Where two solicitors, who are not in partnership, are employed in the same matter for a client, as in the defence of an action, the *prima facie* inference of law is, that they are partners as to that particular matter, and entitled to an equal share of the joint profits, irrespective of the quantity of work performed by each. *Robinson v. Anderson*, 20 Beav. 98. Affirmed, 7 De G., Mac. & G. 239.

Where a judge's order is made by consent to consolidate actions against several defendants who have severally employed the same attorney, upon their undertaking to be bound by the event of the trial of one, the order to consolidate operates as a joint retainer by the defendants of the attorney, and they are jointly liable to him for the costs of the action which is tried. *Anderson v. Boynton*, 7 D. & L. 25 ; 13 Q. B. 308 ; 19 L. J., Q. B. 42 ; 14 Jur. 14.

By Mortgagee, who is Member of the Firm retained.—A. mortgaged to B., and the securities were prepared by a firm of solicitors in which B. was a partner ; the firm acted for the mortgagor :—Held, that B.'s security did not extend to the bill of costs of the firm. *Gregg v. Slater*, 22 Beav. 314 ; 25 L. J., Ch. 440 ; 2 Jur., N. S. 246.

Bound by Terms of.]—In an action by A. and B., who were attorneys, against surveyors of highways of a parish, for business done in procuring an order of magistrates to divert highways in the parish, and, on an appeal against that order, it appearing that A. and B., in their bill, charged for drawing a resolution of a parish meeting held before the order was applied for, which resolution stated that the order was to be applied for at the instance and at the expense of a railway company :—Held, that A. and B. must be considered to have undertaken the business on those terms, unless there was an express employment of them by the surveyors, and on their credit, of which there ought to be direct proof. *Spurrier v. Allen*, 2 Car. & K. 210.

The town council of a borough resolved :—"That 100 guineas be fixed as the salary of the town clerk for his attendance on the business of the council and committees, and that he be paid the usual charges and expenses in defending or bringing actions." Certain bills of the town clerk for business done for the corporation having been taxed :—Held, on motion to review the taxation, that the master was right in disallowing charges made for matters which, as town clerk, it was his duty to perform ; also, that the salary of 100 guineas was to be considered as remunerating him for all business he might do for the corporation, except defending and bringing actions. *Thomas v. Swansea (Mayor)*, 2 D., N. S. 470 ; 12 L. J., Ex. 73.

Determined by Final Judgment.]—The authority of an attorney is determined on final judgment being signed. *Macbeath v. Cook*, 1 M. & P. 513; *S. C.*, nom. *Macbeath v. Ellis*, 4 Bing. 578.

Death of Client.]—The retainer of an attorney is determined by the death of his client. *Whitehead v. Lord*, 7 Ex. 691; 21 L. J., Ex. 239.

Liability of Client—Generally.]—A defendant was held to be bound by the act of an attorney who had been retained by his father, when it appeared that he knew, and had not disapproved, of the retainer. *Cameron v. Baker*, 1 C. & P. 268.

Where the plaintiff was employed as a solicitor to carry on proceedings in chancery, after which the defendant married one of the parties to the suit, and eventually received a proportionate part of the property in dispute, in right of his wife, under an order of that court:—Held, that he was liable to pay the plaintiff his proportion of the bill of costs, after taxation, although there had been no retainer of the plaintiff by the defendant, and although the bill had not been delivered to the latter, but to a co-defendant, who had suffered judgment by default. *Gray v. Wainman*, 7 Moore, 467.

If an attorney has reasonable and probable grounds for commencing an action, and desists from prosecuting it because he afterwards discovers that the cause cannot be successfully proceeded with, he is entitled to recover his costs from his client. *Lawrence v. Potts*, 6 C. & P. 428.

The employment of a solicitor to do a mere ministerial act, such as procuring the execution of a deed, does not so constitute him an agent as to affect his client with constructive notice of matters within the knowledge of the solicitor. *Wyllie v. Pollen*, 32 L. J., Ch. 782; 11 W. R. 1081.

A retainer implies a promise to pay all costs rightly and properly incurred upon the retainer. *Bolden v. Nicholas*, 3 Jur., N. S. 884.

Mortgages.]—B. and C. drew two bills upon one another in order to make an advance of 400l. to D. It was agreed that mortgages should be prepared, and that the advance was to be made in the proportions following: 100l. by B. and 300l. by C. An agreement was accordingly prepared by E., the solicitor for all the parties, but it did not contain any limitation of liability by B. C. having failed, E. being a creditor got both the bills indorsed to himself, and afterwards sued B. for the whole amount:—Held, that E. must be taken to have had notice of the agreement and of the amounts to be paid by B. and C., and that the securities were to be applicable to the payment of the two bills. *Gemmell v. Macalister*, 9 Jur., N. S. 285; 7 L. T. 841; 11 W. R. 486—H. L.

A proposed mortgagee's solicitor has no claim for his charge against the proposed mortgagor, where the negotiation for the mortgage goes off through the default of the latter; he must look to the person who retains him, leaving him to his remedy against the party who occasioned the fruitless expenses. *Wilkinson v. Grant*, 18 C. B. 319; 25 L. J., C. P. 233.

On Mortgage Deed Forged by Solicitor.]—

An attorney was requested by a client to raise 100l. on mortgage of real property, his client handing him over the title deeds; the attorney applied for 420l. upon the property, giving up his client's deeds, and in two days afterwards received the 420l., and handed over a mortgage deed purporting to be executed by his client, but which was in fact forged by the attorney; the attorney told his client there was difficulty in getting the 100l., but let him have in small sums at various times 98l., and at another time 100l., for which 100l. he took his client's note. The mortgage deed was discovered to be forged:—Held, in an action by the mortgagee against the supposed mortgagor, that the mortgagee was not entitled to recover any part of the money from the client, the supposed mortgagor. *Painter v. Abel*, 33 L. J., Ex. 60; 8 L. T. 287; 11 W. R. 651.

For Preparation of Lease.]—If the attorney of a lessor, who is not attorney for the lessee, prepares the lease, the lessor is the person liable to pay the attorney for it, and the lessor can recover over against the lessee; and this is so whether the lessee takes up the lease or refuses to do so. *Baker v. Merryweather*, 2 C. & K. 737.

A. applied to his attorney, who was not attorney of B., to prepare an assignment of a lease to B. The attorney recommended an underlease, to which A. objected, as being more expensive. The attorney said, "You won't have to pay it, for the lessee always pays for the lease." A. gave instructions for an underlease, and his attorney prepared it; but B. would not take it up or pay for it:—Held, that A. was liable to his attorney for the expenses of preparing the underlease. *Id.*

Agreed upon, but not Executed.]—A lessor and lessee, in the presence of the lessor's attorney, signed an agreement that a lease should be prepared by the lessor's attorney, and paid for by the lessee. The lease was prepared accordingly, but the lessor, who had only a life estate, dying, the lease was never executed:—Held, that the lessor's attorney was entitled to recover of the lessee the charge for drawing the lease. *Webb v. Rhodes*, 3 Bing. N. C. 732; 4 Scott, 497; 3 Hodges, 188.

The solicitor of a lessor who has prepared a draft lease cannot recover for his services from the intended lessee, unless there is a privity of contract between them. *Ipsitone Park Colliery Company, In re, Brough's claim*, 18 W. R. 285.

Preparation of Marriage Settlement.]—On the occasion of settling personal property upon a marriage, it is the professional usage for the lady's solicitor to draw the settlement, and for the husband to pay for it, although the only property settled is the husband's; and where nothing has taken place to exclude such usage, the husband is legally liable, in the event of the marriage, to pay the lady's solicitor his costs of the settlement if the retainer was by the lady, or else to indemnify whoever on her part has properly incurred expense by retaining a solicitor to prepare such settlement. *Helps v. Clayton*, 17 C. B., N. S. 553; 34 L. J., C. P. 1; 10 Jur., N. S. 1148; 11 L. T. 476; 13 W. R. 161.

For Trespass.]—The conduct of a cause,

by an attorney, in the name of A., does not make A. liable in trespass for acts done under a *fi. fa.* in such cause, without some evidence of a retainer. *Crook v. Wright*, R. & M. 278.

Action for false imprisonment. Pleas: not guilty, and justification under a *ca. sa.* Replication to the justification: that the *ca. sa.* was irregularly obtained, and set aside for irregularity. It was proved that, judgment having been entered up against the plaintiff, on a warrant of attorney, for 60*l.* given to the defendant to secure payment of a debt by instalments, of which less than the sum of 20*l.* was due, the defendant's attorney caused the plaintiff to be arrested under a *ca. sa.*, indorsed to levy 20*l.* 10*s.* The defendant, having been informed that the plaintiff had been arrested by a person who had joined in the warrant of attorney, wrote a letter in answer, not denying that such arrest had taken place by her authority. The writ was afterwards set aside by order of a judge:—Held, first, that the replication was proved; secondly, that the defendant was liable in trespass for the act of her attorney in improperly causing the plaintiff to be arrested; and thirdly, that there was evidence to go to the jury that the defendant had authorized the arrest. *Collett v. Foster*, 2 H. & N. 356; 26 L. J., Ex. 412.

— **For Retaining Fee at Parliamentary Election.**—An attorney who is retained as the agent of a candidate to represent a place in parliament, is not entitled to recover anything for a retaining fee, unless there has been an express agreement that such fee should be paid to him. *Parker v. Robinson*, 7 C. & P. 241.

— **When Solicitor has not Communicated to him an Offer of Settlement.**—If an attorney, who is conducting a cause, does not communicate to his client an offer of compromise made by the other party, but goes on with the action to put cash in his own pocket, he cannot after that charge his client with the costs incurred; but, as it is the duty of an attorney to communicate such an offer to his client, it must be presumed that he did so, till the contrary is shewn. *Will v. Thomas*, 8 C. & P. 762.

Liability of Trustees on Bankruptcy of Client.]

—If A., having employed an attorney to defend an action, assign his property to trustees for the benefit of his creditors, and the trustees direct the attorney to go on with the defence, they are liable to pay the attorney for what he does after they directed him to go on, but are not liable for the bygone business, unless there is an agreement in writing to make them so. *Becke v. Penn*, 7 C. & P. 397.

A deed of assignment for the benefit of creditors assigned the estate and effects of the debtor to trustees, upon trust to sell the same, and out of the produce, in the first place, to pay and satisfy themselves all costs and expenses which they should be put to in having the deed prepared, and in and about executing the trusts:—Held, that a trustee, who had signed the deed and sold the property under it, was liable for the costs of preparing the deed, in an action by the attorney, though not instructed by him, and though his consent to act had not been obtained before the preparation of the deed. *Campion v. King*, 6 Jur. 35.

Who gave Retainer—How Ascertained.]—A., on the marriage of his daughter with B., executed a deed of appointment (under a power contained in his own marriage-settlement) in favour of his daughter, appointing to his daughter 4,000*l.* This B. settled on his marriage. The marriage-settlement of B., and the deed of appointment, were both prepared by C., who was originally the solicitor of A. There was no evidence to shew whether A. had agreed to give his daughter 4,000*l.* or to execute an appointment of that sum:—Held, that whether A. or his daughter was to pay C. the expenses of this deed of appointment, was not a question of usage, but a question of contract; and that it was for the jury to determine upon whose credit the business was done. *Hayward v. Flett*, 8 C. & P. 59. See *Griswell v. Robinson*, 3 Bing. N. C. 10; 3 Scott, 329; 2 Hodges, 138.

Upon an application by a client a judge's order was made, referring a bill of costs to be taxed without prejudice to the client's disputing the retainer, and restraining the attorneys from commencing or prosecuting any action touching their demand pending such reference. There was no undertaking on the part of the client nor any order upon him to pay what should be found due. At the request of both parties, the master entertained and decided the question of retainer, and he gave his allocatur for the balance due, and for the costs of the taxation:—Held, that the decision of the master upon the question of retainer was conclusive, and that the attorneys were entitled to have judgment entered up for them for the amount. *Lawless, In re*, 6 C. B. 123; 13 L. J., C. P. 793. See *Callow v. Jenkinson*, 2 L. & M. & P. 403; 5 Ex. 666.

Evidence as to.]—A retainer to commence a suit, which suit is afterwards abated by a plea of non-joinder, is sufficient evidence of a retainer to commence another action against the parties named in the plea in abatement. *Crook v. Wright*, R. & M. 278.

A letter written by a deceased solicitor, proposing to act as the solicitor of a particular individual, is not receivable in evidence, as having been written by the authority of that individual, on proof merely that there was such a solicitor in practice at the time, that the letter was in his handwriting, and that it came from the custody of the person to whom it purported to be addressed; and, in order to render the letter receivable, it must be proved aliunde that the writer had been duly authorized by the individual for whom he professed to act as solicitor. *Bright v. Legerton*, 2 De G., F. & J. 606; 30 L. J., Ch. 338; 7 Jur., N. S. 559.

Parol evidence is admissible, not to vary or add to a written agreement, but to shew the instructions and directions given to the solicitor to prepare it. *Gemmell v. Macalister*, 9 Jur., N. S. 285; 7 L. T. 841; 11 W. R. 486—H. L.

— **Under Joint Retainer.]**—In an action on an attorney's bill, against two, it is not sufficient to prove a joint employment, and a joint promise to pay, after the delivery of the bill; but it must be shewn that the business was done for the joint benefit. *Hellings v. Gregory*, 10 Moore, 337; 1 C. & P. 627.

Declaration Setting up—Sufficiency of.]—A declaration stated that the plaintiff was the attor-

ney of a railway company; that it was intended to apply for an act for its incorporation; and that, in consideration that the managing committee of the railway would by the permission and at the instance of the plaintiff, retain the defendant as attorney about performing certain business for the company, in preparing books of reference, serving notices on the landowners, and doing the conveyancing business consequent upon the act of parliament being obtained, if such act should be so obtained, he, the defendant, promised to allow the plaintiff one-third part of the profits of the business. And that the managing committee did, with the permission and at the instance of the plaintiff, retain the defendant as attorney in and about performing certain work and business for the company, in preparing books of reference, serving notices on landowners, and was ready and willing to retain the defendant in and about the conveyancing business consequent upon the intended act being obtained. Breach, non-payment of the third part of the profits:—Held, that the declaration was bad, the meaning of the contract being, that the work to be done, and not the retainer, was to be contingent upon the passing of the act of parliament. *Seuwell v. Allen*, 17 L. J., Ex. 246.

2. GENERAL CONDUCT AND MANAGEMENT OF BUSINESS.

Registering Address.—Service of a rule calling on an attorney for payment of money pursuant to his undertaking, on a clerk not in his employ, although at the place registered at the master's office as the place for serving the attorney with rules and other proceedings, is not sufficient. *Bragg v. Hatchard*, 28 L. J., Ex. 35.

Duty—To give Personal Attention.—Where by a deed between mortgagees, mortgagors, and an attorney, the attorney was to be receiver of the rents, tithes, and other profits of an estate in the country, and he carried on business in London:—The court held, that he was not obliged to leave his business in town, but might employ an agent in the country to collect for the estate in question: and they construed the deed so as to allow the attorney to charge for the agent's expenses, before paying over the net proceeds of the estate to the various owners. *Gilbert v. Dynely*, 3 Scott, N. R. 364; 3 M. & G. 12; 5 Jur. 843.

Where a jury retire to consider of their verdict, the attorneys of the parties ought to remain in court to hear it delivered. *Dauntley v. Hyde*, 6 Jur. 133.

—To inform Client of Expenses of Proceedings.—An attorney is not entitled to charge his client with fees paid to counsel retained by the desire of his client on the trial of a cause before the under-sheriff, unless he expressly informed him that such fees would not be allowed on the taxation of costs against the opposite party. *Fox v. Cooper*, 2 Q. B. 937; 6 Jur. 128.

—To conduct Suit to a Termination.—The contract of an attorney retained to conduct an action is continuing, and, as a general rule, can be determined by him only on reasonable notice. *Nicholls v. Wilson*, 2 D., N. S. 1031; 11 M. & W.

106; 12 L. J., Ex. 266; *S. P., Harris v. Osborn*, 2 C. & M. 629; 4 Tyr. 445.

As a general rule, an attorney or solicitor retained to conduct a suit is under the obligation to carry it on to its termination, and he cannot sue for his bill of costs until that period has arrived. He may, however, give a reasonable notice to his client to supply him with adequate funds; and in case of refusal, he may sue him for his costs. *Whithead v. Lord*, 7 Ex. 691; 21 L. J., Ex. 239; *S. P., Van Sandau v. Brown*, 9 Bing. 402; 2 M. & Scott, 543; 1 D. P. C. 715; *Hoby v. Baill*, 3 B. & Ad. 350.

An attorney who has undertaken a cause is not bound to proceed without adequate advances from time to time by his client, for expenses out of pocket; and, therefore, the court will not compel an attorney, even after notice of trial, to carry the cause into court, unless the client supplies him with sufficient funds to pay the expenses out of pocket thereby incurred. *Wandsworth v. Marshall*, 2 C. & J. 665.

An attorney who is retained for the conduct of a chancery suit, and accepts such retainer, thereby enters into a specific contract to carry on the proceedings, and he cannot, without due notice, and before the suit is terminated, rescind the contract, and sue on a quantum meruit. *Cupping v. Symnott*, 3 Ir. C. L. R. 563.

If a client repudiates his retainer of an attorney to conduct a suit, the latter is entitled to bring an action for his costs, without waiting for the final completion of the suit. *Hawkes v. Cottrell*, 3 H. & N. 243; 27 L. J., Ex. 369.

—To follow Directions of Client.—An attorney retained to defend an action is not bound, in following the instructions of his client, to do what is merely meant for delay. *Johnson v. Alston*, 1 Camp. 176.

An attorney was held liable to pay the costs of sham pleas, though instructed by his client so to plead. *Vincent v. Groome*, 1 Chit. 182.

The court will not require an attorney to disclose the authority by which he pleads a sham plea. *Merrington v. Beckett*, 3 D. & R. 231; 2 B. & C. 481.

—To Examine into Client's Case.—If an attorney undertakes to conduct a cause for the costs out of pocket, it being represented to him by his client that such client took a certain interest under a deed, the attorney cannot charge more than the costs out of pocket, though it should turn out that the cause was lost because his client did not take the interest under the deed which he stated that he took, it being the duty of the attorney to see the deed before so bringing the action. *Theaites v. Markerson*, 3 C. & P. 341; M. & M. 199.

—To Take Care of Client's Papers and Letters.—It is the duty of an attorney, when duly called upon by his client to deliver him the papers of which he has the charge, to deliver them in a reasonable condition. The question whether the condition in which they are delivered is reasonable is for the jury. *London and North-Western Railway Company v. Sharp*, 10 Ex. 451; 24 L. J., Ex. 44; 18 Jur. 564.

When a solicitor discharges himself from a suit he must deliver to the new attorney all papers, or an undertaking to return them at the end of the

suit. *Huntley v. Anglo-California Gold Mining Company*, 1 F. & F. 211.

An attorney who has received his client's deed to keep for him and has lost it for want of proper care, cannot set up such loss as an answer to an action of detinue. *Reece v. Palmer*, 5 C. B., N. S. 91; 28 L. J., C. P. 168; 5 Jur., N. S. 916; 7 W. R. 325—Ex. Ch.

An attorney, with whom deeds are deposited, places them, without his client's knowledge, in the hands of a party from whom he has borrowed money for his client. The attorney afterwards is unable to inform his client where the deeds are:—he is chargeable with having mislaid such deeds. *Wilmoth v. Elkington*, 1 N. & M. 749.

On payment of a solicitor's bill, the client is entitled to the possession of letters written to the solicitor by third parties, but not to copies of letters written by the solicitor to third parties, unless they are paid for by the client. *Thompson, In re*, 20 Beav. 545; 24 L. J., Ch. 599; 1 Jur., N. S. 718.

Seemingly, that a solicitor is entitled to retain the original letters written to him by his client. *Id.*

Where a solicitor of a company writes a letter apparently on behalf of the company, he has no such property in it as to entitle him to prevent its publication, although he swears that it was written in his private capacity. *Howard v. Gunn*, 32 Beav. 462.

Authority to Enter Appearance—Presumption of.—A solicitor must be taken, in the absence of proof to the contrary, to have authority from his client, though an infant, to enter an appearance for him; and, where the appearance has been entered, the court will act upon it without service; and, therefore, after appearance entered for an infant, a guardian ad litem may be appointed for him, although he has not been served with the bill. *Lloyd v. Rossmore*, 9 Ir. R., Eq. 488.

Putting in Fraudulent Defence on Behalf of Client.—Where a solicitor has put in a fraudulent defence for his client without the knowledge of the client, the client is not bound by the act of the solicitor. *Williams v. Preston*, 20 Ch. D. 672; 51 L. J., Ch. 927; 47 L. T. 265; 30 W. R. 555—C. A.

Acting for Opponent.—Where an attorney has been employed in a cause, and is afterwards discharged by his client, not on the ground of misconduct, the court will not restrain him from acting for the opposite party, unless it clearly and distinctly appears that he has obtained information in his former character which it would be prejudicial to the cause of his former client to communicate. *Johnson v. Marriott*, 2 C. & M. 183; 2 D. P. C. 343; 4 Tyr. 78.

The court refused to restrain a defendant's attorneys from acting for him in the cause, on the alleged ground that they had, in the character of solicitors for the defendant and others interested (jointly with the plaintiff) in a chancery suit, in attendance upon a master, obtained a knowledge of the plaintiff's case, and of the evidence upon which it was to be supported; the defendant's attorneys deposing, that they in that suit acted also for the defendants, and had not thereby obtained any further knowledge of the plaintiff's case than would be disclosed by a particular

of demand. *Grisell v. Peto*, 2 M. & Scott, 2; 9 Bing. 1.

Authority of Solicitor to Compromise Client's Case—Client Acquiescing.—Where a cause is compromised by the counsel and attorneys in court, in the presence of the client, and after conference had with him, with a view to an arrangement, and the client does not dissent, and the terms of the compromise have been embodied in an order of nisi prius, subsequently made a rule of court, the arrangement will not be disturbed upon a suggestion by the client, that though present when it was made, he did not understand what was going on. *Chambers v. Mason*, 5 C. B., N. S. 59; 28 L. J., C. P. 10; 5 Jur., N. S. 148.

If an attorney has express authority from his client to compromise a case only on condition of securing for him a certain sum, that (coupled with the fact that he afterwards compromised the suit on payment of a larger sum, and professed to have compromised it in pursuance of that authority) may be evidence of an agreement upon his part to accept the surplus of the money paid over the amount of the net sum his client expected to receive in satisfaction of his costs, not only as between party and party, but between attorney and client. *Churchyard v. Watkins*, 27 L. J., Ex. 13.

Without Express Permission of Client.—Where the respective attorneys of a plaintiff and defendant signed an agreement to withdraw a record on certain terms, and that the defendant's costs should be taxed by certain persons as between attorney and client:—Held, that the defendant was not bound by such an arrangement on the part of his attorney. *Iccson v. Corington*, 2 D. & R. 307; 1 B. & C. 160. And see *Burrell v. Jones*, 3 B. & A. 47.

An attorney retained to defend an action is not guilty of actionable negligence if he enters into a compromise without the consent of his client, provided he acts bona fide and with reasonable care and skill, and the compromise is for the benefit of the client, and is not made in defiance of his express prohibition. *Chown v. Parrott*, 14 C. B., N. S. 74; 32 L. J., C. P. 197; 9 Jur., N. S. 1290; 8 L. T. 391; 11 W. R. 698.

A solicitor or counsel has full authority to either compromise or abandon the claims of his client, provided it is in a matter within the scope of the suit. *Wood, In re, Wenham, Ex parte*, 21 W. R. 104.

Secus, in a collateral matter. *Id.*

An attorney has general authority to compromise an action on behalf of his client, provided he acts bona fide and reasonably, and not in defiance of the direct and positive instructions of his client. *Priestwick v. Poley*, 18 C. B., N. S. 806; 34 L. J., C. P. 189; 11 Jur., N. S. 583; 12 L. T. 390; 13 W. R. 753.

In an action to recover the value of goods sold and delivered, the plaintiff's attorney agreed to a compromise, on the terms that the defendant would return the goods, and pay the costs:—Held, that the plaintiff was bound by the act of his attorney. *Id.*

A. having suffered personal injuries through the negligence of the servants of H. & Co., applied to an attorney, and the attorney's clerk agreed with H. & Co. to accept a certain sum

"in full satisfaction of all demands for the injuries" sustained by A., and gave a written undertaking to that effect. A. having repudiated the transaction and brought an action:—Held, that the agreement entered into by the attorney's clerk, as it took place before the issuing of any writ, was not binding upon A. *Duffy v. Hanson*, 16 L. T. 332.

—**Against the Client's wish.**—A plaintiff, having recovered judgment in an action for breach of promise of marriage, instructed her attorney not to accept any compromise, but at the same time permitted him to continue to act as her attorney for obtaining the fruits of the judgment. The attorney, however, did accept a compromise offered by the opposite party, who had no notice of any limitation having been put on the attorney's authority:—Held, that, although the compromise was entered into without the plaintiff's authority, it was nevertheless binding upon her, and might be relied upon by the defendant in that suit if the plaintiff should attempt to enforce judgment; and that, therefore, the attorney was liable to an action for negligence for compromising against the plaintiff's instructions. *Butler v. Knight*, 2 L. R., Ex. 109; 36 L. J., Ex. 86; 15 L. T. 621; 15 W. R. 407.

A compromise entered into by a solicitor under his implied authority is not affected by his client's subsequent repudiation, nor by the client's previous express prohibition, unless the opposite party had notice of it. *Berry v. Mullen*, 5 Ir. R., Eq. 368.

A client is bound by a compromise entered into by his attorney, though in violation of express directions not to compromise, if the other party has acted bona fide, and without notice of such prohibition. *Brady v. Curran*, 2 Ir. R., C. L. 314; 16 W. R. 514.

An attorney retained to conduct a cause, and having express directions from the client not to enter into a compromise, has no power, under such retainer, to enter into any compromise, even though reasonable and bona fide, and for the benefit of the client; and, if he does so, is liable to an action for damages, though the damage actually sustained is nominal. *Fray v. Voules*, 1 El. & El. 839; 28 L. J., Q. B. 232; 5 Jur., N. S. 1253; 33 L. T., O. S. 133; 7 W. R. 446.

It is no defence to such action that the compromise was entered into by the advice of counsel employed by the attorney, under his retainer, for the conduct of the cause. *Id.*

—**Avoué in Canada.**—An avoué in Canada has authority to bind his client by any proceeding in the cause, but not by any transaction dehors the cause, such as an agreement to settle. *King v. Pincoucault*, 6 L. R., P. C. 245; 44 L. J., P. C. 242; 32 L. T. 174; 23 W. R. 576.

Authority to Refer to Arbitration.—An attorney authorized to appear for a party in an action has incidentally authority to refer it, without any fresh authority to that effect. *Fariell v. Eastern Counties Railway Company*, 2 Ex. 344; 6 D. & L. 54; 17 L. J., Ex. 297.

An attorney having appeared for a corporation in an action, to the knowledge of the directors, the corporation is bound by his acts as their attorney, though he was not authorized to appear

by any authority under seal. *Id.*; *S. P., Smith v. Tromp*, 7 C. B. 757; 6 D. & L. 679; 18 L. J., C. P. 209.

Undertakings.—An undertaking given by his attorney to withdraw pleas is binding on the defendant, even without a formal consent by the plaintiff or his attorney. But if the undertaking is not carried out, and the plaintiff in consequence loses the benefit of a subsequent judgment, the defendant's attorney is not necessarily liable for the plaintiff's debt and costs. *Burnett v. Provis*, 22 L. T. 543.

Payment of Counsel's Fees.—A solicitor has no implied authority to pledge his client's credit to counsel by an express promise to pay his fees, whether they relate to litigation or not, so as to enable the counsel to sue the client for them. *Mostyn v. Mostyn, Barry, Ex parte*, 5 L. R., Ch. 457; 39 L. J., Ch. 780; 22 L. T. 461; 18 W. R. 657.

On Payment of Debt.—Where the debt has been paid to the plaintiff's clerk after writ issued, and before service thereof, and the attorney is aware of the payment, he has no right to proceed further with the action, although he will be entitled to the costs of his writ. *Wyllie v. Phillips*, 4 Scott, 474; 5 D. P. C. 644; 3 Bing. N. C. 776.

Receiving Costs from other Side.—Where costs are ordered to be paid to a defendant, his attorney is competent to demand and receive them, without any express power of attorney. *Mason v. Whitehouse*, 4 Bing. N. C. 692; 6 Scott, 575.

Where Action is Settled behind the Back of Solicitor.—If, after verdict, and pending a rule to enter a nonsuit, the parties themselves settle the action, without the intervention of their attorneys, after which the rule is made absolute, the plaintiff's attorney is bound to give up the record. *Baber v. Harris*, 2 W., W. & H. 53.

Drawing Deed—Estoppel.—An attorney who draws and attests a deed, conveying land from A. to B., is not allowed afterwards to say that the property in the land and deed did not pass. *Lord v. Wardle*, 3 Bing. N. C. 680; 4 Scott, 402; 1 Jur. 382.

Discharge of Defendant taken in Execution.—A plaintiff's attorney on the record has not, by virtue of his retainer, any implied authority to discharge out of custody a defendant in execution before he has received payment of the sum recovered in the action. He must have the special authority of the plaintiff for that purpose. *Salary v. Chapman*, 3 P. & D. 604; 8 D. P. C. 656; 11 A. & E. 829; 4 Jur. 411.

The attorney for a plaintiff, where the defendant has been taken in execution upon a ca. sa., although as such attorney he has authority to receive the fruits of the judgment, has no authority to enter into any other arrangement with the defendant for his discharge from custody under such writ. *Connop v. Challis*, 2 Ex. 484; 6 D. & L. 48; 17 L. J., Ex. 319.

After notice of trial given, the defendant's attorney died, and the plaintiff, not being aware of the fact, went to trial, and obtained a verdict and

judgment, and sued out execution, under which the defendant was detained in custody. The court refused to set aside the proceedings, or to discharge the defendant out of custody, as it did not appear but that the defendant knew of the attorney's death at the time it occurred, and had withheld that knowledge from the plaintiff. *Ashley v. Brown*, 1 L. M. & P. 451; 19 L. J., Q. B. 447; 15 Jur. 399.

Withdrawal of Sheriff.]—The attorney in an action has authority to order the sheriff to withdraw from possession under a *fi. fa.* *Levi v. Abbott*, 4 Ex. 583; 19 L. J., Ex. 26.

Authority to defer Execution.]—A solicitor has authority to enter into an undertaking on behalf of his client, not to issue a writ of *fieri facias* against the client's debtor, in consideration of the acceleration of payment of the debt. *Commonwealth Land, Building, Estate and Auction Company, In re, Hollington, Ex parte*, 43 L. J., Ch. 99; 29 L. T. 502; 22 W. R. 106.

An attorney retained for the conduct of an action has no implied authority, after judgment in favour of the client, to enter into an agreement on his behalf to postpone execution. *Lovegrove v. White*, 6 L. R., C. P. 440; 40 L. J., C. P. 253; 24 L. T. 554; 19 W. R. 823.

— Or as to Seizing Particular Goods.]—It is not within the scope of the implied authority of the solicitor of a judgment creditor issuing a *fi. fa.* to direct the sheriff to seize particular goods. *Smith v. Keal*, 9 Q. B. D. 340; 47 L. T. 142; 31 W. R. 76—C. A. Affirming 51 L. J., Q. B. 487; 46 L. T. 770; 46 J. P. 515.

Privileged Communications.]—A solicitor is not protected from disclosing the residence of his client by the circumstance that it became known to him only in his character of solicitor. To be entitled to claim such a protection the client's residence must have been made known to him in professional confidence for the purpose of obtaining professional advice. *Campbell, Ex parte, Catheart, In re*, 5 L. R., Ch. 703; 23 L. T. 289; 18 W. R. 1056.

The court will not make an order upon a solicitor compelling him to disclose the address of his client, a defendant who has absconded, and whom the plaintiff seeks to serve with a subpoena duces tecum to compel his appearance at the hearing with documents material to the plaintiff's case. *Heath v. Crealock*, 15 L. R., Eq. 257; 42 L. J., Ch. 455; 28 L. T. 101; 21 W. R. 380.

Documents in the possession of a former solicitor of a plaintiff who claimed a lien for costs upon them will not be ordered to be produced for the defendant's inspection. *Kettlewell v. Barstow*, 20 W. R. 621.

A solicitor acting for two clients in a matter is privileged, upon examination before the court, from disclosing to one client professional instructions given to him by the other. *Ubsdell, In re*, 27 L. T. 460; 21 W. R. 70.

Communications between a solicitor and his client ante litem motam, and a bill of costs relating thereto, are privileged. *Turton v. Barber*, 22 W. R. 438.

Communications between solicitor and client, to which privilege once attaches, are always privileged, whether they have been made with

reference to the existing action, or to a previous one; & fortiori are they privileged when the question in dispute is the same in the second action. *Bullock v. Corrie*, 3 Q. B. D. 356; 47 L. J., Q. B. 352; 38 L. T. 102; 26 W. R. 330.

So held, where A., having failed in an action against him by B., brought an action for indemnity against C., who was under the same obligation to him as he was to B., and the application was by C. to inspect documents to which privilege attached in the former action. *Ib.*

On the Queen's Proctor's intervention alleging the adultery of the petitioner, counsel on behalf of the Queen's Proctor proposed to ask the petitioner whether he had not confessed to his solicitor on a former trial that he had been guilty of a matrimonial offence:—Held, that the communication was privileged, and that therefore the question was inadmissible. *Branford v. Branford*, 4 P. D. 72; 48 L. J., Mat. 40; 40 L. T. 659; 27 W. R. 691.

— Evidence of.]—A letter written by a solicitor for a client making a claim for a lost parcel alleged to contain valuable articles, is not inadmissible on the ground of privilege in a criminal case. But in order to make a client criminally responsible for a letter written by his solicitor it must be shewn that the letter was written in pursuance of the instructions of the client. A letter by a solicitor written "in consequence" of an interview with his client is not equivalent to a letter written by the instructions of the client, and is not admissible in a criminal case against the client. *Reg. v. Downer*, 43 L. T. 445.

Not precluded from giving Evidence as to what passed at Execution of Deed, if an attesting Witness.]—A solicitor employed to obtain the execution of a deed, and who is one of the witnesses, is not precluded, on the ground of a breach of professional confidence, from giving evidence as to what passed at the time of execution, by which the deed may be proved invalid. *Crawcour v. Salter*, 18 Ch. D. 30; 45 L. T. 62.

Corporation answering Interrogatories by—Waiver of Privilege.]—Interrogatories delivered in an action against a corporation to the town clerk, or other their proper officer, were answered by the town clerk, who objected to give information on the ground that it was derived from communications which had been made to him as solicitor in the action, and were therefore privileged:—Held, that as the corporation had elected to answer through him, the objection could not be maintained. *Swansea (Mayor) v. Quirk*, 5 C. P. D. 106; 49 L. J., C. P. 167; 41 L. T. 758; 28 W. R. 371; 44 J. P. 378.

3. IN DEALINGS WITH CLIENT.

Notice to affect Client.]—The presumption that a solicitor has communicated to his client facts which he ought to have made known cannot be rebutted by proof that it was the solicitor's interest to conceal the facts. *Bradley v. Riches*, 9 Ch. D. 189; 47 L. J., Ch. 811; 38 L. T. 810.

A solicitor mortgaged hereditaments in Middlesex to one client, and did not register the charge; he subsequently mortgaged the same hereditaments to another client who did register:

—Held, that the second mortgagee was affected with notice of the earlier incumbrance, and did not gain priority by registration. *Id.*

When moneys, which form part of a larger sum placed by his client in the hands of a solicitor for purposes of investment, are lent by him on the security of a mortgage in which he has affected to act as principal, the client is bound by notice of all the circumstances which come within his (the solicitor's) knowledge. *Spaight v. Cowne*, 1 H. & M. 359.

— **Constructive.**—A. borrowed 8,000*l.* on mortgage from his solicitor, B. Of this money, 800*l.* belonged to C., a client of B.'s, who had handed it to B. for investment. No notice was ever given to A., either by B. or by C., that the 800*l.* belonged to C. Afterwards A. paid off the 8,000*l.*, and B. shortly after died insolvent. On a claim made by C. for the 800*l.* against A. :—Held, that as C., by his negligence in not giving notice of his claim to A., had enabled A. to pay back the whole of the mortgage money to B., he had no equity to compel A. to pay part of the money over again ; and claim refused. *Southampton's (Lord) Estate, In re, Roper's claim*, 50 L. J., Ch. 155 ; 43 L. T. 625 ; 29 W. R. 210.

A. deposited deeds with his confidential solicitor, with a memorandum of deposit by way of equitable mortgage to secure the repayment of 3,000*l.* The solicitor handed the deeds and memorandum to B. as security for 2,000*l.*, together with a memorandum signed by himself that the 2,000*l.*, part of the annexed 3,000*l.* security, then belonged to B., with interest at 5 per cent. The solicitor afterwards obtained a return of the deeds from B., upon an assurance that in lieu thereof others of equal value should be deposited. Other deeds were subsequently deposited, which proved to be worthless. The mortgage of 3,000*l.* was paid off by A.'s representatives, and the genuine deeds were given up to them by the solicitor without the memorandum of deposit. No notice of B.'s security had been given to A. B. then claimed payment of the 2,000*l.* against the estate of A., upon the ground of constructive notice to A. through his confidential solicitor :—Held, that B., by neglecting to give notice to A. of the transfer of the mortgage, and by giving up the documents originally deposited with him, had lost any right he might have had against A.'s estate. *Southampton's (Lord) Estate, In re, Allen v. Southampton (Lord), Banfather's claim*, 16 Ch. D. 178 ; 50 L. J., Ch. 218 ; 43 L. T. 687 ; 29 W. R. 231.

Disclosure of Information to other Parties.—Notwithstanding the rule that a solicitor must not use information acquired in his professional capacity in any subsequent proceedings against his former client, a solicitor, who has acted in the formation of a company and been discharged, may act for a petitioner to wind up the same company, when all the facts upon which the petition is based might have been ascertained by any person in the position of the petitioner. *Holmes, In re, Electric Power Company, In re*, 25 W. R. 603.

Property in Letters to and from Client.—Letters received by a solicitor from his client, and copies of letters addressed by a solicitor to his client, are the property of the solicitor.

Wheatcroft, In re, 6 Ch. D. 97 ; 46 L. J., Ch. 669 ; 26 W. R. 69.

Attesting Bill of Sale—Duty and Liability of Solicitor.—A solicitor is an officer of the court, and is liable to serious consequences if he neglects his duty of explaining the effect of a bill of sale to the grantor. He is also liable to an action by his client, as well as to proceedings of a penal character—Per James, L. J., in *National Mercantile Bank, Ex parte, Haynes, In re*, 15 Ch. D. at p. 52 ; 49 L. J., Bk. 62 ; 43 L. T. 36 ; 28 W. R. 848 ; 44 J. P. 780—C. A.

See also cases under **BILLS OF SALE**.

Receipt of Solicitor for Money had to Use of Client.—Payment of a debt to the attorney of a plaintiff amounts to payment to the plaintiff himself, and the latter is bound by the receipt of his attorney. *Yates v. Freckleton*, 2 Doug. 623. See *Vorley v. Garrard*, 2 D. P. C. 490.

Authority to receive Money due from Mortgagee.—The mere fact that a solicitor is in possession of a mortgage deed executed by his client does not authorize him to receive the mortgage money for the client. If the client has not received the money the mortgagee cannot maintain the validity of the mortgage deed by shewing that he paid the money to the solicitor, unless he can shew that the solicitor was expressly authorized by the client to receive it. *Swinbanks, Ex parte, Shanks, In re*, 11 Ch. D. 525 ; 48 L. J., Bk. 120 ; 40 L. T. 825 ; 27 W. R. 898—C. A.

A solicitor, having been instructed by a client to raise 400*l.* for him by a mortgage of some houses belonging to him, prepared a mortgage of the property to another client, the deed containing a recital that the mortgagor had applied to the mortgagee for a loan of 400*l.*, which the mortgagee had agreed to lend on the security of a mortgage of the property. The solicitor induced the mortgagor to execute the deed, without receiving the money, and afterwards handed it over to the mortgagee as security for a debt of 300*l.*, which he (the solicitor) already owed to the mortgagee, telling him that he had himself made advances to the mortgagor. He had, in fact, advanced the mortgagor 200*l.* The solicitor soon after absconded. It was not shewn that the mortgagor had expressly authorized him to receive the mortgage money :—Held, by the Court of Appeal, that, even if it was the intention of the mortgagor that the solicitor should be paid the 200*l.* out of the 400*l.*, when paid by the mortgagee, the mortgagee was not entitled to hold the mortgage deed as security to the extent of the 200*l.* due from the mortgagor to the solicitor. The deed was accordingly declared void as against the trustee in bankruptcy of the mortgagor. *Id.*

— **From Mortgagor.**—P., a solicitor employed both by a mortgagor and mortgagee, received the interest on the mortgage debt regularly. After a time he fraudulently obtained from the mortgagor a portion of the principal. At first the mortgagee received his interest regularly from P. at his office ; but ultimately P. allowed the interest to fall into arrear till a large sum became due to the mortgagee. During this time the mortgagee made no application to

the mortgagor in consequence of the irregularity in payment. In September, 1853, the mortgagor paid the mortgagee 43*l.* 13*s.* 9*d.*, as a half-year's interest on the principal remaining due; that led to an explanation, and the discovery of the fraudulent receipt of the principal by P. The mortgagee did not repudiate the payment at the time. On 24th of February, the mortgagor wrote to inquire in what way he should pay the half-year's interest just due, expressing his fear that P. would not be able to make good his defalcations to the mortgagee. On the 26th the mortgagee wrote, requesting payment by cheque; and on the 4th of March the mortgagee again wrote, saying that he believed that P. was hopelessly involved, and suggesting that the loss should be divided between them:—Held, that P. was the agent of the mortgagee to receive the interest but not the principal; and that in order to bind the mortgagee by the acts of P. in receiving the principal, it was necessary to shew either that what he did was with the intention of adopting the acts of P., or that the position of the mortgagor was altered. *Kent v. Thomas*, 1 H. & N. 473.

— **To receive Purchase-Moneys.**—The possession by a vendor's solicitor of an executed conveyance for purchase of lands, with the signed receipt for the consideration money indorsed, is not in itself an authority to the solicitor to receive the purchase-money. *Viney v. Chaplin*, 2 De G. & J. 468; 27 L. J., Ch. 434; 4 Jur., N. S. 619.

It is well settled that it is not within the ordinary business of a solicitor to receive purchase-money belonging to his client, or money due to him on mortgage, nor to receive money from him for the purpose of investment generally, and one partner is not liable for the misapplication of money so received by another without his privity. *Bourdillon v. Roche*, 27 L. J., Ch. 681.

Secus, where the money is received for the purpose of being invested on a particular security. *Id.*

Purchasers have a right to demand the attendance of the vendors in person to receive the purchase-money, and the vendors cannot insist on its being paid to their solicitor on production of the conveyance duly executed. *Bellamy and Metropolitan Board of Works, In re*, 24 Ch. D. 387; 52 L. J. 870; 48 L. T. 801; 31 W. R. 900; 47 J. P. 550—C. A.

Disclosure of Information to other Parties.—Notwithstanding the rule that a solicitor must not use information acquired in his professional capacity in any subsequent proceedings against his former client, a solicitor, who has acted in the formation of a company and been discharged, may act for a petitioner to wind up the same company, when all the facts upon which the petition is based might have been ascertained by any person in the position of the petitioner. *Holmes, In re, Electric Power Company, In re*, 25 W. R. 603.

Fiduciary Relation—Solicitor taking possible Benefit under Disposition of Client's Property.

—In 1856, O'B., a solicitor, by a voluntary deed conveyed real estate to trustees (of whom the defendant, his son-in-law, was the survivor), and their heirs, to the use of O'B. for life, and after

his death in trust to manage it for the use of the settlor's daughter M., until she should be married with consent, or attain twenty-one, then in trust for M. for life; and after her death in trust for her first and other sons, as they should be in seniority of age and priority of birth, with remainder, in default of such issue, to the settlor's four sons successively in tail, and on failure of issue of the sons to his daughter B. "absolutely." On the next day O'B. made his will, by which, after commencing with the recital, "having heretofore disposed of all my property, both real and personal," he gave one pecuniary legacy only, and appointed the defendant "residuary legatee of any property I may die possessed of, and not otherwise disposed of." The deed and the will were prepared by counsel selected by O'B., upon the instructions of the defendant, who was also a solicitor, and had been in partnership with O'B., and had bound himself on its dissolution to do O'B.'s law business for costs out of pocket. The instructions for the deed and will were taken by the defendant from the dictation of O'B., who was a thoroughly competent man of business, and from the instructions it was proved that O'B.'s intention was to give the property ultimately to B. in fee, but by the inadvertence of the conveyancing counsel, who was also a personal friend of O'B., no words of limitation were inserted in the creation of the equitable estates in the deed, the word "absolutely" having been adopted from the instructions. O'B. died in 1857, and his will was proved in common form. All his children were illegitimate. The sons all died without issue. M. died in 1872, leaving a son who died without issue in July, 1878, and on his death the defendant went into possession, his wife B. having died in 1866. The heirs of O'B. having brought an action to have the defendant declared a trustee of the lands for them:—Held, 1. That, even assuming the word "absolutely" sufficient to have given B. the remainder in fee in the lands, the crown and not the plaintiffs would have become entitled upon her death without issue; 2. That if she only took an estate for life under the deed of 1856, for want of words of limitation, the defendant on her death became entitled to the lands, either under the residuary gift in the will, or as surviving legal trustee under the deed of 1856; and 3. That, under the circumstances, the defendant had not been guilty of any such default or dereliction of duty, as O'B.'s solicitor, in failing to inform him of the possible benefit which might accrue to himself under the deed and will, as would bring the case within the doctrine of *Segrave v. Kirwan* (Beatty, 157), and *Buckley v. Wilford* (2 Cl. & Fin. 102). *Lysaght v. M'Grath*, 11 L. R., Ir. 142—C. A.

Gifts from Client.—In order to bring a case within the rule that a solicitor can receive no gift or reward from his client, there must be clear and unequivocal evidence of the relationship between the parties, that advantage was taken of that relationship, and that what was given was a reward to the solicitor for his services. *Richards v. French*, 22 L. T. 327; 18 W. R. 636.

To prevent the operation of the rule that a solicitor shall not take a gift from his client while the relation subsists, there must not only be a total absence of fraud, misrepresentation,

or even suspicion, but there must be a severance of the confidential relation. *Morgan v. Minett*, 6 Ch. D. 638 ; 36 L. T. 948 ; 25 W. R. 744.

A gift by a client to his solicitor is contrary to public policy, and therefore void. *O'Brien v. Lewis*, 32 L. J., Ch. 569 ; 9 Jur., N. S. 528 ; 8 L. T. 179 ; 11 W. R. 318.

Duty of Solicitor in drafting Will—Legacy to Solicitor's Wife — Evidence.—B., a solicitor, drew the will of R., his father-in-law, which bequeathed a share of residue, amounting to £5,000L., to B.'s wife, and appointed B. sole executor. The will contained no direction that this sum should be for the separate use of B.'s wife. There was no evidence as to what had passed between B. and R. at the time of the execution of the will :—Held, that, in the absence of evidence, the court could not assume such a dereliction of duty on B.'s part in not informing R. of the effect of the will, as to make B. a trustee for his wife. *Birchall, In re, Wilson v. Birchall*, 44 L. T. 243 ; 29 W. R. 461.

B. afterwards made a will which gave the bulk of his property to his illegitimate children, and died, leaving his wife surviving. At R.'s death part of his estate consisted of a sum of 5,000L., outstanding on mortgage, as part of a sum of 20,000L., the residue whereof did not belong to the testator. This sum was still standing in the same investment at B.'s death. Another part of R.'s estate, at his death, consisted of 15,000L. London and North-Western Railway stock standing in B.'s name. B. had also similar stock of his own standing in his name. He transferred 2,000L. of the testator's stock to another residuary legatee, and retained 13,000L. as part of his wife's share. He sold part of the stock standing in his name during his life, but at his death 12,000L. thereof was still standing in his name :—Held, that he had possession of his wife's stock as executor only, that the sales must be attributed to that part which was his own property, and that neither the 5,000L. on mortgage, nor the 12,000L. stock had ever been reduced into possession. *Id.*

When not acting on behalf of Client.—If an attorney is not acting as an attorney for his client on a particular occasion, he may throw off that character, and exercise his independent rights. *Austin v. Chambers*, 6 C. & F. 1.

Purchases from Client.—When a solicitor, acting on behalf of both parties, prepares a conveyance to himself containing an absolute covenant for title on the part of the vendor, when he knows or must be taken to have known that his title was defective, he will be restrained by perpetual injunction from proceeding with an action on the covenant. *Williamson v. Moriarty*, 19 W. R. 818.

The relation of solicitor and client carries with it all its consequences, whether it arises from an already existing relation or is only created for the purpose of a particular transaction ; but if it does not exist previously, and first arises in the particular transaction, it must be definitely established, and is not necessarily to be inferred. *Id.*

A primary decree having set aside as an absolute conveyance an assignment of lands by a client to his solicitor, which, however, was ordered to stand as a security for the amount to

be found due to the latter at its date for cash advances and costs :—Held, that the solicitor should pay the costs of the suit up to and including the first hearing, but that each party should bear his own subsequent costs, it appearing doubtful, on the taking of the account, whether there was not still a small balance due to the solicitor at the date of the final decree. *Shannon v. Casey*, 8 Ir. R., Eq. 307.

The court does not hold that an attorney is incapable of purchasing from his client, but watches such a transaction with jealousy, and throws on the attorney the onus of shewing that the bargain is, speaking generally, as good as any that could have been obtained by due diligence from any other purchaser. The circumstances of the employment may be considered, and the amount of influence estimated. *Pisani v. Att.-Gen. (Gibraltar)*, 5 L. R., P. C. 516 ; 30 L. T. 729 ; 22 W. R. 900.

Semble, that an attorney purchasing from his client ought to insist on the intervention of another professional adviser. *Id.*

A firm of solicitors purchased leasehold property, and soon afterwards they formed a company (of which they were appointed the solicitors) to take over the property, which they sold to the company at a price greatly in excess of that which they had paid for it :—Held, that no fiduciary relation having existed between the parties at the time when the solicitors purchased the property, and there having been no fraud, concealment, or misrepresentation on the part of the solicitors, and all the then members of the company having been fully aware of the facts, the sale could not be opened, and the solicitors were not accountable for the profit made on the transaction. *Mason's Hall Tavern Company v. Nokes*, 22 L. T. 503.

A purchase of the subject-matter of a suit by an attorney is void as against the policy of the law, and it makes no difference that the purchaser is not the attorney on the record. *Simpson v. Lamb*, 7 El. & Bl. 84 ; 26 L. J., Q. B. 121 ; 3 Jur., N. S. 412.

If an attorney or agent can shew he is entitled to purchase property notwithstanding his character of attorney or agent, yet, if, instead of openly purchasing it, he purchases it in the name of a third person, as his agent or trustee, without disclosing the fact, such purchase is void. *Lewis v. Hillman*, 3 H. L. Cas. 607.

When a solicitor purchases or obtains a benefit from a client, he must shew that he has taken no advantage of his professional position, but has done as much to protect the client's interest as he would have done in the case of the client dealing with a stranger. *Savery v. King*, 5 H. L. Cas. 627 ; 25 L. J., Ch. 482 ; 2 Jur., N. S. 503.

Leave to bid at Sale—Determination of Relation.—In an administration action part of the property of the testator was ordered to be put up for sale by auction, and leave was given to the solicitor for the defendant (the executor) to bid at the sale, which was to be conducted by the plaintiffs' solicitors independently of him. At the auction the property was not sold, and the court afterwards sanctioned a contract for its sale to the defendant's solicitor and another person :—Held, that the effect of the order giving leave to the solicitor to bid and of the subsequent approval of the contract was entirely to put an end to the fiduciary relation in which

he formerly stood, and to place him in the position of a mere stranger, and that consequently he was under no obligation to disclose to the court any facts within his knowledge affecting the value of the property. *Bonwell v. Coaks*, 23 Ch. D. 302; 52 L. J., Ch. 465; 48 L. T. 929; 31 W. R. 540.

— **Non-Disclosure of his own prior Charge on preparing Mortgage for Client.**—The plaintiff, in 1865, entered into partnership with L., the terms being that L. should bring in as capital the business premises, to be taken at a valuation, and so much money as might be required to make up 6,000*l.*, and that the plaintiff should bring in 6,000*l.* and pay a premium to L. C. acted as solicitor for L. in this transaction, and furnished the valuer with the particulars of his interest in the business premises. Four years afterwards L. became bankrupt, having drawn all his capital out of the partnership, and being in debt to it at the time; and C. then informed the plaintiff that he and his brother held a mortgage on L.'s interest in the business premises for 850*l.*, the sum advanced being trust money. This mortgage had been created before the partnership was agreed upon, and neither C. nor L. had ever mentioned it to the plaintiff, nor was it noticed in the particulars furnished to the valuer, and the interest had been paid upon it by L. in cash, or by cheques on his private account:—Held, that C. was bound to make good to the plaintiff the amount of the mortgage and any interest which he might have to pay on it, and that he must pay the costs of the suit. *Sterry v. Combe*, 40 L. J., Ch. 595; 25 L. T. 10; 19 W. R. 964.

— **Duty to make entire Disclosure.**—Where parties are contracting, either of them, unless he is under a duty to the other, may keep silence even as to facts which he believes would be operative on the mind of the other; if, however, one of them has made a statement which he believes to be true, but which in the course of the negotiation he discovers to be false, he is bound to correct his erroneous statement. *Davies v. London and Provincial Marine Insurance Company*, 8 Ch. D. 469; 47 L. J., Ch. 511; 38 L. T. 478; 26 W. R. 794.

In some cases, such as contracts between solicitor and client, there is a duty to make entire disclosure. In others, such as contracts of partnership, everything material must be disclosed. There is no such duty in the case of a contract of suretyship, but nevertheless very little said which ought not to have been said, and very little omitted which ought to have been said, will suffice to avoid the contract. *Id.*

The officers of a company, believing that the retention of money by one of their agents amounted to felony, directed his arrest. Certain friends of his came to the officers of the company and proposed to deposit a sum of money by way of security for any deficiency. On the same day the company was advised that the acts of the agent did not amount to felony, and the directions for the arrest were withdrawn. Later in that day the friends of the agent had a second interview with the officers of the company, and agreed to deposit a sum of money as security for his defaults, no mention being made of the withdrawal of the directions for the arrest. The sum of money was afterwards deposited with

trustees on an agreement for the security of the company:—Held, that the change of circumstances ought to have been stated to the intending sureties, and that the agreement must be rescinded and the money returned to the sureties. *Id.*

— **Statute of Limitations.**—The ordinary relation of a solicitor to his client in questions of account is not of such a fiduciary character as to bar the Statute of Limitations, 21 Jac. 1, c. 16. *Watson v. Woodman*, 20 L. R., Eq. 721; 45 L. J., Ch. 57; 24 W. R. 47.

— **Dealing with Client's Money.**—Where money is entrusted by A. to his solicitor for investment, but without any particular investment being then in contemplation, and is allowed to remain in the hands of the solicitor, the amount becomes a debt due from the solicitor to A. If the solicitor afterwards misapplies the money, and to cover his fraud obtains from another client, B., upon a false representation, a transfer of B.'s equitable interest under a previously executed mortgage, no money of A. being then paid to B., the transfer thus obtained may, on B. discovering the fraud, be set aside in equity, for no money of A. having been received by B. at the time the transfer was executed, no interest passed to A. by its execution. *Wall v. Cockerell*, 10 H. L. Cas. 229; 8 L. T. 1; 11 W. R. 442.

It is an established rule that a solicitor shall not, in any way whatever, in respect of any transactions in the relation between him and his client, make gain to himself, at the expense of his client, beyond the amount of his just and fair professional remuneration. *Tyrrell v. Bank of London*, 10 H. L. Cas. 26; 31 L. J., Ch. 369; 8 Jur., N. S. 849; 6 L. T. 1; 10 W. R. 359.

A party gave a sum of money to a firm of solicitors, to invest upon freehold security. They found a security, and invested the money upon it. The security turned out valueless:—Held, that the giving money to a solicitor for the purpose of general investment does not in itself create the relation of trustee and cestui que trust, so as to make the solicitor liable as trustee for a deficiency in the security. *Mare v. Lewis*, 4 Ir. Eq. R. 219.

— **Deposit of Deeds—Segregation—Power of Solicitor to place Client in favourable Position.**—A firm of solicitors received money from R., a client, for the purpose of investment. No investment was made at the time, and the money was applied by them for their own use. After the death of one of the partners his executors commenced a partnership action, in which H., the surviving partner, was appointed one of two receivers. H., without communicating with his co-receiver or with R., put certain deeds forming part of the partnership property into a box with R.'s name outside. R. subsequently obtained possession of these deeds and claimed to retain them as security for the money owing to her by the firm. The articles of partnership contained a clause providing that, on the death of either partner, the surviving partner should, within six months of the next general annual account, pay to the representatives of the deceased partner, his share of the profits of the year, and should execute a bond for payment within two years to them of the share of the capital of the deceased partner:—Held, that H. had no power of giving

R. a security upon these deeds, which formed part of the partnership property, and that R. must deliver them up to the receivers in the partnership action. *Hills v. Reeves*, 30 W. R. 439. Affirmed, 31 W. R. 209—C. A.

Mortgage—Undue Influence.—When a solicitor and mortgagee took a conveyance from the mortgagor, a day labourer, who had no independent legal advice:—Held, that the deed was not valid unless the circumstances were all explained to the mortgagor, and that the onus of shewing that this was done lay on the solicitor. *Prees v. Coke*, 6 L. R., Ch. 645.

— Injunction to restrain Sale.—The ordinary rule that the court will not grant an interlocutory injunction restraining a mortgagee from exercising his power of sale except on the terms of the mortgagor paying into court the sum sworn by the mortgagee to be due for principal, interest, and costs, does not apply to a case where the mortgagee at the time of taking the mortgage was the solicitor of the mortgagor. In such a case the court will look to all the circumstances of the case, and will make such order as will save the mortgagor from oppression without injuring the security of the mortgagee. *Macleod v. Jones*, 24 Ch. D. 289; 53 L. J., Ch. 145; 49 L. T. 321; 32 W. R. 43—C. A.

The plaintiff was a lady who was entitled to a life interest in leasehold property which she had mortgaged to various persons. The defendant acted as her solicitor, and with her sanction in order to release her from embarrassment bought up several of the incumbrances with his own money and took a transfer of them to himself; having previously taken a mortgage of the life interest to secure his past costs and the costs which he might incur in paying off the incumbrances. Afterwards the plaintiff discharged the defendant, and employed another solicitor, who applied to the defendant for information respecting the securities transferred. The defendant refused to give this information unless the payment of what was due to him was guaranteed, and threatened to proceed to a sale of the property. The plaintiff then brought an action to impeach the securities and to restrain the sale of the property, and moved for an injunction till the hearing:—Held, that, considering all the circumstances, an injunction ought to be granted, on the plaintiff paying into court such a sum as the court considered would cover the amount actually advanced by the defendant, and amending the writ so as to make it a simple action for redemption and injunction. *Ib.*

— Conflict of Interest and Duty.—In a creditor's administration action, brought against the administrator of an intestate (the defendant being a solicitor, and a member of the firm of solicitors who were acting for the plaintiff), after judgment for administration had been pronounced, an order was made on the application of the plaintiff by his solicitors for the appointment of a specified person, "upon his giving security," to receive the rents of the intestate's real estate, and to collect and get in his outstanding personal estate. On the application for this order the defendant made an affidavit stating his approval of the person proposed. Before the receiver had perfected his security some money arising from the sale of furniture

belonging to the intestate was received by the defendant's firm, and appropriated by him, and he claimed to retain out of it a debt due to him by the intestate:—Held, that, by reason of the relation in which the defendant stood to the plaintiff as a member of the firm of solicitors who were acting for him, the defendant stood in no better position than he would have stood after the receiver had perfected his security, and that the defendant could not under the circumstances exercise his right of retainer. *Wickens v. Townshend* (1 Russ. & My. 361) applied. *Birt, In re, Birt v. Burt*, 22 Ch. D. 604; 52 L. J., Ch. 397; 48 L. T. 67; 31 W. R. 334.

— Action against Solicitor — Measure of Damages.—A solicitor advanced money to his client on a second mortgage, in which was inserted a power of sale exercisable at any time without the usual proviso requiring that notice should be given, or some interest should be three months in arrear; and it was not shewn that he explained to the client that the power was not in the usual form. The solicitor afterwards took possession, and for several years received the rents, which, together with some payments made by the mortgagor, exceeded the interests on both mortgages. He then sold the property without notice:—Held, in an action by the mortgagor against the solicitor, that the omission from the power of sale of the usual qualifying clause was a breach of duty, and that the mortgagee was liable in damages as for an improper sale, unless it could be shewn that some interest was three months in arrear; and whether the absence of explanation did not make it improper even if there was interest in arrear, *quære*. *Cockburn v. Edwards*, 18 Ch. D. 449; 51 L. J., Ch. 46; 45 L. T. 500—C. A. Varying 16 Ch. D. 393; 50 L. J., Ch. 181; 43 L. T. 755; 29 W. R. 136.

Held, that the fact that the mortgagee had received rents to an amount more than sufficient to pay the interest would not by itself prove that there was no interest in arrear if no appropriation was shewn to have been made. The dictum in *Brooklehurst v. Jessop* (7 Sim. 442) overruled. *Ib.*

But held, that, as in an account sent by the mortgagee to the mortgagor the interest was treated as satisfied up to a certain day out of the rents, there was evidence of an arrangement that the rents should be applied in discharge of interest, and that, as the final account shewed that if the rents were thus appropriated there would be no interest in arrear at the time of sale, the sale was improper. Whether a mortgagee in possession having a balance of rents in hand more than sufficient for payment of the interest and all expenses he has incurred can be heard to say that interest is in arrear so as to justify a sale because no account has been rendered and no appropriation made, *quære*. *Ib.*

Held, also, that the difference between party and party costs and solicitor and client costs of the present action could not be given to the plaintiff by way of damages. *Ib.*

— Provisions for Payment of Costs to Solicitor as Mortgagee.—The owner of leasehold property, part of which was subject to six mortgages, was threatened with an immediate sale by the third mortgagee of the greater part

of it, who had bought in the second mortgage, and was in treaty for the purchase of the first. The defendant, a solicitor, advanced the money needful to pay off the mortgage and prevent a sale, stipulating that the whole of the mortgages should be paid off, and that he should have a mortgage for the total sum paid by him, including costs of the different mortgagees, to bear interest at the rate of 6l. per cent., the first and second mortgages having previously been at 5l. per cent. He also stipulated that the mortgage should include a separate property which was in mortgage at 5l. per cent., and that he should be entitled to costs as if a client had been mortgagee. All these stipulations were distinctly explained to the mortgagor, and were carried into effect by the mortgage deed. In an action for redemption brought by the mortgagor:—Held, that, as the unusual provisions had been fully explained to the mortgagor, they were binding upon him, except that, as to the additional property, which had been included solely for the mortgagee's own protection, the additional rate of interest must be disallowed. *Jones v. Linton*, 44 L. T. 601.

The defendant took from the mortgagor an authority to receive the rents of the property accruing due at the date of the mortgage, and in fact received the rents from that date. He sold some of the properties included in the mortgage, under his power of sale, and contracted for the sale of another at a price which appeared on the evidence to be below its value; the last-mentioned sale was not completed, owing to the pendency of the action:—Held, that the mortgagor was entitled to an account in the usual form as against a mortgagee who has entered into possession before there was any interest in arrear, and that the sale not yet completed must be set aside. An account of costs in respect of several abortive sales, and of the sales finally carried out, which had been signed by the defendant without any independent advice, was ordered to be re-opened and taxed. *Id.*

Right to retain Moneys—Husband and Wife.]

—A woman entitled to property for her separate use was desirous of raising money for the improvement of her estate, while her husband also wished to raise money to discharge a debt. They accordingly arranged through their solicitor to borrow money upon mortgage of the separate estate, and upon policies upon the lives of each of them respectively. The money was to be advanced by instalments, and when the first instalment was due the husband and wife signed a joint authority for the solicitor to receive it for them. He received the money, and claimed to retain part of it in respect of a separate debt due to him as solicitor of the husband:—Held, that in an action by husband and wife the solicitor could not retain the money, or set off against it a debt due from the husband, as it was received upon the express understanding that it was to be held for the husband and wife jointly, so that there never was any reduction into possession on the part of the husband. *Jones v. Cuthbertson*, 8 L. R., Q. B. 504; 42 L. J., Q. B. 221; 28 L. T. 673; 21 W. R. 919—Ex. Ch.

Recovery of Interest on Advances.]—The provisions of the 33 & 34 Vict. c. 28, s. 17, as to the allowance upon taxation of interest on moneys disbursed or advanced by a solicitor for

his client do not entitle a client whose costs, charges and expenses are ordered to be paid out of a fund in court belonging to other parties, to include in such costs, charges and expenses the interest on moneys disbursed for him by his solicitor. *Hartland v. Murrell*, 18 L. R., Eq. 285; 43 L. J., Ch. 94; 28 L. T. 725; 21 W. R. 781.

A security taken for untaxed costs gives a solicitor no right to interest on them. There may, however, be a contract to pay such interest, if it is made with full knowledge, sufficient advice, and necessary warning; but, in the absence of these, it will be of no force between solicitor and client. *Shannon v. Casey*, 8 Ir. R., Eq. 307.

Acting as an Auctioneer.]—An attorney was employed to sell lands, which he did, partly by private contract, and partly at auction; he received a deposit on each sale, and signed receipts for them as agent for the vendor. By the conditions of the sale a deposit was to be paid to him as agent for the vendor. On being applied to by the vendor, he declined to pay over the deposits to him till the sales were completed:—Held, that he had received the deposits as the vendor's agent and not as a stakeholder, and that, therefore, the vendor could recover interest on them from the time of the demand. *Edgell v. Day*, 1 H. & R. 8; 35 L. J., C. P. 7; 13 L. T. 328; 14 W. R. 87.

4. ACTING AS TRUSTEE.

As to Costs.]—The rule, that a solicitor, being also a trustee and a party to a cause, is not entitled to charge costs, except costs out of pocket, does not extend beyond his acting as solicitor for himself alone. *Craddock v. Piper*, 1 Mac. & G. 664; 1 H. & T. 617; 19 L. J., Ch. 107; 14 Jur. 97.

A solicitor who accepts a trust under a will or settlement is not entitled to charge for work and labour done by him as a solicitor in executing the trust. *New v. Jones*, 1 Mac. & G. 668, n.; 1 H. & T. 632, n.

The rule which allows a solicitor, being also a trustee and a party to a cause, to charge full costs, where he acts in the suit for a body of trustees, of which he himself is one, does not apply to the case of a solicitor being a trustee and acting as solicitor for himself and his co-trustees in the administration of the trust estate out of court. *Lincoln v. Windsor*, 9 Hare, 158; 20 L. J., Ch. 531; 15 Jur. 765.

Where one of a set of trustees is a solicitor, and by the direction of his co-trustees acts professionally in matters relating to the trust (such business being done out of court, and not in a cause in Chancery), he will not be allowed any remuneration for professional services, but only be entitled to costs out of pocket. *Broughton v. Broughton*, 5 De G., Mac. & G. 160; 25 L. J., Ch. 250; 1 Jur., N. S. 965.

Where one of a set of trustees is one of a firm of solicitors, and the firm acts, by the direction of the trustees, professionally in the matters of the trust estate (such business being done out of court, and not in a cause in Chancery), the firm will not be allowed any remuneration for their professional services, but only be entitled to costs out of pocket. *Id.*

A trustee solicitor is entitled to be allowed

profit costs where he has agreed with his partner that such partner shall act as solicitor to the trust, and receive the profits for his own benefit. *Clark v. Carlon*, 30 L. J., Ch. 639; 7 Jur., N. S. 441; 4 L. T. 361; 9 W. R. 568.

A solicitor was appointed executor, and was to be at liberty to charge for his professional services:—Held, that he was only entitled to charge for services strictly professional, and not for matters which an executor ought to have done, without the intervention of a solicitor; such as for attendances to pay premiums on policies, attending at the bank to make transfers, and attendances on proctors, auctioneers, legatees, and creditors. *Harbin v. Darby*, 28 Beav. 325; 29 L. J., Ch. 622; 6 Jur., N. S. 906; 8 W. R. 512.

5. POWER OF PARTNER TO BIND FIRM.

Transaction not within scope of ordinary Business.]—In March, 1832, B. & C., who were then in partnership as solicitors, were employed by A. to lay out 500*l.* on mortgage. They lent the money to L. on the mortgage of premises, and retained possession of the mortgage deed. The premises were afterwards sold subject to the mortgage, and the purchaser paid C. the 500*l.* and interest, but without the knowledge of B., and the deed was given up to the purchaser by C., but no receipt was indorsed thereon, nor was any reconveyance or receipt executed or signed by A., who was not informed that the money had been paid. In December, 1832, C., without the knowledge of B., returned to the purchaser 300*l.* and received back the mortgage deed, and no part of the 500*l.* was paid to A. Interest, at first on the 500*l.* and then upon the 300*l.*, was paid to C. by the purchaser, and entries were made in the books of B. & C., giving credit to A. for interest on the 500*l.*, and debiting him with interest paid to his agent. In July, 1838, B. & C. dissolved partnership. Up to the dissolution, interest on the 500*l.* was regularly paid to the agent of A. by C., by cheques drawn by B. & C. on their bankers, and after the dissolution it was paid by C., sometimes in cash, and sometimes by cheques on his own banker. In some of the receipts the money was described as interest upon a mortgage. A. died in May, 1840. In 1846, the purchaser paid C. the 300*l.* and interest, and received from him the mortgage deed. B. was ignorant of the receipts and payments subsequently to the investment of the 500*l.* until 1849. In 1848 the executors of A. first discovered that the mortgage money had been repaid:—Held, that no action would lie against B., inasmuch as the subsequent receipt of the mortgage money by C. was wholly unauthorized, and not within the scope of the partnership business. *Simms v. Bruton*, 5 Ex. 802; 20 L. J., Ex. 41.

Held, secondly, that the Statute of Limitations was a bar to the action. *Id.*

The receipt of money by one of the firm of attorneys from a client, professedly on behalf of the firm, for the general purpose of investing it as soon as he can meet with a good security, is not an act within the scope of the ordinary business of an attorney, so as, without further proof of authority from his partners, to render them liable to account for the money so deposited, such a transaction being part of the business of a scrivener; and attorneys, as such, not necessarily being scriveners. *Harman v.*

Johnson, 2 El. & Bl. 61; 3 C. & K. 272; 22 L. J., Q. B. 297; 17 Jur. 1099.

But if money is so deposited with one partner for the purpose of its being invested on a peculiar security, the other partners are liable to account for it, such a transaction coming within the ordinary business of an attorney. *Id.*

By Drawing Post-dated Cheque in Name of Firm.]—A member of a firm of attorneys has no implied authority to bind his co-partners by a post-dated cheque drawn in the name of the firm. *Forster v. Mackreth*, 2 L. R., Ex. 163; 36 L. J., Ex. 94; 16 L. T. 23; 15 W. R. 747.

By Drawing Bill in Name of Firm.]—One of two attorneys in partnership has no implied authority to bind his partner by a note or bill in the name of the firm, though given for their debt, as for money handed to the firm by a client to be laid out on mortgage. *Hedley v. Bainbridge*, 3 Q. B. 316; 2 G. & D. 483; 11 L. J., Q. B. 293.

The business of attorneys is not such as to render it either necessary or usual to draw or to indorse bills of exchange, and therefore a member of a firm of attorneys has not, as such, authority to bind his firm, either by drawing or by indorsing them. *Garland v. Jacomb*, 8 L. R., Ex. 216; 28 L. T. 877; 21 W. R. 868—Ex. Ch.

By Undertaking to Pay.]—One partner of a firm of attorneys has no authority to sign an undertaking in the name of the firm for the payment of the amount of debt and costs to the plaintiff in an action, in order to procure the discharge of the defendant in that action from custody. *Haleham v. Young*, D. & M. 700; 5 Q. B. 833; 13 L. J., Q. B. 205; 8 Jur. 338.

By Fraudulent Representation.]—A solicitor is civilly responsible for the fraudulent representation of his partner as to the investment of moneys intrusted to the firm. *Blair v. Bromley*, 16 L. J., Ch. 495.

Liability for Receipt of Money by Partners.]—*See post*, cols. 1844, 1845.

VII. LIABILITY OF.

1. GENERALLY.

To Account.]—A firm of solicitors purchased leasehold property, and soon afterwards they formed a company (of which they were appointed the solicitors) to take over the property, which they sold to the company at a price greatly in excess of that which they had paid for it:—Held, that no fiduciary relation having existed between the parties at the time when the solicitors purchased the property, and there having been no fraud, concealment, or misrepresentation on the part of the solicitors, and all the then members of the company having been fully aware of the facts, the sale could not be opened, and the solicitors were not accountable for the profit made on the transaction. *Mason's Hall Tavern Investment Company v. Nokes*, 22 L. T. 503.

Where a party gave a sum of money to his solicitors to invest:—Held, that as this was a single isolated transaction, a bill for an account as between principal and agent could not be

maintained as against the solicitors. *Mare v. Lewis*, 4 Ir. Eq. R. 219.

When on a bill, against a firm of solicitors who were the trustees of a settlement, for an account, but in which there was no charge of wilful neglect or default, and no relief prayed as against it, the plaintiff succeeded in establishing his case; the court directed an inquiry as to the defendant's dealings with the trust fund, and if on taking the accounts it should appear that they had been guilty of wilful neglect or default in the discharge of their duty, they should be charged, in taking the accounts, with such wilful neglect or default. *Nash v. Howell*, 21 L. T. 743.

A solicitor was active in founding a banking company. Before its establishment he entered into a secret arrangement with a stranger, that the latter should purchase some property eligible for the banking-house on a joint speculation. After its establishment, the company purchased part of the premises for their banking-house, not knowing that their solicitor was interested in it:—Held, that he must account to the company for all the profits made by him by the whole transaction, but that the stranger was under no such liability. *Tyrrell v. Bank of London*, 10 H. L. Cas. 26; 31 L. J., Ch. 369; 6 L. T. 1; 10 W. R. 359.

H. by agreement with J. became solicitor on the record in certain suits, and an arrangement was made that moneys received by him as such solicitor should be applied to meet some fees to counsel due from J. The moneys were so received and applied after J.'s death. J.'s estate was insolvent, and a summons was taken out by his executor for payment of these sums:—Held, that as H. had received these moneys as solicitor on the record and by express agreement with J., he was entitled to retain them, subject only to an account. *Jeyes v. Jeyes*, 45 L. J., Ch. 245; 34 L. T. 167.

To Charges of Fraud.—When it was sought to restrain a solicitor from proceeding in a suit to recover costs, and to declare him guilty of fraud, on the ground of not having disclosed a will affecting the title in property which his client was about to purchase, it appearing that a copy of the will had been handed to a solicitor who had previously acted for the vendee in the sale:—Held, that fraud should not be presumed against him, notwithstanding the fact that he had prepared an answer to be sworn by the plaintiff in a chancery suit, in which it was expressly stated that the plaintiff made the purchase without any notice of the will. *M'Elroy v. Murphy*, 22 W. R. 501.

The non-production, in Ireland, of title deeds to the solicitor instructed to prepare a mortgage upon an estate there will not of itself be deemed a proof that the solicitor has acted fraudulently, or even negligently, so as to affect the interest of his client. *Agra Bank v. Barry*, 7 L. R., H. L. 135.

When not supported—Costs.—Although relief may be given at the suit of a client against his solicitor for loss sustained by gross negligence, yet where the loss was in respect of a matter of conduct as to which the advice of the solicitor was founded on the opinions of competent surveyors as to the value of the property, and those opinions submitted to the judgment

of the client, the court dismissed the bill; and as fraud and improper motives were charged without evidence to support those charges, the bill was dismissed with costs. *Chapman v. Chapman*, 9 L. R., Eq. 276; 22 L. T. 145; 18 W. R. 533.

For Breaches of Trust.—A solicitor acting for the sole survivor of three trustees, prepared, by his direction, a deed appointing the husband of the cestui que trust sole trustee in his place, and another solicitor, acting for the cestui que trust and her husband, perused and approved of the draft. The deed was executed, and the trust fund transferred to the husband as new trustee, and by him sold out and never replaced. There being no ground for imputing to either of the solicitors knowledge or suspicion of any improper design in the transaction:—Held, that neither of them was liable for the loss occasioned by the breach of trust. *Barnes v. Addy*, 9 L. R., Ch. 244; 43 L. J., Ch. 513; 30 L. T. 4; 22 W. R. 505.

The court disapproves of the practice of making solicitors or others, who are properly witnesses, and who are not primarily chargeable with any part of the relief prayed, parties to suits with a view of charging them with costs alone. *Id.*

For Money Received or Paid.—A firm of solicitors, acting for two trustees, and receiving trust moneys from them, and paying over a portion of such moneys to one only of the trustees, who afterwards dies insolvent, is liable to the trust estate for the whole amount of moneys received from the two trustees. *Lee v. Sankey*, or *Ginger v. Sankey*, 15 L. R., Eq. 204; 27 L. T. 809; 21 W. R. 286.

A solicitor was employed by the trustees for sale of an estate, his duty being to receive the purchase-moneys and pay them in to the trustees' banking account. He received large sums, paid them in to his private account, and died insolvent. His banking account at his death shewed a large credit, principally made up of specific sums which corresponded with receipts by him on account of sales of the trust estate:—Held, that these specific sums could be followed by the trustees, and that there could not be a set-off allowed in respect of sums alleged to have been paid by the solicitor on account of the trust estate. *Birt v. Burt*, 36 L. T. 943.

A solicitor having received money to invest for a client upon mortgage of a particular property, represented in writing to the client that the money was all invested as arranged, and paid him interest as on the mortgage. After the solicitor's death it was discovered that the solicitor had not effected the mortgage, but had mixed the money with his own, and had invested a larger sum, purporting to be his own money, upon mortgage of the identical property. In a creditors' suit for the administration of the insolvent estate of the solicitor:—Held, under the circumstances, that the solicitor's estate was bound by the representation, and that the client's money was repayable out of the proceeds of sale of the mortgaged estate. *Middleton v. Pollock*, *Wetherall, Ex parte*, 4 Ch. D. 49; 46 L. J., Ch. 39; 35 L. T. 608; 25 W. R. 94.

Liability of Members of Firms.—A client of the defendants' firm of solicitors, who was on terms of intimacy and transacted his business

with one of the members, went to New Zealand to reside, leaving his wife in this country; upon the wife's death the defendants sent out a power of attorney to be executed, by which this member of the firm was to be appointed sole attorney to administer the wife's separate estate, another member being nominated in his stead in case he should die or be unable to act. The firm extracted letters of administration in the name of this one member, the sureties to the necessary bond being another member and the head clerk of the firm. Upon the administrator's death, it was found that he had misappropriated certain of the assets which had come into his hands, but which had not been paid to the firm's account. In an action by the client to recover these misappropriations from the surviving members of the firm, the defendants claimed to set off the firm's professional costs for everything done in the administration by the deceased partner as well as by themselves, and paid into court only the remainder of the amount actually paid by the administrator to the firm's account:—Held, that this was the employment of the deceased member, and not of the firm, to administer; that the costs of the firm were charged as those of solicitors to the administrator; and that the defendants were not liable beyond their payment into court. *Chilton v. Cooke*, 37 L. T. 607.

When a client has intrusted a firm of solicitors with moneys for investment on his behalf, he is at liberty, in the event of their misapplication of the moneys, to sue all or any one or more of the members of the firm, their liability being both joint and several. *Plumer v. Gregory*, 18 L. R., Eq. 621; 43 L. J., Ch. 616; 31 L. T. 80.

In order to render one partner in a firm of solicitors liable for the misapplication of money intrusted by a client of the firm to the other partner, it must be shewn that the money was received by that other partner in the ordinary course of business, for the purpose of being invested on a specific security. *Id.*

A mere general statement to the client by the partner who receives the money that the money is to be lent on security to another client is not sufficient to bind the other partner; the receipt of money for the purpose of laying it out generally not being part of a solicitor's business, or within the scope of a solicitor partnership. *Id.*

Money received by one member of a firm of solicitors in the course of the management and settlement of the affairs of a client of the firm, is money paid to the firm in the course of their professional business; and, consequently, the members of the firm are liable to make good any loss occasioned by the negligence or dishonesty of their partner by whom such money was received. *Dundonald (Earl) v. Masterman*, 7 L. R., Eq. 504; 38 L. J., Ch. 350; 20 L. T. 271; 17 W. R. 548.

Unless it be purchase-money or money due to a client on mortgage. *Bourdillon v. Roche*, 27 L. J., Ch. 681.

In a sale of real estate, to be made with the approbation of the judge, the solicitors of the plaintiff, who had the conduct of the sale, received the deposit from the auctioneer. The deposit was not paid into court as ordered, but was misappropriated by one of the firm of solicitors, who absconded:—Held, that it was the duty of the solicitors to receive the deposit from the auctioneer and pay it into court, and that therefore the remaining partners, and not the

auctioneer, must make good the loss. *Biggs v. Bree*, 51 L. J., Ch. 263; 46 L. T. 8; 30 W. R. 278.

Trustees deposited with a solicitor certain bonds payable to bearer. His partner had no actual knowledge of this, but letters referring to the bonds were charged for in bills of costs delivered by the firm; letters referring to the bonds were also copied into the letter book of the firm; and cheques for money received as interest on the bonds were drawn on the account of the firm. The solicitor made away with the bonds:—Held, that, under the circumstances, his partner was liable. *Dundonald v. Masterman* (7 L. R., Eq. 504) referred to. *Cleather v. Twisden*, 24 Ch. D. 731; 53 L. J., Ch. 365; 49 L. T. 633; 32 W. R. 198.

The practice of the solicitors having the conduct of a sale to pay the deposits into court for the auctioneer is within the ordinary business of a solicitor. An auctioneer sent the deposits received on a sale to the solicitors of the plaintiff, who had the conduct of the sale, to be paid into court. This deposit was received by one of the members of the firm, and misappropriated. On the question whether the auctioneer should not have himself paid this deposit into court, and whether he was not therefore liable to pay it over again:—Held, that the receipt and payment into court of the auctioneer's deposit was within the ordinary business of the solicitors to the party having the conduct of the sale, and that the innocent members of the firm were therefore liable for the defalcation of their partner. *Biggs v. Bree*, 51 L. J., Ch. 263; 46 L. T. 8; 30 W. R. 278—C. A. Affirming 51 L. J., Ch. 64; 45 L. T. 648; 30 W. R. 132.

Mortgage from Client, Measure of Damages in successful Action against.]—A solicitor advanced money to his client on a second mortgage, in which was inserted a power of sale exercisable at any time without the usual proviso requiring that notice should be given, or some interest should be three months in arrear; and it was not shewn that he explained to the client that the power was not in the usual form. The solicitor afterwards took possession, and for several years received the rents, which, together with some payments made by the mortgagor, exceeded the interest on both mortgages. He then sold the property without notice:—Held, in an action by the mortgagor against the solicitor, that the omission from the power of sale of the usual qualifying clause was a breach of duty, and that the mortgagee was liable in damages as for an improper sale, unless it could be shewn that some interest was three months in arrear; and whether the absence of explanation did not make it improper even if there was interest in arrear, *quære*. *Cockburn v. Edwards*, 18 Ch. D. 449; 51 L. J., Ch. 46; 45 L. T. 500; 30 W. R. 446—C. A. Varying 16 Ch. D. 393; 50 L. J., Ch. 181; 43 L. T. 755; 29 W. R. 136.

Held, that the fact that the mortgagee had received rents to an amount more than sufficient to pay the interest would not by itself prove that there was no interest in arrear if no appropriation was shewn to have been made. The dictum in *Brooklehurst v. Jessop* (7 Sim. 442) overruled. *Id.*

But held, that, as in an account sent by the mortgagee to the mortgagor the interest was treated as satisfied up to a certain day out of the

rents, there was evidence of an arrangement that the rents should be applied in discharge of interest, and that, as the final account shewed that if the rents were thus appropriated there would be no interest in arrear at the time of sale, the sale was improper. Whether a mortgagee in possession having a balance of rents in hand more than sufficient for payment of the interest and all expenses he has incurred can be heard to say that interest is in arrear so as to justify a sale because no account has been rendered and no appropriation made, *quære. Ib.*

Held, that the difference between party and party costs and solicitor and client costs of the present action could not be given to the plaintiff by way of damages. *Ib.*

2. ON UNDERTAKINGS.

Generally.—In an application for the summary interference of the court upon an attorney's undertaking, the question is, Did he or did he not act in the particular transaction in the character of an attorney? If he did, the court will hold him liable. *Fairthorne, In re*, 3 D. & L. 548; 1 B. C. Rep. 40; 15 L. J., Q. B. 131; 10 Jur. 287.

To Withdraw Pleas.—If an undertaking given by an attorney to withdraw pleas is not carried out and the plaintiff in consequence loses the benefit of a subsequent judgment, the defendant's attorney is not necessarily liable for the plaintiff's debt and costs. *Burnett v. Provis*, 22 L. T. 543.

To Pay Debt and Costs.—The court will compel an attorney to perform his undertaking to pay a sum of money, even though in respect of the debt of another, and void under the Statute of Frauds, 29 Car. 2, c. 3, s. 4. *Hilliard, In re*, 2 D. & L. 919; 14 L. J., Q. B. 225; 9 Jur. 664.

An attorney of a mortgagor, desirous of selling the property, having induced the attorney of the mortgagee to give up the title-deeds, on his undertaking to pay him the costs of preparing the abstract of title, the court granted a rule, ordering him to pay the amount pursuant to his undertaking. *Gee, In re*, 2 D. & L. 997; 10 Jur. 694.

A plaintiff having issued execution on a judge's order against the defendant, his attorney sent to the plaintiff the following letter:—"Sir, —*Yourself v. Gordon*.—In consideration of your agreeing to suspend execution upon the judgment, I hereby undertake to make an arrangement with you respecting the payment of the debt and costs prior to Mr. G. being discharged from prison under his present detainers; or in the event of your not agreeing to the terms offered by me, to inform you in sufficient time of his intended discharge, so that you may not be deprived of your power of lodging a detainer against him in this action. Your reply, approving this arrangement, will oblige," &c. The court discharged a rule obtained to compel the attorney to pay the debt and costs. *Thompson v. Gordon*, 4 D. & L. 49; 15 M. & W. 610; 15 L. J., Ex. 344.

An attorney, who has acted as such in one of the superior courts, and signed an undertaking in such court, cannot refuse to perform that

undertaking on the ground that he is not an attorney of that court. *Ib.*

The attorneys for the plaintiff and defendant in a horse cause, which was ready for trial, but had been withdrawn at the assizes, signed the following undertaking:—"We, the undersigned, attorneys for the plaintiff and defendant, do hereby personally consent, undertake and agree, that the record in this cause shall be withdrawn; that the defendant shall take back the horse in the pleadings named, and shall pay 6*l.* 17*s.* to the plaintiff; that the costs of the suit on the part of the defendant shall be taxed between the parties, on the principle between plaintiff and defendant; and that such taxation shall be perfected by," &c. :—Held, that the plaintiff's attorney in the original action was personally liable upon this undertaking to pay to the defendant's attorney the costs when taxed, pursuant to the agreement. *Iceson v. Corington*, 2 D. & R. 307; 1 B. & C. 160.

So, where the solicitors of the assignee of a bankrupt tenant, on whose lands a distress had been levied by the landlord, gave an undertaking in the following terms:—"We, as solicitors to the assignees, undertake to pay to the landlord his rent, provided it do not exceed the value of the effects distrained:"—Held, that they were personally liable. *Burrell v. Jones*, 3 B. & A. 47.

The solicitor of the London creditors of a bankrupt in the country wrote to B., the solicitor of the country creditors of the bankrupt, the following letter:—"I am willing, on behalf of the London creditors, to bear two-thirds of the expense of Messrs. B. & B., or such barrister as you may think fit, for resisting Mr. K.'s proof under the commission, and of investigating the accounts of the assignees at the meeting on the 18th inst. I hereby undertake to bear and pay, on behalf of these creditors, two-thirds of the expenses incident thereto accordingly." And the meeting being afterwards adjourned, A. wrote to B. another letter, in which he said—"I shall have no objection to bear as before the proportion of expense of the barrister attending the meeting stated in your letter:"—Held, that A. was personally liable for the proportion of the expenses. *Hall v. Ashurst*, 1 C. & M. 714; 3 Tyr. 420.

An attorney for a defendant in a feigned issue undertook to pay a given sum of money on a given day. The money was not demanded on the day specified, but repeated applications were subsequently made for the money in vain. Between three and four years after the money became due, a summary application was made to the court to compel the attorney to pay the money pursuant to his undertaking. The court, notwithstanding the delay which had taken place, made the rule absolute, with costs. *Swan, In re*, 1 B. C. Rep. 99; 15 L. J., Q. B. 402; 10 Jur. 715.

Plaintiffs were assignees of a mortgage granted by A. and B., for 2,000*l.*, and had procured an advance from them for a client, on the same security, of 325*l.*, and were creditors of A. and B. for a further sum of 164*l.* They had commenced actions for the first two sums, and obtained a verdict in the action for the last. Under these circumstances, an attorney, but not employed as such in his business, induced the plaintiffs to stay proceedings for two months in the last action, and to allow judgment to be suffered by default in the other two, on which no execution was to

issue for two months. The consideration for this stay of proceedings was that the attorney undertook that the money should be paid, whenever the necessary securities should be completed; stating at the same time the name of another party through whom the money was to be procured, and to whom the mortgages were to be transferred. Ultimately, the third party in question refused to execute:—Held, that the attorney had rendered himself personally liable in respect of all these sums. *Harper v. Williams*, 4 Q. B. 219; 12 L. J., Q. B. 237.

S., being desirous of assigning a lease which he had deposited with the plaintiffs to secure advances, employed the defendants, who were in partnership as attorneys, to get the lease from the plaintiffs. T., one of the defendants, accordingly arranged with the plaintiffs that they should give up the lease on receiving from him the following undertaking, signed by him in the name of the firm: "We undertake, in consideration of your handing to us the deeds and papers in your possession relating to the Rose and Crown Inn, at Hounslow, so as to enable us to complete the assignment of the lease of such property, to pay you 200*l.* on the day after the completion of the assignment of such lease, and the further sum of 250*l.* on or before the 3rd September next." The other defendant was not aware that this undertaking was given; but the whole transaction was entered in the books of the firm, and the purchase-money was paid into the partnership account:—Held, that this was not a bare guarantee for the debt of a third person, but an undertaking to appropriate money to be received by the firm in the ordinary course of the partnership business, and that it was therefore binding on the firm. *Alliance Bank v. Tucker*, 17 L. T. 13; 15 W. R. 992.

To Pay Legacy Duty.—Where an attorney was intrusted by executors with a sum of money, for the purpose of paying legacy duty, and failed so to apply it, the court refused to interfere summarily to compel him to refund the money, as it did not appear that this employment was necessary in his professional character, or that he had on other occasions ever acted as attorney for the parties. *Webb, In re*, 2 D. & L. 932; 14 L. J., Q. B. 244; 9 Jur. 538.

Guarantee as Surety.—Where a party, about to borrow money to carry on a lawsuit in an ecclesiastical or in an Irish court, referred the lender to an attorney to inform him of the nature of the suit, and the latter gave a guarantee of the loan, but one on which an action would not lie:—Held, that the court would not interfere summarily to enforce the guarantee. *Kearns, In re*, 11 Jur. 521.

When Acting as Agent.—Upon a proposed sale of a bankrupt's effects, the plaintiff gave notice of a claim to part under a bill of sale, whereupon the solicitors of the assignees wrote to the plaintiff's solicitors in these terms: "In consideration of A., for whom you act, consenting to the sale, we hereby, on behalf of the assignees, consent," &c.; to which the plaintiff's attorneys answered in these terms: "In compliance with the undertaking given by you herein, we, on the part of the plaintiff, consent to the sale:"—Held, that these letters shewed, upon the face of them, under the circumstances,

that the solicitors of the assignees professed to contract only as agents. *Lewis v. Nicholson*, 18 Q. B. 503; 21 L. J., Q. B. 311; 16 Jur. 1041.

An attorney wrote the following letter to the plaintiff: "Sir,—Mr. Wright has handed me your letter of the 3rd respecting the non-payment of the bill for 91*l.* due on Saturday. I am now making arrangements for an advance to Mr. Wright, to enable him to pay this and other claims upon him, and if you will have the goodness to hold the bill for a few days, I shall be prepared on his behalf to take it up." The plaintiff had no further communication with the attorney, and on the receipt of the letter was not aware that he was an attorney:—Held, that this letter did not render him personally liable. *Allaway v. Duncan*, 16 L. T. 264.

A solicitor contracted, in his own name, to purchase a freehold; he resisted the performance of it on the ground that he had acted as the mere agent of a client, and that, it being a case of hardship, damages at law would be an adequate remedy to the vendor:—Held, that he was bound to perform the contract. *Saxon v. Blake*, 29 Beav. 438.

When Acting for Company.—Where an attorney of a railway company contracted as such, but managed all the concerns of the company, there being no acting committee:—Held, that the attorney was not personally liable under such contracts. *Russell v. Reece*, 2 C. & K. 669.

To give Security for Costs.—A defendant obtained a judge's order in the following terms: "It is ordered that the plaintiff do forthwith give security for costs to the satisfaction of the master; no stay of proceedings in the meantime, the attorney for the plaintiff hereby undertaking to find such security:"—Held, that the attorney was not bound to find security for costs unless further proceedings were taken by the plaintiff. *Hill v. Fletcher*, 5 Ex. 470; 1 L. M. & P. 518; 19 L. J., Ex. 320.

To obtain Client's Consent to a Reference.—Where an attorney, in order to get possession of papers belonging to A., in the hands of A.'s former attorney, who had a lien upon them for the amount of a bill then in dispute, undertook that A. should enter into an unqualified reference not revocable:—Held, that the attorney was liable, pursuant to his undertaking, to procure A.'s signature to an agreement of reference, and to find security for the performance of an award to the satisfaction of the master. *Hughes, Ex parte*, 5 B. & A. 482.

When Discharged from.—Where an attorney undertook to pay the sum which should be awarded to be paid by his client in a particular reference, the arbitrator being to make his award by a particular day, did not do so, and the judge's order for enlarging the time was made by consent, the attorney acting on that occasion for his client:—The court held him discharged from his undertaking, he not having recognized it after the original time for making the award had expired. *Staitte v. Haddon*, 9 D. P. C. 995.

Waiver of.—So where a defendant's attorney, on their being sued by the plaintiff, undertook by letter to procure their signature to a cognovit

for the payment of the debt and costs, which he failed to do; but the plaintiff afterwards said that he would proceed with the action:—Held, that this was virtually a waiver of the attorney's undertaking, and that he could not be called on by the court to perform it. *Miller v. James*, 8 Moore, 208.

Mode of Enforcing.]—The undertaking of an attorney can only be enforced by attachment where he has given it for his client. *Watts, Ex parte*, 1 D. P. C. 512.

An attorney giving an undertaking for another, in a cause in which he is not concerned as attorney, will not be forced summarily to fulfil it; but the party to whom it is given will be left to his action. *Walker v. Ariett*, 1 D. P. C. 61.

The undertaking of an attorney cannot be summarily enforced unless he is acting as attorney in the cause. In other cases the party to whom the undertaking is given must be left to his action. *Bateman, In re*, 2 D. P. C. 161.

An attorney who is a party in a cause, giving an undertaking to the sheriff in that cause, is not liable to have that undertaking summarily enforced by the court. *Northfield v. Orton*, 1 D. P. C. 415.

The court will not summarily compel an attorney to pay money pursuant to his undertaking to indemnify against costs, in an action where, at his instance, a party has allowed his name to be used as a plaintiff, without any interest in the matter. *Clifton, Ex parte*, 5 D. P. C. 218; 2 H. & W. 296.

Where an attorney, being employed to sue a defendant, gave his undertaking for the debt sought to be recovered to his own client, the court refused to enforce the fulfilment of the undertaking by attachment. *Evans, Ex parte*, 9 D. P. C. 106; 1 W. P. C. 2; 4 Jur. 991.

The defendant in an action in this court being in prison for contempt, his solicitors, in order to induce the plaintiff's solicitors to give their consent to his release from arrest, entered into an undertaking, in terms unconditional, to pay an agreed sum as the costs of the application for his committal. This undertaking not having been performed, the plaintiffs moved in this matter for a summary order that the defendant's solicitors should be ordered to pay to the plaintiffs or their solicitors the agreed sum, pursuant to the undertaking, and the costs of that application. There was a conflict of evidence as to whether the undertaking was intended to be unconditional, or conditional only upon its being in accordance with the practice of the court (which it was now admitted it was not) to make the order for release only on terms of payment of costs:—Held, that the court had jurisdiction to entertain the application; that the application was properly made; that upon the evidence the undertaking was unconditional; and that there must, therefore, be an order in terms of the notice of motion. *Woodfin and Wray, In re*, 51 L. J., Ch. 427; 80 W. R. 422.

3. ACTING WITHOUT AUTHORITY.

Generally.]—When a solicitor acts without authority, he must as a general rule pay the costs thereby occasioned. *Savage, In re*, 15 Ch. D. 557; 29 W. R. 348.

An attorney having brought an action without

any authority to do so from the plaintiff, was ordered to pay the defendant's costs of the action:—Held, that his liability to pay such costs was a liability incurred by means of a fraud within the Bankruptcy Act, 1869, s. 49. *Jenkins v. Pereday*, 7 L. R., C. P. 358; 41 L. J., C. P. 152; 27 L. T. 37; 20 W. R. 781.

If an attorney sues out a writ against A., at the suit of B., without any authority express or implied from B. for so doing, and A. pays the costs of such writ to the attorney, A. may recover back the amount of those costs, by an action for money had and received against the attorney; but if the attorney had any authority, either express or implied, from B. to sue out the writ, such action for money had and received will not lie against the attorney, even though B. had no cause of action against A. *Dupen v. Keeling*, 4 C. & P. 102.

A. delivered papers to B., an attorney, telling him "that she was entitled to an estate, and that she would pay him if she recovered it;" B. took the papers, saying that he would do what he could for her, and without further communication commenced an action of ejectment, which he afterwards abandoned, under the conviction that A. had no title:—Held, that B. acted without due authority, both in commencing and discontinuing the ejectment, and was not entitled to recover the costs thus incurred. *Tabram v. Horn*, 1 M. & R. 228.

Where a defendant has been served with process to appear, and an attorney without authority appears for him, the court will proceed as if the attorney really had authority, unless the attorney is not solvent, in which case the court will relieve the defendant on equitable terms if he has a defence on the merits. *Bailey v. Buckland*, 5 D. & L. 115; 1 Ex. 1; 16 L. J., Ex. 204; 11 Jur. 564.

But if a plaintiff, without serving a defendant with process to appear, accepts an appearance entered for him by an unauthorized attorney and proceeds to judgment, the court will set aside the judgment with costs, and leave the plaintiff to recover by summary proceeding against the delinquent attorney those costs and the expenses to which he has been put by him. *Id.*

The rule relating to attorneys appearing for parties without their authority is not accurately laid down in 1 Salk. 86, 88. *Id.*

Though the court will not in general, where a defendant is prejudiced by the act of an attorney in acting for him without authority, leave him to his remedy against the attorney, if solvent, that rule does not apply where the defendant is in custody by reason of the unauthorized act, or where the plaintiff or his attorney is party to the wrong. *Hambidge v. De La Crouée*, 3 C. B. 742.

Where an action is brought by an attorney without the plaintiff's consent, and the defendant at the trial agrees to withdraw a juror, the court will not order the attorney acting for the plaintiff to pay the costs of the defendant. *Hammond v. Thorpe*, 1 C., M. & R. 64; 4 Tyr. 838; 2 D. P. C. 721.

A pursuer of a mine, assuming to be authorized to sue on behalf of the adventurers, instructed an attorney to sue in the name of twelve of them. At the trial the record was withdrawn, and the defendant obtained a rule for the costs of the day. Immediately after taxation, on the 19th

September, 1854, three of the plaintiffs obtained judge's orders to strike their names from the record, on the ground that they had ceased to have any interest in the mine, and that their names had been used without their knowledge or consent. On the 5th of May, 1855, the defendant obtained a rule to rescind these orders and for the attorney to pay the costs already incurred, and to give security for the defendant's further costs:—Held, that the application was too late. *Collins v. Johnson*, 16 C. B. 588; 24 L. J., C. P. 231.

Where a solicitor has commenced an action in the name of a plaintiff without authority, the proper course is for the plaintiff to serve notice of motion on the defendant as well as on the solicitor, that the action may be dismissed, and that the solicitor may pay the costs of the plaintiff as between solicitor and client, and the costs of the defendant as between party and party. In cases where no rule of practice is laid down by the new orders, and there is a variance in the old practice of the chancery and common law courts, that practice is to prevail which is considered by the court most convenient. *Newbiggin-by-the-Sea Gas Company v. Armstrong*, 13 Ch. D. 310; 49 L. J., Ch. 231; 41 L. T. 637; 28 W. R. 217—C. A.

Joining as Co-Plaintiff.—The name of a plaintiff having been inserted on the record without his knowledge, consent, or authority, on motion by the defendants to dismiss for want of prosecution, and on motion by the plaintiff to have his name struck out from the record:—Held, that the solicitors to the record who had purported to act for the said plaintiff were liable to pay his costs of the motion as between solicitor and client, and also to pay the costs of the defendants of the action and all the motions therein. *Nurse v. Durnford*, 13 Ch. D. 764; 49 L. J., Ch. 229; 41 L. T. 611; 28 W. R. 145.

The form of order in *Dundas v. Dutens* (1 Ves. 196) not followed. *Ib.*

Order to Attend Proceedings—Order Discharged on Application of Client.—An order to attend proceedings, obtained by a solicitor without the written authority of his client, will be discharged on the application of that client. *Bird v. Harris*, 43 L. T. 434; 29 W. R. 45.

Actions by Authority of Next Friend, but without Married Woman's Consent—Costs.—An action was commenced in the name of a married woman by her next friend against her husband and the trustee of a separation deed to enforce payment of an annuity under the deed. The defendants moved that the action might be dismissed, or that the next friend might be ordered to give security for costs. This was supported by an affidavit of the husband that he believed that his wife had given no authority to commence the action. The husband's solicitor joined in the affidavit, and deposed to the facts that the next friend was not a householder, and had no visible means of paying costs. The next friend replied by affidavit that he had sufficient means to pay any costs that he might be ordered to pay, but said nothing as to his having authority from the married woman to

commence the action, and did not produce any authority:—Held, that the next friend of a married woman will not be called upon to prove his authority on the mere allegation of a defendant that he has no authority. Held, also, that the next friend could not be ordered to give security for costs on the ground that he was not a householder when he deposed that he had sufficient means to pay costs. But, held, by the Court of Appeal, that the action must be dismissed with costs, to be paid by the solicitors of the next friend, as he, when challenged to shew his authority to commence the action, did not shew any. *Schjott v. Schjott*, 19 Ch. D. 94; 51 L. J., Ch. 368; 45 L. T. 333; 30 W. R. 329—C. A.

Acting for Non-Existing Person.—An attorney, though he need not be instructed by a plaintiff personally, but may receive instructions from any one interested in the action, is liable to the defendant for costs, if it turns out that the plaintiff is a non-existing person. *Hoskins v. Phillips*, 16 L. J., Q. B. 339.

Right to Costs of Solicitor to Trustee in Bankruptcy.—The right of the solicitor to a trustee in bankruptcy to be paid his costs out of the bankrupt's estate is only the right of his client, the trustee; he has no independent right. If either the trustee or the solicitor has been guilty of misconduct, the court can refuse to allow the solicitor's costs to be paid out of the estate, and this notwithstanding that the costs have been taxed and an allocatur has been made by the taxing-master. *Harper, Ex parte, Pooley, In re*, 20 Ch. D. 685; 51 L. J., Ch. 810; 47 L. T. 177; 30 W. R. 650—C. A.

Solicitors of the assignees of a bankrupt estate instituted a suit in the names of the assignees, but without any written retainer from the official assignee, against a mortgagee of the bankrupt's property to redeem the mortgage, which was dismissed with costs:—Held, on the petition of the official assignee, that, although he was cognizant of the existence of the suit, yet as there was no sufficient evidence of his having given a retainer, the solicitors were bound to pay and indemnify the official assignee against the costs. *Norton v. Cooper*, 3 Sm. & G. 375.

Staying Proceedings.—Where an attorney brings an action in the name of a person without his authority, the court will stay the proceedings, on the motion of the defendant, and make the attorney pay the costs. *Hubbard v. Phillips*, 2 D. & L. 707; 13 M. & W. 703; 14 L. J., Ex. 103.

When an attorney brings an action without the authority of the plaintiff, the plaintiff is entitled to have the proceedings stayed without payment of costs. *Reynolds v. Howell*, 8 L. R., Q. B. 398; 42 L. J., Q. B. 181; 29 L. T. 208; 22 W. R. 18.

The rule that proceedings taken by a solicitor without proper authority will be annulled with costs, to be paid by him, does not apply unless he was aware of the circumstances which invalidated his authority; and notice from the other side is not sufficient to fix him with knowledge, if he had good reason to suppose that the facts stated in the notice were not true. *Thomas v. Finlayson*, 19 W. R. 255. See also *New-*

biggin-by-the-Sea Gas Company v. Armstrong, and Nurse v. Durnford, supra.

— **Application—Parties to Rule.**—On an application by a defendant to stay proceedings, on the ground that the plaintiff's attorney is going on with the action contrary to the express direction of his client, the plaintiff should be made a party to the rule. *Thatcher v. D' Aguilar*, 11 Ex. 436.

Declaration in Action against—Damage.—A declaration that an attorney, wrongfully, and without the consent or retainer of the plaintiff, entered an appearance for him in an action by D. (a third party) against the plaintiff, and took upon himself to conduct the action, and such proceedings were thereupon had that D. recovered judgment and issued execution, and the plaintiff was obliged to pay the amount recovered and the costs of the execution:—Held, ill, after verdict, as not shewing any damage resulting from any act of the attorney. *Westaway v. Frost*, 17 L. J., Q. B. 286; 12 Jur. 698.

Appeal—Judicature Act, 1873, s. 49.—An order that the costs of an application at chambers on behalf of a client shall be paid by his solicitor personally, is subject to an appeal, without leave. *Bradford, In re, Thursby & Farish, In re*, 32 W. R. 238—C. A. Reversing 11 Q. B. D. 373; 52 L. J., Q. B. 759; 48 L. T. 765; 31 W. R. 919; 47 J. P. 630.

4. TO ATTACHMENT.

Not Entering an Appearance.—An attorney not entering an appearance in pursuance of his undertaking is liable to an attachment, under Reg. Gen., Hil. Term, 1853. *Jacob v. Magnay*, 12 L. J., Q. B. 93; 7 Jur. 326.

Although on an audita querela personal service of the original process cannot be dispensed with, yet an attorney who undertakes to accept process and appear for the defendant may be punished by attachment for not performing his undertaking. *Williams v. Roberts*, 1 L. M. & P. 381; 19 L. J., Ex. 269; 14 Jur. 399.

Disobedience to Order of Court.—The first step, when a solicitor neglects to obey an order of court, is to move for his attachment. *Anon.*, 38 L. T. 113.

Where an attorney employed to recover a debt received the money, and a rule of court was obtained ordering him to pay it over, which he disobeyed, the court refused to grant an attachment, as the remedy for the disobedience of the rule was by proceeding under 1 & 2 Vict. c. 110, s. 18. *Robinson, In re*, 10 B. & S. 75.

The court will refuse to grant an attachment against an attorney for disobeying a rule of court ordering him to pay money, unless special circumstances are shewn, as the remedy for such disobedience is by execution under 1 & 2 Vict. c. 110, s. 18. *Ball, In re*, 8 L. R., C. P. 104; 42 L. J., C. P. 104.

When a solicitor made default in the payment of a sum of money which he received on behalf of his client, and an order for payment within a certain date was obtained from the court, the client undertaking to give credit for any sum due by her, on non-payment of the sum, within the

fixed period, an order for an attachment was obtained. The solicitor not having made any affidavit of credits due from the client, was not allowed to treat them as a set-off against the sum for non-payment of which the attachment was sought. *Anon.*, 22 W. R. 479.

The court will not issue an attachment against an attorney for not delivering up papers pursuant to a rule of court, unless shewn that the person making the demand was duly authorized to do so, and stated that fact to the attorney. *Doc d. Hickman v. Hickman*, 8 D. P. C. 833.

Where an attorney is in contempt for disobeying a rule, the proper course of proceeding against him is by moving for an attachment, and not by applying to strike him off the roll. *Townley, Ex parte*, 3 D. P. C. 39.

A judge's order having been made directing an attorney to deliver up deeds to a client, the court granted an attachment against him for refusing to deliver them up unless the client would pay him for a schedule thereof, to be kept by the attorney. *Willand, Ex parte*, 11 C. B. 544.

A solicitor was ordered to pay money to a receiver of the court on pain of sequestration and imprisonment. His property was seized on a fi. fa. under the order, but possession was given up under an agreement:—Held, on breach of the agreement by him, that he could not be attached under the order. *Harvey v. Hill*, 16 L. R., Eq. 324; 43 L. J., Ch. 95; 28 L. T. 734; 21 W. R. 783.

Where an attorney disobeys a rule of court requiring him to do a particular act, an application cannot in the first instance be made to strike him off the roll, but a rule nisi for an attachment may be obtained; if by the same rule he is required to pay certain costs, and a clause is also introduced into it authorizing the issue of attachment in case of non-payment, that may at once issue although a rule nisi only will be granted for disobedience to the other part of the rule. *Grant, Ex parte*, 3 D. P. C. 320.

Wrongful Detention of Client's Money.—A solicitor, employed to obtain money charged on lands sold in the Landed Estates Court of Ireland, proved the claim, and having drawn out the money by means of a power of attorney, executed by his client under his own advice, failed to pay it over to the client:—Held, that his misconduct was committed in his capacity of solicitor, and that he was accordingly liable to attachment. *M., In re*, 1 Ir. R., Ch. 188.

Where money has been wrongfully detained by an attorney from his client, and a rule requiring him to pay that money over has been made absolute against him, it being clearly shewn that he was aware of what the rule required him to do, the court granted a rule for an attachment absolute in the first instance, he not having complied with the rule. *Burgin, Ex parte*, 1 D., N. S. 292.

Taxation of Bill—Default of Solicitor—Debtors Act, 1869, s. 4, sub-s. 4.—The default by a solicitor in payment of a balance found due from him upon taxation of his bill under the common order for that purpose, is in default in payment of a sum of money ordered to be paid by the solicitor in his character of an officer of the court within the meaning of the Debtors Act, 1869, s. 4, sub-s. 4, and an attachment may be issued against him. *Rush, In re* 9 L. R., Eq.

147; 39 L. J., Ch. 159; 21 L. T. 692; 18 W. R. 331.

A solicitor may be imprisoned for default in payment of a balance ordered to be paid on a common order to tax his bill of costs. *Id.*

Default by a solicitor in payment of the balance found due from him to his client upon taxation, under the common order, is default in payment of a sum of money, when ordered to be paid by a solicitor in his character of an officer of the court (Debtors Act, 1869, s. 4), and an attachment may be issued against him. *White, In re*, 23 L. T. 387; 19 W. R. 39.

Default by a solicitor in payment of a bill of costs found on taxation to be due from him to another solicitor whom he had employed to act for him, is "default by a solicitor in payment of a sum of money, when ordered to pay the same in his character of an officer of the court making the order," within the fourth exception to the Debtors Act, 1869, s. 4, and an attachment may be issued against him. *Barfield, In re*, 24 L. T. 243; 19 W. R. 466.

A solicitor was ordered to pay the costs of an unsuccessful appeal against an order to tax his bill of costs, which had been obtained by his client:—Held, that the non-payment of the costs of the appeal was not a default in payment of money within the Debtors Act, 1869, s. 4. sub-s. 4. *Hope, In re*, 7 L. R., Ch. 523; 41 L. J., Ch. 797; 26 L. T. 814; 20 W. R. 694.

Not Refunding Money pursuant to Master's Allocatur.]—An attachment may be issued against an attorney for not refunding a sum of money pursuant to the master's allocatur, without a previous rule to shew cause. *Anon.*, 10 Jur. 198, n.

Solicitor not Shewing Cause.]—A rule requiring an attorney to shew cause why he should not pay a sum of money, was enlarged at his request, but no cause being shewn, and the rule being made absolute, the court granted an attachment absolute in the first instance. *Brightmore, Ex parte*, 6 Jur. 15.

Disobedience to a Subpoena.]—An attachment will lie against a solicitor of a parish for disobedience to a subpoena duces tecum from the Crown office, requiring him to produce the rate-books of the parish at petty sessions in an inquiry into a pauper's settlement. *Reg. v. Carey*, 2 New Sess. Cas. 103.

Order requiring Client to Pay.]—If a rule of court requires a client to pay a certain sum of money, an attachment cannot be obtained against his attorney for its non-payment. *Poole v. Watkins*, 4 D. P. C. 11.

Delivering Account Ordered—Incorrect.]—Where a client obtained an order that his attorneys should deliver him an account of all moneys received on his behalf, and they accordingly delivered an account, the court refused to grant an attachment against them upon affidavits impeaching the correctness of the account. *Lawrence, Ex parte*, 2 D. P. C. 230.

On Bankruptcy.]—A bankrupt's certificate does not remove an attorney's liability to an attachment for not duly investing his client's money. *Grant, Ex parte*, 3 D. P. C. 320. See

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Newberry, In re, 5 N. & M. 419; 1 H. & W. 375; 5 A. & E. 100.

Misdescription of Parties.]—The court set aside an attachment against an attorney for not paying over moneys received in his professional character, where the party obtaining it had described herself in her affidavit as a *widow*, whereas she was at that time a *married woman*, although it did not appear that the false name and descriptions were used for any fraudulent purpose. *Reg. v. Carttar*, 1 L. M. & P. 386; 19 L. J., Q. B. 422.

An attachment was ordered absolutely in the first instance against an attorney for non-payment of money to another attorney of the party, for whom the former had been changed pursuant to an order of the court; although in that order, as well as in the order for changing the attorney, he had been called John, whereas his real name was James; but he had attended several summonses taken out as against John, and had consented to some of them without objecting to the misnomer, which cured the mistake. *Stevenson v. Power*, 9 Price, 384.

Service of Order against Solicitor.]—An action was ordered to be stayed, and the costs of the defendants to be paid by the plaintiff's solicitor. The order was served by leaving a copy at the office of the solicitor, but was not obeyed. Upon the application of the defendants, the court made an order for an attachment to issue against the solicitor, and for payment by him of the costs of the application and the attachment as between solicitor and client. *Tilney v. Stansfeld*, 28 W. R. 582.

Personal service of an attachment against an attorney for not paying money pursuant to the master's allocatur cannot be dispensed with. *Anon.*, 1 D. & R. 529.

Service of Rule Nisi.]—A notice of motion for a writ of attachment for disobedience to an order made on an original petition need not, as well as the order, be served personally on the respondent to the petition, but may be served by being left at his residence. *Browning v. Sabin* (5 Ch. D. 511) explained. *A Solicitor, or Ryan, In re*, 14 Ch. D. 152; 49 L. J., Ch. 295; 42 L. T. 310; 28 W. R. 529.

On a motion for an attachment against an attorney for disobeying a rule, it is sufficient if it can be collected from the affidavit of service that such rule has been personally served; it is not necessary that the words "personal service" should be used. *Short v. Smith*, 1 M. & G. 211; 8 D. P. C. 584; 1 Scott, N. R. 153.

A rule nisi was obtained against a solicitor to shew cause why an attachment should not issue against him for disobedience to an order of the court. There was no personal service of such rule nisi upon him. He had at one time instructed counsel to shew cause against the making absolute of such rule, and such counsel had consented to an application for a postponement of the hearing being made to the court by the counsel for the applicant, but upon the application to make absolute the rule nisi, the counsel who had been instructed formerly did not appear, nor did any one appear on behalf of the solicitor. The court held that personal service might, under the circumstances, be dispensed with, and made absolute the rule for an attachment. *Alcock*,

In re, 1 C. P. D. 68; 45 L. J., C. P. 86; 33 L. T. 532; 24 W. R. 320, sub nom. *Anon.*

Service of a notice of motion for a writ of attachment upon the solicitor on the record, of the party against whom the attachment is to be issued, is sufficient notice to the party, without personal service. *Browning v. Sabin*, 5 Ch. D. 511; 46 L. J., Ch. 728; 25 W. R. 602.

A notice of motion under Order XLIV. rule 2, for leave to issue a writ of attachment, is sufficiently served upon the solicitor upon the record of the party against whom the attachment is to issue. *Richards v. Kitchen*, 36 L. T. 730; 25 W. R. 602.

Service of a rule on the London agent of a country firm is good service, so as to found a motion for a contempt against a partner who allows it, but it is not sufficient as regards the other partner. *Holiday, In re*, 9 D. P. C. 1020; 5 Jur. 532.

5. TO SUMMARY JURISDICTION.

a. Generally.

Jurisdiction of Court.—An application for the court to exercise its jurisdiction over a solicitor on account of conduct disclosed in an action may be made in the action, and therefore is a further proceeding within Rules of Supreme Court, 1875, Ord. LI. r. 1a. *Cave v. Cave, Cave, In re*, 49 L. J., Ch. 656; 43 L. T. 158; 28 W. R. 764.

The Chancery Division will exercise the jurisdiction over solicitors conferred on it by s. 87 of the Judicature Act, 1873, according to the practice familiar to the Chancery Division, and will not grant a rule nisi. *Copp, In re*, 32 W. R. 25.

Where a writ is sent to be served by a firm of attorneys, only one of whom has been admitted in the court, and they neglect to do so, the court has no jurisdiction, except over the one whose name is on their roll. *Cheshire v. Tyler*, 7 Jur. 704.

Directing an attorney to employ a proctor to obtain probate of a will is not such employment of him in the character of an attorney as will give the court summary jurisdiction over him, as to money received by him to pay the proctor. *Cowie or Cohen, Ex parte*, 3 D. P. C. 600; 1 H. & W. 211.

The test for determining whether the court has or has not jurisdiction is, whether, if the attorney had been called as a witness, the court would or would not have held him justified in refusing to answer on the ground of privilege. *Cutts, In re*, 16 L. T. 71.

— **Betrayal of Client's Secrets.**—The court will not exercise its summary jurisdiction over an attorney simply because he has, from improper motives, given information which might be used against a former client. There must be actual misconduct quâ attorney, by the adverse use of information while the relation of attorney and client is still subsisting, or by the betrayal of secrets relating to the client's business, obtained by the attorney while acting in a confidential capacity, and acquired also in consequence of his so acting. *Id.*

When Court will Interfere—Matter arising in Cause before the Court.—The court will not entertain a motion touching the conduct of an

attorney, unless it appears that he is an attorney of the court, or that the transaction arises in part at least out of a cause before the court; nor will the court exercise its summary jurisdiction over an officer, unless in a case of palpable fraud. *Lord, In re*, 2 Scott, 131; 1 Hodges, 195; *S. P., Cole v. Grove*, 1 Scott, N. R. 30; 4 Jur. 339.

The court granted a rule nisi, calling upon an attorney to answer for an alleged misconduct, in a matter where no suit was depending, but which appeared to have been intrusted to him in the capacity of an attorney. *Knight, In re*, 1 Bing. 91.

The court will not interfere summarily between attorney and client, unless there has been a cause in court; especially where there is any fact in dispute. *Phillips, In re*, 1 W., W. & H. 418; 3 Jur. 479.

The court will exercise its summary authority over an attorney only with reference to his conduct in a cause. *Anon.*, 19 L. J., Ex. 219.

But where an attorney has been guilty of gross misconduct, the court will interfere summarily, although the misconduct does not amount to an indictable offence, and arose in a transaction in which he was not acting in that character. *Blake, In re*, 3 El. & El. 34; 30 L. J., Q. R. 32; 6 Jur., N. S. 1242; 2 L. T. 429.

— **After great Lapse of Time.**—Where more than seven years had elapsed after the settlement of transactions between an attorney and his client, the court refused to interfere to have them reopened, in the absence of any suggestion of fraud or misconduct. *Shipden, Ex parte*, 6 D. & R. 338.

— **After Solicitor has Ceased to Practise.**—One who has been an attorney remains liable to the summary jurisdiction of the court for his conduct whilst he was an attorney, although he may have taken his name off the roll and ceased to be an attorney. *Simes v. Gibbs*, 6 D. P. C. 310; 1 W., W. & H. 40; 2 Jur. 418.

— **Extortionate Charges.**—Excessive and extortionate charges in a bill of costs as between attorney and client form no ground for a summary application against an attorney, in the absence of evidence of wilful fraud, the suitor being sufficiently protected by the taxation of the bill. *Meux v. Lloyd*, 2 C. B., N. S. 409.

— **Negligence.**—The court will not interfere summarily to try the question of negligence on the part of an attorney towards his client. *Brazier v. Bryant*, 2 D. P. C. 600.

— **Solicitor Guilty of Indictable Offence.**—The court will not proceed summarily against an attorney for matters which amount to an indictable offence, where it appears that the facts are not exclusively within his own knowledge. *Anon.*, 2 Jur. 467.

— **Other Cases.**—Where an attorney has not fulfilled his engagement with respect to a loan of money, independently of his character of attorney, the court will not summarily compel him to fulfil it. *Chitty, In re*, 2 D. P. C. 421.

If the agent of an attorney does wrong, the client cannot make a summary application against the agent. *Jones, Ex parte*, 2 D. P. C. 161.

Injunction to restrain Solicitor from acting against former Client.]—The jurisdiction to restrain a solicitor from acting for the antagonist of his former client is founded upon the principle that a man ought to be restrained from doing any act contrary to the duty he owes to another; and will be exercised at the instance of the former client, irrespective of the question whether the solicitor was discharged by him or had discharged himself, whenever the transaction in reference to which the injunction is sought so flows out of or is connected with that in which the solicitor was formerly retained that the same matter of dispute may probably arise. *Hutchins v. Hutchins* (1 Hogan, 315) and *Biggs v. Head* (Sausse & Scully, 335) approved and adopted. On appeal, the injunction granted by the vice-chancellor was disapproved and dissolved by consent, the solicitor undertaking not to disclose his client's secrets. *Little v. Kingswood Collieries Company*, 20 Ch. D. 733; 52 L. J., Ch. 56; 47 L. T. 323; 31 W. R. 178—C. A.

Practice—Mentioning Name.]—In motions respecting misconduct against attorneys, and for the exercise of the summary jurisdiction of the court, the practice is not to mention names. *Anon.*, 2 L. T. 432; 8 W. R. 530.

— Application in Chambers.]—Unless there is a cause in court, an application cannot be made in chambers against an attorney. *Higgs, Ex parte*, 1 D. P. C. 495.

— Plea of Statute of Limitations by Solicitor.]—The court will not, in the exercise of its summary jurisdiction, prevent an attorney, who is a defendant in an action at the suit of his client, suing as administratrix, from pleading not directly to the merits, such as a plea of the Statute of Limitations, even though the accrual of the statute may have been owing to his neglect in not advising his client to take out letters of administration earlier. *Triston, In re*, 1 L., M. & P. 74.

— Entitling Motion.]—An order was made that a solicitor (who was also a trustee of a will) should pay into court trust money which he had by affidavit admitted that he had in his hands, upon motion made by the cestui que trust in a suit to administer the estate of the testator, the notice of motion being entitled in the suit and in the matter of the solicitor. *Clerihew, In re, Howard, In re*, 24 L. T. 860; 19 W. R. 939—L. J.

— How Discharged from Prison—Debtors Act, 1869.]—When a solicitor has been committed to prison under the Debtors Act, 1869, s. 4, for disobeying an order to pay money into court, on the expiration of twelve months he can be discharged only after obtaining an order of the court. *Thompson, In re, Nalty v. Aylett*, 30 L. T. 783; 22 W. R. 857.

Liability on Undertakings.]—See *ante*, col. 1851.

b. What is Misconduct.

Conspiracy to Defraud.]—An attorney had been convicted of a conspiracy to cheat and de-

fraud tradesmen, and among the overt acts alleged were the collusively signing of judgments and issuing writs of *fi. fa.* thereon. The court struck his name off the roll, though the indictment was held defective, for not setting out the names or designating the class of the persons intended to be defrauded. *King, In re*, 8 Q. B. 129; 15 L. J., Q. B. 2; 10 Jur. 7.

Perjury.]—The court will not strike an attorney off the roll on an affidavit alleging a distinct case of perjury, unless enough appears on his own admission to render the interposition of a jury unnecessary. *Anon.*, 3 N. & P. 389.

A bill of costs of an attorney was reduced, on taxation, from 1,100*l.* to 370*l.*, and 374*l.*, part of the bill, sworn to have been paid to witnesses, was reduced to 47*l.*; the court refused a rule to strike him off the rolls on the ground that the charge could be established by witnesses only, and was therefore proper for the consideration of a jury. *Anon.*, 1 W., W. & H. 355.

Cheating in Gambling.]—The court refused an application to strike an attorney off the roll for alleged unfair play in gambling, after the relation of attorney and client between him and the applicant had ceased; the applicant having filed a bill in chancery respecting the promissory notes given by him in payment of the money won, which was still pending. *Stratford, Ex parte*, 12 L. J., Q. B. 231; 7 Jur. 412.

Publishing Libel.]—A verdict having been obtained against an attorney, in an action for publishing a libel of a very aggravated nature, but in which the jury only gave one shilling damages, the court refused to strike him off the roll, on the mere ground of the publication of the libel. *Anon.*, 2 D. P. C. 110.

Improperly bringing Qui tam Actions.]—It is no cause for striking an attorney off the roll, that he has commenced several qui tam actions for the purpose of revenge. *Warren, Ex parte*, 1 H. & W. 113.

Where an attorney brings several qui tam actions, and after their commencement makes an offer to the defendant to compromise them, it is no ground for striking him off the roll. *Smith v. Gillett*, 3 D. P. C. 364.

Non-Payment of Money.]—Mere non-payment of money by an attorney, pursuant to an order and rule of court, is no ground for striking him off the roll. *Guilford v. Sims*, 13 C. B. 370.

An attorney who has been directed by the master to refund a sum of money, disobeys the direction, and keeps out of the way, will be struck off the roll. *Anon.*, 1 D. & E. 529; 10 Jur. 198. See also *cases post*, col. 1872.

Prosecuting without Authority.]—Acting without authority in conducting a prosecution of a prisoner for felony is no ground for striking an attorney off the roll. *Davis, In re*, 1 B. C. C. 207.

Improperly Dealing with Trust Fund.]—A solicitor, who was the only person who acted professionally in a trust, induced his co-trustee, who was his client, improperly to sell out the trust fund, which was received by him and applied to his own use. On application of one of the cestuis que trustent, he was struck off the

rolls. *Chandler, In re*, 22 Beav. 253; 25 L. J., Ch. 396; 2 Jur., N. S. 366.

Defect in Articles, Service, Admission, or Enrolment.]—A motion to strike an attorney off the roll on the ground of misconduct, and the want of regular service in his clerkship, comes too late when the party had been three years and a half admitted. *Anon.*, 2 B. & Ad. 766.

An attorney who has been admitted fraudulently will be struck off the roll, and the court will grant an attachment against the master. *Hill, Ex parte*, 2 W. Bl. 991.

Where an attorney had been admitted on payment of a less amount of stamp duty than was by law required, by mistake of the officers of the court or the Stamp Office, and without any fraud or mala fides on his part, the court will make an order for striking him off the roll, unless he consents to pay the proper duty. *Myers, In re*, 8 Q. B. 515; 15 L. J., Q. B. 209; 10 Jur. 563.

Compromising Criminal Charge.]—It is a high misdemeanor in an attorney to compromise a criminal charge; therefore, an attorney was fined 500*l.*, and suspended six months, for taking 200*l.* from one who was charged with forgery, to let him out of the custody of a tipstaff. *Re v. Vaughan*, 1 Wils. 221.

Making False Affidavit.]—An attorney who had made a false affidavit of increase, which had been acted upon by the master in the taxation of costs, was fined 100*l.* for contempt of court and suspended for three years. *Mant, In re*, 5 L. T. 264; 10 W. R. 13.

Misappropriating Client's Money.]—Where an attorney, being applied to by B. to invest money for him, borrowed it upon his own security and the deposit of a mortgage deed, and afterwards committed a fraud upon B. in receiving the money due upon the mortgage without communicating that fact to B., and in continuing to pay interest to him, the court suspended his certificate for two years, though the transaction was not strictly between attorney and client. *Blake, In re*, 3 El. & El. 34; 30 L. J., Q. B. 32; 6 Jur., N. S. 1242; 2 L. T. 429.

A solicitor who, without authority, instructed counsel to appear for parties interested in money in court, and to consent to its payment out of court, was ordered to be struck off the rolls. *Collins, In re*, 7 De G., Mac. & G. 558.

Misconduct for which the court would either refuse or defer the admission of an attorney is ground for either striking an attorney off the roll or suspending him from practising, though the misconduct is not in his character of attorney. *Hill, In re*, 3 L. R., Q. B. 543; 37 L. J., Q. B. 295; 18 L. T. 564; 16 W. R. 1061; 9 B. & S. 481.

An attorney, acting as a managing clerk to a firm of attorneys, completed the sale of property belonging to a client of the firm, and appropriated part of the purchase-money to his own use. Upon the discovery of the fraud a year afterwards, he admitted the fact, and repaid the amount. Upon motion to strike him off the roll the court suspended him from practising for one year. *Id.*

The court will not strike an attorney off the roll where he has become bankrupt, having moneys of a client in his hands which ought to

have been paid over, unless a clear case of fraudulent misappropriation is made out against him. *Sparks, In re*, 17 C. B., N. S. 727.

Fraudulent Preparation of Deed.]—An attorney on the roll of the High Court of Bengal prepared a conveyance on behalf of his brother containing a false recital as to the consideration, knowing the same to be false, and attested the execution of the deed with such false recital, and signed his name as a witness to the receipt of the consideration-money, knowing that no consideration had passed or was intended to pass. The deed was duly registered. The court ordered him to be struck off the roll:—Held, that he was properly called upon to explain the circumstances under which the deed was executed; but that, as there was no evidence that he was guilty of any fraudulent or dishonest intention, and as no dishonest use was attempted to be made of the deed, and as no person had been injured thereby, the circumstances were not sufficient to warrant the order of the court. *Stewart, In re*, 2 L. R., P. C. 88; 37 L. J., P. C. 25; 16 W. R. 1000; 5 Moore, P. C. C., N. S. 187.

Permitting Others to use Name.]—The mischief against which s. 32 of the 6 & 7 Vict. c. 73, was directed is the practice or acting as an attorney or solicitor without being duly qualified. And the offence prohibited is not the mere permitting your name as an attorney or solicitor to be made use of in an action or suit "upon the account or for the profit of an unqualified person," but doing it in such a manner as thereby to enable such unqualified person to appear, act or practise in any suit at law or in equity. *Scott v. Miller, Johnson*, 220; 28 L. J., Ch. 584; 5 Jur., N. S. 858.

An agreement by an attorney with a certificated conveyancer, that in case the latter should introduce to the former any matters of professional business, for which the attorney would have a claim for costs, he would pay to the conveyancer a commission, is not, on the part of the attorney, such a permitting of his name to be made use of upon the account or for the profit of an unqualified person as was intended to be provided for by the section. *Id.*

Such an agreement would not subject the parties to penalties for common barratry. *Id.*

An attorney admitted in one of the superior courts, according to 6 & 7 Vict. c. 73, may practise in any other court in the name of an attorney of the latter. *Hulls v. Lee*, 10 Q. B. 940; 11 Jur. 891.

A solicitor agreed to act for B., another solicitor, in his personal business, on the terms of principal and agent. B. neglected to take out his certificate during part of the time:—Held, that the agreement was not invalid. *Foley, Ex parte*, 11 Beav. 456.

Preparing Bond to pay Money to Client on wrong Stamp.]—Where an attorney had wholly prepared and signed a bond to pay money to his client upon a wrong stamp, he was compelled upon motion to put a proper stamp upon it. *Guilliam v. Barnett*, 2 Smith, 155.

Inducing Witness to Absent Himself.]—An attorney induced a witness, subpoenaed by the opposite party, to absent himself from the trial on receiving an indemnity against the conse-

quences of disobedience to the subpoena:—Held, that his name ought to be struck off the roll. *Stephens v. Hill*, 10 M. & W. 28; 1 D., N. S. 669; 6 Jur. 585.

Non-Payment of Counsel's Fees.]—The court will not, on motion, interfere to compel an attorney to pay counsel's fees. *Angell, In re*, 29 L. J., C. P. 227; 6 Jur., N. S. 1373.

Preparing Hypothetical Case for the Opinion of the Court.]—Where an attorney, although without any corrupt or unworthy motive, prepares a special case in order to take the opinion of the court upon the will of a testator, and suggested facts which had no foundation:—Held, that he was guilty of a contempt, and he was fined in 30*l.* for his offence. *Elsam, In re*, 5 D. & R. 389; 3 B. & C. 597.

Purging Offence.]—When an attorney has fraudulently obtained and withheld his client's money, the repayment of the money is not a purgation of the offence. *Anon.*, 31 L. T. 730.

Compromising Misconduct.]—Where serious charges of misconduct against an attorney are brought before the court of which he is a member, the court will not permit any private arrangement of it to be made between the parties, but will require that such misconduct be fully explained to the satisfaction of the court. *Anon.*, 9 L. T. 299.

c. Practice on Striking off the Roll.

Where Matters complained of Amount to an Indictable Offence.]—Where an attorney has been guilty of professional misconduct in the course of a cause, the court will grant a rule calling on him to shew cause why his name should not be struck off the roll, even although the matters complained of may amount to an indictable offence. *Stephens v. Hill*, 10 M. & W. 28; 1 D., N. S. 669; 6 Jur. 585.

The court will not grant a rule, calling on an attorney to shew cause why he should not be struck off the roll, if the affidavits in support of the rule state an offence for which he would be liable to indictment. *Anon.*, 5 B. & Ad. 1088.

The court will not proceed summarily against a solicitor for matters which amount to an indictable offence, where it appears that the facts are not exclusively within his own knowledge. *Anon.*, 2 Jur. 467.

Application, how made.]—An application to strike a solicitor off the rolls must be upon notice of motion. *Anon.*, 36 L. T. 113.

By Barrister.]—The court will not receive an application to strike an attorney off the roll, except on the application of a barrister. *Anon.*, 3 N. & M. 566.

Rule Nisi—Form of.]—On an affidavit imputing criminal conduct to an attorney, the form of the rule in the first instance is to shew cause why he should not be struck off the roll, or be suspended from practice for so long a time as the court shall think fit. *Anon.*, 7 L. T. 716; 11 W. R. 68.

The court will not grant a rule in the alternative, calling on an attorney to shew cause why

he should not be struck off the roll, or answer the matters in the affidavit, as either branch of the rule should be the subject of a distinct application. *Burton v. Chesterfield (Earl)*, 9 Jur. 373.

When Application may be made.]—The rule ought not to be moved for on the last day of term, but in sufficient time to enable the party to shew cause against it within the term. *Id.*; *S. P., Anon.*, 1 C. L. R. 481; 23 L. J., Ex. 24.

An attorney was convicted of embezzlement in July, 1861:—Held, that an application to strike him off the rolls was not too late, though made in Michaelmas Term, 1862. *Thompson, In re*, 13 C. B., N. S. 288; 7 L. T. 327.

When Solicitor has already been Convicted in another Court.]—A rule to strike an attorney off the roll for misconduct, having been applied for on the production of a similar rule granted by the Common Pleas against the same party, the court refused it, there being no evidence of the identity of the parties. *Anon.*, 1 Ex. 453; 17 L. J., Ex. 20.

A rule to strike an attorney off the roll of the Exchequer, on affidavit that he has been convicted of a misdemeanor in the Queen's Bench and struck off the roll of that court, is a rule nisi, which makes itself absolute, unless cause can be shewn. *Wright, In re*, 1 Ex. 658; 5 D. & L. 394; 17 L. J., Ex. 128; 12 Jur. 20.

Where a rule had been obtained to strike an attorney off the roll of the Queen's Bench, founded solely on an order of the lord chancellor striking him off the roll of solicitors, for alleged misconduct in the Court of Chancery, but which order was subsequently reversed, and the party restored to the roll of solicitors, on payment of costs, but he was ordered to be suspended for six months from practising in chancery, the Queen's Bench discharged the rule on payment of costs. *Smith, In re*, 1 El. & Bl. 414; 22 L. J., Q. B. 123; 17 Jur. 114.

Where an attorney has been struck off the roll of the Court of Queen's Bench for misconduct, he will, on production of the rule for that purpose, be struck off the roll of the Court of Common Pleas. *Collins, In re*, 18 C. B. 272.

A rule to strike an attorney off the roll, founded upon an order in the Court of Chancery striking him off the roll of solicitors, is a rule to shew cause only. *Hall, In re*, 2 Jur., N. S. 1233.

Service of Rule Nisi.]—It must be served personally. *Anon.*, 1 C. L. R. 481; 23 L. J., Ex. 24.

Where an attorney had been convicted of felony and was undergoing his sentence, a rule to strike him off the roll was well served upon him in prison; and though he was civiliter mortuus, the court allowed counsel, instructed by his friends, to shew cause against the rule. *Thompson, In re*, 13 C. B., N. S. 288; 7 L. T. 327.

Affidavits.]—An affidavit to ground an application to strike an attorney off the roll for misconduct in a cause may be intitled in the cause, though judgment has been obtained in it. *Stephens v. Hill*, 10 M. & W. 28; 1 D., N. S. 669; 6 Jur. 585.

It is no objection to affidavits in support of an application to strike an attorney off the roll, that they are intitled as if there was a cause in court. *Caine, Ex parte*, 4 Jur. 220.

Jurisdiction of Court.]—The Court of Common Pleas has, by virtue of its general jurisdiction, power to strike an attorney off the roll of the Court of Common Pleas at Lancaster. A fortiori, where one of its judges is pro tempore chief justice of that court. *Briggs, Ex parte*, 8 L. R., C. P. 63.

A divisional court of the High Court of Justice may order the name of a solicitor to be struck off all the existing rolls of the former courts consolidated into the High Court of Justice, and may order his name to be struck off, or not to be inserted, in the register of solicitors of the Supreme Court of Judicature. *Martin, In re*, 24 W. R. 111.

Decision of Court Reviewable in another Court.]

—When an attorney has been suspended for a limited period by order of one of the superior courts, the Court of Common Pleas will not adopt such order by suspending, in like manner, the attorney from practising in that court, without examining the facts on which the order was made, and exercising its own discretion in the matter. *Brutton, In re*, 41 L. J., C. P. 58; 26 L. T. 33; 20 W. R. 298.

Where the Master of the Rolls had ordered an attorney to be suspended for a certain period, and the misconduct was such that he might have been struck off the roll for it, the Common Pleas, after reading the affidavits used before the Master of the Rolls, ordered the attorney to be suspended from practising in that court, not only for the period ordered by the Master of the Rolls, but until the further order of the court. *Id.*

An attorney and solicitor having been suspended by the Master of the Rolls from practising in the Court of Chancery for ten years, the Court of Exchequer on affidavits verifying (1) copies of the petition and order in chancery and the affidavits filed there on the hearing of the petition; and (2) a transcript of a shorthand-writer's notes of the judgment, made a similar order, unless cause was shewn before the fourth day of the next term. *Turner, In re*, 8 L. R., Ex. 62; 42 L. J., Ex. 63; 29 L. T. 345.

When a solicitor has been suspended from practice in chancery for a given period by the Master of the Rolls, the Courts of Queen's Bench and Exchequer grant a rule to suspend him from practice in those courts for the like period, which rule makes itself absolute if no cause is shewn, upon an affidavit of the facts and an affidavit of identification. But the Court of Common Pleas will only grant a rule nisi, and requires all the materials upon which the Master of the Rolls acted to be brought before it, and will extend the period "until the further order of the court." *Turner, In re*, 8 L. R., C. P. 103.

Where an attorney has been suspended by one of the superior courts for a term of years, it is not compulsory upon the other courts of coordinate jurisdiction, as in the case of striking off the rolls, to suspend him also, but they will look into the affidavits and exercise their own discretion. *De Medina, In re*, 6 L. T. 536; 10 W. R. 627.

Warrant of Attorney to Stop Proceedings—

Void.]—A warrant of attorney, given to prevent proceedings on a rule for striking an attorney off the roll, is void. *Kirwan v. Goodman*, 9 D. P. C. 330; 5 Jur. 293.

Solicitor Struck off at his own Request.]—An attorney cannot be struck off the roll on his own motion, though he has never practised, without an affidavit that no proceedings are pending against him for misconduct. *Anon.*, 1 Chit. 557.

Where he applies to be struck off the roll at his own request, he must not only swear that no proceedings are pending against him, but also that he expects none. *Gray, Ex parte*, 9 D. P. C. 336; 5 Jur. 25.

But he need not state the ground on which he applies. *Butrell, Ex parte*, 11 Jur. 1062; *S. P., Charnock, Ex parte*, 1 W., W. & H. 548; 3 Jur. 23.

An attorney was struck off the roll of the Court of Exchequer at his own request, on an affidavit made by another person that an application, supported by his own affidavit, had been made by the attorney himself to the Court of Queen's Bench to be struck off the roll there, exhibiting a rule of that court for that purpose, and alleging that the reason why no affidavit was made by the attorney in the Court of Exchequer was, that he was out of town, and would not return in time to make the necessary affidavit to enable him to be struck off during the term. *Sturdy, In re*, 2 Jur., N. S. 452.

An attorney was struck off the roll at his own request, and afterwards (in the same term) applied to be restored. His affidavit described him as "one of the attorneys of the court:—"The court required it to be amended. *Simpson, In re*, 1 C. B., N. S. 554.

— Subsequent Restoration to Roll.]—It is a matter of course to restore to the roll an attorney who has been struck off at his own request, if no opposition is made by the Law Society after notice served on it. *Walke, In re*, 10 Ir. R., C. L. 165.

d. Compelling Disclosure of Client's Abode or Occupation.

Where Object desired is to Arrest Client.]—

A female who had been employed by the defendant to take care of his house, but who had subsequently left it, brought an action against him for breach of promise of marriage. The defendant had threatened to proceed criminally against her on a charge of taking away some of his property from the house. The court refused to compel the plaintiff's attorney to disclose her place of residence, as the defendant knew who she was, and had avowed he sought the information with the view of effecting her arrest on the criminal charge. *Harris v. Holler*, 19 L. J., Q. B. 62.

But the court or a judge will compel a plaintiff's attorney to disclose the place of abode of his client, notwithstanding that one object of the defendant in requiring the information is, that he may be enabled to arrest the plaintiff under a writ of attachment. *Cox v. Bockett*, 34 L. J., C. P. 125; 11 Jur., N. S. 88; 11 L. T. 629; 13 W. R. 292.

Disobedience to Order of Judge—Attachment.]

—Twelve months after issue joined in an action, a judge made an order that the plaintiff's attorney should declare in writing to the defendant the plaintiff's occupation, and that after five days all further proceedings should be stayed until such delivery. The order having been served

and disobeyed :—Held, that the order was not within 15 & 16 Vict. c. 52, s. 7, and that an attachment would not lie against the attorney for such disobedience. *Malpass v. Mudd*, 3 H. & N. 246; 27 L. J., Ex. 367.

To entitle a defendant to obtain an attachment against an attorney for disobeying an order of a judge, made for not declaring the place of abode of the plaintiff, he must have made a demand in writing. *Brown v. Wiggins*, 7 L. T. 622.

Refusing to Produce Client.]—There is no obligation on an attorney or a solicitor to produce his client for the purpose of being served with process by a third person, and a security obtained by the solicitor from his client during the period of the client's concealment will not be thereby avoided in favour of such third person. *Shaw v. Neale*, 6 H. L. Cas. 581; 27 L. J., Ch. 444; 4 Jur., N. S. 695.

e. Delivery up of Documents.

[For the Production of Documents for the Purposes of Evidence—See EVIDENCE.]

When an Order will be made.]—An administrator appointed pendente lite is entitled to call upon the late attorney of the deceased to deliver up deeds and papers belonging to the deceased, which are in his possession. *Du Faur, Ex parte*, 3 Hodges, 135.

Solicitors, instructed by a committee of an association to carry on various matters of business for and on behalf of the association, having recovered judgment against one of the committee, for the amount of their bills of costs in respect of such matters, cannot be made to deliver up, to such defendant, the judgment after it has been paid and satisfied by him, or other securities connected with the debt held by them, either in virtue of the general jurisdiction of the court over solicitors as its officers, or under 19 & 20 Vict. c. 97, s. 5; the defendant can only proceed by action. *Phillips v. Dickson*, 8 C. B., N. S. 391; 29 L. J., C. P. 223; 6 Jur., N. S. 401; 2 L. T. 185; 8 W. R. 390.

When Solicitor has a Lien upon them.]—The court will not order an attorney to deliver up papers on which he has a lien for a balance of a bill of costs, although an offer is made to pay the amount into court, subject to the verdict of a jury. *Broomhead, In re*, 5 D. & L. 52; 16 L. J., Q. B. 355.

See also *cases post*, VIII., 3.

When in the Hands of Counsel.]—The non-delivery of documents left by an insolvent solicitor with counsel and law stationers, and retained by them for non-payment of fees and charges, is not a breach of an order upon the solicitor to deliver up to a new solicitor all deeds and documents in his possession or power relating to the affairs of his client in the suit. *Williams, In re*, 3 De G., F. & J. 104; 30 L. J., Ch. 610; 7 Jur., N. S. 323; 4 L. T. 103; 9 W. R. 393.

When in the Hands of Agent.]—Where an order has been made that an attorney deliver to a client his papers, it is no answer to an attach-

ment for disobedience of the order, that the agent of the attorney having possession of the papers claims a lien on them in respect of agency charges. *Andrew, In re*, 7 H. & N. 87; 30 L. J., Ex. 403.

When Solicitor holds as Party or Trustee.]—The court will not compel an attorney to deliver up a deed where he holds it as a party or trustee. *Pearson v. Sutton*, 5 Taunt. 364.

But the court ordered an attorney, who held a deed as trustee, to deliver the draft of it to the cestui que trust, who had paid for the deed and draft. *Holdsworth, Ex parte*, 4 Bing. N. C. 386; 6 Scott, 170; 1 Arn. 189.

The court refused to grant a rule calling upon an attorney to deliver up papers, when it appeared that the documents had come into his possession as executor to his father, who had been the applicant to the applicant, but where the applicant did not adopt the son as his professional agent. *Nicholls, Ex parte*, 2 D., N. S. 423; 12 L. J. 103; 7 Jur. 374.

Where an attorney has drawn his own marriage settlement, under which he takes no interest, but is mentioned in it, and it is deposited with him for safety, the court will not compel him to give it up at the instance of a trustee under it. *Moson, Ex parte*, 1 D. P. C. 7.

In Solicitor's Hands for Professional Purposes.]—The court will not compel an attorney to deliver up, on payment of his demand, a lease put into his hands for the purpose of making an assignment of it; there being no cause in court, nor any criminal conduct imputed to him in respect of it. *Love, In re*, 8 East, 237.

The court refused to order an attorney to deliver up a deed which had been given to him by one of the parties to it, to get executed by his client, who was another party. *Smart, Ex parte*, 1 H. & W. 526.

If an attorney receives possession of a deed from A., his client, in which B. is also interested, the court cannot compel the attorney, in an action brought against him by B., to give B. a copy of the deed. *Miers v. Evans*, 3 Jur. 170.

Where an attorney is employed by certain cestui que trusts, the court will not compel him to deliver up deeds to one of several trustees, one of such trustees objecting to the application. *Gregory, In re*, 6 Jur. 282.

A bond was taken from A., by a magistrate, on the charge of obtaining it by false pretences. A bill before the grand jury having been ignored, the bond was given to the attorney for the prosecution, who refused to deliver it up :—Held, that the court could not interfere. *Morris, Ex parte*, W., W. & D. 59; 1 Jur. 151.

The court will not compel an attorney to deliver up, on payment of what is due to him, deeds which have been intrusted to him for the purpose of raising money upon them. *Millard, In re*, 1 D. P. C. 140.

But he is bound, upon inquiry by his client, to inform him where such deeds are. *Wilmott v. Elkington*, 1 N. & M. 749.

If a party successfully resists an action by an attorney for costs, on the ground of his never having been employed, he cannot afterwards summarily compel the attorney to give up documents which have come into his possession in the course of the business, for doing which the

action was brought. *Marwell, Ex parte*, 4 D. P. C. 87.

The court can only interfere to compel an attorney to deliver up deeds in his possession, at the instance of the party who deposited them with him. *Thornton, In re*, 2 D. P. C. 156. See *Bunting, In re*, 2 A. & E. 467.

An attorney, with whom a will has been deposited by the testator, will not be compelled to deliver it up to the sole legatee under it. *Crisp, Ex parte*, 2 D. P. C. 455.

Where parties settle a case, without the intervention of the attorney, that settlement is no answer to an application against the attorney to deliver up the record to the opposite party, when successful. *Baber v. Harris*, 7 D. P. C. 589.

— **After Payment by Client.**—An attorney is not entitled to retain drafts and copies of original deeds for which his client has paid; and if he will not deliver them up, the court will compel him to do so. *Horsfall, Ex parte*, 7 B. & C. 528; 1 M. & R. 306.

If A. has employed B. as his attorney, and has paid his bill, A. has a right to have his papers delivered up to him. *Anderson v. Passman*, 7 C. & P. 193.

Promissory Note obtained from Client by Duress.—Where, during the imprisonment of a person, he employed an attorney to conduct an application for his discharge by the Insolvent Court, and the attorney refused to proceed until he had signed a promissory note, which he did, under protest; and after his discharge an action was brought upon the note in the name of the clerk of the attorney, who was believed not to be interested in it, the court refused to grant a rule, calling upon the attorney to give up the note, upon the ground of its having been obtained by duress and fraud, but left the defendant to plead the facts as a defence to the action. *Watts v. Blaney*, 1 D. & L. 203; 7 Jur. 851.

Where Solicitor a Steward.—The court, under special circumstances, will entertain a summary jurisdiction over an attorney, by obliging him to deliver up deeds, on satisfaction of his lien, though they came into his hands as steward of a court and receiver of rents. *Hughes v. Mayre*, 3 T. R. 275; *Grubb, Ex parte*, 5 Taunt. 206. See *Cocks v. Harman*, 6 East, 404; 2 Smith, 409.

In Case of Bankruptcy.—Where a client has deposited a deed in the hands of his attorney, and the latter afterwards becomes a bankrupt, the court will not summarily interfere to compel the assignees to deliver up those deeds which have come to their hands from the bankrupt. *Roy, Ex parte*, 4 D. P. C. 573; 1 H. & W. 669.

An attorney who receives a deed from his client, and is compelled to produce it by commissioners of bankrupt, and afterwards receives it back from them, undertaking to produce it again if required, may nevertheless refuse to produce it in an action by the assignee of the bankrupt, under whose commission he was compelled to produce it. *Nixon v. Mayoh*, 1 M. & Rob. 76.

When Solicitor in Prison.—A solicitor, in custody for debt, being incapacitated from practising, was ordered to deliver up his client's papers in pending suits, without payment of his costs, but to be held subject to his lien. *Williams, In re*, 28 Beav. 465; 6 Jur., N. S. 908.

Practice on.—The court will not grant a rule requiring an attorney to deliver up papers, and in the alternative for an attachment in case of a non-delivery, but each branch must be made the subject of a separate motion. *Roscoe v. Hardman*, 5 D. P. C. 157; 2 H. & W. 118.

The court will not issue an attachment against an attorney for not delivering up papers pursuant to a rule of court, unless shewn that the person making the demand was duly authorized to do so, and stated that fact to the attorney. *Doe d. Hickman v. Hickman*, 8 D. P. C. 883; 1 M. & G. 566.

— **Affidavits.**—Affidavits in support of an application against an attorney, to compel him to deliver up a document, may be intitled in the action out of which the claim arises, although judgment has been signed and execution issued. *Simes v. Gibbs*, 6 D. P. C. 310; 1 W., W. & H. 40.

2. For Payment of Money and of Costs.

Money.—Where an attorney was employed by S. to collect and get in effects due to him as administrator of another person, the court compelled such attorney to render an account to the executors of S. of moneys received by him, although he had never been employed by S. or his executors to conduct any proceedings at law, or in equity, on his or their behalf. *Aitkin, In re*, 4 B. & A. 47.

Where bills have been deposited with an attorney, and he has advanced money on them, and he refuses to account, the court will not compel him summarily to pay over the alleged balance. *Schwalbanker, Ex parte*, 1 D. P. C. 182.

Where an attorney has been employed to prepare mortgage deeds, and receives the money raised by the mortgage, he may be called upon summarily to account for it. *Crippwell, Ex parte*, 5 D. P. C. 689; W., W. & D. 356; 1 Jur. 755.

Where an attorney received money to pay over to a proctor for probate of a will, the court refused to interfere summarily to make him account for it. *Cohen or Cowie, Ex parte*, 3 D. P. C. 600; 1 H. & W. 211.

The court will not compel an attorney to repay his client a sum of money expended by him in consequence of the attorney's alleged negligence, unless the negligence is clearly and unequivocally established. *Meggs v. Binns*, 2 Bing. N. C. 625; 3 Scott, 52; 2 Hodges, 10.

Or compel an attorney to pay over money, the right to which is dependent on the existence of a special agreement between the client and the attorney, which the latter disputes. *Hodson v. Terrall*, 2 D. P. C. 264.

Or where the payment has been the result of an agreement. *Haigh v. Jones*, 6 Scott, N. R. 696; 1 D. & L. 81.

The court will not compel an attorney to pay over or account for money received by him

during his clerkship. *Deane, Ex parte*, 2 D. P. C. 533.

Where money has been paid by a client to one of two attorneys, partners, and which has been applied to their own use in account with their bankers, the court will summarily compel them to refund. *Ford, In re*, 8 D. P. C. 684.

The court will not call upon an attorney to repay money, or to account before the master, on the grounds merely that the attorney obtained such money from his client as if for the purposes of a suit, but that his bill is said not to account satisfactorily for the obtaining and application of such money. *Marris, In re*, 2 A. & E. 582.

Or compel an attorney to pay a sum of money he has received in his character of attorney, he having after the receipt of the money become bankrupt and obtained his certificate. *Culliford, Ex parte*, 8 B. & C. 220; *S. P., Baron v. Martell*, 9 D. & R. 390; *Rees v. Edwards*, 9 B. & C. 652.

Unless fraud is shewn. *Bonner, In re*, 1 N. & M. 555; 4 B. & Ad. 811.

The circumstance of an attorney holding a security for his claim is not sufficient to induce the court to interfere in a summary way to compel him to account. *Cardross (Lord), In re*, 7 D. P. C. 861; 5 M. & W. 545.

Where an attorney, for the purpose of securing a balance due to him from a client, effected a policy of insurance on the life of a client, and charged the premiums to him, and on the client's death received the amount of the policy, the court refused to interfere summarily to compel the attorney to account with the administrator of the client and deliver up the policy. *Ib.*

Where a party purchased parcel of a manor for building, and paid to an attorney, who acted for him in the purchase, money in his capacity of steward of the manor, the court refused to compel the attorney to refund the money by summary proceeding. *Paith, Ex parte*, 9 D. P. C. 973; 5 Jur. 633.

The court will not summarily compel an attorney to pay over money borrowed for his client on security, unless the security is by deed, perused by the attorney on behalf of his client. *Anon.*, 11 Jur. 396.

A., an attorney, having been employed by a former client of B., in consideration of the latter handing him over the papers in the cause, wrote as follows: "Out of any moneys which I may receive on this or any other proceeding on the plaintiff's account, I will hand you such balance as may remain due of your bill of costs as settled at 9l.:"—Held, that A. was bound to pay B. out of the first moneys A. received on account of the client, and not out of the surplus after deducting his own costs. *Tharratt v. Trevor*, 7 Ex. 161; 21 L. J., Ex. 59.

Where a solicitor receives money to be paid into court, and neglects to do so, the court, under its summary jurisdiction, can compel him to repay the money. *Lawrence, In re*, 2 Sm. & G. 367; 23 L. J., Ch. 791; 18 Jur. 742.

The court will not grant a rule calling upon an attorney to shew cause why he should not pay over to his client moneys received by him as his attorney, where the client has sued the attorney and recovered judgment for such moneys against him. *Davies, In re*, 15 L. T. 161; 15 W. R. 46.

— When Solicitor is not on the Roll.]—

Where an attorney being off the roll in consequence of not taking out his certificate, employed his agent to sue out process, and costs were paid in the action to the agent, the court would not compel either the attorney or his agent to refund the costs. *Nash v. Goode*, 9 D. P. C. 929; 5 Jur. 653.

— Upon whose Application Order made.]—

The court will not order an attorney to pay over a sum of money received by him in his character of attorney, except upon the application of the client to whom the money is due. *Fenton, In re*, 5 N. & M. 239; 3 A. & E. 404; 1 H. & W. 310.

Application to Strike Solicitor off the Roll.]

— See ante, col. 1862.

Interest.]—E. employed an attorney to sell land, partly by private agreement and partly through an auctioneer. In the agreement drawn up by himself, he was described as agent for E., and the conditions of sale required payment of deposits on the purchases to be made to him as agent for the vendor. He retained the deposits, though desired by the vendor to pay them over to him, till the purchases were completed. In an action for the interest which had accrued on the deposits whilst in his hands:—Held, that he was not, like an auctioneer, a stakeholder, but was an agent of the vendor only, and, as such, bound to pay over the deposits when demanded. *Edgell v. Day*, 1 L. R., C. P. 80; 35 L. J., C. P. 7; 12 Jur., N. S. 27; 13 L. T. 328; 14 W. R. 87; 1 H. & R. 8.

The court will not grant an application requiring an attorney to pay over the interest of a sum of money which has come improperly into his hands. *Penn v. Wild*, 1 D. P. C. 498.

Refusal by Town Agent of Country Solicitor to pay to Client Amount received in Action.]—

The town agent of the solicitor of the plaintiff, in an action in which judgment had been recovered for a debt, refused to pay over to the plaintiff the amount of the debt which had been received by him from the sheriff under a writ of *fi. fa.*, on the ground that he was entitled to retain such amount for a debt due to him from the country solicitor of equal amount. The country solicitor had no lien on such amount against his client, the plaintiff:—Held, that the court, in the exercise of its summary jurisdiction over its own officers, would order the town agent to pay over the amount of the debt to the plaintiff. In such a case the court will exercise its summary jurisdiction, although there be no fraud imputed to the town agent. *Edwards, Ex parte, Johnson, In re*, 8 Q. B. D. 262; 51 L. J., Q. B. 108; 45 L. T. 578—C. A.

Costs.]—The court will not compel an attorney to refund to his client costs unnecessarily incurred, unless he has been guilty of gross negligence. *Meggs v. Binns*, 2 Bing. N. C. 625; 3 Scott, 52; 2 Hodges, 10.

A plaintiff, who has been made liable to the costs of the day, by the negligence of his attorney, cannot compel the attorney to pay him those costs, unless he (the plaintiff) has first paid them to the defendant. *Layton v. Wood*, 3 Jur. 124.

The court will not, on a summary application, order an attorney to pay the costs of setting aside proceedings for irregularity, even where he has admitted that it was owing to his error, and has promised to pay, unless there is clear evidence of the nature of the negligence, and that it was gross. *Dickenson v. Jacobs*, 5 L. T. 757; 10 W. R. 303.

An order upon an attorney of one of the parties to pay costs incurred in proceedings in a cause, he not being a party applying to the court, is bad, if the attorney had no notice by the summons that he would be called upon to pay such costs. *Wood, Ex parte*, 9 L. T. 420; 12 W. R. 136.

Practice on.]—If a person commences an action against his attorney for money owing to him, he cannot make a summary application against him to make him pay the amount, until he has discontinued the action. *Anon.*, 5 Jur. 678.

A judge has power to make an order on an attorney in a cause to pay money, and such order will be made a rule of court as of course, without a rule to shew cause. *Wilson v. Northrop*, 2 C. M. & R. 326; 4 D. P. C. 441; 5 Tyr. 1102.

When Motion is to be made.]—The rule, that a motion cannot be made against an attorney for misconduct in the last four days of term, applies where, though it is only sought to obtain a rule for repayment of money, misconduct is substantially imputed. *Anon.*, 16 W. R. 908.

Where Motion is to be made.]—An application against an attorney to pay over to his client a sum of money received by him for such client, there being no imputation upon him which he is required to answer, should be made at chambers, and not to the court. *Stecker v. Kralick*, 17 L. T. 441.

Affidavits.]—Affidavits in support of a motion to compel an attorney to pay over money which he has received as attorney in a cause, may be intitled "In the matter of the attorney," and need not be intitled in the cause. *Wood, In re*, 6 D. & L. 154; 2 B. C. Rep. 294; 17 L. J., Q. B. 232; 12 Jur. 962.

Service of Rule.]—Where it is clearly shewn that an attorney keeps out of the way to avoid being served with a rule for the payment of money, the court will allow service upon his clerk to be good service. *Hinton v. Deane*, 4 D. P. C. 352.

g. Answering Matters in Affidavits.

When Solicitor will not be Compelled to Answer.]—The court will not compel an attorney to answer the matters in an affidavit, where, if the facts suggested exist, they might be the foundation of an indictment. *Robertson v. Mills*, 1 D., N. S. 772; 6 Jur. 896.

Where an attorney has been guilty of such misconduct as may amount to a criminal offence, the court will not call on him to answer the matters of an affidavit. *Stephens v. Hill*, 10 M. & W. 28; 1 D., N. S. 669; 6 Jur. 585.

When an attorney charged with a criminal offence denies his guilt, the court will not try the issue on affidavits. *Hill, In re*, 3 L. R., Q. B. 543; 37 L. J., Q. B. 295; 18 L. T. 564; 16 W. R. 1061; 9 B. & S. 481.

The court will not grant a rule calling upon an attorney to answer the matters of an affidavit. *Belcher v. Goodred*, 4 C. B. 472.

It is no ground for calling upon an attorney to answer matters that he is unable to pay the amount found due from him to his client upon a taxation of a bill containing excessive and extortionate charges. *Mew v. Lloyd*, 2 C. B., N. S. 409.

The court will not grant a rule calling on an attorney to answer the matters of an affidavit charging him with an indictable offence, but they will, under such circumstances, grant a rule nisi, calling on him to shew cause why he should not be struck off the roll of the court. *Anon.*, 12 W. R. 311.

After Death of Plaintiff.]—Where, after judgment obtained, a rule was obtained calling upon the plaintiff and his attorney to shew cause why he or his attorney should not refund a sum of money paid in the cause to the attorney, and the plaintiff had died since the commencement of the action:—Held, that the attorney, as an officer of the court, was bound to answer the affidavits on which the rule had been obtained. *Haigh v. Jones*, 1 D. & L. 81; 6 Scott, N. R. 696; 5 M. & G. 634.

Sufficiency of Answer.]—Upon a rule calling upon an attorney to answer matters, the charge being that he had recovered from a defendant an excessive sum for costs, upon a false statement that judgment had been signed and execution issued, when in fact no judgment had been signed, it appearing that the attorney himself had no personal knowledge of the matter, the court discharged the rule, but ordered him to refund the overcharge and pay the costs of the application. *Eyre, In re*, 1 C. B., N. S. 151.

A rule having been obtained calling on an attorney to answer the matters contained in an affidavit, and his answer being unsatisfactory, the court made the rule absolute that he should answer peremptorily on the first day of the following term and pay the costs of the rule within a week. *Fairchild, Ex parte*, 23 W. R. 213.

If an attorney, required to answer the matters of an affidavit, swear in his exculpation to an incredible story, the court will grant an attachment against him, though he positively deny the malpractices imputed to him. *Crossley, In re*, 6 T. R. 701.

A rule having been obtained ordering an attorney to answer the matters in an affidavit, which charged him with a receipt of money of his client, which he had denied but had not accounted for, the attorney made, and after long delay filed, an affidavit, not denying the receipt of the money, nor that he had denied the receipt of it, and not satisfactorily accounting for it:—Held, that the court could not, without some further and substantive application, either attach him for not answering, or order him to pay the money. *Eccrest, In re*, 11 W. R. 114.

It is no answer to an application calling upon an attorney to answer the matters of an affidavit, that the applicant has already filed a bill in equity against the attorney for an account in re-

ference to the transactions complained of, even though the proceedings in equity have resulted in a decree against the attorney. *Wright, In re*, 12 C. B., N. S. 706.

— **Reference to Master.**—Where it has been referred to the master to examine into the charges, and to report to the court, it is not competent to the counsel for the accused to go into the evidence given before the master; the court will only look to his report. *Ib.*

— **Opportunity to be Heard given.**—If an attorney is called upon to answer matters in an affidavit merely, however dissatisfied the court may be with his answer, the court will not order him to be struck off the rolls without giving him an opportunity of being further heard. *Anon.*, 31 L. T. 730.

— **Not Answering.**—Upon a report by the master that the matters contained in interrogatories were not answered, the court may order the attorney to be struck off the roll. *Holmes, In re*, 12 Jur. 657.

An attorney not appearing pursuant to a rule to answer the matters of an affidavit, on being called three times in open court, a writ of attachment was ordered to be issued against him. *Easton v. Neville*, 18 C. B. 548; *S. P.*, *Wicher, In re*, 5 D. P. C. 715.

If a rule is obtained against an attorney to answer matters in affidavits, and to shew cause why he should not pay a sum of money, and he does not answer the matters or shew cause why he should not pay, the court, on an affidavit of service, will make absolute the rule to pay, and grant an attachment for not answering. *Bluck, In re*, 31 L. J., Q. B. 262; 6 L. T. 506; 10 W. R. 668.

When an attorney does not appear to shew cause against a rule calling on him to answer the matters of an affidavit, the court will make the rule absolute to answer within a certain time, and in default, that an attachment issue against him, and also that he be struck off the roll. *Worman, In re*, 1 H. & C. 636; 32 L. J., Ex. 83; 7 L. T. 249; 11 W. R. 26.

— **Motion as to—By whom made.**—An application for a rule, requiring an attorney to answer the matters of an affidavit, must be made by a gentleman at the bar. *Pitt, Ex parte*, 5 B. & Ad. 1077; 2 D. P. C. 439.

— **When made.**—The court will not, on the last day of term, grant a rule or hear cause shewn against such a motion. *Bailey v. Jones*, 1 Chit. 744; *S. P.*, *Jacob's case*, 4 Burr. 2502; *Turner, In re*, 3 D. P. C. 557; 1 H. & W. 217.

So, it is too late to move for the rule within the four last days of term. *Anon.*, 2 D. P. C. 227.

— **Affidavits.**—Affidavits, on which a rule calling on an attorney to answer the matters in an affidavit has been granted, need not be intitled at all. *Grantham, In re*, 4 D. & L. 427; 11 Jur. 242.

But affidavits in answer to the rule must be intitled in the same way as the rule. *Ib.*

Where, however, they were not so intitled, the court enlarged the rule in order that they might be amended. *Ib.*

Where a rule calling on an attorney to answer the matters of an affidavit is discharged by consent, the court will not allow the affidavits in support of the rule to be taken off the file of the court. *Anon.*, 12 W. R. 1012.

6. AS TO CLERKS.

— **Liability of Solicitor—For Act of Clerk.**—Where a managing clerk of attorneys had, without their knowledge, received money for the purpose of investment:—Held, that the question was (in the absence of any actual authority) whether they had held him out as having authority so to receive it on their behalf. *Cornelius v. Harrison*, 2 F. & F. 758.

— **For Fraud of Clerk.**—Where an attorney's clerk had fraudulently simulated the court seal upon a writ of summons, the court set aside the writ and the proceedings thereon, and ordered the attorney (though blameless) personally to pay the costs. *Dunkley v. Farris*, 11 C. B. 457.

— **For Negligence of Clerk.**—On the trial of an action on a bill of exchange the bill was not produced, and its non-production was accounted for by the evidence of two clerks of the plaintiff's attorney, by which it appeared that one of them laid the bill in an envelope on a desk in the attorney's office, and the other burned the envelope, and, as was believed, the bill also. Secondary evidence of the bill having been received, and the plaintiff having obtained a verdict, the master, on taxation of the plaintiff's costs against the defendant, disallowed the costs of the attendance of the clerks to prove the facts:—Held, per Pollock, C. B., and Martin, B., that those costs had been rightly disallowed; *Alderson and Platt, BB.*, contra. *Matthews v. Livesley*, 11 Ex. 221; 3 C. L. R. 898; 24 L. J., Ex. 252; 1 Jur., N. S. 601.

— **Privilege from Arrest.**—An attorney's clerk is not privileged from arrest whilst going to the judges' chambers for the purpose of there conducting his master's business. *Phillips v. Pound*, 7 Ex. 881.

— **Dealings with Client.**—A solicitor's clerk consulted confidentially by a mortgagor, cannot purchase the mortgage debt at less than was due upon it, and retain the same for his own benefit. *Hobday v. Peters*, 28 Beav. 349; 29 L. J., Ch. 780; 8 W. R. 512.

— **Liability of, on Guarantee.**—An articulated clerk held liable on a guarantee given on behalf of his principal. *Whitfield v. Moogjen*, 1 F. & F. 290.

7. FOR NEGLIGENCE.

a. What Amounts to.

— **Solicitor must Employ reasonable Skill and Diligence.**—Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill; he does not, if he is an attorney, undertake at all events to gain the cause. *Lamphier v. Phipps*, 8 C. & P. 475.

An attorney is only responsible in damages to his client for gross ignorance or gross negligence

in the performance of his professional services. *Purves v. Landell*, 12 C. & F. 91.

In undertaking a client's business, an attorney undertakes, on his own part, for the existence and the due employment of skill and diligence; where an injury is sustained by his client, in consequence of the absence of either, he is responsible to his client for such injury. *Hart v. Frame*, 6 C. & F. 193; 3 Jur. 547.

Where, therefore, masters employed an attorney to take proceedings against their apprentices, for misconduct, and an attorney specifically proceeded on the section of a statute which related to servants and not to apprentices:—Held, that this was an instance of such want of skill or diligence, as to render the attorney liable to repay to his clients the damages and costs occasioned by his error. *Ib.*

An attorney employed to conduct an action in which certain measurements were material, employing a surveyor to make them, who was given to drinking, and not ascertaining before the trial that he had made the measurements, in consequence of which there was a nonsuit:—Held, that there was evidence of negligence. *Mercer v. King*, 1 F. & F. 490.

A trader having petitioned the Court of Bankruptcy under 12 & 13 Vict. c. 106, s. 211, an order was made that his estate should be received and possessed by the official assignee, and be taken possession of by the messenger. One of the creditors employed an attorney to prepare an assignment of his effects for the benefit of the general body, informing him that all would concur therein. The assent of all the creditors not having been obtained the assignment became unavailing:—Held, that the attorney was not guilty of gross ignorance or gross negligence in preparing the assignment under such circumstances. *Lewis v. Collard*, 14 C. B. 208; 2 C. L. R. 1345; 23 L. J., C. P. 32.

An attorney is not to lose the amount of his bill on account of any error in the execution of his duty, which a cautious man might fall into; but if the charges contained in his bill are brought upon his client by his inadvertence, he cannot recover them in action. *Montrou v. Jefferys*, 2 C. & P. 113; R. & M. 317.

It is not every mistake or misapprehension of an attorney that will make him liable to an action for negligence. The question in such an action is, whether the attorney has used reasonable skill and reasonable care. *Shillcock v. Passman*, 7 C. & P. 289.

When persons, even without mala fides, make or adopt a statement, the contrary of which they ought to have known by reasonable diligence to be the truth, and a wrongful order is made by the court grounded on such statement, all such persons are liable to indemnify the persons who suffer through such an order from all the consequences. *Spencer, In re*, 39 L. J., Ch. 841; 21 L. T. 808; 18 W. R. 240.

The primary liability in respect of costs falls upon the solicitor, through whose agency the order was obtained, and the primary liability as to the fund lost though the order falls upon those who wrongfully received it. *Ib.*

In an action against an attorney, the declaration alleging that the plaintiff's wife filed a petition against him in the Divorce Court for a judicial separation, on the ground of cruelty; that he employed the defendant as his attorney in the suit, and that he had a good defence in

it, but was willing to consent to a decree for a judicial separation, provided that, if he did so, no evidence upon the charges contained in the petition should be taken; and that the defendant, knowing the premises, negligently advised him not to defend the suit, and induced him to give such consent, and not to attend the hearing with any evidence in support of his defence; but that evidence was taken whereby, it being unanswered, his character had been greatly injured; the plaintiff's case being, that he was induced not to defend, on the assurance that evidence would not be taken:—Held, that he could not complain of the advice given unless it was given upon that specific ground (which it was not disputed would have involved gross ignorance on the part of the defendant). *Hill v. Finney*, 4 F. & F. 616.

Double Retainer—Conflicting Interests.—A. employed B. as his solicitor in an action against C. The learned judge on the trial reserved his judgment, intimating that there would certainly be a verdict for A. as regarded part of his claim, but as to the balance he would consider the matter. In the interval and before judgment actually given, D., a former client of B.'s, consulted him professionally whether he could safely leave in C.'s possession property bought by him of C., which was nearly all C.'s property, and on B.'s advice a bill of sale was executed by C. in D.'s favour. When judgment was given, C. filed a petition for liquidation of his affairs, and in consequence of the bill of sale A. only received a dividend under the liquidation proceedings on his judgment:—Held, that there was a right of action on the ground of negligence if B. acted in ignorance of his duty; or on the ground of misconduct and breach of duty if he were aware of it. *Barber v. Stone*, 50 L. J., Q. B. 297.

Omitting to give Notice to Trustees.—A., an attorney, employed by B. to invest money, lent it to C. on an agreement, by which C. as a security charged his interest in consols standing in the names of trustees for C. A. neglected to give notice to the trustees. A judgment creditor of C. subsequently to this loan obtained a charging order under 1 & 2 Vict. c. 110, s. 14, notice of which was given to the trustees. C. obtained the benefit of the Insolvent Debtors Act. B. brought an action against A. for negligence; the judge directed the jury, in estimating the damages, to consider that as no notice had been given to C.'s trustees of the charge created by B., the subsequent charge created by the judge's order had priority over it:—Held, by Lord Campbell, C. J., Wightman, J., and Crompton, J., that the direction was correct, and that the judgment creditor had the same rights as a subsequent incumbrancer without notice, and was therefore to be preferred in equity to it. But by Erie, J., contra, that the judgment creditor had only those remedies against the debtor which would make his interest in the stock available for payment of the debt, and which would arise upon a lawful charge made by him in favour of the creditor. *Watts v. Porter*, 3 El. & Bl. 743; 2 C. L. R. 1553; 23 L. J., Q. B. 345; 1 Jur., N. S. 133.

Omitting to make Agreement by Deed.—Semble, that an attorney who receives instructions to prepare a security for the payment of an

annuity to a woman in consequence of past cohabitation, is guilty of negligence if he does it by a mere agreement only, not under seal. *Parker v. Rolls*, 14 C. B. 691.

In such a case the judge told the jury that every attorney is bound, under pain of being made responsible in an action, to bring a fair and reasonable amount of care and skill to the performance of his professional duty, without defining what was a fair and reasonable amount of skill:—Held, no misdirection. *Id.*

When Acting in Accordance with Opinion of Counsel.]—An agreement was entered into between A. and B. B. died, and administration to his effects was granted to C., his daughter. D., who was a friend of C., employed the same attorney who had prepared the original agreement to prepare another between him and C., by which he was authorized to bring an action against A., on the original agreement, in C.'s name, and also instructed the attorney to bring such action. The action was brought, and after argument on demurrer, the original agreement was declared void, on the ground of champerty. But it appeared that the attorney, in preparing such original agreement, had consulted a conveyancer, who gave it as his opinion that the agreement was valid:—Held, that the attorney was entitled, under the circumstances, to recover from D., his employer, the costs of preparing the second agreement, and also those of bringing the action upon the first. *Potts v. Sparrow*, 6 C. & P. 749.

Mistake upon Points of Law.]—An attorney is not liable for the consequence of a mistake in a point of law, upon which a reasonable doubt may be entertained. *Kemp v. Burt*, 1 N. & M. 262; 4 B. & Ad. 424.

A mere error in judgment, or a mistake upon a point of law, or in the construction of a difficult act of parliament, is not such negligence as renders an attorney liable to his client for a loss sustained in consequence of such error or mistake; in such cases regard must be had to all the circumstances of the transaction, and if they are such as shew gross or culpable neglect on the part of the attorney, he will be responsible. *Crosbie v. Murphy*, 8 Ir. C. L. R. 301.

Instituting Proceedings in Improper Court.]—If an attorney brings an action within a court of limited jurisdiction, knowing that the circumstances which gave the right of action arose out of the jurisdiction of such court, he is guilty of negligence, and liable in damages. *Williams v. Gibbs*, 6 N. & M. 788; 2 H. & W. 241.

An attorney, before he takes upon himself to sue out a writ in a court of peculiar constitution, is bound to ascertain that the court has machinery to carry out the object of the action. *Cox v. Leech*, 1 C. B., N. S. 617; 26 L. J., C. P. 125; 3 Jur., N. S. 442.

Though, when an attorney is employed to recover a small debt, he is liable to his client for unnecessarily and improperly suing in a superior court (unless, with a knowledge of the consequences, his client instructs him so to do), yet his liability will depend upon whether from his client's instructions he might reasonably suppose that he would recover, and desired to sue for, a sum which would carry costs, or that from the circumstances and the nature of the question, a judge would certify for costs; and if he might

reasonably so have supposed he will not be liable, even though his client, failing to recover in the superior court, became subject to the costs of suit in that court. *Lee v. Dixon*, 3 F. & F. 744.

Not Attending to Conduct of Cause.]—Where a plaintiff employed the defendant (an attorney) to conduct an ejectment for the recovery of premises forfeited to him by the tenant's breach of covenant to repair, and it was referred to an arbitrator, who was to decide what repairs were necessary, but the attorney neglected to attend him, whereby the plaintiff was obliged to pay the defendant's costs incurred in the ejectment, instead of the tenant:—Held, that an action was maintainable. *Suannell v. Ellis*, 8 Moore, 340; 1 Bing. 347.

Where a plaintiff's attorney suffered a cause to be called on for trial, without having ascertained whether a material witness, whom the plaintiff had undertaken to bring into court, had arrived, in consequence of which he was nonsuited:—Held, that in an action against such attorney for negligence, it was rightly left to the jury to determine whether he had used reasonable care in conducting the cause, and the jury having found that he had not, the court refused to disturb the verdict. *Reece v. Rigby*, 4 B. & A. 202.

Omitting Defeasance in Warrant of Attorney.]—Where an attorney omitted to insert a defeasance in a warrant of attorney:—Held, that the attorney was guilty of a breach of the duty imposed on him by the court, and was answerable on motion. *Shaw v. Evans*, 14 East, 576.

In Filing Writs.]—A declaration that the plaintiff employed the defendant as attorney to sue H. for the recovery of a debt; and thereupon it was his duty to use proper care in conducting the suit; yet he did not use proper care in this, that having sued out writs for the recovery of the money and for saving the Statute of Limitations, he did not, upon H. not being found so as to be served, duly file the writs with a proper officer, according to the practice of the court, whereby the action was barred by the statute:—Held, first, that although the 2 & 3 Will. 4, c. 39, s. 10, did not in terms require such writs to be filed, yet the word "file" in the declaration might have the sense of bringing the writs to the office, and in that sense would be included in the word "returned" in the statute, and such filing would, therefore, be a necessary part of the practice in saving the Statute of Limitations, and a part of the attorney's duty. *Hunter v. Caldwell*, 10 Q. B. 69; 16 L. J., Q. B. 274; 11 Jur. 770. Affirmed, 10 Q. B. 83; 12 Jur. 285.—Ex. Ch.

Held, secondly, that the question of negligence in not complying with the practice of the court was a question of fact for the jury under the judge's direction as to the law. *Id.*

Held, thirdly, that there was no ground for arresting the judgment, as, if there could be any sense of the word "file" in which it was the defendant's duty to file the writs, the declaration was good after verdict. *Id.*

Not Indorsing Time of Service.]—An attorney retained to bring an action, and not the person employed as process server, is liable to be sued by the client for damage caused through

neglect in omitting to make the indorsement of service. *Curlew v. Broad*, 1 H. & C. 322; 31 L. J., Ex. 473; 10 W. R. 797.

Omitting properly to instruct Counsel.—An attorney in a cause is not answerable for the absence, neglect, or want of attention of the counsel engaged in it. *Lowry v. Guilford*, 5 C. & P. 234.

A plaintiff's attorney having without reasonable excuse neglected to instruct counsel, or to appear at the assizes when the cause was called on, in consequence of which the plaintiff was nonsuited, the court granted a new trial only upon the terms of the attorney paying the costs of the day out of his own pocket. *Townley v. Jones*, 8 C. B., N. S. 289.

No action lies against an attorney for negligence in the conduct of a cause at nisi prius upon matters within the province of counsel, or for omitting to move for a new trial without instructions so to do. *Fray v. Foster*, 1 F. & F. 681.

In an action against an attorney for neglecting to instruct counsel to appear for the plaintiff in an action brought by the latter against a third party, he pleaded that he did not neglect to instruct counsel to appear. When the cause was called on for trial, the counsel for the plaintiff rose with a brief, called his attorney, who was not present, and the witnesses, who did not answer, and then withdrew the record:—Held, that the plaintiff was entitled to succeed, the meaning of the issue being that counsel had not been properly instructed to appear. *Hawkins v. Harwood*, 4 Ex. 503; 7 D. & L. 181; 19 L. J., Ex. 33.

Where an attorney of a vendee of an estate was employed to investigate the title thereto, and, in taking the opinion of counsel thereon, omitted to state in the case certain deeds materially affecting the title; and upon the faith of the opinion given (which would have been different, had all the deeds been stated) the vendee concluded the purchase, but was afterwards damned by finding that the title was imperfect:—Held, that the attorney was liable to him in an action of negligence. *Ireson v. Pearman*, 5 D. & R. 687; 3 B. & C. 799.

Letting Judgment go by Default.—An attorney was sued for negligence in allowing judgment to go by default, in an action which the plaintiff had retained him to defend; the negligence being proved:—Held, it was for the attorney to defend himself by shewing, if he could, that the plaintiff had no defence in that action; and not for the plaintiff to begin by shewing he had a good defence, and so had been damned by the judgment by default. *Godefroy v. Jay*, 7 Bing. 413; 5 M. & P. 284.

If a cause, which is meant to be defended, is called on, and tried as an undefended cause, in consequence of the defendant's attorney neglecting to deliver his briefs, the court will grant a new trial, compelling the attorney to pay the costs, as between attorney and client, out of his own pocket. *De Bouigny v. Peale*, 3 Taunt. 484.

Issuing Execution and Realizing Fruits of Judgment.—Prima facie, it is the duty of an attorney who has recovered a verdict for a client in an action, to issue execution, and at all events,

if desired to do so. And if told at the time when retained that his client has no money for costs, he cannot demand payment of costs incurred before issuing execution. But to maintain an action for negligence against him for not issuing execution, he deeming it not desirable to do so, there must be some evidence that it was desirable or for the benefit of the client to do so; as that he did not make due inquiries that the debtor could pay. In such a case the attorney is liable for the amount, if any, which the jury think execution would have realized for his client. *Harrington v. Binns*, 3 F. & F. 942.

In Investigating Title.—Sembles, an attorney ought himself to peruse a title on the part of his client, before he sends it for counsel's opinion. *Drax v. Scroupe*, 1 D. P. C. 69; 2 B. & Ad. 581.

A bill in equity will not lie against a solicitor for negligence in investigating a title. *British Mutual Investment Company v. Cobbold*, 19 L. R., Eq. 627; 44 L. J., Ch. 332; 32 L. T. 251; 23 W. R. 487.

Of Leasehold Property.—A. entered into a contract for purchase of leasehold property under conditions of sale, one of which was, that the purchaser should take an underlease "according to the draft underlease already prepared, which will be produced at the time of sale, and may in the meantime be inspected at the office of Mr. H.; but no abstract of the vendor's title thereto shall be required, nor the lessor's title objected to or gone into." He afterwards employed an attorney, to complete the purchase, who failed to make the requisite search, or to investigate the vendor's title, or to require the production of the original lease. It subsequently appeared that the premises had been previously mortgaged, and A. was turned out of possession by the mortgagee:—Held, that this amounted to negligence on the part of the attorney sufficient to maintain an action against his executor, and that A. was entitled to recover, in addition to the amount he had paid to obtain a good title, interest on the same during the time he held possession, as he had been obliged to pay the mortgagee mesne profits during that period. *Allen v. Clark*, 7 L. T. 781; 11 W. R. 304.

If attorneys employed by a vendor to settle on his part the assignment of a term, allow him to execute an unusual covenant, without explaining the liability thereby incurred, they are responsible to him for consequent loss, notwithstanding he is himself at the time of the assignment aware of the fact in respect of which he afterwards incurs liability on his covenant. *Stannard v. Ullithorne*, 10 Bing. 491; 4 M. & Scott, 359.

In Mortgage Transactions.—A bill charged that a solicitor had negligently recommended the plaintiff company to accept a freehold house as security for a loan of 5,000l., and had advised that the mortgagors had the absolute fee-simple in the house free from incumbrance, whereas, in fact, they had only an interest in one moiety, and that subject to incumbrances and a contract for sale. The bill prayed that the solicitor might be decreed to make good the 5,000l. and costs, and to take over the security from the client. A suit for the realization of the security was pending, and the mortgagors were bankrupts, so that the actual loss, if any, was not ascertained:—

Held, that the court had no jurisdiction to grant such relief, and that even if such jurisdiction existed there was a discretion to refuse to exercise it in such a case, and a demurrer was allowed. *British Mutual Investment Company v. Cobbold*, 19 L. R., Eq. 627; 44 L. J., Ch. 332; 32 L. T. 251; 23 W. R. 487.

An attorney having been retained by two trustees about to advance trust-money upon the security of property already mortgaged, to see that the security was sufficient, and that the proper deeds were executed, one of the trustees advanced the money on the execution of the mortgage without receiving an assignment of the first mortgage. It having turned out that there was no other previous mortgage, and the security having proved insufficient:—Held, that there was not evidence of negligence on the part of the attorney, although by the agreement which he had prepared part of the money advanced was to be applied to the redemption of the prior mortgage; it not appearing that the attorney was aware of the trustee's intention to act as he did. *Brumbridge v. Massey*, 28 L. J., Ex. 59; 32 L. T., O. S. 108.

The plaintiff, who held a mortgage for 4,600*l.* upon lands belonging to one F., agreed to make him a further advance of 400*l.* upon having an additional piece of land, which F. had subsequently acquired, added to the former security. The defendant, who acted as the plaintiff's solicitor in the transaction, omitted to ascertain (as the fact was) that a third person had an equitable charge to the extent of 46*l.* upon this additional piece of land; in consequence of which the plaintiff, upon the sale of the property, was unable to convey without paying the 46*l.*:—Held, that this was negligence for which the defendant was liable; and that in the absence of evidence to reduce the amount, the 46*l.* so paid was the proper measure of damages. *Whiteman v. Hawkins*, 4 C. P. D. 13; 39 L. T. 629; 27 W. R. 262.

A solicitor invested the money of one of his clients without his knowledge on an improper mortgage security. The client, believing the security to be insufficient, proved against the estate of a partner of the solicitor, which was being administered in chancery, for the whole amount of the debt, and, under a compromise, received a dividend out of the estate. Afterwards it turned out that the security was sufficient to pay the client in full:—Held, that the dividend must be repaid to the solicitor's estate, and did not enure for the benefit of the subsequent incumbrancers on the mortgaged property. *Sawyer v. Goodwin*, 1 Ch. D. 351; 45 L. J., Ch. 289; 34 L. T. 635; 24 W. R. 493—C. A.

A company employed a solicitor, who was not its ordinary solicitor, in a particular matter, and at its request gave him a mortgage of part of its property to secure the payment of its costs. The mortgage was not registered, under the Companies Act, 1862, s. 43:—Held, that it was the duty of the solicitor to see that the mortgage was registered, and that as he had not done so, he could not claim the benefit of it in the winding up of the company. *Patent Bread Machinery Company, In re, Valpy, Ex parte*, 7 L. R., Ch. 289; 26 L. T. 228; 20 W. R. 347.

Negligence of Solicitor in not explaining Mortgage to Client.—B. being entitled to a sum of 2,916*l.* stock in reversion expectant on the

death of an old lady aged eighty-two, obtained through the defendant E., who acted as solicitor for both parties, a loan of 1,650*l.* upon mortgage. The mortgage contained a power of sale upon three months' notice, or on interest being one month in arrear. B. alleged, and the court held truly, that he had stipulated that the stock should not be saleable without six months' notice, and that E. had assured him it was not. The stock was sold under the power, the interest being in arrear, for 1,950*l.*, as subject to succession duty at 3 per cent. The tenant for life was then in a precarious state of health and died within three months. It was afterwards found that only 7*l.* was payable for succession duty. None of the purchase-money was paid except the deposit, the rest being left upon mortgage of the stock:—Held, that the sale could not be set aside, either on the ground of under value, as there was no fraud; nor by reason of the purchase-money being left on mortgage, nor on account of the mistake as to succession duty, that being merely a ground of compensation. *Bettyes v. Maynard*, 49 L. T. 389; 31 W. R. 461—C. A. Reversing 46 L. T. 766; 30 W. R. 793.

In ascertaining Validity of Securities.—Where an attorney acts for a client who advances money on the security of a legacy, given to the borrower under a will, he is not warranted in relying upon a partial extract from the will; it is his duty to examine the will itself. *Wilson v. Tucker*, 3 Stark. 154; D. & R., N. P. C. 30.

An executrix of an attorney is liable for negligence of her testator in not making due inquiry into the validity of a security upon which his client proposed to advance money. *Ib.*; *S. P., Knights v. Quarles*, 4 Moore, 532; 2 B. & B. 102.

The attorney for a trader in insolvent circumstances, being introduced by him to the plaintiff, a young woman entitled to a reversionary interest, with the view of obtaining from her an advance of money, and having obtained for her an advance upon the security of her reversionary interest, upon high interest, and upon improvident terms, was then a party to the loan of it to his client, the trader, without any security. The money having been lost:—Held, that if he was employed by the plaintiff only to obtain for her an advance of the money, he was not liable; but that if he was employed by her generally, to look after her interests in the entire transaction, and to advise her as to her advance of the money, he was liable for negligence in reference to his advice as to such an advance. *Langdon v. Godfrey*, 4 F. & F. 445.

Omitting to make proper Searches.—It is the duty of an attorney for an intended mortgagee to search at the Insolvent Court for the purpose of learning whether the intended mortgagor has taken the benefit of the Insolvent Acts, if there is reason to suspect that he has been insolvent, or is or has been in embarrassed circumstances. *Cooper v. Stephenson*, 21 L. J., Q. B. 292; 16 Jur. 424.

Purchase by Client of Farm Produce—No Inquiry as to Payment of Rent.—An attorney employed to advise a proposed purchase of farming produce which it is desired to leave on the ground for some time, is *prima facie* bound to inquire as to the payment of the past rent; but

if the client himself has made inquiries about the matter, and leads his attorney to believe that he is satisfied about it, it is not negligence in the attorney to omit to call for the receipts or take the other precautions which otherwise would be usual and necessary. *Waino v. Kempster*, 1 F. & F. 695.

Taking Improper Indemnities.]—Where a party sues or defends in *autre droit* as assignee, or under such circumstances as to render an indemnity a prudent and proper precaution to take, it is the duty of an attorney to advise it; and in the case of a defendant, to obtain such an indemnity as will be sufficient to cover costs, and such damages as may reasonably be anticipated in the event of the defence failing. *Graham v. Lawrence*, 1 F. & F. 285.

Disclosing Defects in Client's Title.]—An attorney, being employed to raise money on mortgage for A., disclosed to the proposed lender certain defects in A.'s title, per quod he was subjected to divers actions at the suit of the proposed lender, was delayed in obtaining the money he wanted, and compelled to give a higher rate of interest:—Held, that this was a breach of duty for which an action lay by A. against the attorney, notwithstanding he had been the attorney of the proposed lender before his retainer by A. *Taylor v. Blacklow*, 3 B. N. C. 235; 3 Scott, 614; 2 Hodges, 224.

Mixing Client's Money.]—If an attorney pays into his banker's hands money of his client, mixing it with his own, and the bankers fail, the attorney is liable to make good the loss. *Robinson v. Ward*, 2 C. & P. 59; R. & M. 274.

Where Solicitor is a Constructive Trustee.]—A settlement of land in Wales, the property of the husband, was executed shortly after a marriage, which took place in India. The husband and wife went to reside in Wales, and the husband employed a solicitor there to make his will and to sell part of the land, the solicitor concluding from the statements of the husband that there had not been any marriage settlement. The husband died, leaving his widow trustee and executrix, and directing his debts to be paid out of his estate. The widow employed the same solicitor to sell other parts of the land, and the solicitor received the purchase-moneys and applied them in payment of the debts of the husband. The deed of settlement had been in the possession of the wife, but had been by her given to the husband. There was no evidence as to what had become of it, but after the sales had been made a copy was found. The solicitor had concluded from what he was told by the husband that there had been no settlement, and though, before all the sales were completed, his clerk had been told by the wife that there had been a settlement, the solicitor continued to believe that there had been none. An action was brought by the children of the marriage, entitled under the settlement, claiming to recover from the solicitor the money which had so passed through his hands:—Held, that, under the circumstances, although the solicitor might have been negligent in that character, he could not be held to have had such notice of the settlement as to be treated as constructively a trustee, and therefore liable

for the money which had passed through his hands. Notice to raise a constructive trust is different from notice to an actual trustee. *Cuthay v. Sydenham* (2 Bro. C. C. 391) discussed. *Williams v. Williams*, 17 Ch. D. 437; 44 L. T. 573.

The owner of a copyhold, which was subject to a mortgage by conditional surrender for 350l., made by a former owner, instructed S., his solicitor, to procure him, on the security of the property, a loan of 550l., out of which the old mortgage was to be paid off. S., in July, 1876, obtained the money from the plaintiff, who was also his client. In July, 1877, S. took a security for 700l. on the property in his own name, the mortgagee assigning the old mortgage debt, and the mortgagor covenanting to surrender. The old mortgage was paid by a cheque drawn by S. on B. & Co., his bankers. S.'s account was already overdrawn, but on the same day he applied to them for leave further to overdraw, which was granted on his depositing with them the security for 700l., and the cheque when presented was honoured. B. & Co. had no notice of the plaintiff's claim. Some time after this S. put his account in credit, but it shortly afterwards became again overdrawn. S. handed over some of the other muniments of title to the plaintiff. The plaintiff commenced his action to establish his right to rank as incumbrancer for 550l. in priority to B. & Co. After this, B. & Co. procured the old mortgagee to be admitted under the old conditional surrender, and to surrender to them:—Held, that after the account of S. with B. & Co. had once been put in credit, their security must, as against other incumbrances on the property, be taken to have been discharged, and that the plaintiff was entitled to priority over B. & Co. B. & Co. appealed, asking for priority over the plaintiff to the extent of the old mortgage which had been paid off with their money:—Held, on appeal, that S., having received money from the plaintiff for the purpose of being invested on a mortgage of specified property, and having taken a security on that property in his own name, was a trustee of that security for the plaintiff to the extent of the money received from him, and that this equitable title must prevail against the deposit with B. & Co., and that the 350l. mortgage could not be set up against the plaintiff. *Harpham v. Shacklock*, 19 Ch. D. 207; 45 L. T. 569; 33 W. R. 49—C. A.

Fact of Negligence—Cannot be Decided on Taxation of Costs.]—On a taxation between solicitor and client of the costs of a cause, objections were taken on behalf of the client to charges occasioned by the postponement of the trial and the amendment of the pleadings, on the ground that the postponement of the trial and the amendment of the pleadings had been rendered necessary by the negligence of the solicitor; the registrar refused to disallow the items, on the ground that it was not within his province as taxing-master to inquire into the question of negligence:—Held, that the ruling of the registrar was right. *The Papa de Rossie*, 3 Adm. D. 160.

But the master has no jurisdiction to disallow items on the ground that, in respect of the business to which they refer, the attorney was guilty of negligence. *Matchett v. Parkes*, 9 M. & W. 767; 1 D., N. S. 924.

b. Action for.

Relation of Client and Solicitor must Exist.]—

An attorney is not liable to an action for negligence at the suit of one between whom and himself the relation of attorney and client does not exist, for giving, in answer to a casual inquiry, erroneous information as to the contents of a deed. *Fish v. Kelly*, 17 C. B., N. S. 194.

Production of Books in Actions.]—

The court will not, in an action against an attorney for negligence, make an order for the production of his books, upon a mere suggestion of the client's belief that they contain entries relating to the matters of which he complains. *Ecans v. Louis*, 1 L. R., C. P. 656.

Answering Interrogatories.]—

In an action against D., an attorney, and B., for not properly investing moneys intrusted to them, the plaintiff was allowed to administer interrogatories to B., although they were such that the answers might render him liable to a penalty for practising (in partnership with D.) as an attorney and a solicitor without having a proper certificate—the court holding, that the questions were put bona fide, to ascertain whether B. was really liable with D., and that B. might safely answer them, as they related to the business of the partnership as scriveners. *Bickford v. D'Arcy*, 1 L. R., Ex. 354; 35 L. J., Ex. 202; 14 L. T. 629; 14 W. R. 900; 4 H. & C. 534.

Fraud and Misrepresentation.]—

Observations on the practice of making solicitors, agents, and arbitrators parties to a suit, alleging against the principal defendant fraud, in which the co-defendants were not implicated. *Mathias v. Yette*, 46 L. T. 497—C. A.

Sufficiency of Pleading in.]—

If a declaration states that the plaintiff retained the defendant, an attorney, to see if a certain security was good, and that he accepted the retainer, and neglected his duty, and represented the security to be good; and that the plaintiff advanced his money, and that the security was bad, by means of which the plaintiff lost the interest:—Held, sufficient. *Houell v. Young*, 5 B. & P. 259; 8 D. & R. 14; 2 C. & P. 238; *S. P.*, *Whitehead v. Greatham*, 2 Bing. 464; *McClell. & Y.* 205; 10 Moore, 183; *O'Hanlon v. Murray*, 12 Ir. C. L. R. 161.

A count, that in consideration that the plaintiff would retain the defendant in investing money in the purchase of an annuity, he undertook to perform his duty in the premises; that the plaintiff retained him for the purpose aforesaid; yet he did not perform his duty in the premises, but invested the money in security of no value, by reason of which premises he lost the money:—Held, that the count was bad; because it did not state that any reward was to be paid to the defendant, or that he was employed in any particular character, so as to make him responsible for taking bad security, although not guilty of negligence or dishonesty. *Dartnall v. Howard*, 6 D. & R. 438; 4 B. & C. 345.

In an action against a solicitor for negligence, the declaration stated that his client was equitably interested in four tenth parts of the lease of a colliery, that the lessee had entered into negotiations for the sale of the lease to a company, and that the client retained him, as soli-

citor, to file a bill in chancery against the lessee and the company for the purpose of enforcing his claim in respect of his shares, and praying that the lessee might convey and secure to him four-tenths of the purchase-money, and that the company might be decreed to do all matters necessary to confirm such conveyance and security, and might be enjoined from paying his proportion of the purchase-money to the lessee. Breach, that the solicitor did not register the bill as a *lis pendens*, according to 2 & 3 Vict. c. 11, s. 7, whereby the lessee was enabled to dispose of the lease to another company, and to receive the purchase-money, and the client was deprived of his share in it:—Held, that the declaration was good, as the bill in chancery, which prayed for an equitable lien against the intended purchasers of the lease was a *lis pendens*, which ought to have been registered under the statute, and that, having regard to the terms of the bill, it was the duty of the solicitor to have registered it, without any express request on the part of his client. *Plant v. Pearman*, 41 L. J., Q. B. 169; 26 L. T. 313; 20 W. R. 314.

In an action against an attorney for negligence, the fact of his having been retained as an attorney is put in issue by non assumpsit. *Aldis v. Gardner*, 1 C. & K. 564.

A declaration, that the plaintiff, at request of defendants, retained and employed them as attorneys, for fees, to use due care in ascertaining the title of R. to lands which were to be charged as security for payment of 600*l.* by R. to the plaintiff, and to take due care that the same should be a sufficient security for the payment of the 600*l.* by R. to the plaintiff; and in consideration thereof the defendants promised the plaintiff to use due care and diligence in and about ascertaining the title of R. to the lands, and to take due care that the same should be a sufficient security for such repayment of the 600*l.* by R. to the plaintiff:—Held, that the undertaking of the defendants, as laid, did not comprehend any inquiry into the value of the lands. *Hayne v. Rhodes*, 8 Q. B. 342; 15 L. J., Q. B. 137; 10 Jur. 71.

When it is sought to make a solicitor liable for negligence, that issue must be raised clearly upon the pleadings. *Bettyes v. Maynard*, 49 L. T. 389; 31 W. R. 461—C. A.

Improper Allegation of Fraud—Costs.]—

Although relief may be given at the suit of a client against his solicitor for loss sustained by gross negligence, yet where the loss was in respect of a matter of conduct as to which the advice of the solicitor was founded on the opinions of competent surveyors as to the value of the property, and those opinions submitted to the judgment of the client, the court dismissed the bill; and as fraud and improper motives were charged without evidence to support those charges, the bill was dismissed with costs. *Chapman v. Chapman*, 9 L. R., Eq. 276; 22 L. T. 145; 18 W. R. 533.

After Death—Action against Executors.]—

A client, in 1869, intrusted money to a solicitor to invest on mortgage of land, trusting to representations by the solicitor (who acted for both parties) that the property was of fee-simple tenure, and free from incumbrances. The mortgagor died in 1879, and the solicitor died in 1881, when the client discovered that part of the property was only leasehold for lives, and also that

the solicitor held a prior mortgage on part of the lands. In an action to make the solicitor's estate liable for the deficiency of the security:—Held, that though on the evidence the solicitor would have had no defence to the action if brought in his lifetime, yet it was not maintainable against his executors. *Young v. Wallingford*, 52 L. J., Ch. 590; 48 L. T. 756; 31 W. R. 838.

c. When a Defence to Action for Bill of Costs.

Generally.]—An attorney employed to prosecute an appeal against an order for the removal of a pauper permitted the next sessions to pass without causing the appeal to be entered and respited; and failed to comply with the directions of the statute, as to the notice and statement of the grounds of appeal. The justices, at a subsequent sessions, having refused to entertain the appeal:—Held, that the attorney could not maintain an action for his costs in respect of his services. *Huntley v. Bulwer*, 8 Scott, 325; 6 Bing. N. C. 111; 3 Jur. 1105.

If an attorney conducting a suit commits an act of negligence, by which all the previous steps become useless in the result, he cannot recover for any part of the business done. *Bracey v. Carter*, 12 Ad. & E. 373.

Whether or not in such a case the work became wholly useless by his fault, is a question for the jury. *Ib.*

Such failure of the work is a defence admissible under the general issue, in an action upon his bill. *Ib.*; *S. P.*, *Symes v. Nipper*, 12 A. & E. 337, n.

Negligence in the conduct of a cause cannot be set up as a defence to an action on the attorney's bill. *Templer v. McLachlan*, 2 N. R. 136.

A parliamentary agent, entrusted with the passing of a local bill through parliament, who puts a construction on an order of the House of Lords which is doubtful in its terms—such construction being different from that which is adopted by the Standing Orders Committee, and by the House, whereby it becomes necessary to abandon the bill—is not guilty of such gross negligence as to disentitle him to recover a remuneration for his labour in passing the bill through the House of Commons. *Bulmer v. Gilman*, 4 M. & G. 108; 4 Scott, N. R. 781.

An action having been brought against an attorney for negligence, in which action the jury gave a verdict for the plaintiff, finding also that he had been guilty of gross negligence, and then he brought an action for his bill of costs, the court refused to stay proceedings in the latter action. *Smith v. Rolt*, 2 D. P. C. 62.

Where there appears to be negligence or ignorance of the law on the part of an attorney, which creates unnecessary costs, the court will order the costs to be disallowed on taxation, without prejudicing his right to bring an action for them. *Cliff v. Prosser*, 2 D. P. C. 21.

When Service wholly Useless or Abortive.]—Where a solicitor has been retained for the prosecution of a suit, and he has by crassa negligentia in the conduct of the suit caused the suit to be lost, he cannot recover any portion of his bill. *Stokes v. Trumper*, 2 Kay & J. 232.

An attorney being instructed to take proceedings against an acceptor of a foreign bill of ex-

change, brought an action against him in the name of his client, without first ascertaining whether his client's title was complete by special indorsement, as required by the law of the foreign country, and it being afterwards ascertained that there was no such indorsement, the action was discontinued:—Held, that he was guilty of such negligence as disentitled him from recovering the costs of the abortive proceedings. *Long v. Orsi*, 18 C. B. 610; 26 L. J., C. P. 127.

In an action upon a money bond, the defendant, after the writ issued, wrote a letter, stating that he had paid part, and was ready to pay the residue. The attorney for the plaintiff then delivered a declaration. When the cause was ready for trial an order was taken by consent for a reference to the master, who made his allocatur in favour of the plaintiff. In the meantime the defendant had become bankrupt. In an action by the attorney for his bill of costs, the judge directed the jury that it was his duty, on receiving the letter, to make an application for an order of reference as in a matter of account, and the jury found a verdict for the defendant:—Held (Lord Campbell, C. J., dissentiente), that the omission of the attorney to apply for an order was not evidence of negligence to disentitle him from recovering his bill of costs. *Chapman v. Van Toll*, 8 El. & Bl. 396; 27 L. J., Q. B. 1; 3 Jur., N. S. 1126.

In an action by an attorney for the costs of an action to recover a chattel, the subject of a specific bequest, but claimed by the possessor as a gift from the testator, the defence being that the action, which had failed, was only brought under the advice of the attorney, and that it was wholly useless, the proper course being to take out an administration summons in chancery:—Held, that it was nevertheless for the jury to say, on the whole case, not whether the course was proper, but whether it was so wholly useless as that the client had derived no benefit from it. *Fletcher v. Winter*, 3 F. & F. 138.

In an action by attorneys for the costs of a defence, which failed, they having been absent on the day of trial, and some of the witnesses consequently not being in court:—Held, that they were entitled to recover, notwithstanding the verdict had passed against their clients, unless the jury thought that the absence of the witnesses had caused the loss of the verdict, and so made the services wholly valueless. *Dunn v. Hallen*, 2 F. & F. 642.

In an action against an attorney alleging that he was retained to conduct the defence of the plaintiff on a criminal charge, and that through his negligence the plaintiff was convicted:—Held, that the plaintiff, in order to recover more than nominal damages, must prove that he was convicted mainly through the attorney's negligence, and the negligence being, not taking the proofs of witnesses who were in court ready to be examined, but whom the counsel, on the plaintiff's own statement, did not wish to call, and whom the plaintiff did not insist on calling, and that the question for the jury was, whether the attorney had done anything which, under all the circumstances, was likely to be of any use. *Hatch v. Lewis*, 2 F. & F. 407. And see *S. C.*, 7 H. & N. 367; 31 L. J., Ex. 26; 7 Jur., N. S. 1085; 5 L. T. 254.

It is no defence that the defendant has derived no benefit from the suit, where the failure

does not result wholly from the attorney's negligence, but partly from accident. *Dar v. Ward*, 1 Stark. 409.

An attorney cannot charge for work which is useless towards accomplishing the object his client has in view, although performed through inadvertence or inexperience, and not with the design of imposing on his client. *Ill v. Featherstonhaugh*, 7 Bing. 569; 5 M. & P. 541.

The jury may discard an item for work entirely useless; though, upon an item partly useless, or in respect of which there has been any negligence, the client's remedy is only by a cross action. *Shaw v. Arden*, 9 Bing. 287; 2 M. & Scott, 341; 1 D. P. C. 705.

8. TO ACTIONS OF TORT.

False Imprisonment.—An action for false imprisonment lies as well against an attorney as against his client, who sues out at the suit of his client an illegal writ of *capias ad satisfaciendum* against a defendant, and causes him to be imprisoned thereon. *Barker v. Braham*, 3 Wils. 368; 2 W. Bl. 866. See *Rogers v. Popkin*, 2 Stark. 404.

Trespass.—An attorney is not liable with his client in a joint action of trespass, unless it can be proved that he has gone beyond the strict line of his duty. *Sedley v. Sutherland*, 3 Esp. 202; *S. P., Carrett v. Smallpage*, 9 East, 330.

So, where an arrest is made under process, which is afterwards set aside for irregularity, the attorney in the suit is liable in trespass as well as the plaintiff; and if in an action of trespass he justifies under the process, it is a good replication that the process was irregularly sued out, and was afterwards set aside by rule of court for irregularity. *Codrington v. Lloyd*, 8 A. & E. 449; 3 N. & P. 442; 1 W., W. & H. 358; 2 Jur. 593.

Where an attorney, at the instance of a creditor, sued out process against a debtor in the county court, and the attorney's agent, after the debt and costs had been paid, but in ignorance of that fact, signed judgment and sued out execution, and levied upon the debtor's goods, though he had never appeared:—Held, that both the creditor and his attorney were liable to the debtor in an action of trespass. *Bates v. Pilling*, 9 D. & R. 44; 6 B. & C. 38.

An attorney who delivers to a bailiff a precept issued out of a local court, to be executed within the jurisdiction, is not liable in trespass jointly with the bailiff for executing the precept out of the jurisdiction, unless he was aware that it was to be executed out of the jurisdiction, although his name was indorsed on the precept, with directions to levy, and he was aware that the bailiff intended to make the levy in the manner he did. *Sowell v. Champion*, 6 A. & E. 407; 2 N. & P. 627; W., W. & D. 667.

An attorney, who deliberately directs the execution of a warrant, is liable in trespass if it proves bad. *Green v. Elgie*, 5 Q. B. 99; D. & M. 199; 14 L. J., Q. B. 162.

An attorney, to whom his client had assigned a debt for which judgment had been recovered, indorsed a *fi. fa.* in the action, "The defendant resides at W., in the county of B., and is an innkeeper." The defendant in that action resided with R., his mother-in-law, and managed the business, which she carried on at an inn at W.

The levy was made upon her goods in that inn. In an action against the sheriff and the attorney:—Held, that the attorney must be taken to have directed the sheriff to levy the goods of R., and was therefore liable. *Rowles v. Senior*, 8 Q. B. 677; 15 L. J., Q. B. 231; 10 Jur. 354. See *Childers v. Wooler*, 2 El. & El. 287.

An action on the case is not maintainable against an attorney, who, being retained to sue for a debt a person of the same name with the plaintiff, by mistake and without malice takes all the proceedings to judgment and execution against the plaintiff, or having obtained judgment against the right person, by mistake and without malice issues execution against the plaintiff. *Davies v. Jenkins*, 1 D. & L. 321; 11 M. & W. 745; 12 L. J., Ex. 386; 7 Jur. 801.

If attorneys conducting the business of a fiat in bankruptcy take out a summons to attend before a commissioner under 6 Geo. 4, c. 16, s. 33, which is disobeyed, and they afterwards obtain a warrant of the commissioner to arrest and bring before him for examination the party so summoned, which warrant proves invalid, the attorneys are not liable in trespass if they have taken no steps in the execution of the warrant, except ordering it to be prepared by an agent, who, when it was ready, gave the messenger notice to take it. *Cooper v. Harding*, 7 Q. B. 928; 9 Jur. 777.

Action for wrongful seizure of goods against an execution creditor and her attorney, jointly. The attorney, who had given the sheriff a *fi. fa.* against C., sent a man, with the sheriff, to point out his goods. He pointed out goods which the sheriff seized, and which, on an interpleader issue, were found to be the goods of D.:—Held, that the attorney, by the direction which he had given the sheriff, had made himself personally liable in trespass. *Power v. Fleming*, 4 Ir. R., C. L. 404.

Held, also, that, the attorney having directed the sheriff to seize the goods which the man sent should point out, the consequence was just the same as if he had himself pointed out the wrong goods and directed the sheriff to seize them. *Id.*

D. obtained, as special damage, a verdict for the costs of the interpleader proceedings which he had taxed against the execution creditor, and for the payment of which by her he had an order of the court, but which he was unable to recover:—Held, that, as his action was brought against both the execution creditor and her attorney, the same damages must be recovered against both; that, as D. had an order which was equivalent to a judgment of the court against her, he could not recover the amount of them as damages against her, and, therefore, the verdict should be reduced by the amount. *Id.*

Refusal to Sign Defendant's Discharge unless Paid on Independent Demand.—Where a defendant, on being taken in execution under a *ca. sa.*, tendered the debt and costs to the plaintiff's attorney, and required him to sign his discharge, which he refused to do until he had paid an independent collateral demand for costs:—Held, that the plaintiff and his attorney were liable to an action on the case for such refusal. *Crozer v. Pilling*, 6 D. & R. 129; 4 B. & C. 26.

Improperly Suing out Writ of Attachment.—Upon a change of solicitors in certain suits in

equity, an order was made by the Master of the Rolls, requiring the former solicitor to hand over to the newly-appointed solicitor all papers and documents in his possession, custody or power relating to the suits. Some of the papers were in the hands of counsel, and others in the hands of a law stationer, who respectively claimed liens thereon for their fees and charges; and the solicitor alleging that his client had undertaken to provide funds for fees and disbursements, but had failed to do so, was consequently unable to comply with the order as to those papers. The newly-appointed solicitor, upon an affidavit alleging the neglect to obey the order, but not mentioning the excuse set up, obtained from the clerk of records and writs a writ of attachment, under which the former solicitor (already in custody for debt) was detained. An application having been fruitlessly made to the Master of the Rolls to set aside the attachment, upon a statement of all the facts, the former solicitor appealed to the lords justices, who reversed the decision of the Master of the Rolls, with costs, and ordered the writ to be set aside and the solicitor discharged from custody:—Held, that neither the solicitor who so sued out the attachment nor the client was liable in trespass. *Williams v. Smith*, 14 C. B., N. S. 596.

Trover.—A., the acceptor of a bill of exchange, had agreed with his creditors to pay a composition, partly in money and partly in notes. The bill having become due, the drawer was unable to take it up, but the indorsee intrusted it to the drawer to get the composition in money and notes for him. The drawer handed it to his attorney, with other bills accepted by A., to get the composition for him, and, at the same time, obtained an advance of 200*l.* from the attorney. The attorney obtained the composition in money, and repaid himself the 200*l.*, and carried the balance to the account of the drawer. For the composition in notes he took one note for the aggregate amount of the composition on the several bills handed to him:—Held, that the attorney was not liable to the indorsee, either in trover for the bill or for the money kept back by him to repay the advance to his client, the drawer. *Symonds v. Atkinson*, 1 H. & N. 146; 25 L. J., Ex. 313.

When Acting in Accordance with Opinion of Counsel.—In an action against an attorney, for a malicious or fraudulent proceeding, it is not enough in order to excuse him that he acted on counsel's opinion, unless he also shews a case fairly stated, and advice obtained bonâ fide and properly pursued. *Andrews v. Hawley*, 26 L. J., Ex. 323.

9. FOR COSTS.

Generally.—In the absence of fraud, the court has no jurisdiction to make a solicitor pay the costs of an action rendered necessary by his mistake or carelessness. *Clark v. Girdwood*, 7 Ch. D. 9; 47 L. J., Ch. 116; 37 L. T. 614; 26 W. R. 90—C. A.

The client's remedy is by an action for damages. *Ib.*

In the absence of fraud the court has no jurisdiction to order a solicitor who has made a mistake in the preparation of a document to pay the costs of a suit for its rectification. *Ib.*

An agreement had been come to between A. and B. The agreement was broken by B., and, as the claim alleged, the breach was accompanied by false instructions to counsel given by a solicitor, and by the solicitor's false statements upon oath:—Held, on an action for injunction consequent upon the breach by B., that on the claim as alleged, there was no right of action against the solicitor for costs. *Blackburn Union v. Brooks*, 26 W. R. 57.

If a summons is taken out to make a solicitor pay costs, notice of the application must be given him. *Ronch v. Albery*, 33 L. J., Q. B. 127.

Of Action brought without Authority.—See *ante*, col. 1851.

Expenses of Witnesses.—The attorney in a cause is not personally liable to a witness whom he subpoenas to give evidence in the cause for her expenses of attendance. *Robins v. Bridge*, 3 M. & W. 114; 6 D. P. C. 140; M. & H. 357.

The mere circumstance of a party being the attorney in the cause will not make him responsible for refreshments supplied by a coffeehouse-keeper to the witnesses while attending the trial. But the fact of his being found in communication with the witnesses at the coffee-house, is some evidence to go to the jury that the supplies were sanctioned by him. *Fendall v. Noker*, 7 Scott, 647; 2 Arn. 101; 3 Jur. 726.

An attorney, being in the position of an agent for his client, is not liable for the charges or expenses of a skilled witness retained by him, in pursuance of his general instructions, to make surveys, researches, calculations or experiments, with a view to examination as a witness in his client's cause. *Lee v. Eccrest*, 2 H. & N. 285; 26 L. J., Ex. 334.

The client, in such a case, is *prima facie* liable; and although it is competent to the attorney to make himself personally liable to pay the charges, there must be evidence of an express undertaking on his part so to do; and the mere fact that the attorney has employed the witness in such a way, and that in the course and conduct of the cause he has had communications with the skilled witness, that being in the course of his business as the attorney, is no evidence of such an undertaking. *Ib.*

A., an attorney, caused B. to be subpoenaed as a witness in a cause in which A. was attorney; and B., before he went to the assizes, asked A. who was to pay him, and A. said he would do so. After the assizes, at which B. attended and was examined, A.'s clerk, by the direction of A., gave B. an I O U for the amount of B.'s expenses and loss of time, which amount A. received from the opposite party, after the costs in the cause had been taxed:—Held, that B. might recover the amount from A. *Evans v. Philpotts*, 9 C. & P. 270.

Solicitor Guilty of Misconduct in Matters not before the Court.—The Court of Chancery will not order the costs of proceedings to be paid personally by the solicitor conducting them, on account of any misconduct unconnected with those proceedings, or upon an application not giving him proper notice of the charges against him. *Gregg, In re, and Prance, In re*, 9 L. R., Eq. 137; 39 L. J., Ch. 107; 23 L. T. 234; 18 W. R. 589.

Of Deeds Improperly Prepared.]—The Court of Chancery will, in a proper case, order a solicitor to pay the costs of litigation occasioned by deeds improperly prepared by him. *Baker v. Loader*, 16 L. R., Eq. 49; 42 L. J., Ch. 113; 21 W. R. 167.

Of Improperly-prepared Settlement.]—An aged lady of weak intellect made a voluntary settlement, which was set aside as it contained no power of revocation. The solicitor who drew it admitted that he had not expressly told her of the absence of such a power:—Held, that he must pay his own costs. *Henshall v. Fereday*, 27 L. T. 743; 21 W. R. 240. Affirmed, 29 L. T. 46; 21 W. R. 570.

Of Entering Appeal at Sessions.]—The solicitor, and not the client, is liable to the clerk of the peace for fees connected with the entering of an appeal at the sessions. *Langridge v. Lynch*, 34 L. T. 695.

Of Adjournment before Judge.]—Where accounts are being taken in chambers before the chief clerk, either party has a right to have an item which has been found against him adjourned before the judge without taking out a summons for that purpose. And where a question of principle is involved in a particular item it may be necessary to do this. But the ordinary practice is to wait till the account is completed, and then take the adjournment once for all before the judge. If a solicitor were to insist upon his right to take particular items before the judge in an unreasonable manner, the court might make him pay the costs personally. *Upton v. Browne*, 20 Ch. D. 731; 47 L. T. 289; 30 W. R. 817—C. A.

For Sheriff's Fees on Behalf of Execution Creditor.]—The solicitors of a judgment creditor, in the course of their duty as such solicitors, lodged a writ of fi. fa. at the office of the sheriff, with a request for execution, giving however no instructions as to the selection of any particular bailiff. The sheriff employed one of his officers to execute the writ, which the officer thereupon proceeded to do. On an action being brought by such sheriff's officer against the solicitors of the judgment creditor to recover his fees for executing the writ:—Held, that the solicitors were not liable to pay the fees; that the law, apart from the contract to pay them (express or implied), cast no such liability upon them; and that, from the mere fact that they in the ordinary course of their duty lodged the writ at the sheriff's office for execution, no such contract could be implied. *Maybery v. Mansfield* (9 Q. B. 745) followed. *Brewer v. Jones* (10 Ex. 655) dissented from. *Royle v. Busby*, 6 Q. B. D. 171; 50 L. J., Q. B. 196; 43 L. T. 717; 29 W. R. 315—C. A.

An attorney who issues a fi. fa. is not bound to pay the costs incurred by a sheriff's officer, who makes an unsuccessful levy under the writ. *Merriman v. Newman*, 20 W. R. 369.

An attorney of judgment creditors issued a fi. fa., and the warrant was placed in the hands of a sheriff's officer for execution; he thereunder seized goods which were claimed by other persons. An interpleader summons was taken out, and the officer was ordered to withdraw upon payment to him by the claimants of four

days' possession money. The officer was in possession of the goods seized eleven days. He afterwards sued the attorney for the fee for executing the warrant, and for seven days' possession money:—Held, that as the levy under the writ had produced nothing, he was not liable. *Id.*

A bailiff may recover from the attorney in the cause the costs of executing a ca. sa., although the bailiff was not specially nominated by the attorney. *Brewer v. Jones*, 10 Ex. 655; 3 C. L. R. 369; 24 L. J., Ex. 143; 1 Jur., N. S. 240.

When, under an order for the payment of costs in chancery, a writ of fieri facias had been issued and executed by the sheriff, the court refused to set aside the writ; but, believing it had been issued in bad faith, ordered the solicitor who had taken it out to pay all charges attending its issue and execution, and also the costs of a motion for that purpose. *Commonwealth Land, Building, Estate and Auction Company, In re, Hollington, Ex parte*, 43 L. J., Ch. 99; 29 L. T. 502; 22 W. R. 106.

A breach of such an undertaking, by the issue of writs against the debtor, was held to be contrary to good faith, and the solicitor was ordered to pay the expenses of issuing such writs, and of an application to recover them. *Id.*

Indemnifying Client for Costs.]—A solicitor, who, in order to induce a plaintiff to go on with a suit, agrees to indemnify him against the costs, thereby makes the suit his own, and becomes liable to pay the costs of the defendant; and this, notwithstanding that by the abatement of the suit by the death of the plaintiff before the hearing and the non-revivor by his executor, the remedy against the plaintiff's estate may be gone. *Fielden v. Northern Railway of Buenos Ayres Company, Jones, In re*, 6 L. R., Ch. 497; 40 L. J., Ch. 113; 23 L. T. 655; 19 W. R. 361.

When a solicitor engages to indemnify the plaintiff in a suit against the costs of the suit, and has the control of the suit, he will be ordered to pay to the defendants their costs of the suit when dismissed. *Jones, In re*, 6 L. R., Ch. 497; 40 L. J., Ch. 113; 23 L. T. 655; 19 W. R. 361.

VIII. COSTS.

1. BILL OF.

a. Delivery of Signed Bill.

When Necessary.]—A solicitor cannot recover for professional charges where a certain sum has been agreed on, without delivering a signed bill of costs pursuant to 6 & 7 Vict. c. 73, s. 37. *Wilkinson v. Smart*, 33 L. T. 573; 24 W. R. 42.

— Irish Solicitor Suing in England.]—An Irish attorney suing in England a person domiciled in England for business done in the Irish courts need not deliver a signed bill. *Kernaghan v. Wadson*, 3 C. L. R. 764.

— Salaried Clerk to Commissioners.]—An attorney who is appointed clerk to commissioners under a town improvement act, at a fixed yearly salary, need not deliver a signed bill of costs for business done by him as such clerk. *Bush v. Martin*, 2 H. & C. 311; 33 L. J., Ex. 17; 9 Jur. N. S. 851; 8 L. T. 509; 11 W. R. 1078.

What Sufficient.]—Whether, in an action for business done by an attorney, there has been a sufficient bill, and delivery thereof unto the party to be charged therewith, depends upon the circumstances of each case. *Gridley v. Austen*, 16 Q. B. 504; 18 L. J., Q. B. 337; 13 Jur. 680.

An attorney proved the delivery of his bill to the defendant, accompanied by the following letter to him: "As Mrs. H. has left your house, I beg to hand you my account, which I hope will be found satisfactory." Mrs. H. was a relation of the defendant, and the business done had reference to procuring a separation between her and her husband:—Held, not a sufficient delivery to the party to be charged. *Ib.*

Delivery of his bill of costs by an attorney to the servants of his client at his dwelling-house is sufficient. *M'Gregor v. Keiley*, 2 D. & L. 635; 3 Ex. 794; 18 L. J., Ex. 391.

It is not a sufficient delivery of a bill of costs for the attorney to shew it to the party charged, and then to take it away again, unless the attorney shewing it intends to leave it with the party, and merely takes it back at his request. *Phipps v. Dabney*, 2 L., M. & P. 180; 16 Q. B. 514; 20 L. J., Q. B. 273; 15 Jur. 797—Ex. Ch.

A delivery to the agent of the client appointed for that purpose is sufficient. *Bush, In re*, 8 Beav. 66.

Delivery of a bill unsigned, but accompanied by a letter signed by the solicitor and referring to the bill, is sufficient. *Ib.*

A bill, in which no name of a client as chargeable was introduced, was forwarded by post inclosed in a letter signed by the attorney and charging the defendant, and requesting a cheque for the amount:—Held, that the letter and bill must be taken in connexion and read together; and that this was a sufficient delivery. *Taylor v. Hodgson*, 3 D. & L. 115; 14 L. J., Q. B. 310; 10 Jur. 355.

A signed bill of costs, headed in the matter of business, but not addressed to any one, was inclosed in an envelope and sent by post to the client:—Held, a sufficient delivery to the party to be charged therewith. *Roberts v. Lucas*, 3 C. L. R. 987; 11 Ex. 41; 24 L. J., Ex. 227; 1 Jur., N. S. 527.

— In Case of Several Joint Contractors.]—

It is sufficient to deliver a bill of costs to one of several joint contractors. *Mant v. Smith*, 4 H. & N. 324; 28 L. J., Ex. 234.

In an action against three, who were promoters of a company, it appeared that the attorney sent to one of them, in a letter, a bill headed, "To the promoters of the Lancashire Cotton Mill Company:"—Held, a sufficient delivery. *Ib.*

In 1845, certain persons, one of whom was the defendant, formed themselves into a committee for establishing a railway company. They took offices in Moorgate-street, where a brass plate was put up, with the name of the company engraved thereon. In November, 1845, the company was provisionally registered. In January, 1846, the scheme was abandoned, and the defendant interfered no further with it. A sub-committee was afterwards appointed (by whom it did not appear), for the purpose of ascertaining and arranging the claims upon the committee-men; and in September, 1846, the plaintiff, a local attorney, and agent to the company, delivered a signed bill at the office in Moorgate-

street, addressed to "The Provisional Committee of the Company:"—Held, by Wilde, C. J., and Williams, J., that this was not a sufficient delivery at the office of business of the defendant, to charge him. Per Coltman, J., and Maule, J., that it was. *Blandy v. De Burgh*, 6 C. B. 623; 6 D. & L. 412; 5 Railw. Cas. 361; 18 L. J., C. P. 2; 12 Jur. 1005.

In an action on a bill against a member of the provisional committee of a railway company, it appeared that G. P., the attorney of the company, employed the plaintiff, another attorney, to do work for the company. The plaintiff sent his bill, headed "Northampton, Lincoln and Hull Railway, to B. D., debtor," by the post, to G. P. The bill was afterwards shewn to the defendant, who said that he had before seen a bill like it:—Held, first, that the bill sufficiently charged the defendant. *Phipps v. Dabney*, 2 L., M. & P. 180; 16 Q. B. 514; 20 L. J., Q. B. 273; 15 Jur. 797—Ex. Ch.

Held, secondly, that there was evidence for the jury that the bill was delivered to the defendant. *Ib.*

In an action against an acting member of a provisional committee of a projected railway company, for work done for the company as a local attorney and solicitor, it was shewn that a bill of the costs and charges sued for had been sent by him to the general solicitor of the company, who, more than a month before action brought, laid it before a meeting of the provisional committee at which the defendant was present:—Held, a sufficient delivery of the bill to the party to be charged therewith. *Eggington v. Cumberlege*, 1 Ex. 271; 5 Railw. Cas. 113; 16 L. J., Ex. 283; 11 Jur. 932.

In an action against one of the members of a provisional committee for work done as an attorney, the defendant pleaded that no signed bill had been delivered. A signed bill had been delivered to another member of the same committee at his place of business, and the defendant was appointed a committee-man after part of the work had been done:—Held, not such a delivery as to render him liable. *Edwards v. Lawless*, 5 Railw. Cas. 357; 6 D. & L. 105; 6 C. B. 329; 17 L. J., C. P. 293.

A bill in such case should be delivered either at the office of the company, or at least to some person who can reasonably be considered to represent the committee. *Ib.*

Amending Bill of Costs after Delivery and before Taxation.]—

A solicitor who has delivered his bill to the person chargeable therewith cannot afterwards avoid taxation by withdrawing it and delivering an amended bill, even though the person chargeable sent back the original bill, with suggested alterations, which were partly acquiesced in. *Heather, In re*, 5 L. R., Ch. 694; 39 L. J., Ch. 781; 18 W. R. 1079.

A solicitor cannot, upon objection being taken to the charges made in a bill of costs delivered by him, withdraw it and substitute another, unless the charges objected to were inserted upon misrepresentation or by mistake, or accident, and unless such circumstances can be proved, the original and not the substituted bill must stand for taxation. *Heather, In re* (5 L. R., Ch. 694), followed. *Chambers, In re* (34 Beav. 177), explained. *Holroyde and Smith, In re*, 43 L. T. 722; 29 W. R. 599; 45 J. P. 437.

See also *cases post*, col. 1905.

Proof of Delivery.—A person who had no place of business of his own directed communications to be addressed and sent to him at his attorney's office, where he occasionally called and wrote his letters. A bill of costs was addressed and left there for him more than a month before action brought thereon, yet he did not actually receive it till a fortnight before action:—Held, that there was evidence for the jury that the bill of costs was properly left there a month before action. *Spyer v. Bernard*, 8 L. T. 396.

A bill with an indorsement upon it, "March 4th, 1815, delivered a copy to C. D.," which indorsement was proved to be in the handwriting of a deceased clerk of the attorney's (whose duty it was to have delivered a copy of the bill) and proved to have existed at the time of the date, is evidence to prove the delivery of the bill. *Champneys v. Peck*, 1 Stark. 404. See also *Phipps v. Daubney*, *supra*.

Day of Delivery.—The day on which a bill is delivered is not to be reckoned as one of the days of the month given to the client. *Blunt v. Haslop*, 2 D. P. C. 982.

Order for—Who can Make.—An order for the delivery of an attorney's bill may be made by a judge of a different court from that in which the action is brought, although a judge of the latter court is attending at the chambers at the time such order is made. *Bennett v. Dean*, 4 M. & G. 638.

When it will be made.—The court, upon the application of the defendant, ordered the plaintiff's attorney to deliver his bill, though, upon the settlement of the action, it had been expressly agreed between the attorneys of the respective parties, that, on certain accommodation being given to the defendant, the plaintiff's attorney should receive 60%, as an ascertained amount of costs between attorney and client. *Tanner v. Lea*, 4 M. & G. 617; 5 Scott, N. R. 237.

P., under the pressure of legal proceedings taken against him by M. & Co. as attorneys for the National Bank of Scotland, entered into an agreement to pay 200l. to M. & Co. for their costs. It was alleged by P. that this payment, and a further payment to the National Bank, were made upon the terms that the bank should exhaust their remedies on certain acceptances given by third persons before taking proceedings against P., and that the bank was acting in violation of the agreement. P. thereupon applied that M. & Co. should be ordered to deliver to him a copy of their bill of costs in the matter of such proceedings. The court refused to grant the application. *Morris, In re, Pooley, Ex parte*, 27 L. T. 554; 21 W. R. 192.

Amendment of.—An order to deliver a bill of costs within fourteen days after notice was served, on June 30, without the indorsement as to liability to attachment. The order was again served, properly indorsed on July 19:—Held, that an attachment might issue for disobedience to it. *Gregg, In re, and Prance, In re*, 9 L. R., Eq. 137; 39 L. J., Ch. 107; 23 L. T. 234; 18 W. R. 589.

Disobedience of Solicitor to.—An attach-

ment will not be granted against an attorney for disobedience to a rule of court ordering him to deliver his bill within a time named, unless a demand is first made on him for his bill by one of the persons to whom he is by the rule ordered to deliver it. *Cutlin, In re*, 6 D. & L. 566; 7 C. B. 136; *S. P., Baster, In re*, 7 D. & L. 296.

On motion for an attachment for non-delivery of an attorney's bill to a party pursuant to rule of court, the affidavit should be made by the party himself; that of a third person is insufficient. *Potter v. Back*, 8 D. P. C. 872.

An action does not lie against an attorney for disobedience of the order of a judge for delivery of his bill of costs. *Dent v. Basham*, 9 Ex. 467; 2 C. L. R. 989; 23 L. J., Ex. 161; 18 Jur. 295.

An attachment is in such case the proper remedy. *Id.*

A rule nisi for an attachment against an attorney for non-delivery of his bill, pursuant to a judge's order, cannot be granted on the last day of a term. *Ashmore v. Ripley*, 2 Scott, N. R. 203. See *Bignall v. Gale*, 2 Scott, N. R. 582; 9 D. P. C. 393.

Where an attorney was arrested for not obeying a judge's order directing him to deliver his bill of costs, and also an account of all moneys received by him on account of his client, and he prayed to be discharged out of custody on the delivery of a bill and cash account, verified only by his clerk, who swore that the account gave credit for all sums received, as he was informed and believed (no affidavit verifying the account being made by the defendant himself), the court refused to discharge the defendant immediately out of custody, but directed the bill of costs and account to be referred to the master, who should report on what terms the defendant should be discharged. *Reg. v. Weston*, 8 Jur. 1122.

Signing—Where Sufficient.—A bill signed by one of two attorneys in partnership, thus: "For self and Robert Owen. James H. Dixon," is a sufficient signature. *Owen v. Seales*, 2 D., N. S. 304; 10 M. & W. 657; 12 L. J., Ex. 26; 6 Jur. 1000.

A solicitor furnished to his client a bill of costs not signed by the former; an arrangement having taken place, the solicitor agreed to accept a smaller sum, and wrote the following memorandum at the foot of his bill of costs: "The amount of these costs are settled for A. B.:"—Held, a sufficient subscription. *Allen v. Murphy*, 9 Ir. L. R. 305.

Letter accompanying Bill—Change of Firm—Signature of Assignee.—A bill of costs for professional work done in part by one firm of solicitors and in part by another firm who have succeeded to the practice of the first firm, is properly signed and delivered so as to enable the new firm to sue for and recover the whole costs, if, though itself unsigned, it is delivered together with a letter signed by the new firm referring to the bill. Professional work was done by a firm, which consisted at first of R. & P., and afterwards of P. & G., practising under the name of R. P. & G., the business and debts of R. & P. having been transferred to R. P. & G. Bills for the costs of the whole work were delivered unsigned, but inclosed with a letter signed by R. P. & G. referring to the bills:—Held, that

the bills were properly signed and delivered to enable R., P. & G. to sue for and recover the whole amount—as to the earlier items, as assignees of R. & P.; as to the latter items, in their own right. *Penley v. Anstruther*, 52 L. J., Ch. 367; 48 L. T. 664.

Availability of Unsigned Bills.]—A solicitor may sue out a commission upon a debt for costs, without having delivered a bill signed. *Howell*, *Ex parte*, 1 Rose, 312.

So, he may prove his bill under a commission, without delivering a signed bill. *Eicke v. Nokes*, M. & M. 303.

An attorney may set off a claim for costs, notwithstanding no signed bill has been delivered. *Brown v. Tibbitts*, 11 C. B., N. S. 855; 31 L. J., C. P. 206; 6 L. T. 385; 10 W. R. 465; *S. P.*, *Harrison v. Turner*, 10 Q. B. 482; 16 L. J., Q. B. 295; 11 Jur. 817.

— Consideration for Promissory Note.]—It is no answer to an action on a promissory note, that the note was given in respect of an attorney's bill not previously delivered pursuant to the statute. *Jeffreys v. Evans*, 3 D. & L. 52; 14 M. & W. 210; 14 L. J., Ex. 363.

A solicitor who delivers an unsigned bill is bound by it; but his client may either treat it as a nullity or waive the want of signature, and adopt it; though, after such waiver, the client cannot treat the bill as non-delivered. *Gedye, In re*, 14 Beav. 56; 20 L. J., Ch. 410; 15 Jur. 851.

Effect of Waiver of Signed Bill.]—See *Gerrard v. Arnold*, *post*, col. 1920.

b. Contents of.

Particularisation of Items, Court, and Name of Cause.]—Where a solicitor has been retained for and undertaken a particular business, his bill of costs for carrying that business through to its conclusion is but one bill. *Stokes v. Trumper*, 2 Kay & J. 232.

The 6 & 7 Vict. c. 73, s. 37, in requiring that a signed bill of costs should be delivered previously to an action by an attorney, means a bill so drawn out that all the items are charged in a taxable shape. *Philby v. Hazle*, 8 C. B., N. S. 647; 29 L. J., C. P. 370; 7 Jur., N. S. 125.

A bill, delivered under 2 Geo. 2, c. 23, s. 23, must have stated the name of the court in which the business was transacted, and also the name of the cause. *Lewis v. Primrose*, 6 Q. B. 265; 13 L. J., Q. B. 268; 8 Jur. 982.

So, under 6 & 7 Vict. c. 73, a bill must shew in what court the business was done. *Englehart v. Moore*, 15 M. & W. 548; 4 D. & L. 60; 15 L. J., Ex. 312.

And the name of every suit in which the business charged for was done. *Trimery v. Marks*, 16 M. & W. 843; 4 D. & L. 109; 17 L. J., Ex. 165; 11 Jur. 355.

Such bill is an entire thing; and if the same bill blends charges for work done in a court of equity with charges for work apparently done in a court of common law, without pointing out which, the client cannot judge or be advised whether he should refer the whole bill for taxation; and the charges in the same bills for equity business, though correctly stated, cannot be recovered. *Id.*

A bill must shew the court and the cause in

which the business referred to in it, or the greater part thereof, was done. *Martindale v. Falkner*, 2 D. & L. 600; 2 C. B. 706; 15 L. J., C. P. 91; 10 Jur. 161.

But where a bill contains items applicable to proceedings in the superior courts, but does not contain any statement from which it can be inferred in which of those courts the business was transacted, the bill is to be presumed to be a compliance with the act, unless the party charged thereby proves that any further information was practically required for the purpose of taxation, or shews that the name of the court in which business was done would have been of use to him. *Cooke v. Gillard*, 1 El. & Bl. 26; 22 L. J., Q. B. 90; 17 Jur. 137.

A bill is not in compliance with 7 & 8 Vict. c. 73, unless it furnishes reasonable information shewing in what cause each item charged for has been transacted. *Dimes v. Wright*, 8 C. B. 831; 7 D. & L. 292; 19 L. J., C. P. 137.

A bill must contain, in express terms, or by reasonable inference, a statement of the name of every cause, and of every court in which any part of the business charged for has been transacted. *Sargent v. Gannon*, 7 C. B. 742; 6 D. & L. 691; 18 L. J., C. P. 220.

— What is Sufficient.]—A bill of costs is sufficient if it gives such information as would enable the client to obtain advice as to the taxation of the bill; and it is not necessary that an attorney, whom the client may consult as to the expediency of having the bill taxed, should be able to say, without further inquiry, whether the charges are fair and reasonable. *Haigh v. Ousey*, 7 El. & Bl. 578; 26 L. J., Q. B. 17; 3 Jur., N. S. 634.

Where a bill contains items for proceedings such as would take place in the superior courts, it is not necessary that it should shew in which of those courts the business took place. *Id.*

The omission sufficiently to specify one or more items does not disentitle an attorney from recovering that portion of the bill which is unobjectionable. *Id.*

A bill is sufficient, if it gives sufficient materials for obtaining advice as to taxation. *Krene v. Ward*, 7 D. & L. 334; 13 Q. B. 515; 19 L. J., Q. B. 46; 14 Jur. 65.

A bill related to twelve actions, of which nine were shewn to be in the Exchequer and two in the Common Pleas; and as to the remaining one, the items for which amounted to 11*l.*, the court was not named, and there was not ground for any further intendment than that it was brought in one of the three superior courts of law:—Held, sufficient. *Id.*

A firm of solicitors had delivered a bill in which the business done was specified in six items; the sum of 25*l.* was put down opposite one item, and there stated to be the agreed amount of costs; no sum was opposite the other items. In an action for the amount of the bill:—Held, that no sufficient bill had been delivered under 6 & 7 Vict. c. 73, s. 37. *Wilkinson v. Smart*, 33 L. T. 573; 24 W. R. 42.

An attorney wrote to the plaintiff, also an attorney, instructing him to serve an inclosed writ of summons in an action of P. r. B., and to inform the defendant when he had done so, with an account of his charges. The plaintiff wrote in reply a letter headed P. r. B., informing the defendant that the writ had been served pur-

suant to his instructions, and that the charges were as below, enumerating the items. There was a similar correspondence respecting the service of notice of declaration in the same cause:—Held, that the plaintiff's letters, by reference to the writ, gave the necessary information as to the court in which the business had been done, and were, therefore, in accordance with the spirit of 6 & 7 Vict. c. 73, s. 37, within the decided cases. *Cosens v. Graham*, 12 C. B. 398; 21 L. J., C. P. 206; 16 Jur. 952.

A bill delivered shewed that a judgment had been recovered by the London and Westminster Bank against the Yorkshire Bank; that writs of scire facias were issued against the defendant and other shareholders of the latter bank; that they were consolidated; and that one of them, not naming which, was tried, and in one of the items, the technical name of the original cause in which the judgment was recovered was stated:—Held, that the proceedings were sufficiently specified. *Anderson v. Boynton*, 7 D. & L. 25; 13 Q. B. 308; 19 L. J., Q. B. 42; 14 Jur. 14.

— **Extra Costs.**—An attorney's bill, which contains, amongst other items, certain extra costs, not mentioning the taxed costs, is bad, even though, in an action on the bill, the jury find that the attorney has no claim for extra costs. *Pigot v. Cadman*, 1 H. & N. 837; 26 L. J., Ex. 134. But see *Haigh v. Ousey*, ante, col. 1904.

— **Names of Parties to be Charged.**—No particular form of heading being prescribed by the statute as essential to an attorney's bill, if the bill is sent with a letter, and the party to whom it is sent knows that it is intended to charge him, it is sufficient. *Champ v. Stokes*, 6 H. & N. 683; 30 L. J., Ex. 242; 7 Jur., N. S. 607; 4 L. T. 334.

A bill of costs, in order to comply with the statute, must clearly point out on the face of it, or by some writing connected with it, the party or parties to be charged. *Kiernan v. Brereton*, 17 Ir. C. L. R. 203.

Adding, Altering, or Amending Items.—By error and mistake, some items were omitted from, and others undercharged and overcharged in a bill referred for taxation. On petition by the executor of the solicitor, liberty was given to insert the omitted items, and increase those undercharged; but he was not allowed to decrease the overcharges. *Whatley, In re*, 20 Beav. 576.

An alteration of a bill referred for taxation cannot be made after it is brought in for taxation. *Davis v. Dysart (Earl)*, 21 Beav. 124; 25 L. J., Ch. 122; 1 Jur., N. S. 1153. Affirmed, 25 L. J., Ch. 322—L. J.

Except by consent. *Catlin, In re*, 18 Beav. 519.

A solicitor, who has included in his bill a lump or gross sum, may, on taxation, supply a detailed statement shewing how the sum is made up, and the master may allow such of the items contained in the detailed statement as are proper, not exceeding in the aggregate the gross sum originally charged; but the master can in no case allow more than the original amount. *Tilleard, In re*, 32 Beav. 476; 32 L. J., Ch. 765; 9 Jur., N. S. 1217; 8 L. T. 142; 11 W. R. 476.

A solicitor, after delivering his bill, may, before being served with an order for taxation, withdraw

it, and substitute another bill of a reduced amount. *Chambers, In re*, 34 Beav. 177.

See also cases ante, col. 1900.

What Charges can be Recovered.—See post, col. 1911.

c. Agreements as to Costs.

Validity of.—Payment in Proportion to Amount Recovered.—By an agreement between a solicitor and his client, it was stipulated that the former should have 5*l.* per cent. commission on the gross amount of property recovered by him for the latter, in addition to his costs:—Held, that the stipulation was contrary to the policy of the law, and that the solicitor must refund the amount received by him for commission, though included in a settled account. *Pince v. Beattie*, 32 L. J., Ch. 734.

An agreement entered into by a client with his attorney, to pay him at a certain specified rate for business to be done, is not binding; but the charges made according to such agreement may be allowed on taxation, if the master, on inquiring into them, considers them proper. *Draz v. Scroope*, 2 B. & Ad. 581; 1 D. P. C. 69.

On an application at the instance of a taxing master for the opinion of the judge under the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), as to the reasonableness of an agreement between a firm of solicitors and their clients, whereby the solicitors were to receive a percentage of 10*l.*, plus their ordinary charges, on the property to be recovered in an intended action, and in case no property should be recovered then only costs out of pocket with interest thereon, the court said it was unnecessary to give any opinion within the meaning of s. 4, since nothing had become payable to the solicitors under the agreement; but at the same time referred to s. 11, and intimated its opinion that the agreement was clear champerty. *Anon.*, 1 Ch. D. 573; 45 L. J., Ch. 47; 24 W. R. 38.

An agreement is bad, on the ground of maintenance, by which it is stipulated that an attorney, for carrying on a lawsuit pending to recover possession of an estate, shall advance the necessary moneys, and that the client shall, if he be successful, pay to the attorney, over and above the legal costs, a sum according to the benefit to the client from possession of the estate recovered. *Earle v. Hopwood*, 9 C. B., N. S. 566; 30 L. J., C. P. 217; 7 Jur., N. S. 775; 3 L. T. 670; 9 W. R. 272.

— **Payment out of Property which is the Subject of Suit.**—An agreement between a solicitor and his client, an illiterate person, for payment of his bills (taken at a given amount) solely out of the produce of some property, the subject of the suit, does not preclude taxation. *Ingle, In re*, 21 Beav. 275; 25 L. J., Ch. 169; 1 Jur., N. S. 1059.

An attorney entered into an agreement with a client to recover a debt due to the client, on the terms that the attorney should be allowed to retain for his trouble half the sum recovered. The agreement was entered into in France, and by the law of that country it was not illegal; but the debt was to be recovered in England:—Held, that the agreement was bad, as amounting to champerty; and that the attorney was bound to hand over the amount recovered to his client,

and was only entitled to retain his taxed costs. *Grell v. Levy*, 16 C. B., N. S. 73; 10 Jur. N. S. 210; 9 L. T. 721; 12 W. R. 378.

An agreement with an attorney, that he shall get his costs out of the fund in the suit, implies the condition that he is continued in the conduct of the suit until there is a fund in court available for costs. *Hollings v. Booth*, 2 F. & F. 220.

— **To Pay Specific Sum.**—In the absence of a plea of no signed bill delivered, it is competent to an attorney to rely upon a contract for a specific sum for business to be done, without producing a bill and shewing charges fair and reasonable amounting to or exceeding the stipulated sum. *Searth v. Rutland*, 1 L. R., C. P. 642.

But an agreement beforehand between a solicitor and his client to pay a specific sum in lieu of costs is illegal. *Brady, In re*, 15 W. R. 632.

An agreement between client and attorney, for the latter to be paid a lump sum in case of success attending some services of a professional character which the latter was retained to perform, is void. *Philby v. Hazle*, 8 C. B., N. S. 647; 29 L. J., C. P. 370; 7 Jur., N. S. 125; 2 L. T. 433; 8 W. R. 611.

Agreement by a solicitor to receive a fixed sum for costs for business hereafter to be done is not binding on the client, who is, notwithstanding payment under it, entitled to an order for the delivery of a bill of costs, and its taxation. *Newman, In re*, 30 Beav. 196.

— **To Transact Legal Business at Annual Salary.**—The solicitor of the city of London entered into an agreement with the corporation to transact their legal business at a fixed annual salary, including all emoluments, he being bound to account for all his receipts and payments, and to hand over to the corporation all costs recovered by him in excess of his disbursements and salary. By the agreement, he was also precluded from transacting business for any other client:—Held, that this agreement was not opposed to the 6 & 7 Vict. c. 73, s. 32, or to the policy of the law. *Galloway v. London (Mayor)*, 4 L. R., Eq. 90; 36 L. J., Ch. 978; 16 L. T. 407; 15 W. R. 1032.

— **Not to Charge Extra Costs.**—If an attorney as next friend employed to bring an action uses language to his client which leads him to believe that, in the event of his recovering, he will not have to pay extra costs, then, although such extra costs are unexpectedly heavy, he cannot recover them. *Collins v. Brook*, 1 F. & F. 407; 4 H. & N. 270; 28 L. J., Ex. 143.

— **To Charge only Costs out of Pocket.**—An attorney who undertakes to conduct a suit upon the terms that he is not to be paid unless it succeeds, is not entitled upon failure of the suit to recover money paid out of pocket. *Turner v. Tennant*, 10 Jur. 429, n.

An attorney, on being retained to conduct a cause, gave his client the following undertaking:—"Should the damages or costs not be recoverable in this action, I shall charge you costs out of purse only." The plaintiff obtained a verdict with damages and costs, but the defendant obtained his discharge under the Insolvent Debtors Act, and the plaintiff only received a dividend of about 7s. in the pound on the amount of his

judgment:—Held, that the attorney was not limited by his undertaking to costs out of pocket only. *Stretton, In re*, 14 M. & W. 806; 3 D. & L. 278; 15 L. J., Ex. 16.

An attorney undertook a prosecution for perjury on the defendant's behalf, and agreed not to charge him full costs, except money out of pocket. He disbursed a large sum towards carrying on the proceedings, but, by negligence, preferred a defective indictment, and, in consequence, the prosecution failed:—Held, that he could not recover for the disbursements. *Lewis v. Samuel*, 8 Q. B. 685; 15 L. J., Q. B. 218; 10 Jur. 429.

An agreement to charge costs only out of pocket does not preclude taxation. *Ransom, In re*, 18 Beav. 220.

An attorney gave to his client, who had commenced an action, the following undertaking:—"I undertake to carry on this action on having the cash provided for costs out of pocket; such costs not to exceed 15l., including counsel's fees; not any witnesses' expenses:"—Held, that this limited his right to costs to 15l. *Moon v. Hall*, 17 C. B., N. S. 760; 11 L. T. 274; 13 W. R. 83.

— **Where Costs have been Prepaid.**—Y. retained B., a solicitor, to conduct for him a suit in chancery; he afterwards borrowed a sum of money from B. upon mortgage, paying, however, out of the sum advanced, B.'s bill of costs due in respect of the suit up to that time, upon the agreement, that if any part of those costs should be afterwards decreed to be paid in the suit, B. would repay the amount to Y. Afterwards Y. became bankrupt, and obtained his certificate; and afterwards an order in the suit was made for the taxation of the costs of all the parties, and then an order for their payment, and under that order B. received his taxed costs out of a fund in court. In an action by the assignees of Y. for this amount:—Held, that the prepayment to B. of his bill of costs was a good consideration for the agreement to repay them in the event which had occurred; that the right of action on behalf of Y. passed to the assignees; and that they were entitled to recover the amount. *Morgan v. Taylor*, 5 C. B., N. S. 653; 28 L. J., C. P. 178; 5 Jur., N. S. 791.

An attorney being consulted by a client, who was under a charge of criminally assaulting a female child of tender years, obtained from the client 200l. to do the best he could for him, but with an understanding that no account of the transaction should be kept or rendered. Having succeeded in procuring his discharge, he was called upon after the lapse of nearly six years to deliver a bill of costs. The court refused to order him to do so, but referred the whole matter to the master, who in the result discharged the rule, but without costs. *Vann, In re*, 15 C. B. 341; 3 C. L. R. 126.

— **Written—33 & 34 Vict. c. 38, s. 4—By whom Signed.**—A document containing the terms of an agreement as to the amount of costs payable by a client to his solicitor, signed by the client only, is not an agreement in writing within s. 4 of the Attorneys and Solicitors Act, 1870. *Raven, In re, Pitt, Ex parte*, 45 L. T. 742; 30 W. R. 134.

A document containing the terms of an agreement as to the amount of costs payable by a client to his solicitor, assented to by the client,

but signed by the solicitor only, is not an "agreement in writing" within the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), s. 4, and the solicitor may be required to deliver a detailed bill of costs, to be taxed in the ordinary way. *Lewis, In re, Munro, Ex parte*, 1 Q. B. D. 724; 45 L. J., Q. B. 816; 35 L. T. 857; 24 W. R. 1017.

An agreement in writing between a solicitor and his client as to payment of costs is not valid by the Solicitors Act, 1870 (33 & 34 Vict. c. 28), s. 4, unless it is signed by both parties. *Id.*

Therefore, when a solicitor received a cheque, and gave a receipt with the words, "it is agreed that the entire costs shall be 300*l.*," added, which was signed by the solicitor, but not by the client:—Held, that the receipt was not an agreement in writing within the act, and an order made for delivery of a bill of costs for taxation. *Id.*

— **When Writing not Necessary.**—An agreement by an attorney with a client "to charge him nothing if he lost the action, and to take nothing for costs out of any money that might be awarded to him in such action," need not be in writing. *Jennings v. Johnson*, 8 L. R., C. P. 425.

Next Friend of Infant.—A person who signs an authority for the use of his name as next friend to an infant, becomes *prima facie* liable to pay the infant's solicitor's bill of costs, as well as those of the other side. *Flower, In re*, 19 W. R. 578.

If for any cause he disputes this liability, the solicitor may nevertheless obtain the common order for taxation against him without mentioning that fact, for the defence cannot be raised in the process of taxation, but requires independent proceedings to be taken to enforce it. *Id.* *S. P., Hawkes v. Cottrell*, 3 H. & N. 243; 27 L. J., Ex. 369.

Dispute as to Agreement constituting Agency or Partnership.—A bill in equity alleged a particular contract as to agency, but charged that the defendant pretended that the contract was one of partnership, and that upon either construction he was liable to account, and prayed for discovery of all matters of business relating to the agency; that he might deliver his bills of costs for taxation, and for an account. Demurrer overruled. *Ward v. Lawson*, 8 L. R., Ch. 65; 42 L. J., Ch. 273; 21 W. R. 88.

When there is an agreement as to costs, which only goes to the extent of the charges to be paid, the master may take that into consideration, and a bill in equity is not the proper remedy; but where the agreement goes farther, and there is, on the face of the bill, a dispute as to whether the agreement was one of agency or of partnership, a bill will be sustained. *Id.*

Charge by Memorandum.—A client wrote a letter to her solicitors authorizing them to sell the property of hers of which they were legal mortgagees by transfer, and to pay off the money due thereon, and on the transfer to them, and "all expenses due to you":—Held, that this memorandum gave the solicitors no charge in respect of their general bill of costs not relating to the mortgage. *Champney v. Burland*, 19 W. R. 913—L. J.

Guaranteeing Payment.—Where A. guaranteed the payment to B. (an attorney) within six months of "all costs for business done for C., or which B. may thereafter do in reference to or arising out of the affairs of C.," the delivery of a bill of such costs by B. to C. before the end of the six months is not a condition precedent to B.'s bringing an action on the guarantee against A.; and in such an action, therefore, an equitable plea alleging the non-delivery of a bill of such costs by B. to C. before the end of the six months, and want of notice to the defendant, before the same period, of the amount of such costs, is bad and no answer to the action. *Reece v. Cox*, 16 L. T. 327.

After Verdict by Consent.—Where, by consent of parties, a verdict is taken for a sum named for damages, and also all costs to which the plaintiff had been put relating to the subject-matter of the cause, as between attorney and client, without being subject to taxation, that agreement is to pay such a sum for costs as would be considered fair and reasonable on taxation in a liberal way, and not by the ordinary rule. *Young v. Walker*, 16 M. & W. 446.

d. Interest on.

When Allowed.—When an order has been made for payment of costs after taxation, a court of equity will order the payment of interest on the amount found due by the master's certificate, under 23 & 24 Vict. c. 127, s. 27, from the date thereof to the date of the application where the payment has been unavoidably delayed. *Carter v. Carter*, 8 L. T. 692.

By orders of the Court of Chancery, made in 1862 and 1863, costs to which a petitioner was entitled were directed to be added to the moneys secured to him by a deed, and it was ordered that they should stand as a charge upon the property comprised in the deed. The deed referred to was a grant, in consideration of 400*l.*, of an annuity of 40*l.* a year for lives to the petitioner, secured by the covenant of the grantor, and by a charge of the annuity upon specified real and personal estate. The order mentioned nothing about interest:—Held, independently of the Attorneys Act, 1860, that inasmuch as the costs were an equitable charge, they bore interest at 4*l.* per cent. *Lippard v. Ricketts*, 14 L. R. Eq. 291; 41 L. J., Ch. 595; 20 W. R. 898.

The court will give interest on costs payable out of a fund which cannot be immediately realized. *Campbell, In re*, 19 W. R. 427.

A solicitor took up his client's bills of exchange:—Held, that these payments could only be treated in the same light as any other ordinary cash advances made by the solicitor for the benefit of his client, and that the solicitor was not entitled to charge interest thereon. *May v. Biggenden*, 24 Beav. 207.

On Disbursements Prior to the Solicitors Act, 1870.—The Attorneys and Solicitors Act, 1870, is not retrospective, and, therefore, interest cannot be allowed under s. 17 on disbursements made prior to the passing of the act. *Ward v. Eyre*, 15 Ch. D. 130; 49 L. J., Ch. 657; 43 L. T. 525; 28 W. R. 712—C. A.

Agreement as to.—An agreement between a solicitor and a client without the intervention of

any other solicitor, to allow the solicitor interest on his bill of costs, cannot be maintained independently of subsequent acquiescence, unless it appears that he informed the client that the law allowed no such charge. *Lyddon v. Moss*, 4 De G. & J. 104; 5 Jur., N. S. 637.

But where the relation of solicitor and client had ceased after such an agreement had been made, and the client subsequently (having in the meantime had proper advice upon the subject of the agreement) entered into a second agreement with the solicitor in part founded on the former, which she did not seek to impeach till fourteen years after its date:—Held, that there had been such delay and acquiescence as to preclude any title to relief. *Ib.*

e. Taxation of.

i. What Taxable.

Generally—Before 6 & 7 Vict. c. 73, s. 37.]—There was no law to tax an attorney's bill of costs for working a country commission of bankruptcy, and, therefore, he was not bound under 2 Geo. 2, c. 23, s. 23, to deliver his bill one month before he brought an action to recover the amount of it. *Harpur v. Williams*, 9 D. P. C. 618; 2 M. & G. 815; 3 Scott, N. R. 97; 5 Jur. 342.

In an action on an attorney's bill, by his executor, the court, before the 6 & 7 Vict. c. 73, had no power to refer the bill for taxation, though it contained taxable items. *Williams v. Griffith*, 2 D., N. S. 281; 10 M. & W. 125.

The court possessed no jurisdiction to compel the taxation of an agency bill, either at common law, or under the 2 Geo. 2, c. 23, and 12 Geo. 2, c. 13, even where a suit was pending against the client for the recovery of the amount. *Cardale v. Bull*, 4 Q. B. 611; 7 Jur. 847.

It is not necessary that an attorney should deliver a signed bill of costs a month before action, where the defendant had been admitted an attorney after the bill became due, but before commencement of the action. *Windsor or Winsor v. Herbert*, 7 M. & W. 375; 9 D. P. C. 237; 5 Jur. 730.

— **Since 6 & 7 Vict. c. 73, s. 37.]—C.**, an attorney in London, employed B., also an attorney in London, to defend a person indicted at Cambridge for bribery at an election there in 1841 and 1842. B. delivered to C. two bills of costs, and in 1847 he delivered copies of the bills duly signed:—Held, that the bills were taxable. *Billing v. Coppock*, 1 Ex. 15; 5 D. & L. 126; 16 L. J., Ex. 265.

A bill for work done by one attorney, as agent for another, is taxable. *Smith v. Dimes*, 7 D. & L. 78; 4 Ex. 32; 19 L. J., Ex. 60; 13 Jur. 518; contra *Simons, In re*, 2 D. & L. 500; 14 L. J., Q. B. 41; 9 Jur. 227; and *Simons, In re*, 3 D. & L. 156; but these cases are untenable.

A bill of fees claimed by a solicitor, simply as steward of a manor, is not taxable. *Allen v. Aldridge*, 5 Beav. 401; 13 L. J., Ch. 155; 8 Jur. 435.

The rights of a party to have a signed bill delivered and to have it referred for taxation are correlative. *Curling v. Sedger*, 6 Scott, 678.

A charge for business done at the quarter sessions is taxable. *Sylrester v. Webster*, 9 Bing. 388; 2 M. & Scott, 506; 1 D. P. C. 708; *S. P.*, *Clark v. Donovan*, 5 T. R. 694; 1 Esp. 187.

So, for prosecuting an extent. *Re v. Collingridge*, 3 Price, 280.

So, fees for holding a court-leet as steward of a manor. *Lethbridge v. Laxmore*, 1 D. & R. 511; *S. C.*, nom. *Laxmore v. Lethbridge*, 5 B. & A. 398.

A charge for preparing a warrant of attorney renders a bill taxable. *Painter v. Linsell*, 8 Scott, 453; 8 D. P. C. 250.

Procuring an appearance to be entered by a proctor in the Consistory Court before 20 & 21 Vict. c. 77, s. 96, was not a taxable item. *Marris, In re*, 2 A. & E. 582.

A charge for serving subpoenas is not a sufficient item to enable the court to refer a bill to taxation. *Predder v. Smith*, 1 W., W. & H. 51; 2 Jur. 205.

Drawing an affidavit of debt and getting it sworn is a taxable item. *Winter v. Payne*, 6 T. R. 645.

A dedimus potestatem is a sufficient item to enable the court to refer an attorney's bill for taxation. *Prickett, Ex parte*, 1 N. R. 266.

When one solicitor asks another to look up some old deeds in his possession, and offers to pay his costs, the bill for these costs is taxable. *Bowen, In re*, 41 L. J., Ch. 327; 20 W. R. 395.

Costs of a sequestration as between solicitor and client will not be taxed. *Shapland, In re, Hunt, Ex parte*, 23 W. R. 40.

Unsigned.]—An attorney's bill may be referred to taxation, though not signed by him, or inclosed in a letter signed by him, and referring to it. *Young v. Walker*, 16 M. & W. 446; *S. P.*, *Pender, In re*, 2 Ph. 69; 16 L. J., Ch. 25; 10 Jur. 891.

Bill for Election Business.]—A court for the registration of voters is not a court within 6 & 7 Vict. c. 73, s. 37, and therefore the jurisdiction of the Court of Chancery to tax a solicitor's bill of costs for electioneering business is not ousted if the bill contains an item for business done in such a court. *Andrew, In re*, 17 Beav. 510; 23 L. J., Ch. 129; 17 Jur. 1145.

The charges of solicitors employed as electioneering agents are taxable. *Osborne, In re*, 25 Beav. 353; 27 L. J., Ch. 532; 4 Jur., N. S. 296.

Where, for a parliamentary election, a solicitor was employed as canvassing agent, other persons being employed as legal agents:—Held, that his bills were not liable to taxation. *Oliver, In re*, 36 L. J., Ch. 261; 15 W. R. 331.

A solicitor, who was appointed returning officer for the election of a school board under the Elementary Education Act, 1870, sent in a bill of his charges in the form of a solicitor's bill of costs, including both the election charges proper and attendance at the board after the election was over:—Held, that, as he had by the form of his bill of costs constituted himself solicitor to the board, the bill was liable to taxation. *Jones, In re*, 13 L. R., Eq. 336; 41 L. J., Ch. 367; 20 W. R. 395.

Soliciting New Bill in Parliament.]—In a bill of 3441., only 31. 3s. 7d. was for business not connected with soliciting a new bill in parliament:—Held, that, notwithstanding the 10 & 11 Vict. c. 69, and 12 & 13 Vict. c. 78, a court of equity was not deprived of its jurisdiction to order taxation. *Strother, In re*, 3 Kay & J. 518; 26 L. J., Ch. 695; 3 Jur., N. S. 736.

Solicitor Employed to Transfer Stock—Distringas.]—An attorney employed to transfer stock found that a distringas had been entered at the bank to prevent the transfer. He thereupon made several inquiries respecting the transactions on behalf of his client, and prepared a notice to the solicitor of the bank to file a bill in consequence of the writ being entered:—Held, that his charges were not taxable items between him and his client, it not appearing that the distringas originated in any suit, or that the business had reference to any proceeding in a court. If the distringas had been in a suit, the steps taken by the attorney would have formed taxable items. *Nicholas v. Hayter*, 2 A. & E. 348.

Preparing Securities.]—A defendant, who had borrowed money of the plaintiff, was, by an agreement, to which the plaintiff's attorney was the attesting witness, to pay the expenses of that agreement, and of the various securities, including a warrant of attorney:—Held, that the plaintiff's attorney, who had prepared those securities, was compellable to deliver his bill to the defendant to be taxed. *Painter v. Lidsell*, 6 Bing. N. C. 197; 8 D. P. C. 250.

Lands Clauses Consolidation Act—Costs Already Paid—No Order as of Course.]—An order for the taxation of the costs of conveyances under s. 83 of the Lands Clauses Consolidation Act, 1845, cannot be obtained where the costs have been paid. Such an order for taxation cannot be sustained as an order of course under the Attorneys Act. *Somerville, Ex parte, South Eastern Railway Company, In re*, 23 Ch. D. 167; 52 L. J., Ch. 438; 48 L. T. 416; 31 W. R. 518.

Judge has to Decide.]—It is for the judge, to whom application is made for an order to tax a bill of costs, to decide whether or not such bill contains taxable items. *Johnson, In re*, 1 Jur., N. S. 1140.

Plaint on Equity Side of County Court—Taxation by Chancery Division.]—By the combined operation of the Attorneys and Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 37, and the Judicature Act, 1873, s. 16, as modified by the County Courts Act, 1856, s. 36, the costs as between solicitor and client in a county court action in which the claim exceeds 20*l.* may be taxed in the High Court of Justice: consequently, the costs as between solicitor and client in a county court administration action may be taxed in the Chancery Division. *Worth, In re*, 18 Ch. D. 521; 50 L. J., Ch. 262; 44 L. T. 462; 29 W. R. 371.

Order to Tax—Undertaking to Pay.]—When the client of a solicitor becomes bankrupt, and the solicitor does not prove for the amount of his bill in the bankruptcy, the assignee cannot obtain an order to tax without giving an undertaking to pay the whole amount of the bill. *Elmslie, In re*, 9 L. R., Eq. 72.

P., being sued by N. for a debt, compromised the matter on certain terms, and consented to pay N.'s attorneys, M. & Co., their costs of the action, agreed at 200*l.* No bill of costs was delivered. On appeal against a refusal of the master to order delivery of M. & Co.'s bill of costs to P. for the purpose of taxation under 6 &

7 Vict. c. 73, s. 38:—Held, that the statute did not apply to such a state of circumstances, and that the master was therefore right in refusing to make the order. *Morris, In re, Pooley, Ex parte*, 27 L. T. 554; 21 W. R. 192.

Deed Reciting that Certain Amount is Due.]—When, on the transfer of a mortgage, the transferee has paid the amount claimed and accepted a deed, which recites that a certain sum is due to the original mortgagee for costs, and contains an assignment of that sum as well as of the principal and interest, he cannot afterwards obtain an order for taxation of the mortgagee's solicitor's bill. *Gold, In re*, 24 L. T. 9; 19 W. R. 343.

Between Solicitor and Client—Cestui que Trust.]—An action will not lie by a cestui que trust against the solicitor of his trustees for taxation of a bill of costs paid by the trustees, the proper remedy being by application, under s. 29 of the Solicitors Act, 1843. *Spencer, In re, Spencer v. Hart*, 51 L. J., Ch. 271; 45 L. T. 645; 30 W. R. 296—C. A.

ii. Who is Entitled to Tax.

Person Liable to Pay.]—A party agreeing to pay the costs of the attorney of another, as between attorney and client, is entitled to have the attorney's bill taxed. *Sadler v. Palfreyman*, 3 N. & M. 599; 1 A. & E. 717.

A person, who is the real plaintiff in a cause, but who is obliged to sue in the name of another, may apply to have his attorney's bill in the cause taxed. *Masters, In re*, 4 D. P. C. 18; 1 H. & W. 348.

"A Party Interested or Chargeable."]—A bankrupt who has obtained his discharge and who has become entitled to the surplus of his estate, all the creditors having been paid in full, is not entitled, under the 39th section of the Solicitors Act (6 & 7 Vict. c. 73), to obtain the taxation of a bill of costs paid by the trustee in the bankruptcy. The trustee in bankruptcy does not stand in the position of a trustee for the bankrupt. *Leadbitter and Harvey, In re*, 10 Ch. D. 388; 48 L. J., Ch. 242; 39 L. T. 286; 27 W. R. 267—C. A.

A defendant in an action agreed, through his solicitor, to pay the plaintiff's solicitor a fixed sum for his costs and for his trouble in promoting a composition between the defendant and his creditors. Within twelve months of the payment of the amount the defendant took out a summons for the delivery by the plaintiff's solicitor of a bill of his costs:—Held, that no fraud or undue pressure upon the defendant having been established, there were no special circumstances within 6 & 7 Vict. c. 73, ss. 37, 38, 40, 41, to warrant the application. *Heritage, In re*, 3 Q. B. D. 726; 47 L. J., Q. B. 509; 38 L. T. 509; 26 W. R. 633.

Semble, that the defendant was not a party "chargeable" within 6 & 7 Vict. c. 73, so as to be entitled to make the application. *Id.*

Ratepayers.]—Where an attorney is retained by a surveyor acting under the Highway Act, 5 & 6 Will. 4, c. 50, the parties who contribute to a rate out of which the attorney's bill is paid are not "persons liable to pay the bill," so as to

entitle them to apply for its taxation. *Barber, In re*, 3 D. & L. 244; 14 M. & W. 720; 15 L. J., Ex. 91; 9 Jur. 976.

Outlaw.]—An outlaw cannot, for his own benefit, move to have an attorney's bill taxed. *Maunder, In re*, 6 Q. B. 867; *S. P., Ford, In re*, 1 B. C. Rep. 88; 10 Jur. 757.

One Executor—Bill Delivered to Executors Jointly.]—One of two executors, although beneficially interested in the testator's estate, cannot obtain an order in equity for taxation of a bill of costs delivered to the executors jointly. *Perkins, In re*, 14 L. J., Ch. 168.

Solicitor has no absolute Statutory Right.]—A solicitor has no absolute statutory right to have the amount of his charges ascertained by taxation. *Ditton, Ex parte, Woods, In re*, 13 Ch. D. 318; 42 L. T. 161; 28 W. R. 402—C. A.

— Jurisdiction of Registrar.]—A solicitor who tenders a proof in the bankruptcy of his client, in respect of costs due to him by the client, is not entitled to insist on having his bill referred for taxation to the taxing-master, but the registrar has jurisdiction to determine the amount due, availing himself if necessary of the advice of the taxing-master. *Ib.*

Party and Party—Third Party.]—A person liable to pay costs as between party and party is not entitled to a reference for taxation under the third party clause (s. 38) of the Attorneys Act, 1843. *Cudwell, In re*, 52 L. J., Ch. 246; 31 W. R. 335.

Cestui que Trust.]—An action will not lie by a cestui que trust against the solicitor of his trustees for taxation of a bill of costs paid by the trustees, the proper remedy being by application, under s. 29 of the Solicitors Act, 1843. *Spencer, In re, Spencer v. Hart*, 51 L. J., Ch. 271; 45 L. T. 645; 30 W. R. 296—C. A.

iii. Order to Tax after Payment or Delay.

Payment.]—On the day fixed for the completion, at a solicitor's office, of the sale of a mortgaged property belonging to a former client, the solicitor delivered to the former client, who was in somewhat embarrassed circumstances, his bill of costs. The client and his new solicitor attended, and in order to prevent the postponement of the completion, allowed the solicitor to retain the amount of his bill, but under protest. The bill contained overcharges to a considerable amount:—Held, that the bill was paid under circumstances of pressure, and that it must be taxed. *Pugh, In re*, 1 De G., J. & S. 673.

To obtain an order for taxation of a bill of costs which has been paid, it must be shewn that there has been undue pressure and overcharge, or overcharge amounting to fraud. *Foster, In re, Walker, Ex parte*, 29 L. J., Ch. 625; 6 Jur., N. S. 687—L. J.

A solicitor delivered his bill of costs to his client, made out in double columns, one being the amount allowed on taxation, which he refused to accept when tendered. The client then paid the larger sum to obtain his papers:—Held, notwithstanding the payment, that he was entitled to an order to tax the bill, as he had been

constrained to pay the larger sum by the refusal of the solicitor to accept what he himself had stated that he was legally entitled to. *Tosland, Ex parte, Lett, In re*, 31 Beav. 488; 32 L. J., Ch. 100; 8 Jur., N. S. 1119; 7 L. T. 303; 11 W. R. 15.

When a client has paid his solicitor's bill under pressure before the delivery of the bill he is entitled to have it taxed at any time before the expiration of a year. *Felder, In re, Bailey, Ex parte*, 40 L. J., Ch. 615; 25 L. T. 56.

A mortgagee's solicitor delivered his bill to the mortgagor nearly three weeks before the day of settlement. At the meeting the bill was objected to, but the solicitor refused to complete without full payment, and the mortgagor paid it under protest:—Held, that this was not sufficient to authorize a taxation, although there might be some overcharges. *Harrison, In re*, 10 Beav. 57; 16 L. J., Ch. 170; 11 Jur. 197.

Semble, that the principle laid down in *Harrison, In re (supra)*, and some other cases, that an attorney's bill which has been paid ought not, except where there has been fraud or misconduct, to be referred for taxation, unless there have been both pressure and overcharge, cannot be supported. *Dearden or Deardon, In re*, 9 Ex. 210; 23 L. J., Ex. 14; 17 Jur. 993.

Where a bill is paid in order to obtain possession of deeds, and an intention is at the same time expressed to have the bill taxed, an order will be made to refer the bill for taxation. *Ib.*

— More than Twelve Months After.]—The court has no power to refer a bill of costs for taxation, when such bill has been paid more than twelve calendar months before the application has been made to the court to refer. *Binn v. Hey*, 1 D. & L. 661; 13 L. J., Q. B. 28; 7 Jur. 1154.

An application to tax must be within twelve calendar months after payment. *Ross v. Wilton*, 7 Jur. 1133; *S. C., Wilton, In re*, 13 L. J., Q. B. 17.

Where twelve calendar months have elapsed since payment of a solicitor's bill of costs by his client, such bill, although not signed by the solicitor, is prohibited by 6 & 7 Vict. c. 73, s. 41, from being referred to taxation. *Sutton and Elliott, In re*, 11 Q. B. D. 377; 52 L. J., Q. B. 752; 49 L. T. 436—C. A.

An account settled between a client and her solicitor, including arranged bills of costs, decreed to be opened and the bills referred for taxation in an action instituted nearly two years after such settlement, on the grounds of undue influence, and that the charges were improper and excessive, and that much of the business done was unnecessary, and ought not to have been done. *Watson v. Rodwell*, 7 Ch. D. 625; 47 L. J., Ch. 418; 26 W. R. 524. Affirmed, 11 Ch. D. 150; 48 L. J., Ch. 209; 39 L. T. 614; 27 W. R. 265—C. A.

— What is Payment.]—By the word "payment," in 6 & 7 Vict. c. 73, is meant a payment in money, and the section is not complied with by the delivery of a bill of exchange or a promissory note. *Harries, In re*, 1 D. & L. 1018; 13 M. & W. 3; 13 L. J., Ex. 259; 8 Jur. 453.

A solicitor retained the amount of his bill out of moneys in his hands belonging to the client, and the client, on receiving the balance

of the moneys, but before the bill had been delivered, signed an account in which the total amount of the costs was an item, and gave a receipt for the balance:—Held, that there had been no payment of the bill within the meaning of 6 & 7 Vict. c. 73, s. 41; and that the client was entitled to have the bill taxed more than a year after the retainer of the costs and the signature of the account. *Street, In re*, 10 L. R., Eq. 165; 39 L. J., Ch. 495; 22 L. T. 429.

Held, also, that a special application was necessary under the circumstances. *Ib.*

Where a bill has been delivered and security given for the amount, that is equivalent to payment, for the purpose of precluding taxation without special circumstances. *Turner, Ex parte*, 5 De G., Mac. & G. 540; 24 L. J., Ch. 71.

Where a solicitor pressed for the amount of his bill, but offered an opportunity of taxation, and apprised his client that it would be difficult to have the bill taxed after payment, and the client chose to pay without taxation, and afterwards applied to have the bill taxed without shewing overcharges amounting to fraud:—Held, that the application ought to have been dismissed with costs. *Ib.*

A solicitor delivered to his client a bill of costs together with a cash account, shewing in favour of the client a balance of 1*l.* 18*s.* 1*d.* The client, upon applying for such balance, was by inadvertence paid 1*l.* 16*s.* only:—Held, that there had been no payment of the bill, and that the client was entitled to the common order for taxation. *Angere, In re*, 46 L. T. 280. Reversed in C. A., 26 S. J. 417.

— **Bill Settled in Account—Pendency of Indictment for Forgery against Managing Clerk**—“**Special Circumstances.**”—Where a charge of felony is pending against the managing clerk of a solicitor, on the trial of which the bona fides and legality of the charges in a professional bill of costs delivered by the solicitor to his client, the prosecutor, at a period anterior to the charge of felony, may directly affect the question of the accused's guilt or innocence, the court will, on the application of the solicitor, as a matter of common justice, order such bill to be referred to taxation, notwithstanding that it had been settled in account between the parties some months before. So held per Kelly, C. B., and Pollock, B., *Fisher, In re*, 42 L. T. 261.

Per Pollock, B.: Whether it would or not be a sufficient ground whereon to call on the court to pursue the course which, under the statute, it has the power of pursuing with regard to the taxation of a solicitor's bill, that it would be a proceeding in aid of either the prosecution or defence when criminal proceedings are pending; yet the fact that such proceedings are pending cannot be a ground for taking away the right which every solicitor of the court has, as an officer of the court, to ask to have a bill which he has delivered referred to taxation, the only question for consideration being whether there are “special circumstances” which in the opinion of the court or judge shew that taxation ought to take place. *Ib.*

— **Review of Taxation by Judge.**—Where an attorney's bill has after payment been referred to the master for taxation by a judge's

order, the court will not review the matter in a case where the amount of the bill is not stated, inasmuch as the matter in dispute may not be worth the expense of the proceedings. *Dearden or Deardon, In re*, 9 Ex. 210; 23 L. J., Ex. 14; 17 Jur. 993.

Delay—After Twelve Months.—A preliminary agreement between a solicitor and his client on obtaining a loan on mortgage, no bill of costs having been delivered, is illegal, and the delivery of the bill and taxation were ordered more than twelve months after completion of the transaction and payment of the balance to the client. *Cawley, In re*, 18 W. R. 1125.

A solicitor lent his client 200*l.* on a promissory note. The note was made out for 210*l.*, the addition being alleged to be for costs on the transaction:—Held, that the client was not precluded from requiring a bill of costs, shewing how the sum of 10*l.* was made up, by the lapse of nearly three years and subsequent money transactions between the parties. *Ib.*

Three months after a solicitor to a company had delivered his bill the company was ordered to be wound up. Subsequently he delivered a further bill to the official liquidator. More than twelve months elapsed, and the solicitor carried in a claim for payment of both bills:—Held, that both bills must be referred for taxation before they could get paid. *Marseilles Extension Railway and Land Company, In re, Evans, Ex parte*, 11 L. R., Eq. 151; 40 L. J., Ch. 197; 23 L. T. 647; 19 W. R. 379.

A solicitor having delivered successive bills of costs relating to the same suit and on the same retainer, and having received from his client payments on account, though not in discharge of any one bill, sent a signed letter to the client, stating that he should increase some of his former charges, and containing a list of additions to certain items in his previous bills:—Held, that, under the circumstances of the case, the letter, being a correction of the earlier bills, must be treated as bringing them down as one entire bill to that date, and that taxation of the whole must be directed, though most of them had been delivered more than twelve months before the application. *Cartwright, In re*, 16 L. R., Eq. 469; 42 L. J., Ch. 735; 28 L. T. 891; 21 W. R. 891.

The court will not after a lapse of twelve months go into questions of excessive charge, unless it can be proved that there are items of gross overcharge amounting to fraud. *Elmslie, In re, Tower Subway Company, Ex parte*, 16 L. R., Eq. 326; 42 L. J., Ch. 570; 28 L. T. 731; 22 W. R. 54.

If a fund on which a solicitor has a lien for costs is paid into court within a year after his bill has been delivered, on payment of the fund out of court the owner of the fund has a right to have the bill taxed, although more than a year may have elapsed since it was delivered. *De Bay v. Griffin*, 10 L. R., Ch. 291; 23 W. R. 737.

B. acted as attorney for G. in an action which resulted in G.'s recovering a large sum. A bill was filed by persons claiming through G. to establish their equitable title to that sum, and in February, 1871, the defendant in the action paid the sum recovered into court to the credit of the cause in which B. was a defendant in respect of his lien. In March, 1871, B. delivered

his bill of costs in the action to G. In December, 1873, the suit was compromised and the fund distributed, except a sum kept in court to answer B.'s claims:—Held, that B. was not entitled to have his bill of costs paid out of the fund without taxation, however the case might have stood, if his bill had been delivered at such a time that G.'s right to tax it would have been lost before the fund was paid into court. *Id.*

— **Special Circumstances which warrant Application to Tax—6 & 7 Vict. c. 73, s. 37.]**

—A defendant in an action agreed, through his solicitor, to pay the plaintiff's solicitor a fixed sum for his costs and for his trouble in promoting a composition between the defendant and his creditors. Within twelve months of the payment of the amount the defendant took out a summons for the delivery by the plaintiff's solicitor of a bill of his costs:—Held, that no fraud or undue pressure upon the defendant having been established, there were no special circumstances within 6 & 7 Vict. c. 73, ss. 37, 38, 40, 41, to warrant the application. *Heritage, In re*, 3 Q. B. D. 726; 47 L. J., Q. B. 509; 38 L. T. 509; 26 W. R. 633.

The continuation of the relationship of solicitor and client is not of itself such a special circumstance that the court will on account of it order the taxation of a bill of costs twelve months after it has been delivered. *Elmslie, In re, Tower Subway Company, Ex parte*, 16 L. R., Eq. 326; 42 L. J., Ch. 570; 28 L. T. 731; 22 W. R. 54.

The special circumstances under which a judge may, by 6 & 7 Vict. c. 73, s. 37, refer an attorney's bill for taxation after verdict, must, in general, be circumstances newly come to the knowledge of the party, and, upon learning which, he must apply promptly to the court. *Whicher, In re*, 13 M. & W. 549; 2 D. & L. 407; 14 L. J., Ex. 78.

Where a party does not apply for the taxation of a bill of costs within a month after the bill is delivered, but waits till an action is brought against him, and then makes terms and obtains time from the attorney, these are such special circumstances as will induce the court not to refer a bill for taxation. *Wilton, In re*, 13 L. J., Q. B. 17; *S. C., Ross v. Wilton*, 7 Jur. 1133.

To entitle a client to an order for taxation of his solicitor's bill of costs after the expiration of twelve months from its delivery, he must shew either pressure or gross overcharge, amounting to what a court of equity designates as fraud. But it is not necessary to shew both. *Strother, In re*, 3 K. & J. 518; 26 L. J., Ch. 695; 3 Jur., N. S. 736.

On application by a residuary legatee to tax a bill of costs of the solicitors of the executors after payment, no case of pressure or actual fraud was made out, nor of very gross overcharge, but various items were of a considerably greater amount than would have been allowed to the executors in a suit to administer the estate:—Held, that taxation had been rightly ordered, for that overcharges of this nature were overcharges amounting to fraud, within the technical meaning of the term. *Dickson, In re*, 26 L. J., Ch. 89; 3 Jur., N. S. 29.

The special circumstances requisite to warrant referring an attorney's bill to taxation after

twelve months, need not be circumstances brought to the knowledge of the client after the expiration of the twelve months, so as to account for the delay. *Robinson, In re*, 3 L. R., Ex. 4; 37 L. J., Ex. 11; 17 L. T. 179; 16 W. R. 110.

Charges in the bill, which *prima facie* appear excessive, are a sufficient special circumstance. *Id.*

The mere fact that an action is pending upon an attorney's bill does not give a judge or the court jurisdiction to refer the bill for taxation after the lapse of a year, without special circumstances. *Cowdell v. Neale*, 1 C. B., N. S. 332; 26 L. J., C. P. 37; 2 Jur., N. S. 1248.

iv. *Costs of.*

By whom Payable in First Instance.]—An action had been brought by an attorney to recover the amount of bills of costs, including costs incurred on an appeal to the House of Lords. The usual order having been obtained on the part of the defendant for taxation, that portion of the bills which related to business done in the House of Lords was referred to the proper taxing officer of the House:—Held, that, as between the parties, the plaintiff was in the first instance bound to pay the fees necessary for obtaining the certificate of that officer. *Becke v. Cattell*, 4 Scott, N. R. 246.

Taxation at instance of Solicitor—Costs of Reference where Party Chargeable does not Attend.]—A solicitor proceeding under the common order for taxation (which is in accordance with s. 37 of the Solicitors Act, 1843) must pay the costs of reference if the party chargeable does not attend the taxation. A person does not attend by writing letters to the taxing-master. *Upperton, In re*, 30 W. R. 840.

Waiver of Delivery of Signed Bill—Effect of.]

—Where, on reference of an attorney's bill to taxation, the parties agree to waive the delivery of a signed bill, *prima facie* they waive the operation of the statute as to payment of the costs of taxation. *Gerrard v. Arnold*, 6 D. P. C. 336.

Less than One-sixth Disallowed.]—If a less sum than one-sixth is taken off on taxation, the plaintiff's attorney will not be entitled to the costs of taxation if he has wilfully inserted any item which he must know ought not to have been charged. *Holderness v. Barkworth*, 3 M. & W. 341; 6 D. P. C. 392; 1 H. & H. 21; 2 Jur. 490.

The court disallowed an attorney his costs of taxation, where his bill had been reduced by nearly one-sixth (20l. 8s. 4d. being taken off a bill of 160l. 18s. 2d.), though the charges were made *bona fide*. *Hodge v. Bird*, 6 M. & G. 1020; 7 Scott, N. R. 993; 1 D. & L. 956; 13 L. J., C. P. 87; 8 Jur. 317.

A judge's order, referring an attorney's bill to taxation, reserved to the client the right of disputing his liability to the whole or any part of it on certain grounds. The order did not contain any direction to the master to tax the costs of the reference. The master taxed off less than a sixth of the whole bill, and taxed the attorney

the costs of the reference :—Held, that the client was liable to pay the costs of the taxation, whatever might be the event of the questions referred. *Shaw, In re*, 2 L. M. & P. 214; 20 L. J., Q. B. 280.

Where an attorney's bill, on which an action is commenced, is referred to taxation, and the defendant succeeds in the action in consequence, a sum, though less than one-sixth, being taxed off, so as to reduce the amount of the charges below advances made, the costs of that taxation shall not be allowed to the defendant in taxing the costs of the cause. *Wilson v. Knapp*, 4 Jur. 220.

— **Liability of Executrix.**—After the death of a plaintiff in an action, his executrix obtained an order for referring the bill of the plaintiff's attorney to taxation, less than a sixth having been taxed off :—Held, that the executrix was liable to the costs of the taxation. *Jefferson v. Warrington*, 7 M. & W. 137; 8 D. P. C. 880.

— **By Arrangement of Parties.**—Where an attorney's bill is referred for taxation, and, after a discussion before the master, the parties come to an arrangement as to the amount, and the master thereupon makes his allocatur for more than five-sixths of the original amount of the bill, the attorney is not entitled to the costs of taxation. *Laurie v. Bartlett*, 1 B. & L. 730; 13 L. J., Q. B. 145; 8 Jur. 474.

More than One-sixth Disallowed.—Where a writ was indorsed pursuant to the rule of court in that behalf, with a certain amount of debt and costs, and that amount, together with 5s. more, was paid within the four days prescribed by the rule, and more than one-sixth of the costs, including the 5s., was disallowed on taxation :—Held, not within the rule, and therefore the defendant was not entitled to the costs of taxation under it. *Ward v. Gregg*, 5 D. P. C. 729; W. & D. 351.

Where an unsigned bill, delivered by an attorney, was, with his consent, referred to taxation, at which he attended, when more than a sixth was struck off, the court, under its general jurisdiction, ordered him to pay the costs of taxation, although the order contained no undertaking on the part of the client to pay the amount found to be due. *Peters v. Sheehan*, 1 D., N. S. 943; 10 M. & W. 213; 12 L. J., Ex. 177; 6 Jur. 739.

Where an attorney's bill is referred for taxation after action brought upon it, he is liable to pay the costs of taxation, if more than one-sixth is struck off. *Wollett, In re*, 12 M. & W. 504; 1 D. & L. 593; 13 L. J., Ex. 121; 8 Jur. 130.

An attorney must pay the costs of taxation, if more than one-sixth is taxed off, although the client has not paid the amount of the taxed costs. *Nrale v. Postlethwaite*, 8 D. P. C. 100.

— **Liability of Bankrupt Solicitor's Assignees.**—Assignees of a bankrupt solicitor are personally liable for the costs of taxation of a bill of costs delivered by them, where more than one-sixth is taken off. *Peers, In re*, 21 Beav. 520.

— **Discharge under Insolvent Debtors Act of Solicitor pending Taxation.**—Pending the taxation of an attorney's bill, he petitioned for and obtained his discharge under the Insolvent Debtors Act. More than a sixth was taxed off. The attorney was personally liable for the costs of the taxation, notwithstanding his discharge. *Whalley v. Williamson*, 6 M. & G. 269; 6 Scott. N. R. 948.

— **Order made Conditional to Undertaking being given—Informality in Undertaking.**—A judge's order directed an attorney's bill to be taxed, upon an undertaking being given, signed by the then churchwardens. The undertaking was signed by a part only of the previous churchwardens; but the attorney having made no objection, the costs were taxed, and more than a sixth deducted. An order for the attorney to pay the costs of the taxation having been obtained :—Held, that the attorney could not apply to set it aside, on the ground that the undertaking was not signed in compliance with the judge's order. *Doe d. Goodland v. Frankland*, 2 D., N. S. 975; 12 L. J., Q. B. 249; 7 Jur. 671.

Mode of Calculating the One-sixth.—Where the master disallows some and adds other items, in order to apply the rule as to the one-sixth, the bill delivered is to be increased by the sum added, and then reduced by the sum disallowed. *Hartley, In re*, 2 Jur., N. S. 448; S. C., nom. *Reg. v. Eastwood*, 6 El. & Bl. 285.

Moneys specifically paid by a client to his solicitor for counsel's fees and stamps, as they were required, are properly included in his bill, in calculating the sixth on a taxation. *Metcalf, In re*, 30 Beav. 406.

— **Legacy Duty Paid by Solicitor.**—A payment for legacy duty made by a solicitor for his client, ought, for taxation, to be included in his cash account and not in his bill of costs, and therefore such a payment is not to enter into the computation, in considering whether a sixth is taxed off. *Haigh, In re*, 12 Beav. 307; 19 L. J., Ch. 79; 14 Jur. 340.

After Payment of Money into Court.—An attorney having brought an action on his bill, the defendant obtained an order to tax it, and after taxation paid money into court. The plaintiff took the money out of court, and taxed his costs of the cause :—Held, that the master was right in treating the costs of taxing the bill as costs in the cause. *Thomas v. Swansea (Mayor)*, 11 M. & W. 83; 2 D., N. S. 1003; 12 L. J., Ex. 281.

v. Proceedings to Tax.

Jurisdiction—Of Master.—The master has no power to inquire into the fact whether the business charged for was agreed to be done for costs out of pocket. *Evans v. Taylor*, 2 D. P. C. 349.

Although the master has no jurisdiction to determine whether acts done by the attorney were useful, he may determine what were necessary. *Heald v. Hall*, 2 D. P. C. 163.

But the master has no jurisdiction to disallow items on the ground that, in respect of the business to which they refer, the attorney was guilty of negligence. *Matchell v. Parkes*, 9 M.

& W. 767; 1 D., N. S. 924. See also *Williams v. Nicholas*, *post*, col. 1925.

Of Court.—Where costs are taxable in chancery, and an action is brought to recover them, the court of common law has no authority to make any order for the taxation of such costs, or for payment of costs of such taxation. *Barradaile v. Nelson*, *post*, col. 1925.

Bill must be Verified by Affidavit.—Upon a motion to tax a bill, the court will not take notice of its contents, unless verified by affidavit or the rule has been drawn up on reading the bill. *Wilton, In re*, 13 L. J., Q. B. 17; *S. C.*, *nom. Ross v. Wilton*, 7 Jur. 1133.

The Whole Bill must be Taxed.—Where an action was brought to recover an attorney's bill for several distinct businesses, as to some part of which the client disputed his liability on account of the negligence of the attorney, but the other part was not disputed; the court refused to order the master to tax the disputed part of the bill separately from the rest, a judge's order to tax having been obtained on the usual terms. *Jones v. Roberts*, 2 D. P. C. 656; 4 Tyr. 310.

Solicitor taking Partner.—C. acted as solicitor for X., and before his bill was paid he took P. into partnership. X. then paid the bill by cheque to the order of C. and P. and received an acknowledgment in their joint names, but in P.'s handwriting. He then took out an order to tax the bill as against C. and P. They then wrote to him informing him that C. alone was interested in the bill, and requested him to get the order altered so as to be against C. alone, but this he declined to do:—Held, that the order must be discharged, C. consenting to an order against himself alone. *Curnot, In re*, 40 L. J., Ch. 608.

By Summons.—Special applications for delivery and taxation of a bill, and for payment over to the applicant of the balance of the cash account, must be made by summons, and not by petition. *Edmonds, In re*, 25 L. T. 152; 19 W. R. 1048.

An application to tax an attorney's bill ought to be made at chambers. *Bassett v. Giblett*, 2 D. P. C. 650.

Order will not be made on Ex parte Application.—An order for the taxation and payment of a bill (after a previous order to change the attorney), cannot be made upon an ex parte application. *Gillow v. Rider or Ryder*, 15 C. B. 729; 3 C. L. R. 263.

Omitting to Tax.—Action on an attorney's bill. Verdict for the plaintiff, subject to taxation of the bill within the first five days of the ensuing term. The defendant having omitted to tax the bill within that time:—Held, that the plaintiff was entitled to sign judgment, and tax his costs. *Tucker v. Neck*, 4 Bing. N. C. 113; 6 D. P. C. 23; 3 Hodges, 242.

Order to Tax—Client Allowed to Question Retainer.—Where a judge at chambers, in the exercise of his discretion in referring an attorney's bill for taxation, reserves to the client liberty to question the retainer and restraining the attorney

from bringing an action upon the bill pending the reference, the court will not interfere without strong ground for so doing. *Pyne, In re*, 5 C. B. 407.

Form of Rule.—The rule for referring it to the master to tax the costs of taxation against an attorney is absolute in the first instance, and the form of the rule is, that the attorney shall pay the costs, when taxed, to his client. *Neale v. Postlethwaite*, 8 D. P. C. 100.

Set-off.—In a plaint in a county court, the defendant pleaded a set-off for work done as an attorney. Before the day of hearing the plaintiff obtained a judge's order to tax the bill. The judge of the county court, on the hearing, allowed the set-off. The court refused to rescind the order for taxation. *Cooper, Ex parte*, 14 C. B. 663.

Cross-examination.—A solicitor may be cross-examined on an affidavit made by him in support of a bill of costs under an order for taxation, and it is the duty of the examiners to take such examination. *Flux, Argles and Rawlins, In re*. 44 L. J., Ch. 375.

Attachment not without Notice.—Under an order to tax made in 1873, a balance was found due from a solicitor in respect of moneys received by him, and ought to have been paid within twenty-one days from the 21st of August, 1875:—Held, that the case was governed by Rules of Court, 1875, Ord. XLIV. r. 2, and that an attachment for non-payment could not be issued without notice to the solicitor. *Anon.*, 1 Ch. D. 445.

Discretion in the Court as to the Delivery up of Papers.—In making an order for taxation under the Solicitors Act (6 & 7 Vict. c. 73), s. 38. it is discretionary with the court whether or not to add the order for the delivery up of papers. *Jarman, Ex parte*, 4 Ch. D. 835; 46 L. J., Ch. 485.

A solicitor delivered to his client a bill of costs incurred in pending suits, in which he afterwards, with his client's knowledge, incurred further costs. While the suits were still pending, the client obtained an order of course for taxation and delivery up of papers, whereupon the client delivered a bill for the further costs. On a motion to discharge the order on the ground that the solicitor had a lien on the papers for further costs:—Held, that the order should be amended so as to include both bills. *Id.*

Semble, that the proper form of order in such a case would be a simple order for taxation, without ordering the papers to be delivered up. *Id.*

Mistake in Order—Time for Application to Vary.—An order of course was obtained for the taxation of a solicitor's bill of costs, and the taxation was commenced and virtually completed:—Held, that an application to vary such order, on the ground of an alleged mistake appearing on the face of it, ought to have been made directly the mistake was discovered, and not delayed until after the virtual completion of the taxation. *Tibbitts, In re*, 30 W. R. 177.

Reviewing Taxation.—Where, in an action

on a bill of costs in chancery, a verdict was given for the amount, subject to taxation, and a judge's order was made to tax the bill, and the bill was afterwards taxed by an officer of the Court of Chancery, the court refused to review the taxation. *Borradale v. Nelson*, 2 C. L. R. 740; 14 C. B. 655; 23 L. J., C. P. 159; 18 Jur. 431.

Where, in a bill of costs, several charges of a discretionary nature were entered, some too low and some too high, the latter of which the master reduced to their proper amount, but refused to raise the former, the court refused to review the taxation. *Eyre v. Shelley*, 8 M. & W. 154; 5 Jur. 439.

If an action is brought to recover the amount of an attorney's bill, and it is referred to taxation by the usual order obtained at the instance of the client, the master has power to determine whether certain items were necessary, and the court will not review his taxation on the ground that such disallowance is an excess of jurisdiction. *Williams v. Nicholas*, 1 D., N. S. 841.

In an action to recover a large sum a verdict having been found for the defendant, and a new trial directed on payment of costs, the master, on taxing the defendant's costs, disallowed the briefs and fees to the junior counsel, and the consultation fees (on the ground that the briefs disclosed no witnesses for the defence), and also the journeys and attendance of the defendant's attorney (from Bath):—The court directed a review of the taxation, on an affidavit shewing that the circumstances of the case justified the employment of two counsel, and the attendance of the attorney from the country. *Maddison v. Bacon*, 5 Bing. N. C. 246; 7 Scott, 207; 3 Jur. 248.

Taxation on Higher Scale, Grounds for—Appeal.]—See post, col. 1926.

vi. Amount Recoverable.

Limit where not more than 20l. claimed—County Court Act, 1856, s. 36, not applying in Superior Court.]—The 36th section of the County Court Act, 1856, which fixes a limit to costs, as between solicitor and client, in actions where not more than 20l. is claimed, applies to county court actions only. *Copp, In re, Drew, Ex parte*, 6 Q. B. D. 607; 50 L. J., Q. B. 233; 44 L. T. 48; 29 W. R. 390—C. A.

—Work done before and after Action—Scale of Costs and Charges in Actions under 20l.]—

The scale of costs and charges in actions in the county court under 20l. framed in pursuance of 38 & 39 Vict. c. 50, s. 8, does not prevent a solicitor from recovering charges other than those specified in the scale for work done out of court before and after the commencement of an action, although there has been no agreement in writing for further costs under 19 & 20 Vict. c. 108, s. 36. *Emanuel, In re, or Druiff v. Emanuel*, 9 Q. B. D. 408; 51 L. J., Q. B. 490; 30 W. R. 735.

6 & 7 Vict. c. 73, s. 38, only applies as between Solicitor and Client, not between Party and Party.]—A creditor's petition to wind up a company having been withdrawn on payment of the debt, the solicitors for the company un-

dertook by letter with the petitioning creditor's solicitors "to pay all proper costs and charges incident to and recoverable under such petition, such costs, in case of difference, to be taxed." The amount of the costs not being agreed upon, the company obtained, *ex parte*, an order to tax under the third party clause (s. 38) of the Attorneys and Solicitors Act, and served it on the solicitors of the petitioning creditors:—Held, on motion to discharge the order, that the undertaking was a personal undertaking to pay the costs, such costs being costs as between party and party; that the 38th section of the act had reference only to the taxation of costs as between solicitor and client; that the order, therefore, was irregular, and must be discharged with costs to be paid by the company. *Hartley, In re* (30 Beav. 620), considered and explained. *Grundy, Kershaw and Company, In re*, 17 Ch. D. 108; 50 L. J., Ch. 467; 44 L. T. 541; 29 W. R. 581.

Scale of Taxation.—The promoters of a tramway company obtained a provisional order from the Board of Trade authorizing the construction of the tramway under the Tramways Act, 1870. Their solicitors sent in their bill of costs:—Held, that the bill must be taxed according to the chancery and not the parliamentary scale. *Morley, In re*, 20 L. R., Eq. 17; 32 L. T. 524; 23 W. R. 532.

An appeal will lie from a decision by a judge under rules of the Supreme Court (Costs), August, 1875, Ord. VI. r. 3, as to the taxation of costs on the higher or lower scale; but where he has exercised his discretion, the Court of Appeal will not interfere unless he has proceeded on a wrong principle or made a manifest slip. *Terrell, In re*, 22 Ch. D. 473; 47 L. T. 588; 31 W. R. 208—C. A.

An action for the recovery of large estates, the statement of claim in which set up a case of concealed fraud to avoid the operation of the Statute of Limitations, was dismissed without costs. The taxing-master in taxing the costs of the plaintiff as between the solicitor and a person who had guaranteed their payment, taxed them on the lower scale as coming within Ord. VI. r. 1, and Bacon, V.-C., affirmed his decision:—Held, that the fact of the issue of fraud being raised was not a sufficient reason for directing the costs to be taxed on the higher scale, but that, to take the case out of the general rule that the costs of an action for the recovery of land are to be taxed on the lower scale, the solicitor must shew that the case was one requiring extra skill or labour. *Id.*

Costs of Counsel at Chambers.]—The Supreme Court Special Allowances, r. 14, that "as to counsel attending at judges' chambers, no costs thereof shall in any case be allowed unless the judge certifies it to be a proper case for counsel to attend," applies to taxation of costs between solicitor and client as well as between party and party. *Chapman, In re*, 10 Q. B. D. 54; 47 L. T. 426—C. A. Affirming 9 Q. B. D. 254; 51 L. J., Q. B. 336; 52 L. J., Q. B. 75; 31 W. R. 266.

The rule in question is made for the protection of clients, and the fact that the client has himself expressly authorized the attendance of counsel ought not of itself to induce the judge to certify that the case is a proper one for coun-

sel to attend. *Id.* See also *Holmes v. Penny*, *post*, col. 1931.

Propriety of Items of Charges.—[An attorney employed to defend an action, and receiving from his client the debt and costs, for the purpose of being paid over to the plaintiff, is not entitled to make that sum an item in his bill, so as to increase the amount of it. *Woollison v. Hodson*, 2 D. P. C. 360.

When there are matters in a bill which have no relation to business as an attorney,—as money advanced to the client,—the master, upon reference to him, should strike those items out, and proceed to tax the rest. *Wardle v. Nicholson*, 1 N. & M. 355; 4 B. & Ad. 469.

An attorney is entitled to recover money lent, without reference to his business of attorney. *Mowbray v. Fleming*, 11 East, 285.

He is not bound to insert in his bill the amount paid to a proctor employed by him for his client. *Franklin v. Featherstonhaugh*, 3 N. & M. 779; 1 A. & E. 475.

Items of the costs taxed in two actions, and paid by the attorney, and for which he had received no specific payment from his client, are properly inserted in the bill, and need not be in the cash account. *Harrison v. Ward*, 4 D. P. C. 39; 1 H. & W. 353.

Two sued by the same attorney for separate damages resulting to each from the same tortious act; both causes were tried at the same assizes, and verdicts found for them:—Held, that each was entitled to the costs of drawing the brief in his case, notwithstanding each brief contained the same pleadings and statements of facts. *Oppenshaw v. Whitehead*; *Mucklow v. Whitehead*, 9 Ex. 384; 2 C. L. R. 553; 23 L. J., Ex. 97.

In an action on an attorney's bill, an order for better particulars was obtained on payment of costs:—Held, that a charge for drawing the bill, as part of the costs, was properly disallowed. *Jones v. Roberts*, 2 D. P. C. 374; 4 Tyr. 310. See also *Holmes v. Penny*, *post*, col. 1931.

Unusual Costs—Shorthand Notes—Communication to Client.—[Where a solicitor proposes to incur unusual expense in the course of an action, such as taking shorthand notes of the evidence or procuring the attendance of experts and scientific witnesses, it is his duty to point out to his client that such expense might not be allowed on taxation as between party and party, and might therefore have to be borne by the client whatever might be the result of the trial. Therefore where the solicitor had omitted such duty, he was not allowed on taxation as between solicitor and client the costs of shorthand notes of the evidence, although the client authorized him to employ a shorthand writer to take such notes and used and otherwise availed himself of them after they had been so taken. *Blyth & Fanshawe, In re, Wells, Ex parte*, 10 Q. B. D. 207; 52 L. J., Q. B. 186; 47 L. T. 610; 31 W. R. 283—C. A.

Letters before Action.—[An attorney will not be allowed, on taxation of costs, to charge for more than one letter before action, under any circumstances. *Capel v. Staines*, 2 M. & W. 850; 5 D. P. C. 770; M. & H. 265; 1 Jur. 740.

— When Solicitor is Party to the Action.]

—[An attorney who is a party to a suit is not entitled to charge a guinea for attending the trial, though he acts as his own attorney, unless it appears that it was necessary that he should attend in person. *Leaver v. Whalley*, 2 D. P. C. 80.

— Briefs Badly Drawn.]—The master having disallowed half the costs of preparing briefs, on the ground that the plaintiff's attorney had prepared them with unnecessary haste, the court declined to interfere. *Bucknall v. Boybell*, 7 Scott, 171.

— Charges for Addressing and Posting Documents for Client.]—A solicitor is not entitled to charge a profit upon the addressing and posting of documents for his client. *Ditton, Ex parte, Woods, In re*, 13 Ch. D. 318; 42 L. T. 161; 28 W. R. 402—C. A.

— Costs of obtaining Act of Parliament.]—An act of a railway company provided that the company should pay the costs of obtaining the act and preparatory thereto:—Held, that the solicitor's costs as to parts of the original scheme, which were abandoned before the passing of the act, were properly included. *Tilleard, In re*, 23 L. J., Ch. 765; 8 L. T. 587; 11 W. R. 764—L. J.

— Abstract of Title.]—The proper charges in respect of an abstract of title are 6s. 8d. per sheet for drawing, and 3s. 4d. for copying. *Broadhurst v. Darlington*, 2 D. P. C. 38.

— Consequent upon Sale of Real Estate.]—Where a vendor's attorney disclosed outstanding terms upon an abstract, although a marketable title might have been shewn by taking it up at a subsequent date:—Held, that upon taxation of the attorney's costs, he was entitled to be paid his charges incurred in getting in the outstanding terms. *Quicke, Ex parte*, 2 Scott, 184; 1 Hodges, 202.

But the attorney was not allowed his charges for attested copies of a will, which, by the conditions of sale, were to be given at the vendor's expense, such a condition not being unusual. *Id.*

— Plaintiff Suing in Formâ pauperis.]—Where a plaintiff sues in formâ pauperis, and obtains a verdict, whatever is the amount recovered, nothing is to be allowed on taxation of costs in respect of fees to his counsel, or by way of remuneration for the services of his attorney. *Dooly or Dewley v. Great Northern Railway Company*, 4 El. & Bl. 341; 3 C. L. R. 110; 24 L. J., Q. B. 25; 1 Jur. N. S. 228.

Where Solicitor is Uncertificated.]—See *post*, col. 1931.

How Affected by Agreement.]—See *ante*, col. 1906.

2 Recovery of Bill by Action.

Recovery of Excess after Taxation.]—A plaintiff having paid to an attorney the amount of his bill, cannot, after the reduction of the bill

by taxation, recover the difference by action. *Gouer v. Popkin*, 2 Stark. 85.

Where it appears that an attorney has been overpaid by his client, but the usual clause, requiring the attorney to refund any sum found to have been overpaid, is omitted in the order for taxation, the court will not afterwards supply the omission. *Peace v. Jones*, 8 D. P. C. 14.

Where attorneys bring an action to recover the amount of their signed bill of costs, which bill contains some items which they are not entitled to recover, the action may be maintained for the residue. *Pilgrim v. Hirschfeld*, 9 L. T. 288; 12 W. R. 51.

Consolidation of Different Actions.—Where an attorney did different kinds of professional work for a client, and after all the business was transacted, sent in a bill for one part of the business, and subsequently sent in a bill for the other part, and commenced an action for the first part of the business before the expiration of the month in respect of the delivery of the second bill, and after the expiration of that month commenced an action for the other part, the court made an order for the consolidation of the two actions. *Beardsall v. Cheetham*, El., Bl. & El. 243; 27 L. J., Q. B. 367.

Partner not a Solicitor.—An attorney carried on business under the firm of A. & Son; the son was not, in fact, a partner, but acted as clerk to his father, and received a salary:—Held, that A. might maintain an action in his own name to recover from a client the amount of a bill for business done. *Kell v. Nainby*, 10 B. & C. 20; 5 M. & R. 76.

Set-off—Joint and Separate Debt—Nominal Partner.—Spurr, an attorney, practised under the firm of Spurr & Chambers. Chambers, although an attorney, was not, in fact, a partner of Spurr, but only a clerk. Cass was a client of the nominal firm, and owed a bill of costs; and Spurr was personally liable to Cass on a bill of exchange of less amount than the bill of costs. Spurr, without joining Chambers, sued Cass for the amount of the bill of costs; and Cass pleaded never indebted, and set off the sum due on the bill of exchange. Cass brought a cross action on the bill of exchange, and Spurr set off the amount of the bill of costs. The two actions being tried together, it was found by the jury that Chambers had authorized Spurr to contract on behalf of himself and Chambers with Cass, and that Spurr had so contracted:—Held, that Spurr, being the real principal, might take the benefit of the contract with Cass, and sue alone, and set off the bill of costs in the action against him. *Spurr v. Cass*, *Cass v. Spurr*, 5 L. R., Q. B. 656; 39 L. J., Q. B. 249; 23 L. T. 409.

After Delivery or Taxation.—After an attorney's bill has been delivered a month, and no application has been made to have it taxed, the client will not be permitted to question the reasonableness of the items before a jury. *Williams v. Frith*, 1 Dougl. 198; *S. P.*, *Hooper v. Till*, 1 Dougl. 198; *Anderson v. May*, 2 B. & P. 237; 3 Esp. 167.

If an action is brought on an attorney's bill, and after action it is taxed on the application of the defendant, without anything being inserted

in the order to tax, as to the question of liability:—Semble, that the defendant could not afterwards deny his liability; but if in the order power was reserved to the defendant to amend his pleas after the taxation, he might still deny his liability, by so pleading as to raise that question. *Baker v. Meryceather*, 2 C. & K. 737.

In an action on an attorney's bill, when there is evidence of a general retainer, the judge will not allow the bill to be taxed in detail by the jury, although particular heads or items of charge not necessarily arising out of the retainer may be disallowed in toto, as not having been authorized by the client. *Dunn v. Hales*, 1 F. & F. 174.

After Paying Money into Court.—A defendant may, after a payment into court, shew that the work was to be done for costs out of pocket, and not for an attorney's accustomed fees and charges. *Jones v. Reade*, 5 D. P. C. 216; 5 A. & E. 529; 1 N. & P. 18; 2 H. & W. 382.

Payable out of Particular Funds.—By a private act of parliament, the expenses attending its passing were directed to be paid out of the tolls raised or levied, or to be raised under it. The attorney who prepared and solicited the act sued the commissioners named in it for the amount of his bill:—Held, that he was bound to shew that there were sufficient funds in the hands of the commissioners, which had been raised or levied by tolls or otherwise, to satisfy his demand. *Andrews v. Dally*, 1 M. & P. 490; 4 Bing. 566.

Where Client has Prevented Work being done.—A declaration alleged that by an agreement in writing between the plaintiff, who was an attorney, and the defendant, it was agreed that the defendant should be prepared to sell certain gas works, and that the plaintiff should be employed to carry out the sale, and be paid a commission of 4l. per cent. on the purchase-money in lieu of costs. Breach, that the defendant would not permit the plaintiff to carry out the sale, and had refused to pay any commission. Plea, that the agreement was for services to be done by the plaintiff as the defendant's attorney and solicitor within the meaning of the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), of which s. 8 enacts that "no action shall be brought upon any such agreement":—Held, that the plea was bad, and the action maintainable, for s. 8 was intended to prevent actions to recover the remuneration agreed upon in lieu of costs when the work had been done, and did not apply to an action for refusing to allow the attorney to do the work and earn the remuneration. *Rees v. Williams*, 10 L. R., Ex. 200; 44 L. J., Ex. 116; 32 L. T. 462; 23 W. R. 550.

When Solicitor has Discontinued Action.—An attorney is not entitled to recover his bill of costs for conducting an action which he has not terminated, but which has been discontinued, unless he shews satisfactory reasons for not proceeding with it, and gives his client reasonable notice thereof. *Nicholls v. Wilson*, 14 M. & W. 106; 2 D., N. S. 1031.

Solicitors to Company acting Ultra vires.—Solicitors to a company cannot recover costs in

respect of business undertaken with full knowledge that it is beyond the powers of the company, nor can they appropriate money, belonging to the company and received by them on a general account, to the payment of such costs. *Phœnix Life Assurance Company, In re*, 1 H. & M. 433; 8 L. T. 728; 11 W. R. 984.

Plaintiff Suing in Formâ pauperis.—A claimant in a chancery suit in March, 1851, retained an attorney, to conduct it upon the ordinary terms. In July an order was obtained from the master of the rolls, by which the claimant was made a pauper. In December an order was obtained from the master of the rolls, by which the claimant was dispaupered from the 31st of October preceding:—Held, that the order of December operated between the parties only of the chancery suit, and not as between attorney and client, and therefore that the attorney was not entitled to charge for services rendered by him whilst the first order was in force, viz., between July and December. *Holmes v. Penny*, 9 Ex. 584; 2 C. L. R. 1004; 23 L. J., Ex. 132.

Held, also, that the attorney was entitled to recover for payments made to the law stationer of parchment and paper, but not for copying. *Id.*

Held, also, that he could not recover for counsel's fees which had not been paid. *Id.*

When Uncertificated.—The 6 & 7 Vict. c. 73, s. 26, merely prevents an attorney or a solicitor from maintaining any action or suit for the recovery of his costs in respect of business done by him while uncertificated; but when a client has paid his solicitor his costs of business done while uncertificated, and the client's adversary is ordered to pay his taxed costs, the client is entitled to have the costs so paid to his solicitor included in the taxation. *Hope, In re*, 7 L. R., Ch. 766; 41 L. J., Ch. 797; 27 L. T. 670; 20 W. R. 1026.

An attorney who does not hold a certificate within the meaning of 6 & 7 Vict. c. 73, cannot recover his costs in respect of proceedings in the Probate Court. *Austin v. Davies*, 28 L. T. 557; 21 W. R. 884.

Under the Attorneys and Solicitors Act, 1874 (37 & 38 Vict. c. 68), s. 12—which enacts that no costs, fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by any person who acts as an attorney or solicitor without being duly qualified so to act shall be recoverable in any action, suit or matter by any person or persons whomsoever—the successful party in a legal proceeding cannot, where the solicitor employed by him was uncertificated recover his costs or disbursements from the party otherwise liable. *Fowler v. Monmouthshire Railway and Canal Company*, 4 Q. B. D. 334; 48 L. J., Q. B. 457; 41 L. T. 159; 27 W. R. 659.

The 6 & 7 Vict. c. 73 (The Attorneys and Solicitors Act, 1843), s. 26, does not extinguish the debt of a solicitor or an attorney for costs in respect of business done while uncertificated, but only his remedy. *Jones, In re*, 9 L. R., Eq. 63; 39 L. J., Ch. 83; 21 L. T. 482; 18 W. R. 159.

Therefore, where a client had taken out an order of course for taxation of his solicitor's bill, with the usual submission to pay what should be found due, and the master had disallowed certain items for business done while his certificate had not been renewed:—Held, that he was entitled

to be allowed the items in question. *Id.* This was, however, before the passing of the 33 & 34 Vict. c. 97, and the 37 & 38 Vict. c. 68, s. 12. *See preceding case.*

A person not duly qualified as a solicitor, who nevertheless acts for parties in an action in the county court and does solicitor's work for them, is not entitled to recover his expenses and fees from those for whom he acts; the Solicitors Act, 1874 (37 & 38 Vict. c. 68), s. 12, having enacted that none but duly-qualified solicitors shall be entitled to do so. *Verlander v. Eddolls*, 51 L. J., Q. B. 55; 45 L. T. 543; 30 W. R. 104; 46 J. P. 229.

Omitting to Tax.—*See ante*, col. 1923.

When Right to bring Action Barred by the Statute of Limitations.—Two attorneys in partnership having been retained to defend an action, it was decided in favour of the defendant, upon which the plaintiffs appealed. While the appeal was pending, the partnership was dissolved, and the proceedings were continued by one of the partners separately:—Held, that the partners were not entitled to sue for their costs till the appeal was decided, so that the Statute of Limitations did not until then begin to run as against their claim. *Harris v. Quine*, 4 L. R., Q. B. 653; 38 L. J., Q. B. 331; 20 L. T. 947.

Pleadings—Declaration.—It is no ground of demurrer to a declaration in an action by an attorney, that he seeks to recover for "materials" supplied by him to his client. *Fisher v. Snow*, 3 D. P. C. 27.

—Flea.—In an action by attorneys for business done in a particular court, the defence under the 2 Geo. 2, c. 23, that one plaintiff was not admitted an attorney of such court could be raised under non-assumpsit. *Hill v. Sydney*, 7 A. & E. 956; 3 N. & P. 161; 1 W., W. & H. 216; 2 Jur. 416.

Where a bill has been taxed, and the master has made his allocatur, a judge will not allow the defendant to plead that no signed bill has been delivered in addition to pleas of *nunquam indebitatus* and payment. *Whalley v. Glover*, 3 C. & K. 13.

The defence that no proper bill duly signed has been delivered, must be specially pleaded. *Lane v. Glenney*, 2 N. & P. 258; 7 A. & E. 83; 1 W., W. & H. 479; 1 Jur. 475. *Robinson v. Rowland*, 6 D. P. C. 271; 1 W., W. & H. 74; 2 Jur. 136.

Or the plaintiff need not prove the delivery of the bill. *More v. Dent*, 1 M. & Rob. 462.

To a declaration for work and labour as an attorney and solicitor and agent of and for the defendant, and for fees due in respect thereof, and for materials used in and about the same, the defendant pleaded that all the moneys in the count mentioned were due from the defendant to the plaintiff in respect of work and labour as an attorney in the superior courts, and that no signed bill had been delivered pursuant to the statute:—Held, that the plea was sufficient, although it was contended that the "moneys" referred to "fees," and that there was no answer in respect of the materials. *Hill v. Wright*, 5 Scott, 662.

A special plea to an action on an attorney's bill, which set up as a defence, that the plaintiff

conducted the business so negligently and unskilfully as to be useless to the defendant; or, that it was done under an indemnity from the plaintiff against costs and expenses, was bad on special demurrer, as amounting to the general issue. *Hill v. Allen*, 2 M. & W. 283; 5 D. P. C. 471; M. & H. 37; 1 Jur. 44.

In an action against two, a plea by one, that no bill had been delivered to him, or left at his dwelling-house, is bad. *Kitoley v. Scofield*, 6 Jur. 1059.

To an action for work and labour, as an attorney, the defendant, being under terms to plead issuably, pleaded that no signed bill had been delivered:—Held, that this was an issuable plea. *Wilkinson v. Page*, 6 M. & G. 1012; 7 Scott, N. R. 961; 1 D. & L. 913; 13 L. J., C. P. 12; 8 Jur. 293.

Declaration for work as an attorney, with a count upon an account stated. Plea denied the delivery of any bill as by the statute required. The work was entirely conveyancing, and a bill (not signed) was inclosed, and referred to in a letter signed by the attorney before the passing of the statute:—Held, that the plea was not bad for not alleging that the work had been done since the passing of the act, or that it was work the charges for which were taxable before the passing of the act. *Brooks v. Bockett*, 9 Q. B. 847; 16 L. J., Q. B. 178; 11 Jur. 284.

Held, secondly, that the delivery of the bill did not satisfy the 37th section of 6 & 7 Vict. c. 73, and was not within the saving in s. 1, because the bill was not taxable before the act, and, therefore, the delivery of it was not under any of the repealed statutes. *Ib.*

Held, thirdly, that the plea was an answer to the count on the account stated. *Ib.*

To a declaration against several contractors, for work and labour as an attorney, and for money paid, one pleaded that the action was commenced after 6 & 7 Vict. c. 73, and was for the recovery of certain fees, charges and disbursements, claimed by the plaintiff to be due, in respect of business done as an attorney, as in the first count mentioned; and that the plaintiff did not, one calendar month before action, deliver unto the defendant, he being the party to be charged therewith, or send by the post to, or leave for him at his counting-house, office of business, dwelling-house or last known place of abode, a signed bill of costs:—Held, that the plea was good, and sufficiently negatived a delivery of a signed bill in compliance with the statute. *Tute v. Hitchins*, 7 D. & L. 123; 7 B. C. 875; 18 L. J., C. P. 256; 14 Jur. 20.

Held also, that the word "disbursements" must be taken to apply to the "money paid" in the second count; and therefore that the plea, which was pleaded generally, contained a sufficient answer to that count also. *Ib.*

Plea, that the action was commenced after the coming into operation of the 6 & 7 Vict. c. 73, and was prosecuted to recover from the defendant the amount of fees by the plaintiff, claimed and demanded to be due to him for work done, and that the same was done by the plaintiff as attorney and solicitor of and for the defendant, and that no signed bill was delivered to the defendant:—Held, on special demurrer, first, that it sufficiently confessed the work done. *Seadding v. Eyles*, 9 Q. B. 858; 15 L. J., Q. B. 364; 10 Jur. 945.

Held, secondly, that it was not necessary to

state that the work was done after the coming into operation of the statute, or that the work was done in England by the plaintiff, as an attorney practising in England. *Ib.*

A declaration stated that the defendant was indebted to the plaintiffs in divers unliquidated debts, namely, for so much as the plaintiffs deserved to have of the defendant for work done by the plaintiffs as attorneys for the defendant; that the plaintiffs alleged that the debts amounted to 171*l.* 9*s.* 8*d.*, and the defendants to 147*l.*; that it was agreed that the dispute between them should be put an end to, and the amount of the debts fixed at 150*l.*; that the plaintiffs should relinquish their claim to the residue, and that the debts should be satisfied upon the terms of the defendant agreeing to pay the plaintiffs 150*l.*; that the disputes were ended; that the debts were agreed and fixed at 150*l.*; that the plaintiffs had not made any further claim; and that the debts were satisfied upon the terms in that behalf. Breach, non-payment of 150*l.* Plea, that the plaintiffs did not, one calendar month before the commencement of the suit, deliver to the defendant a signed bill:—Held, that the declaration, at the best, amounted to a special count on an account stated, and that the plea was good in form and substance. *Bridgman v. Dean*, 7 Ex. 199; 21 L. J., Ex. 90.

To counts for work and labour, money paid and interest, the defendant pleaded, first, as to 48*l.*, parcel, and the causes of action in respect thereof, the non-rejoinder of a co-contractor. Secondly, as to 15*l.*, parcel of the residue, and the causes of action, that the plaintiff sought to recover fees, charges and disbursements as an attorney, and that no signed bill had been delivered:—Held, on special demurrer, that the plea in abatement was good, though not pleaded to any particular count or sum. *Rhodes v. Turner*, 3 Ex. 607.

Held, also, that the second plea was bad, as it afforded no answer to the claim for interest. *Ib.*

Evidence.—An examined copy of a bill of costs, the original of which has been delivered to the client, may be admitted without proof of notice to produce the original; and is conclusive as to the reasonableness of the items. *Anderson v. May*, 2 B. & P. 237; 3 Esp. 167; *S. P.*, *Collins v. Treweek*, 9 D. & R. 456; 6 B. & C. 394.

To a declaration for an attorney's costs, the defendant pleaded that he was always ready and willing to pay a just and reasonable sum in satisfaction of the demand, and that before action he offered to pay such just and reasonable sum. It was proved that he had offered to pay the costs when the bill was taxed:—Held, that such evidence did not support the plea. *Filmer v. Burnby*, 2 Scott, N. R. 689; 9 D. P. C. 466; 2 M. & G. 529.

After action an attorney's bill was, by a judge's order, referred to the master to be taxed, "without prejudice to any defence the defendant may have to this action." The master taxed the bill, and made his allocatur. The defendant pleaded *nunquam indebtedus* and payment:—Held, that, at the trial, the allowance of items in the bill by the master on the taxation was *prima facie* evidence that those items so allowed for had been done by the plaintiff. *Whalley v. Glover*, 3 C. & K. 13.

In an action on an attorney's bill, under never indebted, it is competent to the plaintiff to shew that a greater amount is due to him than the

master allowed on taxation, pursuant to an order for changing the attorney in the course of the cause in which the costs were incurred. *Beck v. Cleaver*, 9 D. P. C. 111.

2. SECURITY FOR.

33 & 34 Vict. c. 28, s. 16.—By 33 & 34 Vict. c. 28, s. 16, an attorney or solicitor may take security from his client for his future fees, charges and disbursements to be ascertained by taxation or otherwise.

Before 33 & 34 Vict. c. 28, s. 16—Bond.—An attorney or solicitor cannot take a bond of his client for unliquidated costs. *Newman v. Payne*, 4 Bro. P. C. 350.

— **Mortgage.**—Nor can he take a security by mortgage for future bills of costs, or business to be done. *Pitcher v. Rigby*, 9 Price, 83; *S. P., Jones v. Tripp*, Jacob, C. C. 322.

A mortgage by a client to an attorney for costs due and to become due is a valid security for the costs then due only. *Williams v. Piggott*, Jacob, C. C. 598.

It is a well-established rule, that a solicitor cannot take a mortgage from his client as a security for costs to be incurred. *Booth v. Creswick*, 13 L. J., Ch. 217; 8 Jur. 323; *S. P., Uppington v. Bullen*, 2 D. & W. 184; 1 C. & L. 291 (1r.).

Or apply a security already taken to the payment of costs, which may be subsequently incurred. *Foster, In re, Walker, Ex parte*, 29 L. J., Ch. 625; 6 Jur., N. S. 687.

Where a solicitor has taken a mortgage from his client to secure the payment of costs, he is entitled to maintain a bill for foreclosure, though an order for taxation has been obtained against him at the Rolls, and no bill of costs has been delivered. *Thomas v. Cross*, 10 Jur., N. S. 1163; 11 L. T. 430; 13 W. R. 166.

The 7 & 8 Vict. c. 73, s. 37, is no bar to such a suit. *Id.*

— **Receiving Deposit of Title Deeds.**—A solicitor cannot receive a deposit of title-deeds as security for future bills. *Laing, Ex parte*, 2 Mont. & Ayr, 381.

— **Warrant of Attorney.**—So, a warrant of attorney given by a client to his attorney to secure future costs is illegal. *Jones v. Hunter*, 1 D. P. C. 462.

— **Money Advanced.**—But a warrant of attorney given to secure the payment of future costs, and also of costs and money already due and advanced, though void as to the client's future liability, is valid as to his actual liability. *Holdsworth v. Wakeman*, 1 D. P. C. 532.

— **Promissory Note.**—An attorney who has received a promissory note on account of costs may bring an action on the note, although he has not delivered a signed bill: and it is no objection that the note includes future costs. *Jeffreys v. Evans*, 3 D. & L. 52; 14 M. & W. 210.

— **Assignment of Subject-Matter of Action.**—After verdict and before judgment a plaintiff

in ejectment assigned the subject-matter of the suit to his attorney, as a security for money advanced by him for carrying on the suit and other purposes and for the amount due to him for his professional services:—Held, that the assignment was not void as against public policy, or by reason of champerty and maintenance, being only a security and not an absolute purchase. *Anderson v. Radcliffe*, El., Bl. & El. 806; 29 L. J., Q. B. 128; 6 Jur. N. S. 578; 8 W. R. 283—Ex. Ch.

3. LIEN FOR.

a. On What.

i. Documents.

Generally.—A solicitor is entitled to a general lien for costs on papers deposited with him by his client for a particular purpose only, unless that general lien is excluded by a special agreement. *Colmer v. Ede*, 40 L. J., Ch. 185; 23 L. T. 884; 19 W. R. 318.

An attorney has a lien for his general balance on papers of his client which come to his hands in the course of his professional employment. *Stevenson v. Blakelock*, 1 M. & S. 535.

He has a lien on the papers in a particular suit, not only for his costs in that suit, but for his general costs. *Broomhead, In re*, 5 D. & L. 52; 16 L. J., Q. B. 355.

A solicitor has a lien on papers delivered to him in that character for all professional business, but no lien as a solicitor on papers delivered to him as steward. *Champernown v. Scott*, 6 Madd. 93.

Deeds deposited with a solicitor for a particular purpose, and after that has failed permitted to remain with him, are subject to the general lien. *Pemberton, Ex parte*, 18 Ves. 282.

A testator devised his estates to trustees to receive the rents and profits, and pay and apply two-thirds of them to the plaintiff, and one-third to his widow during her life, and after her decease he devised the estates to the plaintiff in fee. The trustees deposited the deeds with an attorney, for purposes connected with the trust, who claimed to detain the deeds as a lien for his charges incurred in respect thereof:—Held, that he was not entitled to detain them from the plaintiff on the death of the widow, as the debt incurred was the personal debt of the trustees. *Lightfoot v. Keane*, 1 M. & W. 745; 2 Gale, 138.

Trover against an attorney for deeds; cause referred; award, a nonsuit, and each party to pay his own costs:—Held, that the attorney had no lien on the deeds for the costs. *Sharpe, In re*, 1 D. P. C. 432.

Held, also, that the attorney had no lien on the deeds for expenses incurred by him in consequence of applications made to him for the deeds. *Id.*

An attorney having a lien on a deed for the costs of drawing it is not bound to produce it on a subpoena duces tecum for the client. *Kemp v. King*, 2 M. & R. 437; C. & M. 396.

R. and C., at H. and T.'s request, paid to H. and T.'s country solicitors 350*l.* in part discharge of costs incurred by H. and T. in certain administration suits. Thereupon the country solicitors by indenture assigned to R. and C. certain documents on which they had a lien, and covenanted that they would hold any charging order they might obtain from the Court of Chancery

for payment of their costs, in trust to indemnify R. and C. By a subsequent order of the court the costs were to be taxed and paid out of funds in court to the town agents of the country solicitors:—Held, that the costs must be paid to R. and C. in satisfaction of their claims under the indenture. *Cockayne v. Harrison*, 15 L. R., Eq. 298; 42 L. J., Ch. 660; 21 W. R. 520.

Messrs. G., solicitors, having been requested by P., another solicitor, on behalf of a client for whom they had hitherto acted, to deliver up all deeds belonging to the client on the usual terms, sent the deeds to a relative of the client who held a power of attorney from him, with the bill of costs, the amount of which they retained out of moneys in their hands belonging to the client, and they then informed P. that they had no deeds in their possession, and no bill of costs against the client. An order of course was then taken out by P., on behalf of the client, for taxation and delivery up of deeds and papers, but it was not complied with, and a writ of attachment was issued against Messrs. G.:—Held, that they were not justified in refusing to deliver up the papers, or to give in their bill for taxation. *Grigg, In re, Praeger, In re*, 9 L. R., Eq. 137; 39 L. J., Ch. 107; 23 L. T. 234; 18 W. R. 589.

On payment of his costs, a solicitor's lien on documents of his client in his possession ceases; he is then bound to deliver them up on his client's demand, and cannot refuse delivery because third persons claim an interest therein. *Emma Silver Mining Company, In re, Turner, In re*, 24 W. R. 54.

The trustee of a bankrupt's estate appointed a solicitor, whose appointment was duly confirmed, and who transacted considerable professional business for the trustee as such. After several years the trustee was removed by the creditors, and a new trustee appointed, who called upon the solicitor to hand over all documents relating to the estate to himself or to his solicitor. The solicitor of the old trustee opposed this application on the ground that he had a lien on them for his costs:—Held, that he had a lien upon all documents the fruits of his own labour or expense. *Yalden, Ex parte, Austin, In re*, 4 Ch. D. 129; 46 L. J., Bk. 59; 35 L. T. 720—C. A.

— **Not Greater than Right of Client.**—But the lien which an attorney has on the papers in his hands is only commensurate with the right which the party delivering the papers to him has therein. *Hollis v. Claridge*, 4 Taunt. 807.

The lien of an attorney is only co-extensive with the rights of his client, and therefore, as between the plaintiff and defendant, the lien of the plaintiff's attorney cannot affect the right of the defendant. *Symons v. Blake*, 2 C., M. & R. 416; 4 D. P. C. 263; 1 Gale, 182.

— **Not Confined to Deeds and Papers.**—A solicitor's lien for costs is not confined to deeds and papers, but extends to other articles delivered to him for the purpose of being exhibited to witnesses on the trial of an action. *Friswell v. King*, 15 Sim. 191.

Power of Trustee in Bankruptcy to Demand Delivery of.—S. and M., solicitors, obtained possession in the course of business of certain deeds and documents the property of W., whose solicitors they were, and retained possession of

same, subject to a lien for costs due by W. to them. W. was subsequently adjudicated a bankrupt, and his assignees applied for an order that S. and M. should deliver up to them the deeds and documents so in their possession. The court refused the application. *Watters, In re*, 7 L. R., Ir. 531.

Mortgage Deeds.—A solicitor was instructed to prepare a mortgage, and the title-deeds of the property were deposited with him for this purpose by the mortgagor. He was also acting as solicitor for the mortgagee, and when the mortgage was executed he continued to hold the deeds on behalf of the mortgagee. The mortgagor filed a liquidation petition, and the solicitor was employed on behalf of the trustee. The trustee sold the equity of redemption and the solicitor received the purchase-money:—Held, that the solicitor had a lien on the deeds against the mortgagor, and was entitled to retain out of the purchase-money the amount of costs due to him from the mortgagor. *Messenger, In re, Culvert, Ex parte*, 3 Ch. D. 317; 45 L. J., Bk. 134.

A company having issued a debenture loan, a deed was prepared by their solicitor mortgaging their property to two of the directors as trustees for the debenture holders, the same solicitor acting also for the trustees. The mortgage contained a power of sale and the usual covenant against incumbrances. The company afterwards passed a resolution for a voluntary winding-up, whereupon the trustees, acting under their power of sale, contracted to sell the mortgaged property to a purchaser and applied to the solicitor for the company's title-deeds, which were in his possession. He however refused to give them up, claiming a lien upon them for costs incurred by the company prior to the mortgage. Upon a petition by the trustees and a debenture holder praying that the solicitor might be ordered to deliver up the title-deeds to them:—Held, that the solicitor was not entitled to a lien on the deeds, and that they must be delivered up to them. *Snell, In re*, 6 Ch. D. 105; 46 L. J., Ch. 627; 37 L. T. 350; 25 W. R. 823.

A mortgagee's attorney having possession of the title deeds has a lien upon such deeds for costs due to him from the mortgagee. *Oyle v. Storey*, 1 N. & M. 474; 4 B. & Ad. 735.

A., the attorney of B., an intended mortgagee, has no lien as against C. the intended mortgagor, for the costs of preparing the mortgage upon deeds delivered by C. to B., and by the latter handed over to A. for the purpose of investigating C.'s title. *Pratt v.izard*, 2 N. & M. 455; 5 B. & Ad. 808.

A mortgagee of lands handed over the deeds to his attorney. The mortgagor paid the principal and interest, and the lands were re-conveyed to him:—Held, that the attorney could not retain the deeds against him, as a security for the expenses of the transaction due from the mortgagee to the attorney. *Wakefield v. Newbon*, 6 Q. B. 276.

— **Mortgage by Client to his Solicitor.**—A client mortgaged property, which was at the time subject to a first mortgage, to his solicitors, who prepared the mortgage deed. Afterwards the mortgagor made a third mortgage to another person:—Held, in an action by the solicitors against the first and third mortgagees and the mortgagor, that they were entitled only to their

ordinary costs as mortgagees, and that they had no lien on the mortgage deed for the costs of its preparation or other costs due to them from the mortgagor. *Sheffield v. Eden*, 10 Ch. D. 291; 40 L. T. 283; 27 W. R. 477—C. A.

—**Solicitor of Mortgagees Acting for Mortgagor.**—A mortgage deed and the title deeds to the mortgaged property were deposited by the mortgagees with their solicitors for safe custody. Afterwards the mortgagor instructed the same solicitors to sell the property, and they employed an auctioneer for the purpose, and made use of the deeds in preparing particulars and conditions of sale. The property was put up for sale, but was not sold. The mortgagor then filed a liquidation petition, and the trustee contracted to sell the mortgaged property:—Held, that the solicitors had no lien on the deeds as against the trustee in respect of their costs of the abortive sale. *Fuller, Ex parte, Long, In re*, 16 Ch. D. 617; 50 L. J., Ch. 448; 44 L. T. 63; 29 W. R. 448.

A solicitor acting for the mortgagee as well as mortgagor in the preparation of a mortgage thereby loses his lien on the title-deeds in his possession for costs due to him from the mortgagor, unless such lien is expressly reserved, even though the mortgagee may have known that the solicitor had such lien as against the mortgagor. *Snell, In re, supra*.

Solicitors Acting for a Company and for Trustees of Debenture Holders.—Solicitors of a company, who, upon the occasion of the directors conveying all the property of the company to two of their body upon trusts to secure the repayment of moneys borrowed upon debentures, prepare a mortgage deed and act for the company and the trustees, have no right of lien for the payment of their costs. *Mason and Taylor, In re*, 10 Ch. D. 729; 48 L. J., Ch. 193; 27 W. R. 311.

On Will.—A solicitor has no lien upon the will of his client. *Balch v. Symes*, 1 Turn. & Russ. 87.

Cheques.—H. having employed a solicitor to take proceedings in respect of certain shares of which H. was holder, deposited with him the certificates of such shares as security for the costs. H. afterwards transferred to a company his interest in the shares, with notice of the lien of the solicitor, and the solicitor accepted the retainer of the company to continue the proceedings, and the solicitor obtained certain cheques in exchange for the shares which the complainants claimed to have delivered to them:—Held, that the solicitor was entitled to retain these cheques as security for his costs due from H., notwithstanding that he had accepted a retainer from the company. *General Share and Trust Company v. Chapman*, 46 L. J., C. P. 79; 36 L. T. 179.

Of Papers of Two Persons Jointly.—Where an attorney has a lien upon the papers of two persons jointly, the court will not try the rights of the parties by directing to whom they shall be given up upon the lien being satisfied. *Duncan v. Richmond*, 1 Moore, 99; 7 Taunt. 391.

Solicitor of Company acting Ultra vires.—

Where the directors of a company carry on a business not authorized by the deed of settlement, and costs are thereby incurred, the solicitors of the company have no lien for their costs on the papers of the company. *Phoenix Life Assurance Company, In re, Howard and Dollman, Ex parte*, 1 H. & M. 433.

Where, in such a case, moneys have been recovered in any of the actions, although the solicitors would have a lien for their costs on such moneys while in their hands, yet after they have paid over such moneys to the company, and allowed them to be incorporated with the general assets, they have no lien on those assets in respect of such costs. *Ib.*

Solicitor Refusing to Continue Proceedings.]

—When a solicitor applied to his client for funds to carry on a suit, and upon the client not furnishing any, declined to continue to conduct the litigation, and the client appointed fresh solicitors:—Held, that this was a discharge by the solicitor, and that he might be called upon to deliver to the new solicitors the papers relating to the matters in the suit, on their undertaking to hold them without prejudice to his lien, and to return them undefaced within twelve days after the conclusion of the suit, and to allow the former solicitor access to them for the purpose of carrying on an action for his costs. *Robins v. Goldingham*, 13 L. R., Eq. 440; 41 L. J., Ch. 813; 25 L. T. 900.

When all Matters in Dispute have been Referred.—The lien of an attorney cannot be affected by reference of the cause and all matters in dispute between the parties. *Cowell v. Britten*, 4 M. & Scott, 265; 10 Bing. 432; 2 D. P. C. 780.

Does not Protect Non-Production at Trial of Action.—In an action by a married woman against her husband and the trustees of her marriage settlement, the solicitor who prepared the settlement was called as a witness for the plaintiff, and required to produce the settlement under a subpoena duces tecum. The solicitor objected to produce it on the ground that it had not been paid for, and asserted a general lien on it. The settlement was prepared on the instructions of the wife in contemplation of her marriage in 1873; i. e., between the dates of the Married Women's Property Act, 1870, and the Amendment Act, 1874:—Held, that the solicitor was bound to produce it. *Fowler v. Fowler*, 50 L. J., Ch. 686; 44 L. T. 799; 29 W. R. 800.

A solicitor is not, on the ground of his lien on documents of a bankrupt in respect of professional services before the bankruptcy, entitled to refuse to produce such documents for examination by the trustee. *Toleman and England, In re, Bramble, Ex parte*, 13 Ch. D. 885; 42 L. T. 413; 28 W. R. 676.

The solicitors for the trustees of an estate which is under the administration of the court have not, after their discharge, such a lien for costs and for money advanced in the suit as will enable them to refuse the production of documents which are required by the receiver for the management of the estate. *Belaney v. French*, 8 L. R., Ch. 918; 43 L. J., Ch. 312; 29 L. T. 706; 22 W. R. 177.

The solicitor for the parties to an administration action will not, on a change of solicitor,

be allowed to assert his lien for costs on papers in his possession in such a way as to embarrass the proceedings in the action. On the contrary, he must produce the papers when they are required for the carrying on of the proceedings. *Boughton, In re, Boughton v. Boughton*, 23 Ch. D. 169; 48 L. T. 413; 31 W. R. 517.

An order having been made for winding up a company, applications were made by the official liquidator against B., a solicitor employed by the company before the winding-up, that B. might be ordered to deliver up the following documents: 1. The share register and minute book, which were in B.'s hands before the commencement of the winding-up; 2. Other documents which came to B.'s hands after the presentation of the winding-up petition, but before the winding-up order; 3. Documents relating to allotments of shares which had come to B.'s hands before the presentation of the petition. B. resisted the applications on the ground that he claimed a lien. Mr. Justice Chitty ordered that all the documents should be delivered to the liquidator, subject to the lien, if any, of B.:—Held, on appeal, that the order was right as regarded the share register and minute book, for that the directors had no power to create any lien on them which could interfere with their being used for the purposes of the company:—Held, also, that the order was right as to class 2; for that a solicitor could not assert against documents which came to his hands pending the winding-up any such lien as would interfere with the prosecution of the winding-up:—But held, that the order for delivery of class 3 must be discharged, for that the winding-up order could not defeat any valid lien existing at the time when the winding-up petition was presented. *Belaney v. Ffrench* (8 L. R., Ch. 918) and *Boughton v. Boughton* (23 Ch. D. 169) distinguished. *Capital Fire Insurance Association, In re*, 24 Ch. D. 408; 53 L. J., Ch. 71; 32 W. R. 260—C. A.

Payment into Court—Order for Delivery over of Documents.—Upon an application for delivery over of all documents in a discharged solicitor's possession made by clients undertaking to pay into court a sum amply sufficient to secure the solicitor in respect of all demands, the court will make the order asked for provided that circumstances of pressing necessity are shewn. *South Essex Equitable Investment and Advance Company, In re*, 46 L. T. 280.

In Cases of Partnership—Of Clients.—An attorney with whom title-deeds, the property of a member of a firm, have been deposited by that member, in the course of professional business done on his private account, has no lien on them for a debt due from the partnership. *Turner v. Deane*, 6 D. & L. 669; 3 Ex. 836; 18 L. J., Ex. 343.

Of Solicitors.—After A. had employed B. and C. as his solicitors, they took D. into partnership with them, and A. employed the new firm. In the course of that employment, papers belonging to him came into their possession:—Held, that B. and C. had no lien on the papers for costs which A. owed them before they took D. into partnership. *Forshaw, In re*, 16 Sim. 121; 17 L. J., Ch. 61.

A solicitor does not acquire a lien for costs

due to himself solely upon documents which came into the joint possession of himself and his partner or partners, but he does not lose his lien for such costs upon documents which, having come into his own possession, are afterwards continued in the possession of himself and his partner or partners. *Pelly v. Wathen*, 7 Hare, 351; 18 L. J., Ch. 281; 14 Jur. 9.

When Solicitor in Prison.—A solicitor allowed himself to be arrested for debt and detained in prison. A client, for whom he was acting, presented a petition for delivery up of her papers, upon which he claimed to have a lien for costs:—Held, that he was not entitled to any such lien, although he alleged, and there was reason to believe, that his imprisonment had arisen from the default of the client to pay expenses out of pocket, which she had agreed to do. *Williams, In re*, 28 Beav. 465; 30 L. J., Ch. 610; 6 Jur., N. S. 908.

Of Clerk to Local Board.—Where a solicitor had been appointed clerk to a local board, with a salary, for conducting the legal as well as the ordinary business of the board, it was held by Bacon, V.-C., upon an interlocutory motion in an action for mandamus to compel production of papers, that, whatever claim the clerk might have against the board for payment of costs in respect of professional services, he had no right, being in the relation of servant to the board, to refuse production of the legal papers or other documents claimed by the board as belonging to them:—But held, by the Court of Appeal, that as such an order would prejudice the clerk's lien, it could not be made before the trial of the action without payment into court of a sum sufficient to meet the amount claimed by the clerk, upon which he was to have the same lien as upon the papers; and the court ordered that upon that being done the clerk should deliver up to the plaintiffs all books and papers claimed in the action. *Newington Local Board v. Eldridge*, 12 Ch. D. 349—C. A.

Of Town Clerk.—A town-clerk, who is solicitor to a corporation, has the same lien on corporation papers for professional business that he would have if he were not also town-clerk. *Re v. Sankey*, 6 N. & M. 839; *S. P., Re v. Williams*, 2 H. & W. 275.

Of Town Agent for Country Solicitor.—A client paid her country solicitor his bill of costs before receiving any notice that the town agent of the solicitor claimed a lien upon the documents in his possession for a balance alleged to be due to him from the country solicitor on accounts stated between them:—Held, that the town agent's lien did not attach, and that he must deliver up all the documents in his possession. *Vyse v. Foster*, 10 L. R., Ch. 236; 44 L. J., Ch. 344; 32 L. T. 219; 23 W. R. 413. See also cases post, col. 1964.

ii. In other Cases.

Not Confined to Deeds and Papers.—A solicitor's lien for costs is not confined to deeds and papers, but extends to other articles delivered to him for the purpose of being exhibited to witnesses on the trial of an action. *Friswell v. King*, 15 Sim. 191.

On Debt and Costs Recovered.]—An attorney has a lien upon a sum awarded in favour of his client, as well as if recovered by judgment; and if, after notice to the defendant, the latter pays it over to the plaintiff, the plaintiff's attorney may compel a repayment of it to himself. *Ormerod v. Tate*, 1 East, 464; *S. P., Cowell v. Bettley*, 4 M. & Scott, 265; 10 Bing. 432; 2 D. P. C. 780.

A builder, and an uncertificated bankrupt, sued for a balance due to him for repairs, and was nonsuited; the cause was referred, and the arbitrator found a sum due to the plaintiff:—Held, that his attorney had a claim, as against the assignees, to the amount of his lien on the award, for the costs of the action and of the award. *Jones v. Turnbull*, 5 D. P. C. 591; 2 M. & W. 601; M. & H. 106; 1 Jur. 638.

An attorney has a lien for his bill of costs, on money levied by the sheriff under an execution on a judgment recovered by his client, and is entitled to have it paid over to him, notwithstanding the sheriff has had notice from the party against whom the execution issued, to retain the money in his hands. *Griffin v. Eyles*, 1 H. Bl. 122.

An attorney has a lien on interlocutory costs under an order of a judge. *Aspinall v. Stamp*, 4 D. & R. 716; 3 B. & C. 108.

Where a defendant is entitled against a plaintiff to be released from a verdict obtained against him, the court will not abstain from interfering, on the ground of the lien of the plaintiff's attorney upon the verdict for his costs. *Symons v. Blake*, 2 C., M. & R. 416; 4 D. P. C. 263; 1 Gale, 182.

On reference of an action (the costs to abide the event), the arbitrator ordered the defendant to pay the plaintiff a certain sum. The plaintiff afterwards became insolvent. His attorney, whose bill of costs exceeded the amount awarded, and the costs taxed under the award, claimed a lien in respect of his bill on such an amount and taxed costs, and called upon the defendant to pay them to him for his own use, and in satisfaction of his lien:—Held, that the plaintiff's attorney was not entitled to a rule, calling upon the defendant to pay him the money. *Lloyd v. Mansell*, 1 B. C. C. 130; 22 L. J., Q. B. 110.

The lien attaches upon money received by way of compromise, though the verdict and judgment are against his client. *Davies v. Lowndes*, 3 C. B. 823.

An attorney has no lien on his client's money in his hands, beyond the amount in which the latter is indebted to him. *Miller v. Alter*, 3 Ex. 799; 13 Jur. 431.

— On Judgments.]—The fact that an attorney has obtained a judgment for a client, and that costs are due to the attorney, does not raise the relation of trustee and cestui que trust between the client and the attorney with respect to the proceeds of such judgment; and the lien of the attorney is merely a claim to the protection of the court as to his costs when the equitable interference of the court is invoked for the purpose of setting off one judgment against another. *Mercer v. Graves*, 7 L. R., Q. B. 499; 41 L. J., Q. B. 212; 26 L. T. 551; 20 W. R. 605.

After A. had recovered judgment in an action against B., C., the attorney of A. in that action, had a general unsatisfied balance against his

client for business done. D., a creditor of A., having recovered judgment against him, sought to enforce it by attachment under 17 & 18 Vict. c. 125:—Held, that the general lien of the attorney against his client for that balance did not take away D.'s right to do this. *Hough v. Edwards*, 1 H. & N. 171; 26 L. J., Ex. 54; 2 Jur., N. S. 814.

The lien which an attorney has on a judgment obtained by his client, is merely a claim to the equitable interference of the court to have that judgment held as a security for his debt. *Ib.*

On Inheritance.]—In a suit in the nature of a partition suit, it having been decided that each party must bear his own costs, a solicitor employed by a party entitled as tenant in tail who had not barred the entail has not a lien for costs on the inheritance of his client's share. *Berrie v. Howitt*, 39 L. J., Ch. 119.

On Real Estate.]—An attorney has no lien on an estate recovered for a client, in respect of the costs and expenses incurred in recovering it. He has a lien only on the papers in his hands. *Shaw v. Neale*, 6 H. L. Cas. 581; 27 L. J., Ch. 444; 4 Jur., N. S. 695.

On Funds in Court.]—Solicitors have no right to look for their costs to a fund in court not belonging to their clients. *Chick v. Nickolls*, 26 W. R. 231.

Where, therefore, in an administration suit the estate in court was exhausted by creditors so that nothing was left for the testator's representative, and she became insolvent, a motion that her costs of suit might be retained out of the fund in court, so that her solicitors might be paid, was refused. *Ib.*

On Money in his Hands for Composition.]—The creditors of a debtor having agreed to accept a composition secured by sureties, the debtor and one of the sureties placed funds in the hands of the debtor's solicitor, for the purpose of paying the composition. The solicitor sent round a circular to the creditors informing them they could be paid at his office on a certain day. Before that day the debtor absconded, leaving the solicitor's bill of costs unpaid:—Held, that the solicitor held the funds as trustee for the creditors, and that he was not entitled to any lien on them for his costs. *Clark, In re, Newland, Ex parte*, 4 Ch. D. 515; 35 L. T. 916; 25 W. R. 275.

Costs of Proceedings under the Declaration of Titles Act on Behalf of Infant.]—The costs of proceedings under the Declaration of Titles Act (25 & 26 Vict. c. 67), on behalf of an infant, together with the costs of a partition suit and of a suit to obtain a declaration of lien, are costs for which the solicitor has a lien on the fund recovered. *Pritchard v. Roberts*, 17 L. R., Eq. 222; 43 L. J., Ch. 129; 29 L. T. 883; 22 W. R. 259.

Chattels Personal.]—Chattels personal, not under the control of the Court of Chancery nor in possession of the plaintiff's solicitor, are not subject to a lien for his costs in the suit in which they are recovered. *Savage v. James*, 9 Ir. R., Eq. 357.

On Money Payable in Futuro.]—A firm of solicitors were employed throughout the proceed-

ings in an action for partition and sale of certain hereditaments of which the defendants were in possession, and for an account of the rents and profits of one-third part thereof for six years prior to the issue of the writ. By the decree the plaintiffs were declared entitled to one-third part of the hereditaments, and to an account and payment by the defendants of one-third of the said rents and profits, and the premises were ordered to be sold, and the plaintiffs' costs up to and including the hearing were ordered to be costs in the action. The account was not completed and the property was not sold when the plaintiffs threatened to change their solicitors and to compromise the action. The share of the plaintiffs in the property and rents was insufficient to pay the plaintiffs' costs. On a petition by the plaintiffs' solicitors asking for a declaration that they were entitled to a charge on the whole property in respect of the plaintiffs' costs, as such costs had been made costs in the action:—Held, that no order having been made for payment of the costs of the action out of the proceeds of sale, the court could not anticipate such order, and that the solicitors could only be treated as having a lien on the plaintiffs' share recovered by them in the action. An injunction was granted to prevent the plaintiffs from receiving any money in the action, or by way of compromise, without notice to the solicitors. *Lloyd v. Jones*, 40 L. T. 514; 27 W. R. 655.

On Policy of Assurance—Notice.—A solicitor's lien on a policy of assurance is not lost by want of notice to the assurance company against assignees who give notice. *West of England Bank v. Batchelor*, 51 L. J., Ch. 199; 46 L. T. 132; 30 W. R. 364.

Alimony Pendente Lite.—A solicitor's lien does not extend to alimony pendente lite paid over to him as such, i.e., for the purpose of the wife's maintenance, unless he holds her direct written authority to him to receive it as her agent under r. 94 of the Divorce Rules. *Bremner v. Bremner* (1 L. R., Mat. 254) distinguished. *Leete v. Leete* (48 L. J., P. 61) followed. *Cross v. Cross*, 43 L. T. 533—C. A.

An attorney who has acted in a suit on the part of a wife, and has a claim for costs therein incurred beyond those which have been taxed against the husband, has a lien upon the alimony paid into his hands on her behalf for such extra costs. *Bremner v. Bremner*, 36 L. J., Mat. 11; 15 L. T. 297; 15 W. R. 75; *S. C.*, nom. *Bremner*, *Ex parte*, 1 L. R., Mat. 254.

An order was made for the change of solicitors in a wife's suit for dissolution of marriage. At the date of the order the former solicitor had in his hands a sum of money, being the balance of an amount received by him on account of alimony due to the petitioner:—Held, that the solicitor had no lien for his costs upon the balance of alimony in his hands. *Leete v. Leete*, 48 L. J., Mat. 61; 40 L. T. 788; 27 W. R. 921.

On Person of Defendant.—A plaintiff having charged the defendant in execution, died; the defendant's wife took out administration to the plaintiff; the court ordered the defendant to be discharged out of custody, saying, that the plaintiff's attorney had no lien on the judgment for his costs. *Pyne v. Erle*, 8 T. R. 407.

A solicitor's lien for his costs upon costs

ordered to be paid to his client by the opposite party in a suit, remains notwithstanding he has ceased to be the client's solicitor in the suit, and notwithstanding that he has taken the client's body in execution under a judgment against him for the amount of the solicitor's costs. *O'Brien v. Lewis*, 3 De G., J. & S. 606.

A defendant was in custody under a judgment recovered by the plaintiff. The plaintiff had died previously in insolvent circumstances, leaving two infant children. As soon as the defendant heard of the death he applied to be discharged. The plaintiff's attorneys resisted the application, alleging that they had advanced sums of money to the plaintiff, and that the plaintiff had agreed that they might retain these sums, together with their costs, out of the amount to be recovered by the judgment; and they expressed an intention of taking out administration to the plaintiff's estate. The court refused to discharge the defendant. *Cor v. Pritchard*, 20 L. J., Q. B. 353.

A defendant was taken upon a ca. sa. at the suit of the plaintiff, in June, 1841; in August the plaintiff left England, and was shortly afterwards seen at St. Petersburg, but had never been heard of since. Upon an affidavit of these facts, and shewing reasonable ground to induce them to believe that the plaintiff was dead, and that proper search had been made, and no trace of a will or grant of administration found, the court (in 1849) ordered the defendant to be discharged from custody, without any regard to any supposed lien of the attorney for costs. *Camp v. Pote*, 8 C. B. 375; 7 D. & L. 289.

It is competent to a plaintiff to discharge the defendant from custody under a ca. sa., notwithstanding the claim of his attorney for the costs of the action is unsatisfied, and by reason of the plaintiff being an infant, is likely to remain so. *Langley v. Headland*, 19 C. B., N. S. 42; 34 L. J., C. P. 183; 11 Jur., N. S. 431; 12 L. T. 385; 13 W. R. 752.

Of Solicitor Employed by Liquidator.—The general principle that an official liquidator can retain no part of the company's estate without an order of the court, applies equally to the lien of his solicitor for costs on the company's moneys recovered by his exertions. Such moneys must in the first instance be paid into court. *Union Cement and Brick company, In re*, 26 L. T. 240; 20 W. R. 361.

Priority of, over Garnishee Order.—The plaintiffs were the solicitors for W. in an action in which he recovered a sum of money. The defendant was a judgment creditor of W., and obtained, ex parte, on the day that judgment was signed in the above action, a garnishee order attaching all debts due to W. On the taxation of costs on the same day the plaintiffs for the first time learned of the defendant's claim, and then gave notice to the defendant in the action in which W. was plaintiff, of their claim of lien, and within five days applied for an order declaring that they were entitled to a charge on the money recovered by W.:—Held, that the plaintiffs had a lien for their costs on the sum recovered by W.; that they were entitled to the order sought for; and that the garnishee order obtained by the defendant did not take priority over that lien. *Shippey v. Grey*, 49 L. J., C. P. 524; 42 L. T. 673 (nom. *Shipley*); 28 W. R. 877—C. A.

A proctor's lien on a fund in court is not affected by a garnishee order, and he is entitled to be paid his costs in priority to the claim of the garnishee. *The Jeff Davis*, 23 L. R., Adm. 1. See also cases post, col. 1958.

Change of Solicitors—Effect of.]—An order was made for the change of solicitors in a wife's suit for dissolution of marriage. At the date of the order the former solicitor had in his hands a sum of money, being the balance of an amount received by him on account of alimony due to the petitioner:—Held, that the solicitor had no lien for his costs upon the balance of alimony in his hands. *Leete v. Leete*, col. 1945.

Not Barred by Statute of Limitations.]—The lien of an attorney remains although the claim is barred by the Statute of Limitations. *Broomhead*, *In re* 5 D. & L. 52; 16 L. J., Q. B. 355.

b. Set-off of Damages or Costs.

How far Solicitor Prejudiced by.]—An arbitrator, to whom a cause of A. v. B., and all matters in difference between them, were referred by order of nisi prius, awarded a sum to be paid by B. to A. in respect of the matters in difference, the verdict to be entered for B., and the costs of the cause (which were taxed at a less sum) to be paid by A. to B. G. having paid the difference:—Held, that rule 93 of Hilary Term, 2 Will. 4, did not apply; and the court refused to order B. to pay to A.'s attorneys, for the purpose of enforcing a lien claimed by them for costs against A., the residue of the sum awarded to A. *Dunn v. West*, 10 C. B. 420; 1 L. M. & P. 608; 20 L. J., C. P. 1; 15 Jur. 88.

A declaration contained three counts; on two issues in fact were found for the plaintiff; and on the third, which was for a distinct cause of action, judgment on demurrer had been given for the defendant:—Held, that the defendant's costs of the demurrer must be deducted from the costs of the plaintiff; and that the defendant's attorney had no lien, the costs of the judgment on demurrer being interlocutory costs within the proviso of the above rule. *Scott v. De Richborough*, 11 C. B. 447; 20 L. J., C. P. 263; 15 Jur. 882.

The right of setting off one judgment against another is not a legal right, but is given by the equitable jurisdiction of the court with reference to all the circumstances of the transaction, and will not be allowed so as to defeat either the attorney's lien for costs or the right acquired by an assignee. *Simpson v. Lamb*, 7 El. & Bl. 84; 20 L. J., Q. B. 121; 3 Jur., N. S. 412.

Where, in an action of trespass, a verdict is found against one defendant, but in favour of another, the costs may be set off, notwithstanding the effect of it would be to deprive the attorney of his lien. *George v. Elston*, 1 Scott, 518; 3 D. P. C. 419; 1 Bing. N. C. 513; 1 Hodges, 63.

So a successful defendant's costs will be set off against the costs of the plaintiff, without regard to the lien of such plaintiff's attorney, if shewn that the attorney is substantially the plaintiff in the cause. *Pocock v. O'Shaunessy*, 6 A. & E. 807.

In another case, the court made absolute, without costs, a rule for setting off the costs of

a successful defendant against the damages and costs awarded for the plaintiff against the other defendant, disregarding the attorney's lien. *Rawlings v. Sewell*, 7 Scott, 231.

The attorney's right to lien extends to costs taxed as between attorney and client. *Watson v. Maschall*, 1 Scott, 658; 1 Bing. N. C. 366; 3 D. P. C. 638; 1 Hodges, 73.

Where one judgment is set off against another, the lien of an attorney does not extend beyond his costs in the particular cause. *Ib.*

Interlocutory costs may be set off against final costs in the same cause, without reference to the attorney's lien. *Halliday v. Lavers*, 5 D. P. C. 636; 3 Bing. N. C. 774; 4 Scott, 475; 3 Hodges, 130.

A verdict in favour of a plaintiff having been given, a rule nisi was obtained by the defendant for a new trial. On the hearing, the court, by consent, ordered that the cause, and another cause between the same parties in a county court, should be referred to an arbitrator, the costs of each cause to abide the event, the costs of the reference and of the award to be in the discretion of the arbitrator. The arbitrator made his award in the cause in favour of the defendant, and in the cause in the county court in favour of the plaintiff, with damages, and gave the plaintiff the costs of the reference, and divided the costs of the award between the parties. The plaintiff took up the award:—Held, on a rule to set off against the money and costs payable to the plaintiff the costs of the cause, and the rule to which the defendant was entitled, that the defendant, not being entitled to such costs, under the award, could not set off the several costs to the prejudice of the attorney's lien. *Little v. Philpotts*, 31 L. J., Q. B. 125; 8 Jur., N. S. 1175.

Sums of costs incurred in the same suit or proceedings, though payable under different orders, may be set off against each other; and this right of the parties is not affected by the solicitor's lien. So held, where the defendant, after becoming liable under orders in the suit to pay costs to the plaintiff, had changed his solicitor, and subsequently under another order became entitled to receive a smaller sum of costs from the plaintiff; and although the application to set off was made by the plaintiff after notice from the defendant's solicitor that he claimed a lien upon the smaller sum. *Roberts v. Buée*, 8 Ch. D. 198; 47 L. J., Ch. 414; 23 W. R. 393.

A partnership suit having been compromised upon the terms of the plaintiff taking the assets, and covenanting to pay thereout and to the extent thereof the costs of the suit, &c., and the defendant covenanting, so soon as these liabilities had been discharged, to pay in a certain event a sum of money to the plaintiff, by an order in the suit the compromise was confirmed, and the plaintiff was ordered to pay the costs as covenanted out of assets to be received by him. An account was afterwards settled between the parties which shewed assets in excess of liabilities including the costs; but the plaintiff afterwards alleging that the moneys had become payable under the defendant's covenant, claimed to set them off against the defendant's costs. Upon an application by the defendant and his solicitor for an order for payment of his costs:—Held, that, apart from other considerations, the solicitor intervening had such a lien on the de-

fendant's costs payable under the order as precluded the set-off. *Heiron v. Hobson*, 47 L. J., Ch. 574.

By an arbitrator's award in an action, the plaintiff was ordered to pay a sum of money to the defendant, and the defendant was ordered to pay the plaintiff a part of his costs when taxed:—Held, that the defendant was entitled to have the debt set off against the taxed costs, and that the right of set-off in such a case was not interfered with by the ordinary solicitor's lien for costs. *Pringle v. Gloag*, 10 Ch. D. 676; 48 L. J., Ch. 380; 40 L. T. 512; 27 W. R. 574.

Payment of, by Liquidator.]—A liquidator is not entitled to make any payment to his solicitor without the sanction of the court; nor may such solicitor set off his costs against funds recovered through his own exertions. All moneys must, in the first instance, be paid into court. *Union Cement and Brick Company, In re*, 26 L. T. 240; 20 W. R. 361.

c. Collusion to Deprive.

By Settlement of Parties.]—When a judgment or a verdict which is not disturbed has been obtained, and, semble, where a debt is ascertained through the exertions of the attorney, and the parties make a collusive compromise, the court will enforce the attorney's right of lien for his costs. *Sullivan v. Pearson*, 4 L. R., Q. B. 153; 38 L. J., Q. B. 65; 19 L. T. 430; 9 B. & S. 960.

The compromise is collusive where the object of it is that the plaintiff should get more than he would in the ordinary course, while his attorney would get less. *Ib.*

An action for unliquidated damages was compromised by the parties after the plaintiff, who was a labourer, had obtained a verdict for 25*l.*, and a rule nisi for a new trial had been granted on the ground that the verdict was against the evidence:—Held, that the attorney had no ground for claiming the equitable interference of the court to enforce his right of lien. *Ib.*

In an admiralty action for wages the plaintiffs and defendants compromised the action by payment to each of the plaintiffs of a certain sum in discharge of the claim and costs. The plaintiffs left the country without paying their solicitors' costs:—Held, by the Court of Appeal, reversing the judgment of Sir R. J. Phillimore, that as there was no evidence that the parties had made the settlement, with the intention of depriving the plaintiffs' solicitors of their lien for their costs, the defendants ought not to be ordered to pay the plaintiffs' taxed costs. *Brunsdon v. Allard, infra; Sullivan v. Pearson, Morrison, &c. parte, supra*, approved. *The Hope*, 8 Adm. D. 144; 52 L. J., Adm. 63; 49 L. T. 158; 32 W. R. 269—C. A.

Where there are cross actions, and the plaintiff in each has obtained judgment, it is competent for the parties to come to a bona fide settlement of the matter between themselves, although the consequence of such settlement may be, that the attorney for one party will lose his lien for his costs. But if such settlement is come to by collusion and fraud, for the purpose of depriving the attorney of his costs, he has a right to call for the interference of the court. *Brunsdon v. Allard*, 2 El. & El. 19; 28 L. J., Q. B. 306; 5 Jur., N. S. 596; 33 L. T., O. S. 220; 7 W. R. 581.

A satisfaction piece collusively signed by the

defendant at the instance of the plaintiff, whereby the defendant's attorney was deprived of costs, which were payable by the plaintiff, was set aside at the instance of the attorney. *Sharpley v. Carwood*, 7 Ir. R., C. L. 38.

A plaintiff may, without consulting his attorney, compromise an action with a defendant, and take upon himself the payment of the costs to the attorney, if there is no fraudulent conspiracy to cheat the attorney of his costs. *Chapman v. Haw*, 1 Taunt. 341.

The attorney of a defendant has no such interest in the suit as to prevent the parties from compromising it without his consent. *Quested v. Callis*, 10 M. & W. 18; 1 D., N. S. 888; 6 Jur. 512.

If a plaintiff compromises the debt and costs with the defendant before the plaintiff's attorney has been paid, the court will not oblige the defendant to pay him, unless he gave notice to the defendant not to settle with the plaintiff till his bill should be paid. *Welsh v. Hole*, 1 Dougl. 238.

Where the amount of damages sought to be recovered in an action is unliquidated, the parties may compromise, without regard to the plaintiff's attorney's claim to costs. *Hart, Ex parte*, 1 D. P. C. 324; 1 B. & Ad. 660.

An attorney is not justified in proceeding with an action after it has been settled between the parties themselves, though it is known that costs have been incurred, and that the plaintiff himself is not in a condition to pay them; it must be shewn affirmatively, that the settlement was come to for the purpose of cheating the attorney. *Jordan v. Hunt*, 3 D. P. C. 666; 1 Gale, 159; *S. P., Nelson v. Wilson*, 4 M. & P. 385; 6 Bing. 568.

Where a plaintiff and defendant collude in the settlement of an action, in order to deprive the plaintiff's attorney of his costs, and a bill for debt and costs is given by the defendant in furtherance of that collusion, the court will compel the delivery up of that bill. *Gould v. Davies*, 1 D. P. C. 288; 1 C. & J. 415; 1 Tyr. 380.

An attorney's lien on a judgment being merely a claim to the equitable interference of the court to have the judgment held as a security for his costs, he has no authority over the execution of a ca. sa. so as to carry it into effect against the order of the plaintiff, even though the plaintiff and defendant should collude to deprive him of his lien. *Barker v. St. Quintin*, 12 M. & W. 441; 1 D. & L. 542; 13 L. J., Ex. 144.

A plaintiff and defendant having settled an action, after verdict for the plaintiff, without the knowledge of his attorney, the defendant gave notice of the compromise to the attorney, who afterwards signed final judgment. The court, upon affidavits denying any conspiracy to deprive the attorney of his costs, made a rule absolute to set aside the judgment. *Clark v. Smith*, 1 D. & L. 960; 7 Scott, N. R. 946; 6 M. & G. 1051; 13 L. J., C. P. 97; 8 Jur. 406.

An attorney has a lien for his costs on a judgment recovered by his client, and the court will lay hold of the fund where it exists, and when it does not thereby set aside any arrangement of the parties. *Slater v. Sunderland (Mayor)*, 33 L. J., Q. B. 37; 9 L. T. 422.

A plaintiff who had obtained judgment for his costs, in collusion with the defendant, and in order to defeat the lien of the plaintiff's attorney,

gave him and the sheriff notice not to execute any process on pain of being treated as trespassers:—Held, that a judge had power, in the exercise of the equitable interference of the court, to order that the plaintiff "or the defendant" pay the attorney the costs. *Games, Ex parte*, 3 H. & C. 294.

—Where Plaintiff Sues in Formâ pauperis.]

—Where a pauper plaintiff settles the action behind the back of his attorney, it is entirely a question for the discretion of the court, under the particular circumstances of the transaction, whether they will interfere and set aside the proceedings. *Jones v. Bonner*, 2 Ex. 230; 5 D. & L. 718; 17 L. J., Ex. 343.

The court will not interfere, even in the case of a plaintiff suing in formâ pauperis, to prevent effect being given to a settlement between the parties, although it be evident that the attorney will lose his costs, unless the settlement is clearly collusive or fraudulent. *Francis v. Webb*, 7 C. B. 731; *S. P., Moore v. Angell*, 11 Jur. 455.

—Payment to Plaintiff by Defendant's Solicitor.]—If a defendant's attorney pays to the plaintiff the debt and costs recovered, after notice from the plaintiff's attorney not to do so till his bill has been first satisfied, the former is liable to pay over again to the latter the amount of his lien on such debt. *Read v. Duppa*, 6 T. R. 361.

By Release.]—A release of all demands from the plaintiff to the defendant will not deprive the plaintiff's attorney of his lien upon the costs of an action awarded in favour of the plaintiff. *Gifford v. Gifford*, Forrest, 109; *S. P., Ormerod v. Tate*, 1 East, 404.

By Entry of Satisfaction.]—Where a plaintiff, after judgment recovered, settled the action with the defendant, and employed a new attorney to enter up satisfaction on the record:—Held, that the defendant was entitled to be discharged out of custody, although the lien of the plaintiff's attorney on the costs had not been satisfied. *Marr v. Smith*, 4 B. & A. 466.

Where an attorney, without a regular authority from the plaintiff, commenced an action, and the plaintiff, with a knowledge of the proceedings, suffered the cause to be carried down to trial, but afterwards concerting with the defendant entered up satisfaction on the record without securing to the attorney his costs, the court refused to vacate the entry of satisfaction. *Abbott v. Rice*, 3 Bing. 132; 10 Moore, 489.

By Attaching Judgment Debt.]—The attachment of a judgment debt overrides an attorney's lien on or control over the judgment in respect of general costs due to him from the garnishee. *Hough v. Edwards*, 1 H. & N. 171; 26 L. J., Ex. 54; 2 Jur., N. S. 814.

d. Waiver of.

By Taking Security.]—Where C. gave his attorney a specific sum for the purpose of satisfying a debt, for which an execution had issued against his goods at the suit of B., and the attorney paid the money to B., who thereupon delivered to him a lease which had been depo-

sited by C. with B. as a security for the debt:—Held, that the attorney had a lien on it for his general balance due from C.; and that such lien was not extinguished by his having taken acceptances from C. for the amount of that balance before the lease came to his hands, some of those acceptances, when the lease did come to his hands, having been dishonoured, and one of them taken up by the attorney. *Stevenson v. Blakelock*, 1 M. & S. 535.

An attorney's lien is superseded by taking a security. *Balch v. Symes*, 1 Turn. & Russ. 92; *S. P., Cowell v. Simpson*, 16 Ves. 275.

By Taking his Client under a Ca. sa.]—A solicitor does not lose his lien on costs ordered to be paid to his client, by taking the client in execution under a ca. sa. for non-payment of costs. *O'Brien v. Lewis*, 32 L. J., Ch. 665; 9 Jur., N. S. 764; 8 L. T. 683; 11 W. R. 973—L. J.

4. CHARGING ORDERS ON PROPERTY RECOVERED.

In what Cases Granted.]—A solicitor for a party in an administration suit, who cannot otherwise obtain payment of his bill, may apply by petition to have his costs taxed, and for a charge for them on dividends payable to his client under an order made in the suit, although there may have been no real question at issue between the parties to the suit, or although, so far as there has been any such question, the decision in the suit may have been given wholly or in part in favour of the opposite party. *Smith v. Winter, Hartley, Ex parte*, 18 W. R. 447.

A solicitor is entitled to a charge for his costs on property, the subject of a successful suit conducted by him against an incumbrancer, although the incumbrance is entirely valueless, provided it formed a cloud upon the title. It is no objection to an application for such a charge that it is made in a suit which is no longer pending, and which was never brought to a hearing, nor that the property has been sold before the application of the solicitor. *Jones v. Frost, Piddley, In re*, 7 L. R., Ch. 773; 42 L. J., Ch. 47; 27 L. T. 465; 20 W. R. 1025.

In a suit for the administration of a testator's estate, an order was made for the taxation of the costs and payment to the plaintiff's solicitor personally of the plaintiff's costs out of a fund set apart for that purpose. The plaintiff sold his life interest in the estate with the knowledge of his solicitor, who did not then raise any claim upon it for his costs. The plaintiff subsequently, and before any of the costs were taxed, changed his solicitor. The solicitor then took out a summons for a charging order, under 23 & 24 Vict. c. 127, s. 28, upon the plaintiff's interest in the funds in court. It was not the practice for the masters to give a warrant for taxation to any solicitor not acting for a party to the cause:—Held, that the solicitor was entitled to a charging order, with liberty to apply to the judge as to enforcing it by sale or otherwise. *Pilcher v. Arden, Brook, In re*, 7 Ch. D. 318; 47 L. J., Ch. 479; 38 L. T. 111; 26 W. R. 273—C. A.

An attorney can only have a charge upon property recovered or preserved by him for his client in respect of the costs in the particular suit, matter or proceeding in which they were incurred and not for general costs. *Thompson, Ex parte*, 3 L. T. 317.

A town agent is entitled to a charge on all property recovered in three suits for an unascertained balance due to him by the country solicitor. *Tardrew v. Howell*, 3 Giff. 381; 31 L. J., Ch. 57; 7 Jur., N. S. 1120; 5 L. T. 276; 10 W. R. 32.

Costs were incurred for proceedings in a foreclosure suit, and for proceedings in actions of ejectment, and on indictments in reference to the mortgaged property: a court of equity refused to make a charging order for more costs than those incurred in the proceedings for foreclosure. *Wilson v. Round*, 4 Giff. 416; 10 Jur., N. S. 34; 9 L. T. 675; 12 W. R. 402.

An attorney was declared entitled to a charge upon the land recovered by him in ejectment, his client having died since the action, the lands being in the course of administration by his executors, the judge before whom the ejectment was tried not having been applied to, and a court of equity, before whom the case had been brought in another form, having declined to make an order for the common-law costs. *Seaman, Ex parte*, 3 H. & C. 148; 33 L. J., Ex. 204; 10 Jur., N. S. 592; 10 L. T. 345; 12 W. R. 748.

— **Solicitors Practising in Admiralty Court.**]—The 23 & 24 Vict. c. 127, s. 28, applies to solicitors practising in the Court of Admiralty. *The Philippine*, 16 L. T. 34; 13 W. R. 462.

Where, in a suit by a master against an owner for wages and disbursements, a sum of money was found to be due to him as master by the owner; but a counter-claim being set up, the registrar took all the accounts between the parties, and reported that there was a balance due by the master for unpaid purchase-money for shares in the vessel; but the transfer of the shares had not been registered:—Held, that the solicitors who acted in the suit had preserved property of the master under the act, and were entitled to their costs out of the master's shares, subject to the claim of the owner for the balance found to be due. *Ib.*

— **In Matters of Lunacy.**]—A lunatic died in June, 1853. In February, 1854, an order in lunacy was made, by which it was declared that the costs incurred in prosecuting the commission had been incurred for the benefit of the lunatic, and the bill was directed to be taxed. The taxation was completed in February, 1855, and after this the solicitor who had been employed in prosecuting the commission delivered for the first time a signed bill of costs. In October, 1860, the solicitor presented a petition to have his costs raised out of property of which the lunatic, who left issue, had been tenant in tail:—Held, that under the proviso contained in 23 & 24 Vict. c. 127, s. 29, the application was too late. *Cumming, In re*, 2 De G., F. & J. 376; 30 L. J., Ch. 29; 6 Jur., N. S. 1129; 3 L. T. 391; 9 W. R. 213.

Action brought by Next Friend of Infant.]—It is not merely when there is an adverse claim to property recovered or preserved in a suit through the instrumentality of the solicitor for his client, that the solicitor is entitled to a charge on the property for his costs, under 23 & 24 Vict. c. 127, s. 28; but he may also obtain such a declaration, where the suit is a friendly one and instituted on behalf of an infant. *Baile v. Baile*, 13 L. R., Eq. 497; 41 L. J., Ch. 300; 26 L. T. 283; 20 W. R. 534.

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A bill was filed by the maternal grandmother of an infant tenant in tail, as his next friend, praying the appointment of a guardian to him and his brothers and sisters, directions for his maintenance and education, having regard to the circumstances of the family, accounts, and a receiver. The solicitor employed by the next friend died pending the suit, and within six years from the presentation of the petition. A petition was presented by the personal representative of the solicitor for a declaration as to, and a charge for, his costs:—Held, that the solicitor was employed for the infant; that the property was preserved for the infant through the instrumentality of the solicitor; that the infant had, as a matter of fact, adopted the suit after attaining his majority; that the Statute of Limitations was not a bar to the petition; that it was well presented by the legal personal representative; and that the petitioner was entitled to the relief for which she prayed. *Ib.*

A suit was instituted in equity by a next friend on behalf of an infant to recover real estate and a fund in court. The costs were directed to be paid by the defendant, but in consequence of his insolvency they could not be recovered from him. A court of equity directed that the fund in court should be applied in payment of the costs pro tanto, the proceedings taken by the next friend being for the benefit of the infant, but refused to make an order, declaring that the residue of the costs were a charge on the real estate recovered, as that act applied only to suits instituted by persons sui juris. *Bonser v. Bradshaw*, 30 L. J., Ch. 159; 7 Jur., N. S. 231; 3 L. T. 545; 9 W. R. 229.

Where a solicitor was employed by the next friend in establishing an infant's title to land, the infant having attained his majority, a court of equity declared so much of the costs as remained unpaid a charge on the land recovered. *Bonser v. Bradshaw*, 4 Giff. 260; 9 Jur., N. S. 1048; 9 L. T. 195.

What is "Property Recovered or Preserved through Instrumentality of Solicitor."]—A solicitor instituted an administration suit on behalf of a cestui que trust against a sole trustee, obtained a common decree with a direction for the appointment of a new trustee, and procured an account to be brought into chambers by the defendant. The plaintiff then abandoned the suit. On a petition by the solicitor that his costs might be made a charge on the plaintiff's interest in the trust estate, under 23 & 24 Vict. c. 127, s. 28:—Held, that no property had been preserved or recovered on which the costs could be made a charge. *Pinkerton v. Easton, Pinkerton, In re*, 16 L. R., Eq. 490; 42 L. J., Ch. 878; 29 L. T. 364; 21 W. R. 943.

A bill was filed alleging that the defendant had built so as to obstruct the plaintiff's ancient lights, and was proceeding to build so as further to obstruct them, and asking for an injunction against further building, and a mandatory injunction to pull down part of what had been built. An interlocutory injunction was granted against building higher, and the suit was afterwards compromised on the terms that the building should remain of its then height. The defendant having become bankrupt, his solicitor petitioned to have his costs made a charge on his property to which the suit related:—Held, that no property had been recovered or preserved

within the meaning of 23 & 24 Vict. c. 127, s. 28. *Foxon v. Gascoigne*, 9 L. R., Ch. 654; 43 L. J., Ch. 729; 31 L. T. 289; 22 W. R. 939. Affirming *S. C.*, sub nom. *Fox v. Gascoigne*, 30 L. T. 743.

A suit which only relates to an easement is not a suit in which it can be said that property is recovered or preserved, even though a mandatory injunction for pulling down buildings is refused. *Ib.*

The defendant having recovered a sum of money in an action brought by him against M., B., the defendant's attorney in that action, had taken out a summons for an order charging his costs in such action upon the sum recovered. The plaintiff afterwards, having recovered judgment in his action against the defendant, obtained an ex parte garnishee order attaching the sum recovered by the defendant against M. in execution. Under these circumstances the parties came before a judge at chambers, B. claiming to have a charging order on the judgment debt as property recovered within 23 & 24 Vict. c. 127, s. 28, and the plaintiff claiming an order on M. to pay the sum attached to him. The judge made an order in favour of B.:—Held, that he was right in so doing; that the sum recovered was property within the section, and that the attorney was entitled to priority. *Birchall v. Pugin*, 10 L. R., C. P. 397; 44 L. J., C. P. 278; 32 L. T. 495; 23 W. R. 923.

A., as administrator of his deceased mother, sued B. and C. (his brother and sister) in the Common Pleas at Lancaster, in detinue for goods belonging to the estate of the intestate, and recovered a verdict and judgment against them, but was unable to levy. Afterwards B. and C. sued out a plaint in a county court for administration of the estate, and brought into court the proceeds of the goods of the intestate, which they had hitherto concealed:—Held, that the solicitor who acted for A. in the action of detinue was entitled to a charge or lien upon the fund in the hands of the registrar of the county court, under 23 & 24 Vict. c. 127, s. 28, as "property recovered or preserved through his instrumentality," in respect of his costs incurred by him, to be taxed as between attorney and client. *Catlow v. Catlow*, 2 C. P. D. 362; 25 W. R. 866.

An undischarged bankrupt commenced an action for the purpose of recovering moneys alleged to be due to him for remuneration for his personal services as an architect, rendered since the bankruptcy, and for damages for wrongful dismissal since that date, and also for further relief of a personal character which it was possible, but not probable, that he might obtain. The defendant denied the whole claim, but paid money into court. The plaintiff took out a summons to withdraw the money so paid in. The trustee in his bankruptcy took out another summons to withdraw the money, and also, before this case came on for hearing, a further summons, upon which being heard, the trustee was added as a co-plaintiff, and given the conduct of the action on the ground that the bulk, if not the whole, of the money which might be recovered in the action, would, if recovered, pass to the trustee for the benefit of the creditors. The solicitor, acting for the bankrupt, took out a summons under the Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28, by which he asked for an order charging upon the fund in court his costs of or in reference to the action:—Held, that the fund paid into court had been

"recovered or preserved" through the instrumentality of the solicitor, within the meaning of s. 28 of the Solicitors Act, 1860, and that such solicitor was entitled to a charging order on the money in respect of his costs down to the time when the trustee intervened, but not as to his costs incurred in opposing the trustee's claim to intervene. *Emden v. Carte*, 19 Ch. D. 311; 51 L. J., Ch. 371; 45 L. T. 328; 30 W. R. 17. Reversing 44 L. T. 840; 29 W. R. 840.

An action was brought by a husband against his wife and another person for a sum of money invested in a building society, which the husband alleged to have been fraudulently transferred by his wife to the other person. The building society were also made defendants to the action and appeared. Judgment was given for the defendants. Upon petition presented under the Attorneys and Solicitors Act, 1860, by the solicitor to the defendants other than the building society:—Held, that he was entitled to a charge upon the whole sum invested, as being the amount "recovered or preserved" to them. *Porter v. West*, 50 L. J., Ch. 231; 43 L. T. 569; 29 W. R. 236.

— **Property of Person not employing the Solicitor—Property of Infant.**—The charge declared in pursuance of the 28th section of the Solicitors Act, 1860, on the property recovered or preserved in favour of the solicitor employed is in the nature of salvage, and may be made on the interest of persons who did not employ the solicitor, and who were not parties to the suit, if they adopt the benefit obtained in the suit. It makes no difference that the persons whose interests are charged are infants, but the court will not make the order until the infants have an opportunity of being heard on it. *Greer v. Young*, 24 Ch. D. 545; 52 L. J., Ch. 915; 49 L. T. 224; 31 W. R. 930—C. A.

P. and Y. were trustees under the will of G. P. misapplied some of the trust funds and died. The suit of M. v. P. was brought for the administration of P.'s estate, and a proof was carried in by Y. on behalf of the trust in respect of the breaches of trust by P. Afterwards the action of G. v. Y. was brought by some of the cestuis que trustent under G.'s will to establish the liability of Y. and to appoint new trustees, in which a small dividend was recovered from Y.'s estate. The solicitor who acted for the plaintiffs in G. v. Y. applied for a charging order for his costs on the dividend recovered from P.'s and Y.'s estates, which was opposed by the new trustees on behalf of the infant cestuis que trustent:—Held, that the solicitor was entitled to a charge upon the dividend recovered in the action from Y.'s estate, as against the infant cestuis que trustent, but not on the dividend recovered from P.'s estate, as it was not recovered in the action. *Ib.*

— **Extent of Charge.**—Under s. 28 of the Act 23 & 24 Vict. c. 127, the court can declare a solicitor entitled to a charge for costs on the whole of the property recovered or preserved through his instrumentality, and not merely on his own client's interest in that property. *Berrie v. Howitt*, *infra*, not followed. *Charlton v. Charlton*, 52 L. J., Ch. 971; 49 L. T. 267; 23 W. R. 90.

In a suit in the nature of a partition suit, it having been decided that each party must bear

his own costs, a solicitor employed by a party entitled as tenant in tail who had not barred the entail has not a lien for costs on the inheritance of his client's share. *Berrie v. Howitt*, 9 L. R., Eq. 1; 39 L. J., Ch. 119; 21 L. T. 414.

— **Amount Awarded by Arbitrator.**—A reference to arbitration having been made in an action, the arbitrator awarded that a certain sum should be paid by the plaintiff to the defendant, and the award was confirmed by the court. An order was made, on the application of the defendant's solicitor, under the 3rd section of the act 39 & 40 Vict. c. 44, declaring him entitled to a lien for the costs of the defendant in the action upon the amount awarded, as property recovered or preserved for the defendant through the instrumentality of the solicitor, and directing the plaintiff to pay thereout to the solicitor the amount of such costs when taxed. *McAleavey v. McAleavey*, 9 L. R., Ir. 165. See also *Greer v. Young*, *supra*.

Client not being Beneficial Owner is Immaterial.—A plaintiff in a suit instituted to set aside a conveyance of real estate sold his interest in the property, and the suit was compromised, and a conveyance of the property made to the purchaser, who obtained an order dismissing the bill.—Held, that the plaintiff's solicitor was entitled to a charge for his costs upon the property as against the purchaser. *Jones v. Frost, Fildes, In re*, 7 L. R., Ch. 773; 42 L. J., Ch. 47; 27 L. T. 465; 20 W. R. 1025.

The principle of 23 & 24 Vict. c. 127, s. 28, is analogous to the principles of salvage, and gives a charge on the property preserved, irrespective of any question as to who is the owner of it; and the fact that the client by whom the solicitor was retained is not the beneficial owner of the whole property is immaterial. *Bulley v. Bulley*, 8 Ch. D. 479; 47 L. J., Ch. 841; 38 L. T. 401; 26 W. R. 638—C. A. Affirming 38 L. T. 95; 26 W. R. 310.

Therefore, when a solicitor has been retained by a person interested in an estate, as to two-fifths in his own right, and as to three-fifths as a trustee for others, and the whole estate has been preserved, the court will make an order as against the cestui que trust charging the whole property preserved; and this charge will not be incumbered or affected with any equities that may exist between such trustee and his cestui que trust, even though the trustee were a defaulting trustee or bankrupt. *Id.*

A solicitor is entitled to a charge upon property recovered or preserved, for his costs of the litigation by which it is recovered or preserved, irrespective of his client's interest in the property, and although it turns out that the latter has not and never had any interest therein. *Bailey v. Birchall*, 2 H. & M. 371; 11 Jur., N. S. 57.

Priority of Solicitor's Claim.—In a suit by a cestui que trust against a trustee of landed estate, praying for an account and a reconveyance, a receiver was ordered to be, and afterwards was, appointed, adversely to the defendant. Notice of motion for decree was served, but before the time for closing evidence had arrived, the plaintiff, without consulting her solicitor, and without his knowledge, entered into an agreement with the defendant for a compromise of the suit on the terms, first, that a sum of cash

should be paid to the plaintiff, then that the mortgages on the property should be paid off, and then that the costs of all parties estimated at a fixed sum should be paid. Upon hearing of the compromise, the plaintiff's solicitor applied to the plaintiff and to the defendant's solicitor for the terms of it, but was refused all information.—Held, that the solicitor was entitled to a first charge for the amount of his taxed costs, as between solicitor and client, upon the property of the plaintiff, as having been recovered and preserved through his instrumentality. *Twynnam v. Porter*, 11 L. R., Eq. 181; 40 L. J., Ch. 30; 23 L. T. 551; 19 W. R. 151.

In winding up a company the costs of the petition are the first charge on the estate, and next to them are the costs of the winding-up, including the bill of costs of the solicitor employed, which bill must be paid before any payment is made by way of remuneration to the official liquidator. *Freehold Land and Brick-making Company, In re, Massey, Ex parte*, 39 L. J., Ch. 492; 21 L. T. 195.

— **Over Garnishee Order.**—A judgment creditor of the defendant in a partnership action obtained a garnishee order nisi to attach all moneys in the hands of the receiver in the action appearing to be due to the defendant on taking the accounts. On the following day, and before service of the order nisi, the defendant's solicitors obtained, on a summons served on the receiver, a charging order intitled in the action, declaring that they were entitled to a charge for their costs upon all moneys coming to the defendant under the action. On the next day the garnishee order nisi was served on the receiver, and was subsequently made absolute.—Held, that the solicitors were entitled to their costs in priority to the claim of the creditor under the garnishee order both under the act and independently of it. *Hamer v. Giles*, 11 Ch. D. 942; 48 L. J., Ch. 508; 27 W. R. 834. See also *Birchall v. Pugin, ante*, col. 1955.

The plaintiffs were the solicitors for W. in an action in which he recovered a sum of money. The defendant was a judgment creditor of W., and obtained, ex parte, on the day that judgment was signed in the above action, a garnishee order attaching all debts due to W. On the taxation of costs on the same day the plaintiffs for the first time learned of the defendant's claim, and then gave notice to the defendant in the action in which W. was plaintiff, of their claim of lien, and within five days applied for an order declaring that they were entitled to a charge on the money recovered by W.—Held, that the plaintiffs had a lien for their costs on the sum recovered by W., that they were entitled to the order sought for, and that the garnishee order obtained by the defendant did not take priority over that lien. *Shippey v. Grey*, 49 L. J., C. P. 524; 42 L. T. 673 (nom. *Shippey*); 28 W. R. 877—C. A.

A proctor's lien on a fund in court is not affected by a garnishee order, and he is entitled to be paid his costs in priority to the claim of the garnishee. *The Jeff Davis*, 23 L. R., Adm. 1.

— **Over Mortgage of Client's Interest with Notice.**—The plaintiffs in a suit mortgaged their interests in the estate, the subject of the suit, to two of the defendants. This mortgage was sent to the solicitor of the plaintiffs for his

perusal and approval on their behalf, and he sanctioned their executing it. Nothing was said by either party about any claim by the plaintiffs' solicitor for the costs of suit. The solicitor afterwards obtained a charging order for them under 23 & 24 Vict. c. 127, s. 28, on the interests of the plaintiffs:—Held, that as the mortgagees had notice of the suit, they must be presumed to have known the rights of the solicitor of the plaintiffs, and that his charge ought not to be postponed to the mortgage, he not having been guilty of any misrepresentation or concealment. *Faithfull v. Ewen*, 7 Ch. D. 495; 47 L. J., Ch. 457; 37 L. T. 805; 26 W. R. 270—C. A.

— **Over Judgment Creditor.**—A solicitor's lien for costs upon a fund in court, recovered by his exertions, is independent of the 23 & 24 Vict. c. 127, s. 28, and he is entitled to priority in respect thereof over a judgment creditor who has obtained a charging order before the solicitor. *Haymes v. Cooper*, 33 L. J., Ch. 488; 10 Jur., N. S. 803; 10 L. T. 87; 12 W. R. 539.

— **Held paramount to Restraint on Anticipation.**—A solicitor was retained by a wife in the successful defence of a suit instituted by her husband to set aside a settlement, whereby he covenanted to pay to her an annuity for her separate use without power of anticipation, and assigned property to trustees to secure the annuity. Upon a petition by the solicitor to charge, under 23 & 24 Vict. c. 127, s. 28, the annuity with his costs incurred on her behalf:—Held, that the married woman was competent to employ a solicitor for the purpose of defending such a suit and that the right of the solicitor under the act to a charge upon the property preserved by his exertions was paramount to the restraint on anticipation. *Kcane, In re, Lumley v. Desborough*, 12 L. R., Eq. 115; 40 L. J., Ch. 617; 24 L. T. 780; 19 W. R. 1025.

Held, also, that the charge was limited to the annuity and did not extend to the trust fund upon which it was secured. *Ib.*

— **Over Lien for Necessaries Supplied, or Wages of Master.**—When a solicitor in the Court of Admiralty has acquired, by order of the court under 23 & 24 Vict. c. 127, s. 28, or otherwise, a lien for his costs upon a ship, as for property recovered or preserved by his exertions, or upon its proceeds in court, his lien takes precedence of liens for necessities supplied after the institution against the ship of the cause in respect of which he is entitled to costs, but not of liens for necessities supplied before the institution. *The Heinrich*, 3 L. R., Adm. 505; 41 L. J., Adm. 68; 26 L. T. 372; 20 W. R. 759.

His lien takes precedence of the lien of the master of the ship for wages, where the master is also part owner, and has instructed him to defend the cause. *Ib.*

— **Priority of Claim by Foreign Consul for Payment of Expense of sending Crew of Ship Home.**—Salvage actions were brought against an Italian vessel, and she was sold by order of the court. After the salvors had been remunerated, the balance of the fund in court was insufficient to satisfy the costs of the solicitors who had appeared in the above actions for the parties interested in the ship, and who sought to enforce their claim for such costs by virtue of 23

& 24 Vict. c. 127, s. 28, as well as the claim of the Italian consul in respect of the expenses of sending the crew back to Italy. It was proved that by the law of Italy such expenses and the keep of the master and crew ranked next to the salvage payments:—Held, that the claim of the Italian consul had priority to that of the solicitors. *The Lirietta* (No. 2), 8 Adm. D. 209; 52 L. J., Adm. 81; 49 L. T. 411.

— **Petition.**—An application by a solicitor, under s. 28 of the Solicitors Act of 1860, for an order charging his costs upon the interest of a party to an action in a fund in court, is, notwithstanding s. 39 of the Judicature Act, 1873, properly made by a petition in the action. But the other parties to the action ought not to be served with the petition. *Brown v. Trotman*, 12 Ch. D. 88; 48 L. J., Ch. 862; 28 W. R. 164.

— **How Intituled.**—An order giving a solicitor a charge under s. 28 of the Attorneys and Solicitors Act, 1860, for his costs as between solicitor and client, on property recovered by him for his client in an action, is sufficient if intituled in the action; it may be obtained either on summons or petition, and need not be intituled either in the matter of the act or of the solicitor. *Hamer v. Giles*, 11 Ch. D. 942; 48 L. J., Ch. 508; 27 W. R. 834.

A declaration giving a solicitor a charge for his costs upon property recovered or preserved in a suit may be made upon a petition presented in the suit after an order has been made dismissing the bill upon a compromise. *Jones v. Frost, Fiddley, In re*, 7 L. R., Ch. 773; 42 L. J., Ch. 47; 27 L. T. 465; 20 W. R. 1025.

And a petition for the purpose of obtaining a declaration under the statute must be intituled in the suit, notwithstanding that the bill has been dismissed, and that the parties to the suit, whom it will become necessary to serve, are numerous. *Kcane, In re*, 19 W. R. 429.

— **Application, to what Court.**—When a solicitor applies to the Court of Chancery to have it declared that he is entitled to a charge upon property which has been recovered or preserved by him for his client in a suit in which he has been employed, he must make the application to the judge to whose court the suit is attached, and it must be intituled in that suit as well as in the matter of the solicitor. *Heinrich v. Sutton, Fiddley, In re*, 6 L. R., Ch. 865; 25 L. T. 643; 19 W. R. 1075.

An order declaring a solicitor entitled to a charge for his costs under 23 & 24 Vict. c. 127, s. 28, on a judgment recovered in an action which he was employed to prosecute, must not be made by any other judge than the judge who tried the action. *Higgs v. Schrader*, 3 Q. B. D. 252; 47 L. J., Q. B. 426; 26 W. R. 831.

Upon a petition by a solicitor for a charging order under 23 & 24 Vict. c. 127, s. 28, upon property preserved in an action instituted in the Chancery Division in the Liverpool District Registry, and attached to the court of the Vice-Chancellor Hall, but which had been tried by a judge and jury at Liverpool:—Held, that the judge before whom the action had been tried, and who had dealt with the substantial question in the case, was the judge to whom the application ought to be made. *Owen v. Hen-*

shaw, 7 Ch. D. 385; 47 L. J., Ch. 267; 26 W. R. 188.

A., as administrator of his deceased mother, sued B. and C. (his brother and sister) in the Common Pleas at Lancaster, in detinue for goods belonging to the estate of the intestate, and recovered a verdict and judgment against them, but was unable to levy. Afterwards B. and C. sued out a plaint in a county court for administration of the estate, and brought into court the proceeds of the goods of the intestate, which they had hitherto concealed:—Held, that the Common Pleas Division of the High Court was the proper court in which to make the application. *Catlow v. Catlow*, 2 C. P. D. 362; 25 W. R. 866.

Jurisdiction to make Order where Cause Transferred.]—Under Rules of Supreme Court, 1875, Ord. LI. r. 1a, a judge, to whom an action has been transferred for trial, has authority to hear a petition by a solicitor under the Attorneys and Solicitors Act, 1860, for costs incurred in recovering property in the action. *Porter v. West*, 50 L. J., Ch. 231; 43 L. T. 569; 29 W. R. 236.

Jurisdiction of Judge at Chambers to make Order.]—The defendant having paid money into court in the action, the plaintiff's solicitor declined to proceed with the action, except on terms to which the plaintiff would not assent. Thereupon, the plaintiff retained fresh solicitors, and obtained an order for a change of solicitors. After the order was made, the late solicitor obtained a judge's order at chambers, charging the money in court with his costs in the action:—Held, that when an action is pending, a judge at chambers has jurisdiction to make such an order. *Clover v. Adams*, 6 Q. B. D. 622.

Solicitor ceasing to be such at Time of Order.]—Held, also, that the order was valid, though the plaintiff's solicitor had ceased to be such when it was made. *Id.*

And that though he had discharged himself from the position of plaintiff's solicitor, yet, as he had not done so wrongfully or improperly, the order was right. *Id.*

Substituted Service of Summons.]—A sum of money having been paid into court for the benefit of the defendant, M., his solicitor, obtained a charging order for costs upon it under 23 & 24 Vict. c. 127, s. 28. The costs had been taxed *ex parte*. M. then took out a summons to shew cause why the sum of money paid into court should not be paid out to him in part satisfaction of his taxed costs. This summons could not be served upon the defendant, who appeared to be wilfully evading service of it. L. had acted for the defendant after M. had ceased to do so, and H. had introduced the defendant to M.:—Held, that substituted service of the summons should be allowed; that a notice calling upon the defendant to appear in one month should be put up at the master's office, and served upon L. and H., and advertised in the Times newspaper, and thereupon, if the defendant did not appear, an order might be made on the summons. *Hunt v. Austin, Mason, Ex parte*, 9 Q. B. D. 598; 51 L. J., Q. B. 455; 47 L. T. 300—C. A.

Costs.]—Solicitors who had obtained a charg-

ing order for costs due to them were not allowed the costs of appearing by counsel at the hearing on further consideration. *Mildmay v. Quicke*, 25 W. R. 788.

5. APPROPRIATION OF PAYMENTS ON ACCOUNT.

An attorney, who has several demands against his client, some of which are barred by the Statute of Limitations, has no right to appropriate, in payment of the demands so barred, a sum received by him on account of his client, for damages recovered in an action. *Waller v. Lacy*, 1 M. & G. 54; 1 Scott, N. R. 186; 8 D. P. C. 563; 4 Jur. 435.

Where directors of a company carry on business unauthorized by the deed of settlement, and moneys have been paid by the company to the solicitors on account of costs generally, the solicitors have no right *post litem motam* to appropriate such payments to the costs incurred in respect of the unauthorized business, but, on the contrary, the court will appropriate the payments to the costs which the company was liable to pay. *Phoenix Life Assurance Company, In re, Howard and Dolman, Ex parte*, 1 H. & M. 433.

IX. RELATIONS BETWEEN COUNTRY SOLICITOR AND LONDON AGENT.

Authority of.]—The acts of an attorney's agent in town, in matters relative to the suit, are binding upon the parties. *Griffiths v. Williams*, 1 T. R. 710.

An attorney, as such, is bound by the acts done on his behalf of his London agent. *Withers v. Parker*, 29 L. J., Ex. 320; 6 Jur., N. S. 1033—Ex. Ch.

Gives Credit to Country Solicitor, not to Client.]—A London agent of a country solicitor, acting in the ordinary course of business, is always taken to give credit to the country solicitor, not to the country solicitor's client. *Waller v. Holmes*, 1 Johns. & H. 239; 30 L. J., Ch. 24; 6 Jur., N. S. 1367; 3 L. T. 289; 9 W. R. 32.

A country attorney, being retained to conduct an action (on behalf of an infant), in which he obtained a verdict, employed, in the latter stages of it, a London attorney as his agent, and died before judgment was signed. The London attorney wrote to the client in the country, stating that he had acted as the agent, and proposing to continue so to do; and, receiving no answer, taxed costs, and signed final judgment, without the knowledge of the client; meanwhile the client, without any notice, either to him or to the defendant, had employed another attorney. The court refused a rule to set aside the taxation; the plaintiff's remedy, if any, being against the attorney. *Davis v. Bowen*, 7 L. T. 739; 11 W. R. 282.

An attorney employing an agent to do business for his client, is primarily liable to such agent for his bill, though the latter knows the business is to be done for the client; but to whom the credit is given is a question for the jury. *Sr-race v. Whittington*, 3 D. & R. 195; 2 B. & C. 11.

Payment to.]—Payment by a defendant to the London agent of the plaintiff's attorney is a payment to the plaintiff. *Hanley v. Cassan*, 11 Jur. 1088.

Death of Country Solicitor—Effect of.]—The death of the principal attorney, pending a suit, does not revoke his agent's authority to obtain possession of a postea, after a verdict for the client of the former. *Taunton v. Goforth*, 6 D. & R. 384.

Misconduct of—Privity with Client.]—If a London agent receives money improperly, the remedy of the client is not against him but against his attorney. *Gray v. Kirby*, 2 D. P. C. 601.

A., being defendant in an action brought by B., paid the debt and costs to his own country attorney, for transmission to B. The attorney sent a cheque exceeding the amount to his own town agent, directing him to pay the debt and costs out of it. The agent acknowledged the receipt by letter to the country attorney, and therein promised to apply the money as directed; but he retained it in reduction of a debt due to him from the attorney:—Held, that there was no sufficient privity to support an action for money had and received by A. against the agent. *Cobb v. Becke*, 6 Q. B. 930; 14 L. J., Q. B. 108; 9 Jur. 439.

Where a country attorney who is employed in a cause employs a London agent, there is not in general such privity between the client and the London agent as entitles the client to recover for money had and received against the agent in respect of proceeds of the cause which the agent has received in the ordinary course of his business. *Robbins v. Fennell*, 11 Q. B. 248; 17 L. J., Q. B. 77; 12 Jur. 157.

But if it appears that such proceeds have been received by the agent, without authority, either from the client or the country attorney, the court will, if the agent is an attorney of the court, compel him, upon application, to pay over the proceeds to the client, though the country attorney is indebted to the London agent in a greater sum on other accounts. *Ib.*

Where a town agent received moneys (not in any cause), belonging to B., the client of a country attorney, under a power of attorney from B., and placed them to the credit of the country attorney, the court refused a rule, on the application of B., to compel the agent to pay over the moneys to him, as the receipt of them did not establish the relation of attorney and client between the agent and B. *Baker, Ex parte*, W., W. & D. 591; 1 Jur. 894.

Refusal by Town Agent of Country Solicitor to Pay to Client Amount of Debt received in an Action.]—The town agent of the solicitor of the plaintiff, in an action in which judgment had been recovered for a debt, refused to pay over to the plaintiff the amount of the debt which had been received by him from the sheriff under a writ of *fi. fa.*, on the ground that he was entitled to retain such amount for a debt due to him from the country solicitor of equal amount. The country solicitor had no lien on such amount against his client, the plaintiff:—Held, that the court, in the exercise of its summary jurisdiction over its own officers, would order the town agent to pay over the amount of the debt

to the plaintiff. In such a case the court will exercise its summary jurisdiction, although there be no fraud imputed to the town agent. *Edwards, Ex parte, Johnson, In re*, 8 Q. B. D. 262; 51 L. J., Q. B. 108; 45 L. T. 578.

Suit for Accounts.]—Notwithstanding the definition of the word "client" in s. 3 of the Attorneys and Solicitors Act, 1870, that act does not apply to accounts between country solicitors and town agents. *Ward v. Eyre*, 15 Ch. D. 130; 49 L. J., Ch. 657; 43 L. T. 525; 28 W. R. 712—C. A.

A bill by a country solicitor against a London solicitor, alleged that he had made a special agreement with the plaintiff to transact certain business for him on agency terms, and charged that the defendant falsely pretended that the agreement was one not for agency but for partnership in the particular business. The bill charged that, on either construction of the agreement, the plaintiff was entitled to an account, and prayed that the defendant might deliver his bills of costs as the plaintiff's agent, and also for a general account of all dealings and transactions between them. The defendant demurred, on the ground that the proper remedy of the plaintiff was by petition under 6 & 7 Vict. c. 73, s. 37:—Held, that the demurrer ought to be overruled. *Ward v. Lawson*, 8 L. R., Ch. 65; 42 L. J., Ch. 273; 21 W. R. 88.

Lien between Town Agent and Client.]—A London solicitor acting as agent for a country solicitor has a general lien against the country solicitor upon any money recovered in an action, for all costs for agency business and disbursements due from the country solicitor, whether in the particular action or in any other proceedings; but as between the town agent and the client, the lien of the former extends only to the costs of the particular action in which he is engaged. *Lawrence v. Fletcher*, 12 Ch. D. 858; 27 W. R. 937.

A client paid her country solicitor his bill of costs before receiving any notice that the town agent of the solicitor claimed a lien upon the documents in his possession for a balance alleged to be due to him from the country solicitor on accounts stated between them:—Held, that the town agent's lien did not attach, and that he must deliver up all the documents in his possession. *Tyso v. Foster*, 10 L. R., Ch. 236; 44 L. J., Ch. 344; 32 L. T. 219; 23 W. R. 413.

A town agent has no lien for the general balance due to him from a country attorney, upon money of a client of the latter coming to his hands in a cause in which he acts as such town agent, because he must have known that the money was received for the client's use. *Moody v. Spencer*, 2 D. & R. 6.

Where a client has paid the bill of his country solicitor before receiving notice of anything remaining due from the solicitor of the London agent, the latter has no lien on documents which have come into his hands in the course of the suit. *Waller v. Holmes*, 1 Johns. & H. 239; 30 L. J., Ch. 24; 6 Jur., N. S. 1367; 3 L. T. 289; 9 W. R. 32.

An attorney cannot set up the lien of his London agent on the papers of his client, against the claim of that client, the client having paid his attorney's bill. *Andrew, In re*, 7 H. & N. 87; 30 L. J., Ex. 403.

A town agent of an attorney has a lien upon the money received in the particular cause, and upon the papers in the particular cause, for the account due to him by the attorney for the agency bill in that particular cause only, and he has this lien against all the world: and if he has had no payment made to him specifically on account of the cause, he is entitled to this lien, until his agency bill in the particular cause is satisfied. If the agent has parted with the possession of the papers by his own act, though by mistake, his lien is at an end; but if the papers did not get lawfully out of his possession, his lien continues. *Dicas v. Stockley*, 7 C. & P. 587.

— **Between Town Agent and Country Solicitor.**—A town agent has a lien against the solicitor in the country to the extent of his entire bill. *Steele, Ex parte*, 16 Ves. 164.

A town agent is entitled to a charge on all property recovered in three suits for an unascertained balance due to him by the country solicitor. *Tardrew v. Howell*, 3 Giff. 381; 31 L. J., Ch. 57; 7 Jur., N. S. 1120; 5 L. T. 276; 10 W. R. 32.

Taxation of Bill of Costs.—Under 2 Geo. 2 c. 23, and 12 Geo. 2 c. 13, the courts had no power, by direct statutory provision, or in the exercise of any common-law authority, to order taxation of an agency bill delivered by one attorney to another. *Cardale v. Bull*, 4 Q. B. 611; 7 Jur. 847.

But since 6 & 7 Vict. c. 73, an attorney's bill for agency business is taxable. *Smith v. Dimes*, 4 Ex. 32; 19 L. J., Ex. 60; contra, *Simons v. Peacock*, 3 D. & L. 156; 14 L. J., Q. B. 296; *Gedge, In re*, 2 D. & L. 915; 14 L. J., Q. B. 238; 9 Jur. 470,—which are unsustainable decisions.

In an action for an attorney's bill, the town agent of the defendant's attorney obtains an order for taxing the bill. The plaintiff cannot call upon such agent to take up the master's allocatur and pay the fees. *Becke v. Cattell*, 3 M. & G. 480; 4 Scott, N. R. 246.

So, where part of the business is done in the House of Lords, and the certificate of the officer of the house is necessary for the purpose of enabling the taxing-master to complete his allocatur, the court will not compel the defendant's agent to take up such certificate. *Id.*

Costs—To whom Payable.—At the request of the client of a country solicitor, R. paid to the solicitor a sum of money in part discharge of costs due to the solicitor in respect of administration suits to which the client was defendant, and the repayment was secured by a mortgage of the solicitor's lien. Afterwards the costs were ordered to be taxed, and paid out of a fund in court to the town agents of the solicitor:—Held, that the costs so ordered to be paid to the agent must be paid to R. in satisfaction of his claim under the mortgage. *Cockayne v. Harrison*, 15 L. R., Eq. 298; 42 L. J., Ch. 660; 21 W. R. 520.

— **What Recoverable by Country Solicitor.**—A country solicitor personally attending an appeal instead of employing his London agent, will be allowed the additional charges and expenses thereby occasioned. *Foster, In re, Dickens, Ex parte*, 8 Ch. D. 598; 26 W. R. 915.

A country solicitor with an office in town, conducting personally the business which would ordinarily be transacted by a London agent, is not

entitled to charge for letters passing between the two offices; but such charges are not "overcharges amounting to fraud," so as to induce the court to refer the bill more than twelve months after delivery. *Harle, In re*, 19, L. T. 305; 17 W. R. 21.

Where a London agent has been employed to attend the trial of a cause, it is a matter within the discretion of the master whether the costs of a journey to London by the country attorney, to attend the trial of the cause, shall be allowed. *Parsloe v. Foy*, 2 D. P. O. 181.

It is a matter for the discretion of the master, and with which the court will not interfere, whether the expenses of a country attorney attending a reference, as well as his town agent, shall be allowed. *Archer v. Marsh*, 7 D. P. C. 541.

X. CHANGE OF SOLICITORS.

Necessity of obtaining Order for.—It is an irregularity for a defendant to take a declaration out of the office by one attorney, and plead by another, without an order for changing the attorney. If no such order has been obtained and served, the court will set aside the plea. *King v. Archer*, 1 B. C. Rep. 219.

Where a defendant has appeared and pleaded to an action by one attorney, he cannot make any application to the court by another in the same cause, unless he has obtained an order for changing his attorney. *Ginders v. Moore*, 1 B. & C. 654.

A party called on to shew cause may oppose the rule in person, or by a new attorney, without notice to the other party of the order to change his attorney. *Lovegrove v. Dymond*, 4 Taunt. 669.

A plaintiff may sue out execution by a different attorney, without an order to change. *Tipping v. Johnson*, 2 B. & P. 357.

So a defendant may bring error without such an order. *Batchelor v. Ellis*, 7 T. R. 337.

Waiver of Irregularity.—Taking a plea out of the office, and keeping it, waives the irregularity of its having been pleaded by a new attorney without an order. *Margerem v. Makilwaine*, 2 N. R. 509.

If the attorney on the record is changed, without an order for that purpose, and the opposite party treats the new attorney as the attorney in the cause, he cannot afterwards object that no order was obtained. *Farley v. Hobbs*, 3 D. P. C. 538; 1 H. & W. 203.

Application for Order.—Upon an application to change the attorney, where the client is unacquainted with the English language, the affidavits must clearly shew that the purport and object of the motion are known to and sanctioned by the client. *Davies v. Lowndes*, 3 C. B. 808.

It is no objection to such an application that it is made after final judgment. *Id.*

— **By Husband to Change Wife's Solicitor.**—Where a wife was beneficially interested in an annuity, and became a defendant in replevin to try her right, and her husband joined with her to sign the distress-warrant on which the proceedings arose, the court would not entertain a rule moved for on behalf of the husband, *

change the attorney selected by the wife, and who had conducted the suit through several stages; especially as it appeared that the husband was colluding with the plaintiff to prevent his wife from trying her right to the rent-charge as against the plaintiff. *Wynne v. Wynne*, 2 Scott, N. R. 615; 9 D. P. C. 396; 5 Jur. 220.

— **On what Condition made.**—It is the invariable practice of the court not to allow the attorney on the record to be changed unless the costs of the first attorney have been paid, and the fact that such attorney has other sufficient security for his costs is no reason for departing from that rule. *Witt v. Ames*, 8 L. T. 425; 11 W. R. 751.

The rule as well at law as in equity, since the Judicature Acts, 1873 and 1875, is, that an order for changing a solicitor shall be made without any provision as to the payment of his costs. *Grant v. Holland*, 3 C. P. D. 180; 47 L. J., C. P. 518; 26 W. R. 742.

— **Notice of.**—Obtaining an order, by consent, to change the attorney is not a proceeding in the cause so as to make it unnecessary to give a term's notice. *Deacon v. Fuller*, 1 C. & M. 349; 1 D. P. C. 675.

— **Service of.**—The order for changing an attorney must be served on the opposite party. *Rez v. Middlesex (Sheriff)*, 2 D. P. C. 147.

Discharge and Delivery up of Papers.—An assigned solicitor of a pauper, in consequence of delay in the prosecution of proceedings in the suit, was ordered to be discharged and to deliver up to the new solicitors all the papers, subject to his lien for what might be found due to him for costs upon taxation. *Hannaford v. Hannaford*, 24 L. T. 86; 19 W. R. 429.

Where an order for changing an attorney on payment of costs is made, and the attorney gives up the client's papers without the costs being paid, the court will not grant an attachment for their non-payment. *Handy v. Collett*, 7 D. P. C. 599; 2 W., W. & H. 63; 3 Jur. 870.

Where there is an order for changing upon payment of the first attorney's bill upon taxation, and delivery up of papers, the first attorney is entitled to the possession of it to enforce payment of his bill. *Alger v. Hafford*, 1 Taunt. 38.

Rights of First Solicitor as to Costs.—Upon a change of attorneys under a rule of court, the new attorney undertook to hold the record and papers in the cause, subject to the lien of the former attorney:—Held, that, the cause having been brought to a successful termination, the former attorney was entitled to call upon his successor to proceed with the taxation, issue execution, and pay him the amount of his lien, out of the first proceeds, subject only to the costs necessarily incurred on such taxation. *Newton v. Harland*, 4 Scott, N. R. 769.

— **Lien on Alimony.**—An order was made for the change of solicitors in a wife's suit for dissolution of marriage. At the date of the order the former solicitor had in his hands a sum of money, being the balance of an amount received by him on account of alimony due to the petitioner:—Held, that the solicitor had no

lien for his costs upon the balance of alimony in his hands. *Leete v. Leete*, 48 L. J., P. 61; 40 L. T. 788; 37 W. R. 921.

Made without Order—Effect of.—A suit was instituted against a vessel, and an appearance entered by a firm of solicitors on behalf of the owner. A sum of money was paid into court in lieu of bail, and the solicitors thereupon procured the release of the vessel, and incurred costs in defending the suit on behalf of the owner. Whilst the suit was pending, and before any sum had been paid to the firm of solicitors on account of such costs, another firm of solicitors entered a second appearance in the same suit on behalf of the same defendant. On an application on behalf of the firm of solicitors by whom the first appearance had been entered, the court made an order setting aside the second appearance, and condemned the defendant in the costs of the motion. *The Oneiza*, 4 L. R., Adm. 36; 27 L. T. 632.

An inoperative plea having been pleaded without authority, by a new attorney for a defendant, without an order to change the attorney, the judgment which had been signed as for want of a plea was set aside. *Perry v. Fisher*, 6 East, 549.

It is no ground for treating a rule nisi for a new trial as a nullity, that it has been obtained by a different attorney from the one on the record, without an order to change the attorney. *Doe d. Bloomer v. Bransom*, 6 D. P. C. 490.

Appointment of Solicitor after Proceeding in Person.—If a party has been proceeding in person, and afterwards appoints an attorney, he may give the other side notice of the fact by the very step which the attorney takes in the cause as attorney, without any formal notice. *Jones v. King*, 2 B. C. Rep. 192; 5 D. & L. 412.

XI. DEATH OF SOLICITOR IN THE CAUSE.

Upon the death of the attorney in the cause, notice must be given to the opposite party of the appointment of the new attorney, before he can proceed in the cause. *Ryland v. Noakes*, 1 Taunt. 342.

A notice of trial was, on the 10th August, 1849, given to the defendant's attorney for the first sittings in Michaelmas Term. On the 9th October the defendant's attorney died. In pursuance of such notice the cause was duly entered, and tried on the 3rd November, when a verdict was found for the plaintiff. On the 8th November notice of taxation of costs was given on behalf of the plaintiff, by leaving the same at the deceased attorney's office, the plaintiff being unaware of his death. On the 9th November the plaintiff signed judgment for the debt and costs; and in March, 1850, the defendant being in custody, a detainer was lodged against him. A rule having been obtained to set aside all the proceedings subsequent to the 9th October, the defendant swearing that he had no notice of any proceedings subsequent to the plea until the detainer was lodged, but omitting to state the time he first received intimation of the attorney's death, the court discharged the rule. *Ashley v. Brown*, 1 L., M. & P. 451; 19 L. J., Q. B. 477; 15 Jur. 399. See *Lord v. Wardle*, 3 C. B. 295; 15 L. J., C. P. 259.

XII. UNQUALIFIED PRACTITIONERS.

Attachment against for acting as a Solicitor in the Name of a Qualified Solicitor.—An unqualified person who acts as a solicitor commits an offence against 6 & 7 Vict. c. 73, s. 2, though he acts in the name and with the consent of a duly qualified solicitor. *H.*, who had carried on the business of an accountant, arranged with *C.*, who had been admitted as a solicitor, that he should use *H.*'s offices, and any business *H.* had he was to allow *C.* to attend to, *H.* to share in the profits, but in what proportion was not settled, or, according to *H.*'s version of the arrangement, *H.* was to be paid, as a commission, one half share of profits after deducting all expenses, including rent of offices, and was to find money and clerk to carry on the business. Pursuant to this arrangement, *H.*, sometimes with *C.* and sometimes alone, transacted various matters which it was alone competent to a solicitor to transact, generally using the name of *C. & Co.*, but sometimes not, and not always with the knowledge or express sanction of *C.*:—Held, that *H.* had been guilty of a contempt of court, and that an attachment must issue against him. *Abercrombie v. Jordan, Hunt, In re*, 8 Q. B. D. 187; 30 W. R. 810—C. A.

S., who carried on the business of an accountant, was instructed to collect a debt. Failing to recover the money he issued a writ which purported to be issued by *Smale*, a solicitor, but it was not signed by or on behalf of a solicitor, as required by Ord. V. r. 7, and the address for service given upon the writ was the address of *S.* After the writ was served, and after the summons had been taken out to stay proceedings on the ground that Ord. V. r. 7, had not been complied with, *S.* telegraphed to *Smale*, who was in London, asking for a reply that the writ was issued with his authority and privity. *Smale* replied that it was issued with his authority and privity, being under the impression that *S.* was acting as clerk to a solicitor, in whose service *S.* had formerly been, and with whom he had previously had transactions as his agent. The Incorporated Law Society obtained a rule calling upon *S.* to shew cause why a writ of attachment should not issue against him for contempt of court for having acted as a solicitor contrary to 6 & 7 Vict. c. 73, s. 2, and 23 & 24 Vict. c. 127, s. 26:—Held, that there was not sufficient evidence to shew that *S.* had put himself forward as actually acting as a solicitor, and on that ground alone the rule would be discharged upon *S.* paying all the costs. *Dockings v. Vickery, Symons, In re*, 46 L. T. 139.

Law Stationers—Obtaining Probate—Proctors.—Law stationers, not qualified as solicitors or proctors, were accustomed upon the instruction and in the names of London or country solicitors, to take to the registry of the Probate Division original wills and the engrossments thereof, with the proper affidavits, and if these were in order, to fetch away the probate; if any question arose as to the sufficiency of the documents the stationers communicated it to the solicitors. All the charges between solicitor and client were made by the solicitors, and the stationers charged the solicitors for their clerks' time only:—Held, affirming the decision of the Court of Appeal, that the stationers had not acted as solicitors or proctors, and were not

liable to the penalties imposed by 23 & 24 Vict. c. 27, s. 26. *Law Society v. Waterlow, Law Society v. Skinner*, 8 App. Cas. 407; 52 L. J., Q. B. 674; 49 L. T. 141; 31 W. R. 754—H. L. (E.). Affirming 9 Q. B. D. 1; 51 L. J., Q. B. 249; 46 L. T. 187; 30 W. R. 820; 46 J. P. 308—C. A.

Interlocutory Proceeding taken by—Proof of.—The objection, that an interlocutory proceeding has been taken by an attorney not on the record is of a strict nature, and it is incumbent on the party making it to establish it distinctly. *Lord v. Wardle*, 3 C. B. 295; 15 L. J., C. P. 259.

Practising without Admission.—An indictment will lie against a person who acts as an attorney, without being admitted and enrolled pursuant to 6 & 7 Vict. c. 73, s. 2, although, by s. 35, disabilities and penalties are imposed on a person so acting. *Reg. v. Buchanan*, 8 Q. B. 883; 15 L. J., Q. B. 227; 10 Jur. 736.

If an attorney practises in a court in which he has not been admitted, he cannot maintain an action for his fees, nor even for money out of pocket; neither has he any lien for his costs, or for money disbursed, upon a judgment recovered; and therefore he cannot prevent the damages and costs in one action being set off against those in another, though his costs have not been paid. *Latham v. Hyde*, 1 D. P. C. 594; 1 C. & M. 128; *S. C.*, nom. *Hyde v. Latham*, 3 Tyr. 143.

Assistant Clerk Practising in County Court.—An assistant clerk of a county court is an officer of the court, within s. 29 of 9 & 10 Vict. c. 95, as explained by 13 & 14 Vict. c. 61, and is therefore liable to the penalty imposed by s. 30, if he practises as an attorney in the county court. *Ackroyd v. Gill*, 5 El. & Bl. 808; 25 L. J., Q. B. 111; 2 Jur., N. S. 184.

Liability of an Uncertificated Practitioner.—If an unprofessional man undertakes to conduct legal proceedings for another, he is liable to that other for negligence, although he may have employed an attorney to do part of the work. *Brown v. Tolley*, 31 L. T. 485.

B., being in difficulties, employed the defendant to take him through the county court in bankruptcy for reward. A petition for liquidation, signed by an uncertificated attorney, was filed, and the plaintiff was appointed trustee; the defendant partly employing an attorney in the matter. The necessary notices for the meeting of creditors not having been inserted in the Gazette, the registrar refused to register the proceedings, which became inoperative, so that *B.* was forced to pay debts which would otherwise have been barred:—Held, that the defendant was liable to the plaintiff. *Id.*

Employing Uncertificated Solicitor—Costs.—Under the Attorneys and Solicitors Act, 1874 (37 & 38 Vict. c. 68), s. 12—which enacts that no costs, fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by any person who acts as an attorney or solicitor without being duly qualified so to act shall be recoverable in any action, suit, or matter by any person or persons whomsoever—the successful party in a legal proceeding can-

not, where the solicitor employed by him was uncertificated, recover his costs or disbursements from the party otherwise liable. *Finler v. Monmouthshire Railway and Canal Company*, 4 Q. B. D. 334; 48 L. J., Q. B. 457; 41 L. T. 159; 27 W. R. 669.

The 6 & 7 Vict. c. 73 (the Attorneys and Solicitors Act), s. 26, does not extinguish the debt of a solicitor or an attorney for costs in respect of business done while uncertificated, but only his remedy. *Jones, In re*, 9 L. R., Eq. 63; 39 L. J., Ch. 83; 21 L. T. 482; 18 W. R. 159.

Therefore, where a client had taken out an order of course for taxation of his solicitor's bill, with the usual submission to pay what should be found due, and the master had disallowed certain items for business done while his certificate had not been renewed:—Held, that he was entitled to be allowed the items in question. *Id.* This was, however, before the passing of the 33 & 34 Vict. c. 97, and the 37 & 38 Vict. c. 68, s. 12.

The 6 & 7 Vict. c. 73, s. 26, merely prevents an attorney or a solicitor from maintaining any action or suit for the recovery of his costs in respect of business done by him while uncertificated; but when a client has paid his solicitor his costs of business done while uncertificated, and the client's adversary is ordered to pay his taxed costs, the client is entitled to have the costs so paid to his solicitor included in the taxation. *Hope, In re*, 7 L. R., Ch. 766; 41 L. J., Ch. 797; 27 L. T. 670; 20 W. R. 1026.

An attorney who does not hold a certificate within the meaning of 6 & 7 Vict. c. 73, cannot recover his costs in respect of proceedings in the Probate Court. *Austin v. Davies*, 28 L. T. 567; 21 W. R. 884.

Proceedings taken by—How Client affected.]—Proceedings taken by an uncertificated attorney are not, as affects his client, deemed void or irregular. *Brown v. Tolley*, 31 L. T. 485.

Agreement between Solicitor and Unqualified Practitioner—Validity of.]—An agreement by a solicitor to give to an unqualified party a share of profits arising from business, in which he was employed through the intervention of the latter, is not illegal; and even if illegal, the client could not deduct from the solicitor's bill of costs the amount agreed to be paid by him to such unqualified person. *Gordon v. Dalzell*, 15 Beav. 351; 21 L. J., Ch. 206; 16 Jur. 186.

SOVEREIGNS AND STATES.

See INTERNATIONAL LAW.

SPECIAL CASE.

I. STATED BY JUSTICES.—See JUSTICE OF THE PEACE.

II. IN OTHER CASES.—See PRACTICE.

SPECIAL CONSTABLE.

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See JURY.

SPECIFIC PERFORMANCE.

I. WHEN GRANTED OR REFUSED.

1. *Concluded Agreement*.
2. *Certainty*, 1974.
3. *In respect of Personal Services*, 1976.
4. *Of Part of Agreement*, 1977.
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II. MATTERS OF DEFENCE.

1. *Misrepresentation and Delay*, 1990.
2. *Statute of Frauds*, 1993.
3. *In other Cases*, 1996.

III. PRACTICE RELATING TO, 1997.

I. WHEN GRANTED OR REFUSED.

1. CONCLUDED AGREEMENT.

In what Cases.]—Specific performance of an agreement "subject to a contract to be settled," will not be enforced. *Harvey v. Barnard's Inn (Principal)*, 50 L. J., Ch. 750; 45 L. T. 280; 29 W. R. 922.

By a written agreement the defendant agreed with the plaintiff to take a lease of a house for a certain term at a certain rent, "subject to the preparation and approval of a formal contract." No other contract was ever entered into between the parties:—Held, that there was no final agreement. *Winn v. Bull*, 7 Ch. D. 29; 47 L. J., Ch. 139; 26 W. R. 230.

C., a lessee, sub-demised to W. Both the lease and sub-lease were determinable on notice. C. died leaving the plaintiff his widow. A correspondence between her and W., with reference to a new sub-lease, extended from the 24th December, 1867, to the 4th February, 1869. By the earlier of those letters she distinctly stated the terms on which the new sub-lease was to be granted; and by the later W. returned certain plans, approved on his part, and asked for, and received, a draft agreement for the new sub-lease. In the meantime, viz., on the 29th September, 1868, the original lease had been duly determined by notice from the plaintiff's lessor, of which fact the defendant was informed, though no notice to determine the under-lease was given. On the 5th of March, 1869, W. returned the draft agreement approved on his behalf, but without prejudice to his rights against the estate of the plaintiff's late husband in

respect of not having received notice determining the under-lease. On the 4th of June, 1869, she obtained a new lease of the property at an improved rent, and called upon W. to accept and execute the sub-lease at the increased rent, according to the contract contained in the correspondence. W. refused to do so, on the ground that the original sub-lease to him was still subsisting; that he was, therefore, entitled to remain in possession at his original rent; that he had never agreed to take a new lease; and that the whole transaction had been carried on under a mistake of the true position of the parties. The plaintiff then filed a bill for the specific performance of the contract:—Held, that there was a concluded agreement between her and W., and that she was entitled to a decree with costs. *Cayley v. Walpole*, 39 L. J., Ch. 609; 22 L. T. 900; 18 W. R. 782.

A bill was filed by a principal against an agent to enforce specific performance of an agreement which was alleged to have been entered into for the purpose of settling certain matters in dispute between them. The principal had, prior to the alleged agreement, charged the agent with having committed various frauds upon him, and all these matters were to have been disposed of by the agreement. In the bill all these charges of fraud were repeated as substantive allegations, and the defendant went into evidence to rebut the charges—Held, that the evidence did not shew that any concluded agreement had been come to between the parties. *Forester v. Read*, 6 L. R., Ch. 40; 24 L. T. 79; 19 W. R. 114.

A court of equity cannot, when called on to decree specific performance of an agreement, direct any act to be done whereby the agreement itself, if not already legally binding, can be made so, and therefore in a case in which fraud was clearly proved, where an agreement had clearly been come to by a public company, but was not made out and executed in the statutory form (there being no agreement signed by two directors, as required by 8 & 9 Vict. c. 16, s. 97), the court could not make the directors sign it, and dismissed the bill; although if they had signed the agreement, specific performance would have been decreed. *Leominster Canal Company v. Shrewsbury and Hereford Railway Company*, 3 Kay & J. 654; 26 L. J., Ch. 764; 3 Jur., N. S. 930.

Where a contract between two companies proves to be one by which one of the contracting parties will gain considerable advantages, at the expense of the other, while the other will receive no corresponding benefit, whether such contract is or not legally valid, equity will not aid in enforcing it by a decree for specific performance. *Shrewsbury and Birmingham Railway Company v. North-Western Railway Company*, 6 H. L. Cas. 113; 26 L. J., Ch. 482; 3 Jur., N. S. 775.

A private act authorized one railway company to accept a lease of another railway; the directors of the first company then entered into an agreement with the directors of a third company, the stipulations of which were to be performed during the continuance of such lease. No lease within the provisions of the act was ever granted. The agreement appeared to be, if legally valid, at least unfair to the shareholders of one of the companies:—Held, that equity could not enforce it by a decree for specific performance. *Id.*

M., by letter addressed to G., proposed to sell to him certain premises at the price of 5,000*l.* M. had no legal title to the premises, and, at an interview, at the office of F., who was M.'s solicitor, G. refused to give more than 4,800*l.* M. said he would not give any title but that which he would himself get under a family arrangement, and, as to the offer of 4,800*l.*, he said he would not take less than 5,000*l.*, and that there was an end of the matter. Subsequently, at the same interview, G. said he would give 5,000*l.* F., in answer to G., who asked if some writing should not be drawn up, said he could not allow M. to enter into a contract at that moment, nor advise G., in the absence of his solicitor, to agree to the conditions which he, F., would think necessary for M.'s protection. The parties separated; G., under the impression that there was, M. under the impression that there was not, an acceptance by G. of M.'s original proposal, and a concluded agreement between them:—Held, that G. could not sustain a bill for specific performance. *Gradwell v. Maguire*, 6 Ir. R., Eq. 477.

A plaintiff filed a bill for a specific performance of an agreement into which he had entered with the defendant. The parties disputed the construction of one of the clauses in the agreement, the defendant swearing that his intention at the time of executing the agreement was not according to the construction contended for by the plaintiff. The court was of opinion that the defendant's construction was plainly the correct one, but independently of that, being satisfied that there had been no concord between the parties, dismissed the bill. *Griffin v. Coleman*, 28 L. T. 493.

Cancelled Clause.—In 1870, B. furnished to H., who had agreed shortly before to take from him a lease for thirty-one years of lands, a memorandum embodying its proposed terms. H. having struck out a clause binding him to keep the fences in repair, returned the draft as accepted. B., in acknowledging its receipt, described that cancellation as "the only thing I now see likely to cause any difference between us," adding, "such a point should not cause any difference between us, as I believe it is the usual custom for a tenant" to keep the fences in repair. B. having subsequently filed a bill for specific performance:—Held, that there was a concluded agreement for a lease including the cancelled clause, and that he was entitled to a decree. *Blakeney v. Hardie*, 8 Ir. R., Eq. 381.

2. CERTAINTY.

What is.—An agreement to give so much of a thing as may be necessary for a specified purpose confers a right of a nature known to the law, and is not open to the objection of uncertainty. Under an agreement to give so much of a specified piece of land as may be necessary for a specified purpose, when the quantity has been determined, the right of selecting the position of the piece to be given belongs to the promisee. If the promisor, however, had any objection to the promisee's selection, and made a reasonable offer in lieu thereof, the court might listen to it. But it is not reasonable to wish to interpose a road between a burial-ground and the church to which it is to belong. *Rumble v. Heygate*, 18 W. R. 749.

Specific performance will not be decreed of a contract to employ a person to construct works which the court is unable to superintend. *Greenhill v. Isle of Wight (Newport Junction) Railway Company*, 23 L. T. 885; 19 W. R. 345.

Therefore, where directors of a railway company entered into a written agreement to give G. "a contract for the construction of the line for 55,000l., subject to a specification of the works on the line included in the sum to be agreed upon between G. and the engineer of the company, in case of dispute the matter to be referred" to an arbitrator, and a bill was filed for specific performance.—Held, that the terms of this agreement were too indefinite to be enforced in a specific performance suit; but that even had the terms been sufficiently definite, the agreement was of such a nature that specific performance could not have been decreed. *Ib.*

Contract for the sale of an estate, vendor reserving "the necessary land for making a railway" through the estate to P. In a suit by the purchaser for specific performance.—Held, that the reservation was void for uncertainty, and that the contract could not be enforced. *Pearce v. Watts*, 20 L. R., Eq. 492; 44 L. J., Ch. 492; 23 W. R. 771.

Lease—Date of Commencement left Uncertain.—Specific performance will not be enforced of an agreement to grant a lease where no time for the commencement of the lease is fixed by the agreement, and the mere fact that the agreement itself is dated does not fix the time for such commencement. *Jacques v. Millar* (6 Ch. D. 153) disapproved of; *Blore v. Sutton* (3 Mer. 237) explained. *Marshall v. Berridge*, 19 Ch. D. 241; 51 L. J., Ch. 329; 45 L. T. 599; 30 W. R. 93—C. A.

A memorandum of agreement to grant a lease, not stating any time for the commencement of the lease, is valid as an agreement to let the premises from the date thereof. *Jacques v. Miller*, 6 Ch. D. 153; 47 L. J., Ch. 544; 37 L. T. 151; 25 W. R. 846.

An executory agreement in writing to grant a lease for a term of years, which does not state the date from which the term is to commence, is not sufficiently definite to satisfy the Statute of Frauds, and cannot be enforced, and the mere fact of the agreement being dated does not shew from what date the lease is to run. *Wyse v. Russell*, 11 L. R., Ir. 173.

Seemingly, in a contract for a lease the words "immediate possession if required" do not fix the commencement of the term. *Rock Portland Cement Co. v. Wilson*, 52 L. J., Ch. 214; 48 L. T. 386; 31 W. R. 193.

Action for specific performance of an agreement to take a lease of a house. In order to take the case out of the Statute of Frauds the plaintiff relied on a letter, written by the defendant, in which "the term" was stated "to be for twelve years," but the day of the commencement of the term was not mentioned; and in the same letter, referring to certain covenants, the defendant "suggested that they be similar to those contained in A.'s lease."—Held, first, that there never was any concluded agreement between the parties. *Cartwright v. Miller*, 36 L. T. 398.

Held, secondly, that if there had been an agreement, there was no memorandum of the agreement, in writing, sufficient to satisfy the

Statute of Frauds, as the commencement of the term was not stated. *Ib.*

—Length of Term when Uncertain.—By an agreement in writing made in 1839, S., who was entitled to a leasehold house for a term, expiring in 1898, agreed to let the house to the plaintiff at 26l. yearly rent; and to let him have a lease at the same rent "at any period he may feel disposed," and not to molest, disturb, or raise the rent "of the plaintiff "after his having laid out money in improving the premises." The plaintiff remained in possession under the agreement until 1876, having expended about 150l. in improvements. In 1876, being threatened with an action of ejectment by the legal personal representative of S., who had died, he commenced an action for specific performance of the agreement, and there being no statement of defence or counter-claim, asked at the bar for a declaration that he was entitled to a lease for the unexpired residue of the defendant's term, less one day.—Held, that the plaintiff was entitled to the declaration asked for. But held on appeal, by Jessel, M. R., and Bramwell, L. J. (dubitante Baggallay, L. J.), that he was entitled only to an underlease for the residue of the term less one day, if he should so long live. *Kusel v. Watson*, 47 L. J., Ch. 825; 38 L. T. 604; 26 W. R. 653—V.-C. B.; 11 Ch. D. 129; 48 L. J., Ch. 413; 27 W. R. 714—C. A.

Document capable of two Constructions.—Where an agreement is in writing and is unambiguous, it is the duty of the court to construe it quite independently of the ideas of the parties as to what it means; but where an agreement is ambiguous or capable of two constructions, I think it would be very strange indeed if a plaintiff, who had always acted on the one construction, should succeed in persuading the court to grant specific performance on the footing that it ought to bear the opposite construction—Per Jessel, M. R. *Marshall v. Berridge*, *supra*.

In a suit for specific performance of a contract vague in its language, a court of equity, having regard to the terms of the agreement, will consider the surrounding circumstances and conduct of the parties in dealing with the property comprised in it, in the interval between the making of the agreement and the commencement of the suit for its enforcement. *Oxford v. Provan*, 2 L. R., P. C. 135; 5 Moore, P. C. C., N. S. 150.

3. IN RESPECT OF PERSONAL SERVICES.

Not Enforceable.—Specific performance will not be enforced of an agreement for personal services. *White v. Boby*, 37 L. T. 652; 26 W. R. 133—C. A.

Damages instead of specific performance will only be given when a plaintiff had an equity at the time of issuing the writ. *Ib.*

Although the Chancery Division of the High Court exercises both legal and equitable jurisdictions, those jurisdictions still exist, and the court still acts upon the rule that there could be no damages at law for a breach by the assignee of an agreement. *Ib.*

W. agreed with L. to sing at his theatre during a certain period of time, and not to sing elsewhere without his written authority.—Held, on a bill filed to restrain her from singing for a

third party, and to grant an injunction for that purpose, that the positive and negative stipulations of the agreement formed but one contract, and the court would interfere to prevent the violation of the negative stipulation, although it could not enforce the specific performance of the entire contract. *Lumley v. Wagner*, 1 De G., M. & G. 604; 21 L. J., Ch. 898; 16 Jur. 871. See *Mapleson v. Bentham*, 20 W. R. 176, and *Montague v. Flockton*, 16 L. R., Eq. 189; 42 L. J., Ch. 677; 28 L. T. 580.

4. OF PART OF AGREEMENT.

In what Cases.]—An agreement was entered into between F. and O. that F. should grant to O. a lease of a coal wharf at a certain rent, and should be employed throughout the tenancy at a salary of 200*l.* a year and a commission on the coal sold at the wharf. Disputes having arisen, O. filed a bill against F. for specific performance of the agreement to grant the lease:—Held, that specific performance could not be decreed, inasmuch as that part of the agreement of which the court could decree specific performance was inseparably connected with stipulations which the court could not enforce. *Ogden v. Fossick*, 4 De G., F. & J. 426.

It is fully settled that a contract cannot be specifically performed in part; it must be wholly performed or not at all. *Ford v. Stuart*, 15 Beav. 493; 21 L. J., Ch. 514.

On Bankruptcy.]—A firm of shipbuilders agreed to alter a vessel according to a specification; and it was provided that, in case of their failing to execute the alterations according to the agreement, the owners of the vessel should be at liberty, with workmen, to enter on the shipbuilders' yard and themselves complete the alterations. The shipbuilders were adjudicated bankrupts before the vessel was completed:—Held, that the court could not specifically perform the whole agreement, and therefore would not restrain the trustee under the bankruptcy from selling the dock in which the vessel was lying, although the owners might be thus prevented from themselves entering and completing the vessel pursuant to the agreement. *Merchants' Trading Company v. Banner*, 12 L. R., Eq. 18; 40 L. J., Ch. 515; 24 L. T. 861; 19 W. R. 707.

Intention to Separate.]—Parts of an agreement can be separately enforced if an intention to separate the parts appears in the agreement. *Odessa Tramways Company v. Mendel*, 8 Ch. D. 235; 47 L. J., Ch. 505; 38 L. T. 731; 26 W. R. 887—C. A.

The fact that an agreement is carried out by two instruments affords a presumption that the contracts in the two instruments are separable. *Id.*

A company was, by its articles of association, prohibited from issuing shares below par without the sanction of a general meeting. M. agreed to subscribe for 2,000 shares in the company, which should be taken up and paid for in full by him, in such numbers and at such times as should be required for the purposes of the company. On the same day on which he entered into this agreement the board of directors agreed to pay him 4,000*l.* in consideration of the services rendered by him in connexion with the company. The company failed. On an action brought by

the company against M. for specific performance of his agreement:—Held, that, as M. had acted in collusion with the directors to defraud the company, he could not be heard to set up this fraud for the purpose of invalidating the agreement to take the shares; that as the parties had contemplated a piecemeal performance of the agreement, the court could decree specific performance of a part of it; and that in the absence of mala fides the resolution of the directors to call up the shares was conclusive evidence that the money was required for the purposes of the company. *Id.*

So, where the conditions of an agreement between a builder and the owner of lands are by the terms of the contract separable, specific performance will be decreed according to those terms. *Wilkinson v. Clements*, 8 L. R., Ch. 96; 42 L. J., Ch. 38; 27 L. T. 834; 21 W. R. 90.

5. PRICE TO BE FIXED BY THIRD PERSON.

In Default of Appointment.]—By the contract for the sale of an estate it was agreed that the price should be 24,000*l.*, and that certain furniture and other articles on the estate, the value of which was about 2,000*l.*, should be valued by valuers mutually agreed upon, and that the purchaser would take a part of the furniture and articles at that valuation. The vendor refused to appoint a valuer and refused to complete. A decree made at the suit of the purchaser for specific performance of the contract, except so far as it related to the furniture and articles, *Richardson v. Smith*, 5 L. R., Ch. 648; 39 L. J., Ch. 881; 19 W. R. 81.

When Fixed Price Inadequate.]—Specific performance of an agreement to purchase at a price to be fixed by third persons named in the contract, decreed, though price thus fixed was inadequate, there being no evidence that the valuation was unfair. *Weekes v. Gallard*, 18 W. R. 331.

6. IN OTHER CASES.

Foreign Contracts.]—The court will specifically enforce against a foreigner a contract of sale made abroad, if the subject-matter of the contract is within its jurisdiction. *Hart v. Herwig*, 42 L. J., Ch. 457; 28 L. T. 329; 21 W. R. 538. Affirmed, 8 L. R., Ch. 860; 29 L. T. 47; 21 W. R. 663.

Therefore, when a contract was made abroad for the sale of a foreign vessel to be delivered in this country, the court granted an interim injunction to restrain the removal of the ship from an English port, allowing substituted service of the notice of motion on the captain. *Id.*

Statutory Engagement.]—A bill to enforce a right springing from a statutory engagement is analogous to a bill for specific performance, and the plaintiff must come into court with clean hands. *Fisher v. Tully*, 3 App. Cas. 627; 47 L. J., P. C. 59; 38 L. T. 236.

To Advance Money.]—A court of equity will not decree specific performance of a mere agreement to advance money. *Larios v. Gurety*, 5 L. R., P. C. 346.

— **Parol Agreement.]**—The plaintiff, who

was a builder, agreed with the defendant, who was an owner of freehold land, to erect thirty-one houses on the land on the terms of such agreement, and also of a parol understanding communicated to the plaintiff on behalf of the defendant prior to the signing of the principal agreement. The chief stipulation of the parol understanding was the advance of moneys in definite instalments by or through the defendant to the plaintiff for the purposes of the buildings. The plaintiff afterwards took leases of the unfinished houses and executed two successive mortgages to enable defendant to raise money on them as a security for the same purposes. The defendant failed to supply the plaintiff with the required funds as stipulated under the parol agreement, which, however, had been successively departed from:—Held, in a bill praying specific performance of the parol understanding, together with damages, or at all events damages, that the plaintiff was entitled to neither, but that (the defendant submitting to it) the plaintiff might have the ordinary redemption decree. *Thorpe v. Husford*, 20 W. R. 922.

To give Bill of Sale.—On the 13th March, A. commenced an action against B. to enforce specific performance of an agreement to execute a bill of sale of the chattels and effects in an inn. On the 16th March, A., on his ex parte application, was appointed interim receiver, pending a reference for the appointment of a receiver, and the same day he took possession of the inn, and left a man in charge. The same night B. left the inn, and the next day filed a liquidation petition. The trustee under the liquidation claimed the chattels and effects in the inn on the ground that the agreement was void as against him under the Bills of Sale Act, and that the chattels and effects were in the apparent possession of B. at the commencement of the liquidation:—Held, that the Bills of Sale Act did not apply, that the agreement created a good equitable charge in favour of A., and that the possession taken by A. as interim receiver took the chattels and effects out of the order and disposition of B. *Taylor v. Eekersley*, 5 Ch. D. 740; 36 L. T. 442; 25 W. R. 527.

Against Company — Not under Seal.—The court will not entertain a bill for specific performance of a contract to pay a sum of money, either on the ground of part performance or on the ground that for want of formality the contract is not enforceable at law; nor in such a case can the court give damages in lieu of specific performance under 21 & 22 Vict. c. 27. *Crompton v. Yarna Railway Company*, 7 L. R., Ch. 562; 41 L. J., Ch. 817; 20 W. R. 713.

By the constitution of a railway company all contracts above the value of 500*l.* were required to be under seal. By an agreement not under seal, made between the duly authorized agent of the company and the contractor for the line, it was agreed that if the contractor would erect and leave upon the company's land substantial cottages, the company would pay him a rent of 500*l.* or a lump sum of 5,000*l.* at their option. The contractor having performed his part of the agreement, filed a bill against the company for payment of the money or for damages in lieu of specific performance, alleging that for want of a seal the contract was not enforceable at law. A demurrer was allowed to the bill. *Id.*

A municipal corporation and local board, on the 17th of July, caused certain tolls to be put up for letting by auction, under conditions by which the purchaser was immediately on the fall of the hammer to pay a month's rent in advance, and to produce two sureties, who were forthwith to sign the conditions and a draft lease. The highest bidder at the auction was declared the purchaser, and he paid a month's rent in advance, and signed an agreement to become lessee indorsed on the conditions; but he did not then, nor at any subsequent time, produce two sureties; and the corporation ultimately, in pursuance of the conditions, determined the contract and sold the tolls at a loss. The contract was not executed by the corporation under its common seal, nor signed on its behalf by any person authorized under seal to do so. After the sale, the corporation, on the 7th of August, by resolution, which was entered on the minutes under seal, adopted the report of a committee, to the effect that the tolls had been put up to auction, and that the defendant had become the purchaser at a rent of 350*l.* and had paid a deposit of 29*l.* 3*s.* 4*d.* Before this, however, the defendant had, on the 4th of August, written to the corporation saying that he could not carry out his contract, and asking for a return of the sum paid. In an action against the defendant to recover damages for the breach of his agreement to take the tolls:—Held, that the contract was one that required to be made under the common seal of the corporation; that not having been sealed, nor signed by any person authorized under seal by them to do so, the defendant was not bound by it; that the payment of a month's rent in advance was not such a part performance as would have bound the corporation in equity specifically to perform their agreement; and that the resolution of the 7th of August (even assuming it to be a ratification under seal of the contract) came too late. *Kidderminster (Mayor) v. Hardwick*, 9 L. R., Ex. 13; 43 L. J., Ex. 9; 29 L. T. 612; 22 W. R. 160.

Corporation bound by Acquiescence though not under Seal.—A corporation passed a resolution in 1860, agreeing to let the plaintiff the flat part of the beach opposite to his field, for 300 years, at a nominal rent. He claimed all the beach comprised between lines drawn in prolongation of the sides of his field, and he built a wall and terrace along the part so claimed. In 1864 the corporation gave him notice to quit, and, after much negotiation, in 1869 brought an ejectment against him, and thereupon he filed a bill for specific performance:—Held, that though the agreement was not under seal the corporation was bound by acquiescence, and must perform the agreement to grant a lease. *Crook v. Seaford (Corporation)*, 6 L. R., Ch. 551; 25 L. T. 1; 19 W. R. 938. See preceding case.

Held, that the boundaries of the piece of land agreed to be demised were lines drawn from the extremities of the field perpendicular to the coastline. *Id.*

Positive or Negative Stipulations.—Where a contract contains an express negative covenant, and complete justice can be done between the parties, a court of equity will grant an injunction to restrain a breach of the negative covenant; but the court rarely interferes where there is no distinct negative stipulation, but the negative

obligation is inferred only from the positive contract. *Peto v. Brighton, Uckfield and Tunbridge Wells Railway Company*, 1 H. & M. 468; 52 L. J., Ch. 677; 11 W. R. 874. See *Lumley v. Wagner*, and cases cited, *ante*, col. 1977.

To Erect Station.—A railway company agreed for valuable consideration with a landowner to erect, construct, and fit up a station on certain lands which they had bought from him. The agreement contained no further description of the station, nor any stipulations as to the use of it. The company having refused to erect a station in the specified place, and substituted one at a distance of two miles:—Held, that the case was one in which justice could be better done by an inquiry as to damages than by a decree for specific performance. *Wilson v. Northampton and Banbury Junction Railway Company*, 9 L. R., Ch. 279; 43 L. J., Ch. 503; 30 L. T. 147; 22 W. R. 380.

To make Siding.—An agreement was entered into between a railway company and a landowner, part of whose land had been, under another agreement, taken by the company, whereby, in consideration of the previous withdrawal by the landowner of a petition to parliament against the company's bill, the company agreed to construct and for ever maintain at their expense a siding of specified length alongside the line upon land belonging to the landowner, and to be provided by him for that purpose, for the use and to the reasonable satisfaction of the landowner:—Held, that this agreement was not incapable of being enforced by a court of equity. *Greene v. West Cheshire Railway Company*, 13 L. R., Eq. 44; 41 L. J., Ch. 17; 25 L. T. 409; 20 W. R. 54.

The court will not refuse to decree specific performance of an agreement, although the plaintiff may have a concurrent remedy in damages, or may have entered into a negotiation for a money compensation which has failed. *Id.*

A railway company, as compensation for injury to the plaintiff's mill by the construction of their railway, agreed to lay down a siding from their line to the mill. The siding was made, but the plaintiff not having used it, the railway company removed the points, undertaking by a letter of the 2nd March, 1871, to replace them on receiving sufficient notice of an intention to use the siding. In November, 1879, the siding not having been used, the railway company removed the rails, and the plaintiff having required them to be replaced, its secretary, on the 27th November, 1879, wrote to the plaintiff that the rails had been removed under misapprehension, and would be replaced at once, or that the directors would undertake to do so at any time when called on. By regulations of the Board of Trade, issued in July, 1879, railway companies were required to provide signals, &c., on the opening of any siding or branch line which had not been in use before that time. On the 17th September, 1880, the plaintiff required the railway company to replace the siding. On the 19th of October the secretary replied, requiring the plaintiff to indemnify the directors against the expenses occasioned by the regulations of the board, in consequence of the non-user of the siding, if he required it to be replaced. The plaintiff's solicitors refused, and having again required the siding to be replaced, on the 5th of January,

1881, wrote to the secretary that unless in that month the plaintiff should be fully compensated for the injury and expense sustained by him from the construction of the railway, proceedings would be taken to recover full compensation. The secretary replied on the 19th of January, denying the liability of the company in respect of a right never used, and on which the plaintiff apparently placed no value. In an action for specific performance of the agreement to replace the siding:—Held, first, that the non-user of the siding, and the expenses caused thereby, under the regulations of the Board of Trade, was not a defence to the action, and that the company was not entitled to any indemnity against those expenses. *Todd v. Midland Great Western Railway Company*, 9 L. R., Ir. 85.

Held, secondly, that the plaintiffs were entitled to a decree to replace the siding and keep it in working order, the court considering damages an insufficient remedy. *Wilson v. Northampton and Banbury Junction Railway Company* (9 L. R., Ch. 279), *Powell Duffryn Steam Coal Company v. Taff Vale Railway Company* (9 L. R., Ch. 331) considered and distinguished. *Id.*

Specific performance of an agreement, whereby a railway company agreed to construct and maintain a siding on land, was decreed, although the owner of the land, had previously entered into negotiations with the company for compensation in respect of the breach of the agreement. *Green v. West Cheshire Railway Company*, 13 L. R., Eq. 44; 41 L. J., Ch. 17; 25 L. T. 409; 20 W. R. 54.

Doubtful Point.—It is the duty of the court, in a bill for specific performance arising out of a doubtful point of law, to settle the law on the subject. *Bell v. Holtby*, 15 L. R., Eq. 178; 42 L. J., Ch. 266; 28 L. T. 9; 21 W. R. 321.

The court will not decree specific performance when the title is doubtful. *Palmer v. Locke*, 18 Ch. D. 381; 45 L. T. 229—O. A.

Inconsistent Prior Agreement.—The court will not compel a defendant specifically to perform an agreement when the result would be to compel him to commit a breach of a prior agreement with another person. *Willmot v. Barber*, 15 Ch. D. 96; 43 L. T. 95; 28 W. R. 911.

Rescission if Decree not Obeyed.—A plaintiff in a specific performance suit may obtain a rescission of the contract on the defendant's default to obey the decree. *Watson v. Cox*, 15 L. R., Eq. 219; 42 L. J., Ch. 279; 27 L. T. 814; 21 W. R. 310.

A decree was made for specific performance of an agreement to take a lease of a house, and an order on further consideration for payment of a sum of money by the defendant, and thereupon for the execution of the lease. The defendant having made default and absconded, an order was made on the plaintiff's motion for rescission of the contract, and the stay of all proceedings in the suit except as to his costs and damages. *Id.*

Sufficiency of Consideration.—A contract for sale for value, which had been entered into by a vendor upwards of ninety years of age, was upon his death resisted by his devisee, first, on the ground of his incapacity

and of undue influence on the part of the purchaser (the evidence as to which, however, entirely failed); and, secondly, on the ground that the vendor had, by a deed executed by him before the date of the contract, conveyed the property in fee to the devisee, his great-nephew. The deed was expressed to be in consideration of natural love and affection, and contained a covenant by the grantee to "commence" a house upon the property according to plans to be furnished by the grantor; and that if the grantor failed to furnish such plans, then the grantee "would build such a house as he, the grantee, should think fit." No house was ever commenced, and the deed contained no proviso for re-entry or other penalties for breach of covenant. Upon a bill by the purchaser for specific performance:—Held, that the deed was purely voluntary, there being an absence of any consideration by way of payment or benefit moving from the grantee to the grantor, and specific performance decreed accordingly. *Rosher v. Williams*, 20 L. R., Eq. 210; 44 L. J., Ch. 419; 32 L. T. 387; 23 W. R. 561.

To Execute Separation Deed.]—An agreement between a husband and the father of the wife, that the husband and wife should live apart, and that the husband should execute a deed of separation containing all usual and proper clauses, and securing an annuity for the maintenance of his wife and child, and that the expense of the agreement and deed should be borne equally by the husband and the father, will be decreed to be specifically performed. *Gibbs v. Harding*, 5 L. R., Ch. 336; 39 L. J., Ch. 374; 18 W. R. 361.

Semble, in an action for specific performance of an agreement to execute a separation deed, the court will not go into evidence whether the provisions agreed upon are for the benefit of the children. *Evershed v. Evershed*, 46 L. T. 690; 30 W. R. 132.

Where the agreement on the face of it is complete, an arbitration clause can only come into force in case of difference between the parties, and does not oust the jurisdiction of the court to settle the deed itself. *Ib.*

Decree for specific performance; the deed of separation to be settled in chambers if the parties differed, and no dum casta clause to be inserted. *Ib.*

A married woman can contract to live apart from her husband, and the husband is entitled to come to the court to enforce specific performance of such a contract. A husband is not debarred from enforcing a deed of separation and from obtaining an order restraining his wife from commencing an action for the restitution of conjugal rights by reason of trifling breaches of the covenants on his part. Where, in a separation deed, the husband had covenanted to allow an infant child to reside with the wife, and had subsequently concurred as next friend of the infant in a petition under the Infants' Custody Act (36 Vict. c. 12), for the removal of the infant from the wife's custody, which had been ordered by the court:—Held, that this was not a breach of the husband's covenant. Injunction granted to restrain the wife from suing for restitution of conjugal rights. *Besant v. Wood*, 12 Ch. D. 605; 40 L. T. 445.

Of Marriage Settlement.]—By a marriage

settlement real estate was limited to the use of A. and B. successively during their respective lives, with remainder, in case C. should at the death of B. be discoverd, to the use of C. in fee; but in case C. should then be a married woman (which event happened), to the use of D., his heirs and assigns, upon trust to receive the rents and profits, and to pay the same to C. for her life for her separate use, and after the determination of that estate to stand seised of the said hereditaments to such uses and upon such trusts as C., notwithstanding coverture, should, by her last will duly executed, appoint, and in default of any such appointment, and so far as the same, if made, should not extend, to the use of the heirs and assigns of C. for ever. C. survived her husband, and entered into an agreement to sell the real estate in fee:—Held, that the legal estate in fee was vested in D., and consequently that the limitation to the heirs and assigns of C. created only an equitable estate, which coalesced with her equitable life estate, and that she could, therefore, make a good title to the fee, and was entitled to a decree for specific performance of the agreement. *Cooper v. Kyrock*, 7 L. R., Ch. 398; 41 L. J., Ch. 296; 26 L. T. 566; 20 W. R. 503.

Of Agreement by Father in Consideration of Daughter's Marriage.]—A father, on his daughter's marriage, agreed by a memorandum in writing to charge his property with 1,000*l.* as her fortune to be settled in trustees for her benefit, she to receive the interest at 5 per cent. on her sole and separate receipt during the term of her natural life; but if she had a family, she was to have the power of disposing of it amongst her children as she and her husband might think proper; the father to have the power to lodge the 1,000*l.*, with her consent and that of her trustee, in any security they might agree upon. No settlement was executed, and the wife died without issue:—Held, that the husband, who survived and who took out letters of administration to his wife's effects, was entitled to the 1,000*l.*; and the court directed specific performance against the father to effectuate payment of the 1,000*l.* to the husband as such administrator. *Dennely v. Delany*, 10 Ir. R., Eq. 377.

Ante-nuptial Agreement by Husband to Settle Wife's Real Estate.]—By an ante-nuptial agreement, signed by the intended husband and wife and the parents of the wife, the parents agreed to appoint a share of real estate (which was subject to their life interest and to the appointment of them and the survivor of them) to the wife, and the husband agreed that he would settle his wife's reversionary share of the real estate upon the usual trust for the husband and wife, and their children. The wife's father having survived her mother, released the power and granted the estate after his death, giving his daughter a share. The wife predeceased the husband and left two children. The property being still reversionary, an action was brought by the husband and one of the children against the other child, the wife's heir-at-law, for specific performance of the agreement:—Held, that the agreement bound the wife as having assented to her father's stipulation, and also her heir-at-law, and specific performance decreed accordingly.

Lee v. Lee, 4 Ch. D. 175; 46 L. J., Ch. 81; 36 L. T. 138; 25 W. R. 225.

Of Compulsory Purchase—When Price Fixed.]

—A railway company, after notice to treat for land has been given to the landowner, and the price of the land has been fixed by arbitrators under the Lands Clauses Act, 1845, is in the same position with regard to the landowner as an ordinary purchaser, and will be compelled by a court of equity to complete the purchase. *Harding v. Metropolitan Railway Company*, 7 L. R., Ch. 154; 41 L. J., Ch. 371; 26 L. T. 109; 20 W. R. 321.

—Proceedings for Compensation—No Bar.]

Sects. 101—106, inclusive, of the Lands Clauses Act, 1845, with reference to the ascertaining of compensation for common lands, are not imperative so as to preclude the enforcement of specific performance of an agreement entered into otherwise than as mentioned in those sections. *Bee v. Stafford and Uttoxeter Railway Company*, 23 W. R. 863.

—When Notice to Treat Withdrawn by Reason of Counter-notice.]—A corporation gave notice to take part of premises under compulsory powers. Being required to take the whole, the corporation gave notice of application for the appointment of a surveyor to assess the value of both the part and the whole. The corporation subsequently gave notice of abandonment of both notices:—Held, that specific performance of a contract to take the whole would not be decreed against them. *Grierson v. Cheshire Lines Committee*, 19 L. R., Eq. 83; 44 L. J., Ch. 35; 31 L. T. 428; 23 W. R. 68.

Transfer of Shares.]—The owners of an English patent, and of certain foreign patents obtained for the same invention, agreed with A., in consideration of pecuniary advances made by him to them, to procure the transfer to him of certain fully paid-up shares in a proposed company, to be formed with the object of purchasing their English and foreign patents, and which were to be allotted to them in part payment of their interests in the patents. The company was to be called the "Non-Radiating Steam Engine Company," and was to have a capital of 220,000*l.* The patentees also appointed A. their agent for the sale of a certain number of the shares that were to be allotted to them in such company, and it was arranged that the shares which A. should obtain for his advances should be applied towards fulfilment of the contracts which he, as their agent, should enter into with purchasers of shares. Under these arrangements A. became entitled to 847 shares, and sold 224 shares to different persons. The scheme of the company, as at first proposed, was abandoned, and the patentees brought out a company called the "Patent Steam Engine Company," with a capital of 100,000*l.*, and formed with the object of purchasing the English patent only. The patentees then refused to transfer any of the shares which they had acquired in the second company to A., and the several persons to whom he had sold shares. On a bill by A. and the several purchasers of shares from him to enforce specific performance of the arrangements which had been entered into between A. and the patentees:—Held, that the second company com-

prehended, in effect, the substance of the contract which existed between the parties, and that an objection for want of mutuality in the contract could not be sustained. *Turner v. Moy*, 32 L. T. 56.

Held, also, that an objection for multifariousness, on the ground of misjoinder of plaintiffs, and that each plaintiff ought separately to make out his own case, could not, under the circumstances, be supported. *Id.*

The court has no jurisdiction under the Companies Act of 1862, s. 35, to grant specific performance of an agreement to transfer shares or to enforce against the company an equitable claim to be registered as a shareholder; but where an applicant has a legal title, the court will compel the company to enter his name on the register, although his title is disputed by the person registered as holder. In such case the court has no jurisdiction to make such person disputing the title pay the costs of the summons rendered necessary by his opposition. *Tuhiti Cotton and Coffee Plantation Company, In re, Sargent, Ex parte*, 17 L. R., Eq. 273; 43 L. J., Ch. 425; 22 W. R. 815.

Leases—Quantity Inaccurate—Abatement.]

Where a tender for a lease of a farm was accepted under the mistaken impression that the quantity of land inserted therein by the person making the tender was the same as that intended to be let, and it was subsequently discovered that the quantity of land inserted in the accepted tender was of larger amount than was intended to be let:—Held, that as the mistake was one which related to quantity only it did not touch the essential terms of the contract, and that specific performance could be granted with an abatement. *McKenzie v. Hesketh*, 7 Ch. D. 675; 47 L. J., Ch. 231; 38 L. T. 171; 26 W. R. 189.

—Subject-Matter of Action.]—Contract by a railway company to grant a lease of the whole of a house No. 1, and part of a house No. 2:—Held, that part of the house No. 1 being evidently intended to be retained by the company, only that other part of it designated in a plan was meant to be included in the lease, and a bill to compel a lease of the whole house dismissed. *Richards v. North London Railway Company*, 20 W. R. 194.

—Of Part-Interest in Remainder Disclaimed.]—When the conditions of an agreement between landlord and builder, whereby the landlord agrees to grant leases of successive plots of land as the houses upon each of them are built to a certain stage, are by the terms of the contract separable, there is no rule of equity to prevent them from being separately enforced by way of specific performance. Therefore where the assignee of the builder's interest had completed the houses upon some only of the plots agreed to be built upon:—Held, upon a bill for specific performance, that he was entitled to the leases of those plots, even though disclaiming all interest in the remaining plots. *Wilkinson v. Clements*, 8 L. R., Ch. 96; 42 L. J., Ch. 38; 27 L. T. 834; 21 W. R. 90.

—Usual Covenant.]—Agreement to accept a lease of a dwelling-house in London "to contain all usual covenants and provisions." The

lease contained a covenant not to assign without the lessor's consent. In an action to compel specific performance of the agreement:—Held, that the covenant was not a "usual covenant," and that the agreement could not be enforced. *Hampshire v. Wickens*, 7 Ch. D. 555; 47 L. J., Ch. 243; 38 L. T. 408; 26 W. R. 491.

A judge cannot of his own authority say what should be "usual covenants," nor should the locality, nature or tenure of the property be, except under special circumstances, regarded. *Id.*

In a lease of a colliery in Derbyshire a proviso that when the mines demised are incapable of being worked to a profit, the lessee shall be entitled to determine the lease, is not "usual." The court will make a declaration that a clause ought not to be inserted in a lease which it refers to chambers to settle. *Strelley v. Pearson, infra.*

— **Renewal.**—The performance of the conditions in a lease, to paint, keep the premises in repair, &c., held to be a condition precedent to the lessee's privilege under the lease of having a renewal of the term. *Bastin v. Bidwell*, 18 Ch. D. 238; 44 L. T. 742.

Tenancy—Constructive Notice of Mortgage.—When money is lent on an equitable mortgage without notice of a prior equitable agreement, the lender gains no priority over the owner of the prior equitable interest by getting in the legal estate after he has had notice that his mortgagor has made himself a trustee for the owner of the prior equity. *Mumford v. Stohwasser*, 18 L. R., Eq. 556; 43 L. J., Ch. 694; 30 L. T. 859; 22 W. R. 833.

A builder entered into a building agreement under which leases of plots of land were to be granted on completion of houses on them. He built a house on one plot, and verbally agreed on getting his lease to grant an underlease to M., who gave valuable consideration for the underlease, and entered into possession. Subsequently the builder, without the knowledge of M., obtained a lease of the house, and deposited it with the defendant to secure an advance made without notice of M.'s title. After this the builder, as agent for the plaintiff (who claimed under M.'s will), let the house to a tenant. Subsequently the builder granted to the defendant a legal mortgage to secure the previous advance. The suit was instituted for specific performance of the agreement for an underlease:—Held, that the tenancy gave the defendant constructive notice at the time of taking the legal mortgage that the builder was a trustee for M., and that the legal estate was no protection to the defendant against the prior equity; and a decree was made for specific performance, but having regard to the negligence of M., without costs. *Id.*

Mines and Minerals—Lease—Mode of Working.—A lease of a coal mine was granted, reserving a minimum rent of 720*l.*, to be increased to 1,000*l.* in case there should be pits sunk upon the estate, with a royalty upon all coal gotten beyond a certain quantity; and the lessees covenanted to work the mine uninterruptedly, efficiently, and regularly, according to the usual or most improved practice. The lessees paid the minimum rent, but only raised a small quantity of coal by working through an adjoining mine without sinking pits on the lessor's property.

They being desirous of enforcing a larger amount of working, whereby an increased rent would be payable, filed a bill against the lessees for specific performance of the covenant in the lease:—Held, that there was no obligation upon the lessees to sink pits, although that might be the most efficient mode of working; and that, so long as the minimum rent was paid, the lessees could not be compelled to work the mine at all; that the lessees had committed no breach of contract; but if they had done so the remedy was at law and not in equity; and that the Court of Chancery could not, by a reference to chambers, give effect to the covenant by directions as to the management of a coal mine. *Wheatley v. Westminster Brymbo Coal and Coke Company*, 9 L. R., Eq. 538; 39 L. J., Ch. 175; 22 L. T. 7.

— **Restraining Lessee from Ceasing to Pump.**—In an action for specific performance of an agreement to grant a colliery lease where the lessee had long retained possession, and had worked the coal and then threatened to cease pumping:—Held, that a motion for an injunction to restrain the lessee from ceasing pumping was a proper motion for preservation of the property pending the action under Ord. LII. r. 3. The motion having been ordered to stand over until the trial, the colliery had become drowned before the motion could be heard, owing to a cross-examination of the plaintiff's witness by the defendant:—Held, that it was proper at the trial to make the costs of the motion costs in the action. *Strelley v. Pearson*, 15 Ch. D. 113; 49 L. J., Ch. 406; 43 L. T. 155; 28 W. R. 752.

— **Warranty.**—A., on the application of B. and C., agreed to grant them a lease of a vein or seam of coal, called the S. vein, "about two feet thick, with the overlying and underlying beds of clay," on and under a farm called X., at 100*l.* per annum as certain or dead-rent, and royalties of 9*d.* per ton for the coal and 4*d.* per ton for the clay; the lessees to have any part of the farm at the rent of 10*l.* per acre, and to expend not less than 500*l.* in the erection of a manufactory and buildings for the purpose of working the coal and clay; way-leave of a 1*d.* per ton for foreign coal and clay; lessees to have power to determine the lease at the end of three years on giving one year's notice. On action by A. for specific performance, B. and C. alleged that the S. vein did not exist under the farm, and it was proved that on search it had not been found, but counter evidence was given to shew that the searches were insufficient:—Held, that, under the agreement, B. and C. had, in consideration of the dead-rent reserved, obtained licence to enter and search for the vein, but not a warranty that such vein was to be found; and, accordingly, that A. was entitled to specific performance of the contract whether the S. vein existed or not. *Jefferys v. Fairs*, 4 Ch. D. 448; 46 L. J., Ch. 113; 36 L. T. 10; 25 W. R. 227.

To Execute Mortgage.—When a person had agreed to execute a mortgage of leasehold premises in the usual form, containing an absolute power of sale, in consideration of money due, and had, when requested to do so, failed to execute such mortgage:—The court made a decree for specific performance. *Ashton v. Corrigan*, 13 L. R., Eq. 76; 41 L. J., Ch. 96.

The court will decree specific performance of an agreement to execute a mortgage with an immediate power of sale. *Hermann v. Hodges*, 16 L. R., Eq. 18; 43 L. J., Ch. 192; 21 W. R. 571.

Sale by Mortgagee—Concurrence of Mortgagors curing Defect in Title.—The 23 & 24 Vict. c. 145, s. 15, gives power to a mortgagee of leaseholds by underlease to sell the whole of the original term. *Hiatt v. Hillman*, 25 L. T. 55; 19 W. R. 694.

A mortgagee contracted to sell together two properties mortgaged to him by different persons; and on the purchaser objecting to the title, the mortgagors, some of whom were married women, verbally promised to concur. The purchaser, however, refused to complete, and before a final order for specific performance could be obtained, some of the mortgagors died, leaving infants interested in the equity of redemption:—Held, that the willingness of the mortgagors to concur covered the defect in the title. *Ib.*

The mortgagors had so mortgaged the property that the distinct powers of sale could not be exercised separately without selling undivided shares:—Held, that under the circumstances they would be benefited by a joint exercise of the powers, and must be bound by it. *Ib.*

Of Partnership Agreements.—A., in June, 1869, borrowed 250*l.* from B., and, at the time, signed a paper in the following words: "In consideration of 250*l.* this day paid to me, I hereby undertake to execute a deed of co-partnership to you for one-eighth share in the profits of the Oxford Music Hall and Tavern, to be drawn up under the Limited Partnership Act of the 28 & 29 Vict. c. 86, called 'An Act to amend the Law of Partnership:'"—Held, that this paper (which contained no provision as to the date or duration of the partnership) constituted a partnership at will; and that it was not put an end to by a letter, dated in August, 1872, in which A. promised to repay B. on the 1st of September, 1872, the principal, together with interest thereon (treating it only as a loan) such as should, as on a calculation of one-eighth of the profits, be found to be due to B. on that day. This letter was followed by a tender, which was not accepted. *Syers v. Syers*, 1 App. Cas. 174; 35 L. T. 101; 24 W. R. 970—H. L.

On a bill by B. for specific performance of the agreement to execute a partnership deed for one-eighth share of the profits, A. put in an answer in which he denied that there had been a partnership at all, but submitted that if any partnership had ever existed it was only a partnership at will, of one-eighth share of the profits (payment of which he offered to make), and he submitted that this partnership had been determined by the letter of August, 1872:—Held, that it had not been determined by that letter, but that the answer had the effect of putting an end to it; and that accounts must be directed to be taken as up to the day of filing the answer, and that these accounts must include the principal, the eighth share of the profits, and also the eighth share of the assets up to that day. *Ib.*

A bill does not lie for specific performance of a partnership agreement, where the sole relief sought is the payment of a sum of money, for which there is a remedy by action. *Bagnell v. Edwards*, 10 Ir. R., Eq. 215.

Sale of Medical Practice.—Whether the court can enforce specific performance of a contract to sell a medical practice, where the practice is non-dispensing, quære:—Semble, that there would be power to do so, if it were a dispensing practice. *May v. Thomson*, 20 Ch. D. 705; 51 L. J., Ch. 917; 47 L. T. 295—C. A.

Performance of Contract—Becoming Possible.—When a party has entered into a contract without having the power to perform it, and afterwards acquires the right to do so, he is then bound to perform it. *Carne v. Mitchell*, 15 L. J., Ch. 287.

Chattels.—A court of equity will not enforce the specific performance of ordinary contracts for the sale of chattels, unless there is something very special in the nature of the contract. On the other hand, if a trust is created, the circumstance that the subject-matter is a personal chattel will not prevent the court from enforcing the due execution of the trust. *Pooley v. Budd*, 14 Beav. 34.

A court of equity will enforce specific performance of a contract for the sale of a chattel, where pecuniary damages would not be a sufficient compensation for the breach of a contract, as where the chattel is of unusual distinction and curiosity and of doubtful value. *Fulke v. Gray*, 4 Drew. & Sm. 651; 29 L. J., Ch. 28; 5 Jur., N. S. 645.

Specific performance of the purchase of a mansion and estate was decreed, though the parties could not agree as to the valuation of the chattels. *Richardson v. Smith*, 5 L. R., Ch. 648; 39 L. J., Ch. 877; 19 W. R. 81.

Sale of Coal.—A contract to sell a quantity of coal to be raised and delivered is a simple contract for the sale of chattels, and will not be enforced in equity, damages to be ascertained by a jury being the proper remedy. *Fothergill v. Rowland*, 17 L. R., Eq. 132; 43 L. J., Ch. 252; 29 L. T. 414; 22 W. R. 42.

II. MATTERS OF DEFENCE.

1. MISREPRESENTATION AND DELAY.

Delay, when Unreasonable.—A plaintiff filed a bill for specific performance of a contract to lease certain coal mines to him. The contract was entered into in February, 1872. There was delay in completion, not, however, as far as appeared, attributable to the plaintiff. In September, 1872, the defendant gave notice that he should rescind the contract unless the plaintiff complied with certain requisitions within fourteen days, and on the 29th of October, 1872, he stated his intention of abiding by that notice. The bill was filed on the 2nd of April, 1873. A demurrer allowed on the ground that the notice having put the parties at arm's length, the plaintiff had been guilty of unreasonable delay in taking proceedings. *Huxham v. Llewellyn*, 28 L. T. 577; 21 W. R. 570, 776.

When a plaintiff to a bill for specific performance has allowed five months to elapse after the defendant has rescinded the contract before filing his bill, it is not a sufficient explanation of the delay to state that the defendant's solicitor was suffering from mental alienation. Leave, however, to amend may be given. *Ib.*

Delay, after the parties were at arm's length, of three calendar months and thirteen days, in filing a bill for specific performance of a contract for the sale and purchase of a colliery :—Held, a bar to relief. *Glasbrook v. Richardson*, 23 W. R. 51.

At the expiration in July, 1857, of a lease under which by assignment he was in possession of property, B. signed an agreement to accept from A. a new lease for thirty-one years, at the same rent as was reserved by the old lease, and payment of 600*l.* on the day fixed for completion (1st August, 1857), with interest if the lease should not be completed on the day fixed. A draft lease was sent to B. for his approval, but was not returned, and no steps were taken by A. to press for completion. B. remained in possession and paid rent, but no payment of the 600*l.* or interest was ever made or demanded. In 1871 A. died. On a bill by her legal personal representative :—Held, that as B.'s possession and payment of rent must be referred to the new agreement, and not to a holding over after the expiration of the former lease, the lapse of time did not operate as a bar to specific performance, which was accordingly decreed, with interest on the 600*l.* from the 1st of August, 1857. *Shepherd v. Walker*, 20 L. R., Eq. 659 ; 44 L. J., Ch. 648 ; 33 L. T. 47 ; 23 W. R. 903.

In 1855 A. agreed with B. that, "in the event of B. marrying his daughter," he would grant him a ninety-nine years' lease of a shop at C., "should he at any time require it," at a rent of 30*l.* per annum. B. was let into possession of the shop and married A.'s daughter, and duly paid the rent to A. and his assigns until March, 1874, when his then landlord gave him notice to quit. On a bill for specific performance of the agreement :—Held, that B. by his laches and his acts had precluded himself from the relief to which he might have been entitled. *Davenport v. Walker*, 34 L. T. 168.

The fixed rule of equity that specific performance of an agreement for a lease will not be granted after a long lapse of time will not be relaxed merely on account of possession and payment of rent during the whole of such time. *Powis v. Dynevor (Lord)*, 35 L. T. 940.

In 1844 the plaintiff verbally agreed with the agent of a predecessor in title of D., to build a shop, and hold the same on lease at a rent of 5*s.* per annum. The plaintiff built the shop and occupied and paid rent for it up to the time of action brought, but no lease was executed, nor were negotiations for a lease had. In 1876 the plaintiff sued D. for specific performance :—Held, that specific performance ought not to be decreed. *Ib.*

Misrepresentation and Delay.—Misrepresentation, whereby one has been induced to enter into an agreement, may afford a good defence to a suit for specific performance of the agreement, although it is not such a clear and direct misrepresentation as would afford a good ground for a suit to set the agreement aside, or for an action for damages upon it. *Lamare v. Dixon*, 6 L. R., H. L. 414 ; 43 L. J., Ch. 203 ; 22 W. R. 49.

If the plaintiff in a suit for specific performance has delayed for a length of time to enforce the agreement, acquiescence in a breach of the agreement, or in a misrepresentation on the faith of which the defendant entered into the

agreement, will not be imputed to the defendant by reason of a similar delay on his part in repudiating it, though accompanied by possession. *Ib.*

When a suit is instituted for specific performance of a contract, and the defence set up is, that the contract was made in consideration of certain promises which the plaintiff has not fulfilled, a delay to defeat that defence must be such as amounts to an acquiescence in the non-fulfilment of the alleged promises. *Ib.*

When the subject of the contract was an agreement to take the lease of a house, and the proposed tenant went into possession at once, and occupied for two years, but, while continuing in occupation, from time to time called on the landlord to fulfil promises which the tenant alleged to have been the inducement for the contract, and paid rent, but always paid it under protest :—Held, that these circumstances did not amount to such acquiescence as to prevent the tenant from ultimately refusing to perform the contract, but that the payments were to be treated as merely made in respect of the actual use and occupation, and in no other character. *Ib.*

A. was the owner of some land, on which he was about to erect buildings ; B. wished to have cellars there for wine vaults. A. promised that they should be made dry, but would not introduce that promise into the written agreement. B., however, confiding in the promise, signed the agreement, by which he undertook to accept from A. a lease of the vaults for a certain term, and at a certain rent. B. was to pay down 100*l.* and was to pay another 100*l.* on the execution of the lease. B. paid the first 100*l.*, and, for his own convenience, before the day fixed, took possession of the vaults, and placed therein a large quantity of wine, but soon complained that the vaults had not been made dry. These complaints he constantly renewed, and every time he paid the rent paid it under protest ; and, finally, after more than two years' actual occupation of the cellars, refused to sign the lease, on the ground that the cellars had not been made fit for his occupation, and he did not pay the second sum of 100*l.*, but removed his stock of wines to another place. On a bill for specific performance, the court granted a decree against B., but accompanied it with a direction that there should be an inquiry whether a certain thing suggested by B. in the course of the long correspondence between the parties, but neglected by A., should not be done :—Held, that the decree in this form was erroneous. *Ib.*

Held, also, that the taking possession of the vaults, and the payment of the rent, which payment must be attributed to the actual use and occupation of the premises, did not prevent B. from setting up as a defence the non-performance of the promise which had been the inducement to the contract. *Ib.*

Held, also, that as there had been delay on both sides, though the plaintiff's bill ought to be dismissed, it must be dismissed without costs. *Ib.*

Submission not Bar to Action.—Semble, that mere submission to a wrongful act which has been completed without the knowledge or assent of the person whose right is infringed cannot, without some conduct amounting to accord and

satisfaction, or a release under seal being shewn, bar his right of action; although, under the name of laches, it may afford a ground for refusing relief under some particular circumstances. *De Busche v. Alt*, 8 Ch. D. 286; 47 L. J., Ch. 386; 38 L. T. 370—C. A.

As to Rescission of a Contract on the Ground of Fraud.]—*See FRAUD—VENDOR AND PURCHASER.*

2. STATUTE OF FRAUDS.

When Sufficient Memorandum.]—A person, who was in treaty for taking the lease of a house, stated, in a letter to the owner, that he had authorized his solicitors to settle the terms of the agreement. They subsequently sent the owner a draft agreement, signed by them, stating that its provisions were approved by their client, who afterwards refused to sign or acknowledge it:—Held, in a suit for specific performance, that the solicitors were agents in what they did, and that a defence under the Statute of Frauds failed. Also, that an alteration made by the owner in the terms of the agreement, but not insisted on by him, did not vitiate the contract. *Jolliffe v. Blumberg*, 18 W. R. 784.

Nature of Documents.]—The plaintiff claimed specific performance of a contract to purchase a house and premises sold by auction. After the sale the auctioneer signed the following memorandum at the foot of the conditions: "The property duly sold to A. Shardlow, butcher, Pinxton, and deposit paid at close of sale;" and he also signed this receipt: "Pinxton, March 29th, 1880. Received of A. Shardlow the sum of 21l. as deposit on property purchased at 420l. at Sun Inn, Pinxton, on the above date. Mr. G. Cotterell, owner." The Statute of Frauds was set up in defence. The conditions contained no description of the property sold, but posters had been put up describing the property to be sold on the 29th of March at the Sun Inn:—Held, that the word "purchased" was enough to connect the receipt with the conditions of sale, though not with the poster, and that the description in the receipt and conditions was sufficient to satisfy the Statute of Frauds. *Shardlow v. Cotterell*, 20 Ch. D. 90; 51 L. J., Ch. 353; 45 L. T. 572; 30 W. R. 143—C. A.

The plaintiffs claimed the specific performance of an agreement for the composition of a literary work by the defendant, alleging that the agreement was contained in three written documents. At the trial the first and third of the documents were proved; the second was not produced, nor was any evidence given of its contents. The defendant, by his statement of defence, denied that he had agreed with the plaintiffs as alleged by them with reference to the second document:—Held, that the plaintiffs were not entitled to specific performance of the agreement contained in the first and third documents, nor to damages for the breach of it. *Post v. Marsh*, 16 Ch. D. 395; 50 L. J., Ch. 287; 43 L. T. 628; 29 W. R. 198.

The plaintiff, in a bill for specific performance of an agreement to take a lease of a house, alleged evidence of a verbal agreement, which was denied by the defendant. In order to take the case out of the Statute of Frauds,

the plaintiff relied on a letter written by the defendant, in which the defendant agreed to take the house for seven years on certain terms, but in which the day of the commencement of the lease was not mentioned; and on another letter from the defendant mentioning the day of commencement, and adding terms to which the plaintiff did not agree:—Held, that there was no memorandum of agreement sufficient to satisfy the requirements of the Statute of Frauds. *Nesham v. Selby*, 13 L. R., Eq. 191; 41 L. J., Ch. 173; 26 L. T. 145. Affirmed, 7 L. R., Ch. 406; 41 L. J., Ch. 551; 26 L. T. 568.

Names of Parties.]—The defendant wrote and signed a letter beginning with the word "Sir," and offering to take the lease of a theatre for a fixed term at a fixed rent. This letter was delivered to W., for delivery to the lessor. W. delivered it, and as lessor's agent wrote and sent to the defendant a letter containing an acceptance of the offer by the owner; but this letter was not signed by the defendant nor referred to in any subsequent writing of his. The lessor brought an action for specific performance:—Held, that the lessor being only described as "Sir" in any writing signed by the defendant, there was no binding contract under the Statute of Frauds, and the action was dismissed with costs. *Williams v. Jordan*, 6 Ch. D. 517; 46 L. J., Ch. 681; 26 W. R. 230.

Part Performance—Representation influencing Conduct.]—The plaintiff, as heir-at-law of an intestate, claimed the title-deeds of the intestate's farm, of which the defendant had taken possession on his death. The defendant counter-claimed for a declaration that she was entitled to a life estate in the farm, and to retain the title-deeds for her life. The jury found that the defendant was induced to serve the intestate as his housekeeper without wages for many years, and to give up other prospects of establishment in life by his promise, which was a verbal one, to make a will leaving her a life estate in his farm, if and when it became his property:—Held, that neither the continuance of the defendant in the service of the intestate, nor the fact that the latter had executed a document which he intended to operate as a will in the defendant's favour, but which failed to take effect from want of proper attestation, was any evidence of a sufficient part performance of the parol agreement between the intestate and the defendant, upon which the defendant's counter-claim was based, to exclude the operation of the Statute of Frauds, and therefore that the 4th section of that statute was an answer to the counter-claim. *Maddison v. Alderson*, 8 App. Cas. 467; 52 L. J., Q. B. 737; 49 L. T. 303; 31 W. R. 840; 47 J. P. 821.

The plaintiff, who was proposing to enter into business as a milliner, was induced by C. to abandon the project, C. promising her verbally that she should occupy a leasehold house of C.'s during her (the plaintiff's) life, the plaintiff to pay the ground-rent, rates and taxes, and maintain herself by letting lodgings. The plaintiff thereupon abandoned the idea of the millinery business, and entered into possession of C.'s house, and continued there for several years until C.'s death, paying the ground-rent, rates and taxes. C. bequeathed the house to P., who brought an action of ejectment against the

plaintiff, who thereupon filed a bill to restrain the action:—Held, that there had been a part performance of the verbal contract between the plaintiff and C. sufficient to take the case out of the Statute of Frauds. *Coles v. Pilkington*, 19 L. R., Eq. 174; 31 L. T. 423; 23 W. R. 41.

A father verbally promised, in consideration of his daughter's marriage, to give her a house as a wedding present, and immediately after the marriage he put the daughter and her husband into possession. The father was then the owner of the house, which was leasehold and was subject to a charge in favour of a building society, payable by instalments. The father paid the instalments which fell due during his lifetime, and at his death there remained a balance of 110*l.*, which fell due shortly afterwards:—Held, that the verbal promise to give the house having been established, the possession took the case out of the Statute of Frauds; that the contract was to give the house free from incumbrances; and that the 110*l.* was payable out of the father's estate. *Ungley v. Ungley*, 5 Ch. D. 887; 46 L. J., Ch. 854; 37 L. T. 52; 25 W. R. 733—C. A. Affirming 4 Ch. D. 73; 46 L. J., Ch. 189; 35 L. T. 619; 25 W. R. 39.

— **Extent of Doctrine.**]—The equitable doctrine of part performance taking contracts out of the operation of s. 4 of the Statute of Frauds cannot be extended by the High Court of Justice, under s. 24, sub-s. 7, of the Judicature Act, 1873, beyond the limits to which it was confined by the courts of equity. It is, therefore, applicable only to contracts for the sale and purchase of lands, and not to a contract of service. *Britain v. Rossiter*, 11 Q. B. D. 123; 48 L. J., Ex. 362; 40 L. T. 240; 27 W. R. 482—C. A.

— **Expenditure.**]—A., a tenant in possession, filed a bill against B. for the specific performance of a parol agreement for a lease of thirty years. A. had contracted to sub-let, and his sub-lessee had expended money in alterations and repairs with the knowledge and approval of B.:—Held, that the outlay by the sub-lessee was as much a part performance of the agreement as if made by A., who was therefore entitled to specific performance. *Williams v. Evans*, 19 L. R., Eq. 547; 44 L. J., Ch. 319; 32 L. T. 359; 23 W. R. 466.

To maintain a contract on the ground that it is taken out of the Statute of Frauds by part performance, the court will require it to be shewn that the party seeking relief has expended money or otherwise acted in reliance on and in the execution of the agreement, and that non-performance would amount to a fraud upon him. Specific performance of a contract to purchase will not be enforced merely because the defendant has done acts on the property which, unless construed as acts of ownership, would, in the absence of licence, amount to a trespass. *Phillips v. Alderton*, 24 W. R. 8.

The plaintiffs being in negotiation with the vendors, which afterwards resulted in a contract for the purchase of an estate, applied to B. for an advance to enable them to pay the deposit, and a verbal agreement was entered into, by which B. was to be substituted as the purchaser of the estate, paying to the plaintiffs 2,000*l.*, and securing to them other advantages; and in order to enable B. to have his name substituted for

those of the plaintiffs as purchaser, they signed a memorandum simply transferring to him the benefit of the contract entered into with the vendors in consideration of the 2,000*l.* B. having paid a large sum under the agreement, afterwards refused to perform any more of the verbal agreement than was comprised in the written memorandum, and the plaintiffs filed a bill to set aside the memorandum and to restrain the dealing with the estate on the footing of it, but did not offer to repay the advances:—Demurrer overruled. *Jervis v. Berridge*, 8 L. R., Ch. 351; 42 L. J., Ch. 518; 28 L. T. 481; 21 W. R. 395. Affirming 21 W. R. 96. See *Kelly v. Walsh*, 1 Ir. Ch. D. 275.

Held, also, that if the plaintiffs could have maintained a bill for specific performance of the parol agreement between them and B., on the ground that it had been part performed—as to which, quære—they were not bound to do so; but that as B. had repudiated that agreement, they were entitled to fall back on their original rights under the agreement with the vendors. *Id.*

Where a corporation leased tolls by agreement not under seal, the payment of a monthly rent in advance was held insufficient to constitute a sufficient part performance to enable the court to enforce the agreement. *Kidderminster (Mayor) v. Hardwick*, 9 L. R., Ex. 13; 43 L. J., Ex. 9; 29 L. T. 612; 22 W. R. 160.

— **Recovery back of Money Expended.**]—Money expended on the alteration of premises, for the leasing of which an agreement has been entered into, but which is incapable of being enforced by reason of the Statute of Frauds, may be recovered back as on a failure of consideration. *Pulbrook v. Lawes*, 1 Q. B. D. 284; 45 L. J., Q. B. 178; 34 L. T. 95.

P., by letter, proposed to take a lease for seven, fourteen or twenty-one years of one of L.'s houses, conditionally on certain alterations being made. A correspondence ensued between the parties, and it was ultimately agreed that the alterations should be carried out, P. undertaking to contribute a sum of money towards them. By L.'s consent some of the alterations were executed by P.'s workmen. Eventually P. was unable, owing to L.'s fault, to take the house:—Held, that though he was unable to recover damages occasioned through not having a lease granted, by reason of the letters not disclosing an agreement such as to satisfy the Statute of Frauds, he was, nevertheless, entitled to recover on a quantum meruit for the loss incurred in making the alterations. *Id.*

Deposit of Title-Deeds.]—Whether a deposit of title-deeds, in pursuance of a contract to charge real estate, is a sufficient part performance to take a case out of the Statute of Frauds, quære. *Whitmore v. Farley*, 14 Cox, C. C. 617; 45 L. T. 99; 29 W. R. 825—C. A.

3. IN OTHER CASES.

Consent of Landlord to Assignment not being Obtained—No Defence.]—To a suit for specific performance by the purchaser against the vendor of a leasehold interest, it is not a defence that the lease contains a covenant against alienation without the consent of the landlord, and that it does not appear that the consent of the

landlord has been obtained. *Leitch v. Simpson*, 5 I. R., Eq. 613.

Mistake, when Available.]—The court will not refuse to decree the specific performance of an agreement on the ground that one of the contracting parties has mistaken its legal effect. *Powell v. Smith*, 14 L. R., Eq. 85; 41 L. J., Ch. 734; 20 W. R. 602.

Therefore, when a lessor's agent had contracted to grant a lease for seven or fourteen years, which the lessor understood to mean a lease determinable at the lessor's option, and alleged that the agent had acted without authority:—Held, that the lessee was entitled to have the agreement specifically performed, and to have a lease for fourteen years, determinable at his own option at the end of seven years. *Ib.*

Held, also, that the lessee having been put into possession of the farm under the agreement, the lessor was precluded from disputing the agent's authority. *Ib.*

It is no answer to a suit for specific performance for the defendant to say that, though he understood what the words of the agreement were, he was under a mistake as to their legal effect. *Evershed v. Evershed*, 46 L. T. 690; 30 W. R. 132.

A. offered for sale a plot of land fronting the street, 176 feet deep, possessing a frontage of about 40 feet, which he described as well adapted for bank or insurance buildings, a public institution, carriage factory, or any building requiring space, or two good houses or shops. B. contracted to purchase it as a site for a carriage factory, but subsequently discovered that he would not be able to build within 62 feet 3 inches of the street, by reason of the restriction placed on building beyond the general line of buildings in the street by the Metropolis Local Management Act (25 & 26 Vict. c. 102), s. 75:—Held, that B. was at liberty to resist a suit for specific performance on the ground that he had purchased under a misapprehension. *Bray v. Briggs*, 26 L. T. 817; 20 W. R. 962.

Mistake of fact is not the less a ground for relief because the person who has made the mistake had the means of knowledge. *Willmott v. Barber*, 15 Ch. D. 96; 43 L. T. 95; 28 W. R. 911.

The purchaser may escape from his bargain on the ground of mistake, if it was a mistake which the vendors contributed to—that is, in other words, if he was misled by any act of the vendors; if the mistake was entirely his own, then the court ought not to let him off his bargain on the ground of a mistake made by himself solely, unless the case is one of considerable harshness and hardship. *Goddard v. Jeffreys*, 51 L. J., Ch. 59; 45 L. T. 675; 30 W. R. 270.

— Damages.]—Where specific performance is refused on the ground of mistake by the defendant, so that under the old practice a bill for specific performance would have been dismissed without prejudice to an action, the court will proceed to consider the question of damages. *Tumplin v. James*, 15 Ch. D. 215; 43 L. T. 520; 29 W. R. 311—C. A.

III. PRACTICE RELATING TO.

Parties to Action—Sub-Lessee.]—A lessee of a

house agreed to sub-let two rooms for a part of his term, taking a fine; he afterwards became bankrupt and his trustee disclaimed the lease. The landlord commenced an action of ejectment against the sub-lessee. The sub-lessee filed his bill to restrain the action, and to compel the landlord to grant him a lease according to the terms of his agreement with the first lessee. The provisions of the agreement differed from those of the lease:—Held, that the sub-lessee had no equity to enforce the provisions of the agreement against the landlord. *Taylor v. Gilliott*, 20 L. R., Eq. 682; 44 L. J., Ch. 740; 32 L. T. 795; 24 W. R. 65.

A lessee of premises covenanted with his under-lessees of part, that in case he obtained an extension of the term or a renewal of his lease, he would give to the under-lessees a like renewal or extension of his under-term. A lease was subsequently taken from the ground landlord for an extended term in the name of a trustee for the separate use of the lessee's wife. The under-lessees filed a bill against the lessee, his wife, and her trustee, charging that the extended lease had been taken in a trustee's name, in order to defeat their rights under the lessee's covenant, and praying that the wife and her trustee might be decreed to grant an underlease to the plaintiffs for the extended term:—Held, that the relief sought could not be given, as the suit was virtually one for specific performance against persons who were not parties to the original covenant or contract to renew the underlease. *Lumley v. Tims*, 28 L. T. 157; 21 W. R. 319.

— Administrator.]—The owner of six leasehold houses agreed in writing to let one of them, numbered 737, to a tradesman, the agreement saying nothing about a restrictive covenant. On the same day he also agreed to let another of the houses, numbered 735, to a grocer, and he agreed with him that the business of a grocer should not be carried on in any of the other five houses. Afterwards he contracted to sell the house No. 737 and a third house numbered 739, to T., also a grocer, and the agreement, which was in writing and dated the 6th of July, 1870, contained nothing about a restrictive covenant, but an underlease was prepared and engrossed which did contain a covenant that the premises should not be used for a grocer's business. An appointment was made for the execution of the underlease and counterpart on a certain day; but on the previous evening T. died suddenly, intestate. It was stated, but on the plaintiff's evidence only, that after the written agreement of the 6th of July, and before T.'s death, T. verbally agreed to the insertion of the restriction, and there was other evidence that he was prepared to execute a counterpart of the engrossment. It having been shewn that the insertion of such a restriction would considerably diminish the value of the property:—Held, that the administrator of the intestate could not be compelled to execute a counterpart of a lease containing such a restriction. *Snelling v. Thomas*, 17 L. R., Eq. 303; 43 L. J., Ch. 506.

The written agreement of the 6th of July stipulated that the property should be bought "subject to the existing tenancies." The plaintiff alleged that on the 6th of July the lessee of the house No. 737 was under an agreement to consent to a restrictive covenant, and in proof of this the counterpart of a lease, bearing date the

day before the agreement of the 6th of July, was produced, containing such a covenant. It having been shewn that the lease was antedated and was not in fact executed till after the 6th of July, 1870:—Held, that the administrator was not by this clause bound to execute the counterpart of a lease containing the restriction. *Id.*

— **Auctioneer.**—Although it is the law that an auctioneer holding the deposit on a purchase may be made a defendant in an action for specific performance, yet, as a general rule, the proper practice is not to make him a defendant when the deposit is of small amount, unless he refuses to pay it into court when required; but where the deposit is of large amount, he may be properly made a defendant, unless he has paid it into court before action brought. *Egmont (Earl) v. Smith, Smith v. Egmont (Earl)*, 6 Ch. D. 469; 46 L. J., Ch. 356.

— **Where Sub-contract.**—B. agreed to sell property to W., who, before the completion of the agreement, contracted to sell a portion of the property to F. Subsequently F. filed a bill against B. and W., praying for the specific performance of his agreement, and of so much of the agreement between B. and W. as related to the property comprised in his agreement:—Held, that B. was a proper party to the suit. *Fenwick v. Bulman*, 9 L. R., Eq. 165; 21 L. T. 628.

— **Mortgagee of Contracting Party Compelling Performance.**—The owner of land entered into an agreement with a builder to grant him a building lease at a ground-rent. It was thereby provided that the builder should build a specified number of houses by a fixed date, and should make sewers and a road, and that, so soon as a certain number of houses should have been covered in upon several portions of the land, distinguished on the plan as blue and green, the builder should be entitled to separate and distinct leases of those portions at specified apportioned parts of the rent, and that, so soon as a certain number of houses should have been covered in upon another portion of the land, distinguished on the plan as pink, the builder should be entitled to a separate and distinct lease of that portion at an apportioned rent. The builder assigned the agreement by way of mortgage to secure money which had been advanced to him. He commenced building houses on the blue and green plots, but he became embarrassed, and was unable to finish them, and the mortgagee completed them:—Held, that the mortgagee was entitled to compel specific performance of the agreement to grant leases of the blue and green plots, without putting himself under any obligation with regard to the rest of the land. *Wilkinson v. Clements*, 8 L. R., Ch. 96; 42 L. J., Ch. 38; 27 L. T. 834; 21 W. R. 90.

— **Remainderman.**—In a case resting simply upon covenant, if the party seeking specific performance be entitled in possession, he has a right to the enjoyment of the property, *modo et forma*, according to his covenant; but if he be entitled in remainder only, he must shew that he has sustained some material damage by reason of the breach to entitle him to relief of this nature. *Johnstone v. Hall*, 2 Kay & J. 414; 25 L. J., Ch. 462; 2 Jur., N. S. 780.

— **Trustees.**—Where trustees sell property with depreciatory conditions which render the sale liable to be impeached by the cestui que trust, the trustees cannot maintain an action for specific performance against the purchasers. *Dunn v. Flood*, 49 L. T. 670; 32 W. R. 197.

— **Mode of Trial.**—In an action for the specific performance of an agreement by the incumbent and patron of a church to give up a portion of his district to form a part of a district for another church, an application by the plaintiff, under r. 26, Ord. XXXVI., Rules of Supreme Court, 1876, that the action might be tried by a judge without a jury, was granted, although the defendant had given notice under r. 3 of the same order, for the trial of the issues of fact by a jury. *Usil v. Whelpton*, 50 L. J., Ch. 511; 45 L. T. 39; 29 W. R. 799.

— **Effect of Compromise—Fresh Bill when Necessary.**—In a redemption suit against the mortgagee in possession of business premises, a compromise was agreed upon, under which the mortgagor was to pay a fixed sum on a certain day and the mortgagee was to carry on the business in the meantime and give up possession on payment, and all proceedings in the suit were to be stayed. The mortgagor failed to pay the money at the time appointed:—Held, that the agreement for compromise could not be enforced on motion in the suit, but a fresh bill must be filed for specific performance. *Pryer v. Gribble*, 10 L. R., Ch. 534; 44 L. J., Ch. 676; 32 L. T. 238; 23 W. R. 642.

— **Appointment of Receiver—When Plaintiff entitled to.**—In an action for specific performance of an agreement to execute a bill of sale, the plaintiff applied *ex parte*, and before the appearance of the defendant, for the appointment of a receiver, and the usual order was made directing a reference to chambers to appoint a receiver:—Held, that the plaintiff was entitled to have the property protected in the meantime, and the order of the court below varied by directing the appointment of the plaintiff as interim receiver without security for fourteen days, or until a receiver should be appointed under the order. *Taylor v. Eekersley*, 2 Ch. D. 302; 45 L. J., Ch. 527; 24 W. R. 450—C. A.

— **Damages—When Recoverable.**—In a purchaser's action for specific performance a plaintiff cannot recover damages for breach of contract unless he establishes misrepresentation on the part of the defendant. The object and intention of Lord Cairns' Act (21 & 22 Vict. c. 27), which gives the court jurisdiction to award damages in substitution for specific performance in all cases in which the court has jurisdiction to entertain an application for specific performance, was not to give any new right to damages, but to prevent the mischief arising from two distinct methods of procedure, which, previously to the time of its passing, were in existence. In no case where damages could not previously have been recovered at law can they now be obtained under Lord Cairns' Act. *Rock Portland Cement Company v. Wilson*, 52 L. J., Ch. 214; 48 L. T. 386; 38 W. R. 193.

When an action is dismissed on the ground of mistake the court will now consider the question

of damages. *Tamplin v. James*, 15 Ch. D. 215; 43 L. T. 520; 29 W. R. 311—C. A.

A lease of a colliery contained an implied covenant on the part of the lessor to procure land by certain compulsory powers, for the lessees to make a railway to a neighbouring canal, without which they had no access to any available market. The lessor did not procure the land, but brought an action against the lessees for rent. The lessees applied for an injunction, and, the powers having expired, they asked at the hearing for an inquiry as to damages:—Held, that as the court could not have compelled the defendant to provide the land, it had no jurisdiction to award damages. *Acraman v. Price, Davies v. Price*, 18 W. R. 540. Affirmed with variation, 24 L. T. 487; 19 W. R. 364.

In an action for specific performance, where, on an inquiry as to damages, it was necessary to examine witnesses, the inquiry was referred to an official referee. *Stafford v. Cowan*, 25 W. R. 788.

The power conferred by 21 & 22 Vict. c. 27, s. 5, on the Court of Chancery, of directing an inquiry as to damages, was not intended to be exercised concurrently with the ancient jurisdiction of the court for granting an inquiry as to profits. Therefore a plaintiff cannot obtain an inquiry both as to damages and also as to profits. He must be put to his election between the two inquiries. *De Vitre v. Betts*, 7 L. R., H. L. 319; 42 L. J., Ch. 841; 21 W. R. 705.

When a bill is filed for specific performance of a contract, and circumstances prevent the court from giving a decree for specific performance, the court may at the hearing award damages, although the subject-matter of the contract has then expired. *Oakeley v. Ramsay*, 27 L. T. 745.

A defendant entered into an agreement with the plaintiff, of which the material clause was in the following words—"Sold R. F., Esq., M. P., the whole of the get of the No. 3 coal out of the Newbridge Colliery property for five years, the quantity not to be less than at present delivered to his Taff Vale works, unless the coal should fail, at 6s. a ton; payment as usual." He afterwards sold some of the coal to other persons, and contracted to sell the colliery itself:—Held, that the agreement was, in effect, for the sale of a chattel, and that not one of specific value, but a marketable commodity; that the plaintiff's remedy was at law for damages, and not in equity for specific performance; and that being so, the court would not extend its jurisdiction in granting an injunction to restrain a breach of a portion of an agreement when it could not enforce the whole. *Fothergill v. Rowland*, 17 L. R., Eq. 132; 43 L. J., Ch. 252; 29 L. T. 414; 22 W. R. 42.

— **In Addition to Specific Performance.**—The plaintiff agreed with the defendant to take a lease of premises belonging to the defendant for the purpose, as the defendant knew, of carrying on a trade which the plaintiff was about to commence. In consequence of his wilful refusal to fulfil his agreement, the plaintiff was unable for fifteen weeks to commence his trade:—Held, that, in addition to judgment for specific performance of the agreement, damages must be awarded in respect of the loss of profits from his trade during the fifteen weeks; and 250*l.* damages were awarded. *Jaques v. Millar*, 6 Ch. D.

153; 47 L. J., Ch. 544; 37 L. T. 151; 25 W. R. 846.

Action for Specific Performance not Necessary where Order made.—A purchaser who has availed himself of the provisions of the Vendor and Purchaser Act, 1874, and has thereby obtained an order on summons which has disposed of every objection which he thought fit to raise, and under which the vendor has been ordered to make compensation, is not entitled to bring an action for specific performance of the contract for sale and damages. If a vendor does not comply with the order made on the vendor and purchaser summons, the purchaser should apply in chambers to get it enforced.—Action dismissed without prejudice to any proceedings which plaintiff (the purchaser) might adopt under the Vendor and Purchaser Act, 1874. *Thompson v. Ringer*, 44 L. T. 507; 29 W. R. 520.

Costs.—A, having agreed to grant a lease to B., died before granting it, leaving an infant heir. B. filed a bill against the infant for specific performance, which was decreed:—Held, that each party should bear his own costs. *Longinotto v. Morris*, 26 L. T. 828.

A lessor by his will subsequent to the date of the lease devised the property to his infant sons. The right of the plaintiff to maintain the suit was not disputed; the only question in the cause related to the costs:—Held, that the parties should pay their own costs. *White v. Beck*, 6 Ir. R., Eq. 63; 20 W. R. 275.

Where the registered holder of shares disputes the right of an applicant for a transfer under an agreement, the court has no jurisdiction to make the former pay the costs rendered necessary by his opposition. *Tuhiti Cotton and Coffee Plantation Company, In re, Sargent, Ex parte*, 17 L. R., Eq. 273; 43 L. J., Ch. 425; 22 W. R. 815.

By a decretal order specific performance was decreed against a vendor; an inquiry was directed what damage had been sustained by the plaintiff by reason of the acts complained of in the bill, and the defendant was ordered to pay the costs of suit; liberty to apply being given, but further consideration not being reserved. The acts complained of by the bill were commencing to pull down buildings and removing the materials, and cutting and carrying away the crops on the land. The plaintiff carried in a very large claim for damages under various heads, most of which were at once rejected in chambers, but a certificate was made (which the court refused to vary) giving damages for pulling down buildings, and also under four other heads. The Lords Justices, on appeal, held that no damage was shewn, on the ground that, under the peculiar circumstances, pulling down the buildings caused no damage, and that the other heads of damage were not within the scope of the inquiry. The defendant subsequently applied for the costs of the inquiry, on the ground that it had resulted wholly in his favour. This application having been refused by the court:—Held, on appeal, that the plaintiff, though unsuccessful, was entitled to the costs of the inquiry so far as they related to pulling down buildings, removing materials, and cutting and carrying away crops; but must pay all the other costs of the inquiry. *Krechl v. Park*, 10 L. R., Ch. 334; 44 L. J., Ch. 286; 33 L. T. 83; 23 W. R. 475.

Priority of Purchaser's Costs over Mortgage after Contract.]—A vendor brought an action claiming a declaration that his contract for sale was at an end. The purchaser made a counter-claim for the specific performance of the contract. Judgment was given for the defendant, with costs, on both claim and counter-claim :—Held, that the defendant was entitled to deduct his costs from his purchase-money in priority to a mortgage of the plaintiff, whose mortgage had been created after the contract for sale, but before the commencement of the action. *Green v. Sevin*, 13 Ch. D. 589.

SPECIFICATION.

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STATUTE.

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III. OF LIMITATIONS. — *See* LIMITATIONS (STATUTE OF).

IV. OF FRAUDS.

1. *Executory Contracts.* — *See* CONTRACT—SALE.
2. *Guarantees.* — *See* PRINCIPAL AND SURETY.
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4. *Sale of Lands.* — *See* VENDOR AND PURCHASER.
5. *Sale of Goods.* — *See* SALE.

I. CONSTRUCTION AND OPERATION.

1. GENERAL RULES.

According to Ordinary and Grammatical Sense of Language, having regard to Intention of Legislature.]—An act is to be construed according to the ordinary and grammatical sense of its language, if there be no inconsistency apparent in its provisions; and a proviso, which, on the face of the act, is not inconsistent with the other enactments of it, is not to be limited in its effect by reason of local circumstances, not apparent on the face of the act causing such inconsistency. But such proviso will not limit an express authority given by the act. *Smith v. Bell*, 2 Railw. Cas. 877; 10 M. & W. 378.

The rule for the construction of acts is, that they should be construed according to the intent of the parliament which passed the act. If the words of the statute are of themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do, in such case, best declare the intention of the legislature. *Sussex Peerage*, 11 C. & F. 86; 8 Jur. 793.

In construing an ordinary act, every word must be understood according to its legal meaning, unless the context shews that the legislature has used it in a popular or more enlarged sense; but in a penal enactment, where it is sought to depart from the ordinary meaning of the words used, the intention of the legislature that those words should be understood in a larger or more popular sense must plainly appear. *Stephenson v. Higginson*, 3 H. L. Cas. 638.

The intention of the legislature must be ascertained from the words of a statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the statute. *Fordyce v. Bridges*, 1 H. L. Cas. 1; 11 Jur. 157.

The court knows nothing of the intention of an act, except from the words in which it is expressed, applied to the facts existing at the time. *Logan v. Courtown (Earl)*, 13 Beav. 22; 20 L. J., Ch. 347.

The court must read the words in their grammatical sense, unless they be in such a sense repugnant to the act. *Richards v. McBride*, 8 Q. B. D. 119; 51 L. J., M. C. 15; 45 L. T. 677; 30 W. R. 121; 46 J. P. 247.

The language of a statute taken in its plain ordinary sense, and not its policy or supposed intention, is the safer guide in construing its enactments. *Philpott v. St. George's Hospital*, 6 H. L. Cas. 338; 3 Jur., N. S. 1269.

I prefer to adhere to the golden rule of construction, that the words of a statute are to be read in their ordinary sense, unless the so construing them will lead to some incongruity or manifest absurdity. *Collins v. Welch*, 5 C. P. D., at p. 29—per Grove, J.

When Ordinary Signification should be Restricted.]—When from the provision contained in a statute it is clear that a restriction must be put upon the ordinary and literal signification of some word or expression, and it is uncertain from anything to be found in the act itself or in the circumstances judicially cognisable under which the provision was inserted, what the exact character and extent of that restriction is, it is the duty of the court to put no greater restriction than the nature of the provision and the subject-matter to which it relates necessarily impose. *Sullivan v. Mitallfe*, 5 C. P. D. 459; 49 L. J., C. P. 815; 45 L. T. 8; 29 W. R. 181—per Thesiger, L. J.

Any one who contends that a section of an act of parliament is not to be read literally, must be able to shew one of two things, either that (1) there is some other section which cuts down its meaning, or else (2) that the section itself is repugnant to the general purview of the act. *Nuth v. Tamplin*, 8 Q. B. D. 253; 1 Colt, 260; 51 L. J., Q. B. 180; 30 W. R. 346; 46 J. P. 692.

A statute is not to be construed literally when a literal construction would end in an absurdity or inconsistency with the intention of the legislature, as evidenced by the provisions of the statute, but is to be construed in harmony with common sense and the intention of the legislature. *Walton, Ex parte, Levy, In re*, 17 Ch. D. 756; 50 L. J., Ch. 662; 45 L. T. 1; 30 W. R. 395.

When two Constructions can be put upon Words.]—The more literal construction of a section of a statute ought not to prevail if it is opposed to the intentions of the legislature as

apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated. *Caledonian Railway Company v. North British Railway Company*, 6 App. Cas. 122; 29 W. R. 685—per Selborne, L. C., and Blackburn (Lord).

No court is entitled to depart from the intention of the legislature as appearing from the words of the act, because it is thought unreasonable. But when two constructions are open, the court may adopt the more reasonable of the two. *Roths (Countess) v. Kirkcaldy Waterworks Commissioners*, 7 App. Cas. 702—per Blackburn (Lord).

Words Used in Technical Sense.]—Where words have been long used in a technical sense, and have been judicially construed to have a certain meaning, and have been adopted by the legislature as having a certain meaning prior to a particular statute, in which they are used, the rule of construction requires that the words used in such statute should be construed according to the sense in which they have been so previously used, although that sense may vary from the strict literal meaning of the words. *Rucknaboye v. Lulloobhoy Mottichund*, 8 Moore, P. C. C. 4; 5 Moore, Ind. App. 234.

Legislature not assumed to take away Private Rights.]—On those who seek to establish that the legislature intended to take away the private rights of individuals lies the burden of shewing that such an intention appears by express words or necessary implication. *Metropolitan Asylum District Managers v. Hill*, 6 App. Cas. 208; 50 L. J., Q. B. 353; 44 L. T. 653; 29 W. R. 617; 45 J. P. 664—H. L. (E.)—per Blackburn (Lord).

Right not Extinguished unless by Express Words.]—A statute must not be deemed to take away or extinguish the right of a subject, unless it appear by express words or by plain implication, that it was the intention of the legislature so to do. *Western Counties Railway Company v. Windsor and Annapolis Railway Company*, 7 App. Cas. 188; 51 L. J., P. C. 43; 46 L. T. 351—P. C.

Jurisdiction taken away by.]—An existing jurisdiction cannot be taken away by an act of parliament, except by precise and distinct words. *Galsworthy v. Durrant*, 8 W. R. 594.

Legislature is assumed to use Words in Sense which Decisions point to.]—If an act of parliament uses the same language which was used in a former act of parliament referring to the same subject, and passed for the same purpose and for the same object, the safe and well-known rule of construction is to assume that the legislature, when using well-known words upon which there have been well-known decisions, uses those words in the sense which the decisions have attached to them. *Greaves v. Tufeld*, 14 Ch. D. 563, 571; 60 L. J., Ch. 119; 43 L. T. 100; 28 W. R. 840—per James, L. J.

Legislature must be taken to have known Interpretation put on Words in former Act.]—Where the legislature have reproduced words

upon which a case has been decided, they must be taken to have known the interpretation that had been put upon them in that case. *Clark v. Wallond*, 52 L. J., Q. B. 322—per Mathew, J.

Reference to Cases on former Acts.]—The proper course is to read a section of an act, and to ascertain its meaning, and not to trouble ourselves about decisions upon a former act. Any other course would be apt to lead us astray. If the later act can clearly have only one meaning, we ought to give effect to it accordingly. If instead of doing that we compare it with the former act, and say that it differs from it only to such and such an extent, and then consider the decisions upon the former act, we might in that way go back to half-a-dozen older acts, and, after considering the decisions on them, we might at last arrive at a conclusion exactly contrary to the later act. *Blaiberg, Ex parte*, *Tomer, In re*, 23 Ch. D. 258; 52 L. J., Ch. 463; 49 L. T. 16; 31 W. R. 906—per Jessel, M. R.

Intention of Legislature—Uniformity in the Law.]—If we can fairly construe an act, so as to carry out what must obviously have been the intention of the legislature, although the words may be a little difficult to deal with, and although they may possibly admit of more than one interpretation, we ought from those general considerations to adopt the interpretation which will make the law uniform, and will remedy the evil which prevailed in all the cases to which the law can be fairly applied. *Freem v. Clement*, 44 L. T. 399; 30 W. R. 3—per Jessel, M. R.

Balance of Inconvenience should be Considered.]—If upon ambiguous words or expressions the balance of hardship or inconvenience seems to be strongly against the public upon one construction, or strongly against a private person upon another construction, I think it is consistent with all sound principles to have regard to the balance of inconvenience in determining the question of construction. *Dixon v. Caledonian Railway Company*, 5 App. Cas. 827; 43 L. T. 513; 29 W. R. 250—H. L. (Sc.)—per Selborne, L. C.

Consideration of Practice under Statute.]—Whilst it is true that we ought not to construe an act itself by looking at the practice which has taken place in carrying the act out, it is equally true that we are entitled to construe a subsequent act not only with regard to the actual words used, but also to the practice which had grown up and existed at the time the subsequent act was passed. *Yewens v. Noakes*, 6 Q. B. D. 535; 50 L. J., Q. B. 135; 44 L. T. 128; 28 W. R. 562; 45 J. P. 8—per Thesiger, L. J.

Inquiries as to the History of the Statute.]—If the words are really and fairly doubtful, then, according to well-known legal principles and principles of common sense, historical investigation may be used for the purpose of clearing away the doubt which the phraseology of the statutes creates. *Reg. v. Mont*, 7 Q. B. D. 251; 14 Cox, C. C. 583; 50 L. J., M. C. 116; 44 L. T. 823; 29 W. R. 760; 45 J. P. 696—per Coleridge, C. J.

Contemporanea expositio.]—When there are

ambiguous expressions in an act passed one or two centuries ago, it may be legitimate to refer to the construction put upon these expressions throughout a long course of years, by the unanimous consent of all parties interested, as evidencing what must presumably have been the intention of the legislature at that remote period. But I feel bound to construe a recent statute according to its own terms, when these are brought into controversy, and not according to the views which interested parties may have hitherto taken. *Clyde Navigation Trustees v. Laird*, 8 App. Cas. 673—per Watson (Lord).

Beneficial rather than Injurious Meaning.]—The court should, in construing a statute, endeavour to attach a rational and beneficial meaning, if that is possible, rather than an irrational and an injurious meaning, to the statutes passed by the legislature. *Mersey Steel and Iron Company v. Naylor*, 9 Q. B. D. 648; 51 L. J., Q. B. 584; 47 L. T. 369; 31 W. R. 83.

Legislature not presumed to intend Palpable Injustice.]—Unless you are obliged to do so, you must not suppose that the legislature intended to do a palpable injustice. *Corbett, Ex parte, Shand, In re*, 14 Ch. D. 122, 129.

Mistake in Act not assumed.]—We cannot assume a mistake in an act of parliament. The draftsman may have made a mistake, but if so, the legislature must amend it. *Richards v. McBride*, 8 Q. B. D. 119; 51 L. J., M. C. 15; 45 L. T. 677; 30 W. R. 121; 46 J. P. 247.

Affecting Custom.]—As a rule, existing customs or rights are not to be taken away by mere general words in an act. But, without words especially abrogating them, they may be abrogated by plain directions to do something which is wholly inconsistent with them. And this may be the case though the act is a private act, and though the particular custom may have been confirmed, years before, by a verdict in a court of law. *Green v. Reg.*, 1 App. Cas. 513; 35 L. T. 495.

The usage of a particular place cannot control the operation of a general statute. *Rex v. Hogg*, 1 T. R. 721; Cald. 266.

Long usage is of no avail against plain statutory enactments, and it can be binding on parties only as the interpreter of a doubtful law, and as affording a contemporaneous exposition. Where a statute, expressive as to some points, is silent as to others, usage may well supply the defect, if not inconsistent with express directions of the statute. *Dunbar (Magistrates) v. Roxburgh (Duchess)*, 3 C. & F. 335.

Affecting General Law of Country.]—The general law of the country is not altered or controlled by partial legislation, made without any special reference to it. *Denton v. Mannors (Lord)*, 27 L. J., Ch. 199; 4 Jur., N. S. 151. Affirmed, 27 L. J., Ch. 623; 4 Jur., N. S. 714.

Elimination of Word.]—Where a word in a statute would make the clause in which it occurs unintelligible, the word may be eliminated and the clause read without it. *Stone v. Yeovil (Mayor)*, 2 C. P. D. 99; 46 L. J., C. P. 137; 36 L. T. 279; 25 W. R. 240—C. A.

The 8 & 9 Vict. c. 18, s. 9, provides for assessment of purchase-money for lands taken from parties under disability and compensation for injury "to any such lands:"—Held, that the section may be read as if the word "such" were not in it, and therefore a party under disability is entitled to compensation for injury to lands not taken. *Ib.*

Alteration of Word.]—When the intention of the legislature can be collected from the statute itself, words may be modified, altered or supplied in the statute, so as to obviate any repugnancy to, or inconsistency with, such intention. *Quin v. O'Keeffe*, 10 Ir. C. L. R. 393. See also *Laird v. Briggs*, *post*, col. 2014.

Act of God.]—An act which in general terms imposes a liability in a certain event is to be read subject to the implied qualification that the liability will not arise where the event happens through the act of God. *River Wear Commissioners v. Adamson*, 1 Q. B. D. 546; 35 L. T. 118; 24 W. R. 872—C. A.

Therefore the Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), s. 74, imposes no liability on the owner of a vessel for damage to a pier occasioned by the vessel being driven against the pier by stress of weather after it has been wrecked and abandoned on the high seas. *Ib.*

When Common Law is affected.]—A statute which refers to the matter of a common-law liability and declares to whom it shall attach, will not thereby create a new and extended application of that liability, unless it contains words expressly declaring such a purpose. *S. C.*, 2 App. Cas. 743; 47 L. J., Q. B. 193; 37 L. T. 543; 26 W. R. 217.

It is the most natural and genuine exposition of a statute to construe one part by another, for that best expresseth the meaning of the makers; and this exposition is *ex visceribus actus*. *Reg. v. Mallow Union*, 12 Ir. C. L. R. 35.

The common-law rights of the subject, in respect of the enjoyment of his property, are not to be trenching upon by a statute, unless such intention is shown by clear words or necessary implication. *Ib.*

Statutes restrictive of the common law receive a restrictive construction. *Ash v. Abdy*, 3 Swans. 664.

In construing acts which infringe on the common law, the state of the law before the passing of the act must be ascertained to determine how far it is necessary to alter that law, in order to carry out the object of the act. *Swanton v. Gould*, 9 Ir. C. L. R. 234.

Binding Character of House of Lords' Decisions.]—Decisions of the House of Lords upon questions of law, as to the construction of statutes, and especially of fiscal acts, are binding on the house in subsequent cases. *Commissioners of Inland Revenue v. Harrison*, 7 L. R., H. L. 1; 43 L. J., Ex. 138; 30 L. T. 274; 22 W. R. 559.

Opinion of Lord Chancellor expressed in Speech in House of Lords as to Construction.]—During the argument of a case counsel proposed to cite as an authority for the interpretation of the Church Discipline Act, s. 3, the opinion of the

Lord Chancellor as to its construction, contained in a speech delivered by him during a debate in the House of Lords upon the third reading of the bill:—Held, by Bramwell and Baggallay, L. JJ. (Thesiger, L. J., dubitante), that the speech of the Lord Chancellor might be lawfully read for that purpose by counsel during his argument. *Reg. v. Oxford (Bishop)*, 4 Q. B. D. 525; 48 L. J., Q. B. 609; 41 L. T. 122—C. A. See *next case*.

Reference to Debate in Parliament.]—An act cannot be construed by reference to a debate in parliament. It has been regretted in the House of Lords that the Court of Appeal had allowed such a reference to be made in *Reg. v. Oxford (Bishop)*, *supra*. *South-Eastern Railway Company v. Railway Commissioners*, 60 L. J., Q. B., p. 203—per Selborne, L. C.

Duty of Court.]—When a doubt arises upon the construction of the words of an act of parliament, it is the duty of the court to remove the doubt by deciding it; and when the court has given its decision, the point can no longer be considered doubtful. *Bell v. Holtby*, 15 L. R., Eq. 178; 42 L. J., Ch. 266; 28 L. T. 9; 21 W. R. 321.

Statutory Fiction.]—When a statute enacts that something should be deemed to have been done, which in fact was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. *Walton, Ex parte, Levy, In re*, 17 Ch. D. 756; 50 L. J., Ch. 662; 45 L. T. 1; 30 W. R. 395—per James, L. J.

When Founded on Report of Commissioners.]—Where a statute is supposed to have been founded on a report of commissioners appointed by the crown, that report ought not to be referred to in a court of justice as a guide in construing the statute. *Martin v. Hemming*, 18 Jur. 1002; *S. P.*, *Ewart v. Williams*, 3 Drew. 21, 24; *Arding v. Bonner*, 2 Jur., N. S. 763.

As to Service.]—Where personal service is not required by a statute, service at the dwelling-house is sufficient. *Lowe, Ex parte*, 2 New Sess. Cas. 331; 3 D. & L. 737; 15 L. J., M. C. 99; 10 Jur. 595.

General Words.]—One of the safest guides to the construction of sweeping general words it is difficult to apply in their full literal sense, is to examine other words of like import in the same instrument, and to see what limitations must be imposed on them. If it is found that a number of such expressions have to be subjected to limitations or qualifications, and that such limitations or qualifications are of the same nature, that forms a strong argument for subjecting the expression in dispute to a like limitation or qualification. *Blackwood v. Reg.*, 8 App. Cas. 94; 52 L. J., P. C. 14; 48 L. T. 441; 31 W. R. 645—P. C.

The general words of a statute are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be put upon those words consistently with the intention of preserving the existing policy untouched; but the title and preamble of the Inclosure Act (8

& 9 Vict. c. 118), being quite general, the words of s. 147 appear to be so general as to make it impossible to limit them to exchanges of freeholds of the same species, notwithstanding inconveniences and seeming injustice to parties. *Minen v. Leman*, 20 Beav. 269.

General provisions in an act do not always extend to every case which falls literally within them. *Cope v. Doherty*, 2 De G. & J. 614; 27 L. J., Ch. 600; 4 Jur., N. S. 699.

Of Statutes on same Subject.]—Statutes on the same subject must be construed together. *Anon.*, Loft, 398.

If there are several acts upon the same subject, they are to be taken together as forming one system, and as interpreting and enforcing each other. *Rea v. Palmer*, 1 Leach, C. C. 352, 355; 2 East, P. C. 898.

It is a rule that several statutes on the same subject are to be read as one statute. *M'William v. Adams*, 1 Macq. H. L. Cas. 120.

The 32 Hen. 8, c. 28, and 13 Eliz. c. 10, are in pari materia, and must be taken together. *Doe d. Tennyson v. Yarborough* (Lord), 7 Moore, 258; 1 Bing. 24.

By 19 & 20 Vict. c. 108, s. 3, that act and the 9 & 10 Vict. c. 95 (County Courts Act), are to be read as one act. "That clause is frequently inserted in modern acts of parliament, but if the two acts be in pari materia, the construction would be the same without it." *Waterlow v. Dobson*, 27 L. J., Q. B. 55—per Campbell (Lord), C. J.

A repealed statute in pari materia with an existing one may properly be referred to for the purpose of construing the latter. *Copeland, Ex parte*, 2 De G., M. & G. 914; 22 L. J., Bk. 17; 17 Jur. 121.

Punctuation.]—The words in 13 Geo. 3, c. 21, s. 3, are to be read, "aliens' duties, customs and impositions," and not "aliens, duties, customs and impositions." *Barrow v. Wadkin*, 24 Beav. 327.

2. TITLE, PREAMBLE, RECITALS, MARGINAL NOTES, AND INTERPRETATION CLAUSES.

Title.]—The title of a statute is no part of the law. *Rea v. Williams*, 1 W. Bl. 95.

There is authority for saying that the title of a statute may be used where there is any ambiguity in the statute. *Coomber v. Berke (Justices)*, 9 Q. B. D. 33; 51 L. J., M. C. 304; 30 W. R. 785; 46 J. P. 629.

The title cannot be resorted to for the purpose of construing the provisions of the act. *Hunter v. Nockolds*, 1 Mac. & G. 640; 1 Hall & T. 644; 19 L. J., Ch. 177; 14 Jur. 256.

If there is in the provisions of an act anything admitting of a doubt, the title of the act is a matter proper to be considered in the interpretation of the act. *Shaw v. Rudden*, 9 Ir. C. L. R. 214; *S. P., Reg. v. Mallow Union (Guardians)*, 12 Ir. C. L. R. 35.

The 56 Geo. 3, c. 50, s. 11, which enacts that no assignee of any bankrupt or of any insolvent debtor's estate, nor any assignee under any bill of sale, nor any purchaser of the stock or crop of a tenant on lands let to farm, shall take, use or dispose of any hay or other produce, in any other manner than the tenant ought to do, applies to

all sales, though the title, preamble and other sections of the act are confined to the sale of farming stock taken in execution. *Wilmut v. Rose*, 3 El. & Bl. 563; 2 C. L. R. 677; 23 L. J., Q. B. 281; 8 Jur. 518.

The 58 Geo. 3, c. 51, describes by their titles and dates several acts relating to persons employed in the woollen and other manufactures, which acts it in part repeals. Among these is an act stated to have been passed in 13 Geo. 3, but agreeing in title with 17 Geo. 3, c. 56, and with no act passed in 13 Geo. 3:—Held, that this act might be identified by the title with the act recited, and that the legislature must be deemed to have mistaken the date. *Reg. v. Wilcock*, 7 Q. B. 317; *S. P., Boothroyd, In re*, 15 M. & W. 1; 15 L. J., Ex. 57.

Title or Recitals.]—The enacting part of an act is not to be controlled by the title or recitals unless the enacting part is ambiguous, and then the title and recitals may be referred to for the purpose of ascertaining the intention of the legislature. *Bentley v. Rotherham Local Board*, 4 Ch. D. 588; 46 L. J., Ch. 284.

Preamble.]—Though the preamble of one act may appear to be directed against a particular evil, and though another act may be passed to aid its application, the enactments of the second act are not necessarily to be confined to the special purpose which seemed to be the particular object that the first had in view. Its own words must be considered as explaining and defining its objects and its means. *Copland v. Davies*, 5 L. R., H. L. 358; 21 W. R. 1.

The preamble of an act of parliament cannot be resorted to in order to ascertain the intention of the act, unless there is an ambiguity in the enacting part. *Taylor v. Oldham Corporation*, 4 Ch. D. 595; 46 L. J., Ch. 105; 35 L. T. 696; 25 W. R. 178.

Although the preamble is generally the key to the construction, yet it does not always open all the parts of it, as sometimes the legislature, having a particular mischief in view, which was the primary object of the statute, merely states that in the preamble, and then goes on in the body of the act to provide a remedy for general mischiefs of the same nature, but of different species, neither expressed in the preamble, nor perhaps then in immediate contemplation. *Mann v. Cammel*, Loft, 783.

If the enacting part of a statute will bear only one interpretation, the preamble shall not confine it; but, if it is doubtful, the preamble may be applied to throw light upon it. *Mason v. Armitage*, 13 Ves. 36.

In construing acts, the court must take into consideration not only the language of the preamble, or any particular clause, but of the whole act; and if, in some of the enacting clauses, expressions are to be found of more extensive import than in others, or than in the preamble, the court will give effect to those more extensive expressions, if, upon a view of the whole act, it appears to have been the intention of the legislature that they should have effect. *Doe d. Bywater v. Brandling*, 7 B. & C. 643; 1 M. & R. 600.

— Cannot Cut down Express Provisions.]
—We ought not to restrict a section in an act of

parliament by the preamble or general purview of the act where the section is not inconsistent with the spirit of the act. *Sutton v. Sutton*, 22 Ch. D. 521; 52 L. J., Ch. 338; 48 L. T. 98; 31 W. R. 372—per Jessel, M. R., and Bowen, L. J.

We are to give effect to the preamble to this extent, namely, that it shews us what the legislature are intending; and if the words of enactment have a meaning which does not go beyond that preamble, or which may come up to the preamble, in either case we prefer that meaning to one shewing an intention of the legislature which would not answer the purposes of the preamble or which would go beyond them. To that extent only is the preamble material. *West Ham (Overseers) v. Iles*, 8 App. Cas. 387; 52 L. J., Q. B. 650; 49 L. T. 205; 31 W. R. 928; 47 J. P. 708—per Blackburn (Lord).

Strong words in the enacting part of a statute may extend it beyond the preamble. *Pattison v. Bankes*, Cowp. 543.

But the preamble cannot control the enacting part, which is clear. *Crespigny v. Wittenoom*, 4 T. R. 793; *S. P.*, *Lees v. Summersgill*, 17 Ves. 508.

Although if doubts arise on the words of the enacting part, it may be resorted to. *Id.*

It is a general rule, in the construction of statutes, that the preamble may extend, but cannot restrain, the effect of an enacting clause. *Kearns v. Cordwainers' Company*, 6 C. B., N. S. 388; 28 L. J., C. P. 285; 5 Jur., N. S. 1216.

Recitals.—A clear and an explicit enactment is not to be cut down by a more limited preamble or recital; but if the enactment is not explicit in itself, it may be explained and cut down by the preamble or recital. *Hughes v. Chester and Holyhead Railway Company*, 1 Drew. & Sm. 524; 9 W. R. 760.

In construing an act, the court is at liberty to regard the state of the law at the time, and the facts which the preamble or recitals of the act prove to have been the existing circumstances at the time of its preparation. *Att.-Gen. v. Powis (Earl)*, 1 Kay, 186.

The object of the act is to abolish the distinction between specialty and simple contract debts, and the recital of the act is that that alone is the object. I must therefore read the enactment as corresponding with the express recital of its object; and if I find words that may be carried further, I must read them with reference to the mischief intended to be remedied, and to the express recital of the act. *Crowder v. Stewart*, 16 Ch. D. 370; 50 L. J., Ch. 136; 29 W. R. 331—per Malins, V. C.

A mere recital in a statute, either of fact or of law, is not conclusive, and the court is at liberty to consider the fact or the law to be different from the statement in the recital. *Reg. v. Haughton*, 1 El. & Bl. 501; 22 L. J., M. C. 89; 17 Jur. 455.

A recital in an act will not bind those who are not within its enacting part. *Edinburgh and Glasgow Railway Company v. Linlithgow (Magistrates)*, 3 Macq. H. L. Cas. 704.

Marginal Notes.—Semble, the marginal notes to an act now form part of the act, and may be used for the purpose of interpreting it. *Venour, In re, Venour v. Sellon*, 2 Ch. D. 522; 45 L. J., Ch. 409; 24 W. R. 752.

But see *Att.-Gen. v. Great Eastern Railway*,

11 Ch. D. 449; 48 L. J., Ch. 429; 40 L. T. 265; 27 W. R. 759—C. A.—per Bramwell and Baggallay, L. JJ.

The marginal note to a section in the copy printed by the Queen's printer, forms no part of the statute itself, and is not binding as an explanation or as a construction of the section. *Claydon v. Green*, 3 L. R., C. P. 511; 37 L. J., C. P. 226; 18 L. T. 607; 16 W. R. 1126.

The dictum in *Venour's Settled Estates, In re* (2 Ch. D. 525), is not correct, and the marginal notes to the sections of an act of parliament are not to be taken as part of the act. *Sutton v. Sutton*, 22 Ch. D. 513; 52 L. J., Ch. 334; 48 L. T. 96; 31 W. R. 370—per Jessel, M. R.

Interpretation Clause.—But for the interpretation clause, no difficulty as to the construction would have arisen. But I think an interpretation clause should be used for the purpose of interpreting words which are ambiguous or equivocal, and not so as to disturb the meaning of such as are plain. *Reg. v. Pearce*, 5 Q. B. D. 386, 389; 49 L. J., M. C. 81; 28 W. R. 568; 44 J. P. 216—per Lush, J.

An interpretation clause in an act should be understood to define the meaning of the word thereby interpreted, in cases as to which there is nothing else in the act opposed to or inconsistent with that interpretation. *Midland Railway Company v. Ambergate, Nottingham, and Boston and Eastern Junction Railway Company*, 10 Hare, 359.

3. PARTICULAR WORDS.

Generally.—The meaning of particular words in a statute, in the absence of express definition, "is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object that is intended to be attained."—Per Abbott, C. J., in 1 B. & C. 136, approved of in the case of *The Lion*, 2 L. R., P. C. 525; 38 L. J., Adm. 51; 6 Moore, P. C. C., N. S. 163, 171.

Power to Change Word.—There is a very serious consideration whether we can alter the word "convenient" in the 8th section of the Prescription Act by putting the word "ease-ment" instead. That is a question which appears to me to be one of very considerable difficulty. A judge may take the view that the 8th section as it stands is so absurd that the word "convenient" cannot stand there, but that does not quite conclude the question as to whether you can insert another word. *Laird v. Briggs*, 19 Ch. D. 33; 45 L. T. 238—per Jessel, M. R. See also *Quin v. O'Keefe, ante*, col. 2009.

"Tenements and Hereditaments."—An act for lighting a hamlet enacted that rates should be laid upon all persons who should inhabit, use, occupy or be in possession of or enjoy any messuages, tenements, houses, warehouses or other buildings, tenements or hereditaments situate or being in such of the streets, or other public passages and places within the hamlet, as should from time to time be lighted by virtue of the act:—Held, that the general words, "tenements and hereditaments," included only things ejusdem generis with those before mentioned, and which

were capable of being inhabited and tenanted, and that a water company was not rateable in respect of its pipes laid in the ground under the streets of the hamlet. *Reg. v. East London Waterworks Company*, 17 Q. B. 512; 21 L. J., M. C. 49; 16 Jur. 121.

"Near"—"Next."—The word "near" in a penal case must be construed strictly, and is not equivalent to the word "next." *Re v. Hercey*, 1 W. Bl. 20.

"Division."—Where the moiety of a penalty is given by statute to the treasurer of a county, riding, or division, the word "division" does not apply to small districts, such as the Cinque Ports of Seaford in Sussex, but must be construed with reference to county and riding, and means something analogous to them. *Evans v. Storrens*, 4 T. R. 224, 456.

"Reputed Thieves."—The London Police Act (3 Geo. 4, c. 55), s. 16, authorizing the apprehension of suspected persons or "reputed thieves," only applied to the apprehension of persons of general bad character, as rogues and vagabonds, and not to apprehension on suspicion of a particular felony. *Cowles v. Dunbar*, M. & M. 37; 2 C. & P. 565.

"Cattle" does not include Bulls.—Bull-baiting was not punishable under 3 Geo. 4, c. 71, for preventing cruelty to cattle, as bulls were not included in that statute. *Hill, Ex parte*, 3 C. & P. 225.

"Insolvent Circumstances."—The words "insolvent circumstances" in 19 Geo. 2, c. 32, s. 1, are to be understood in the popular sense; and do not mean a state of utter and complete insolvency. *Teale v. Younge*, M'Clel. & Y. 497. See *Biddlecombe v. Bond*, 4 A. & E. 332.

"Substantial Inhabitants."—The 11 Geo. 3, c. 29, which renders "substantial inhabitants" of the wards of London eligible to the office of collector of the ward rates, applies to resident inhabitants only. *Downe v. Martyr*, 2 M. & R. 98; 8 B. & C. 62.

"Square."—The 27 Geo. 3, c. 28, s. 5, by the word "square" meant all rectangular figures only. *Att.-Gen. v. Cast Plate Glass Company*, 1 Anst. 39.

"On."—Whatever meaning may be given to the word "on" in an act of parliament, it is very difficult to extend it to above a year. It is not necessary to express an opinion as to what time should be allowed, but it is not to be conceived that a period of more than a year can be included in the word "on." "On," if not confined to the time of making the decree, must mean shortly after. *Robertson v. Robertson*, 8 P. D. 96; 48 L. T. 591; 31 W. R. 652.

"And," "or."—The question is whether the word "or" is used in the disjunctive or conjunctive. We think in construing "or" as conjunctive, we are construing the act according to an ordinary use of language, though it may

not be strictly grammatical. *Metropolitan Board of Works v. Steed*, 8 Q. B. D. 447; 51 L. J., M. C. 24; 45 L. T. 612; 30 W. R. 891—per Grove, J.

"Person" not including Corporation.—If a statute provides that no person shall do a particular act except on a particular condition, it is, *prima facie*, natural and reasonable to understand the legislature as intending such a person as by the proper means may be able to fulfil the condition; and not those who, though called "persons" in law, have no capacity to do so at any time, by any means or under any circumstances whatever. *Pharmaceutical Society v. London and Provincial Supply Association*, 5 App. Cas. 862; 49 L. J., Q. B. 736; 43 L. T. 389; 28 W. R. 957; 45 J. P. 20.

Trustees of a will had power to grant leases to any "person or persons" they should think fit:—Held, that this authorized them to grant a lease to a limited company. *Jeffcock's Trusts, In re*, 51 L. J., Ch. 507.

"Shall"—"May."—See *post*, col. 2035.

"It shall be Lawful."—See *post*, col. 2035.

4. PRIVATE.

How Distinguished.—Whether an act is to be deemed a public act, binding on all the Queen's subjects, or merely a private act, depends upon the nature and substance of the case, and not upon the technical consideration whether the act does or does not contain a clause declaring that it shall be deemed to be a public act. *Dawson v. Paver*, 5 Hare, 415; 16 L. J., Ch. 274; 11 Jur. 766.

Who affected by.—The fact of no notice or insufficient notice of an application for a private act being given to an individual affected by it, is no ground for holding that the act, when passed, does not apply to such individual. *Edinburgh and Dalkeith Railway Company v. Wauchope*, 8 C. & F. 710; 3 Railw. Cas. 233.

As Evidence.—A private act is not evidence in support of an ancient customary payment of toll within a manor. *Beaufort (Duke) v. Smith*, 4 Ex. 450; 19 L. J., Ex. 97.

General Construction of.—Where an act interferes with private rights and private interests, it ought to receive a strict construction, so far as those rights and interests are concerned. *Hughes v. Chester and Holyhead Railway Company*, 31 L. J., Ch. 97; 8 Jur., N. S. 221; 7 L. T. 197; 10 W. R. 219.

An estate act is to be construed according to the intention of the legislature, clearly expressed therein; and its validity cannot be questioned, on the suggested ground that all the parties who ought to have been, were not before parliament during the discussion, or that parliament assented to it under a false impression, imposed upon them by interested parties, in the absence of other parties equally interested. *Shrewsbury (Earl) v. Hope Scott*, 6 C. B., N. S. 1; 29 L. J., C. P. 34; 6 Jur., N. S. 472. Affirmed, 6 C. B., N. S. 221; 29 L. J., C. P. 190—Ex. Ch.

An act empowering a company to contract, for purposes of public advantage, ought not to

receive a narrow construction. *Dover Gas Light Company v. Dover (Mayor)*, 7 De G., M. & G. 545.

Therefore, in construing a gas company's act, which, after requiring the consent of certain local commissioners to breaking up of the pavements, provided, that where any consent was required and should be obtained by the company to break any pavement, to lay down pipes, or for any other purpose which might be required under the act, nothing in the act contained should (after such consent obtained, and after twenty-four hours' notice) prevent the company from breaking up the pavement for the purpose of laying down pipes, or for any other purpose which might be required under the act:—Held, that a construction *reddendo singula singulis* was not the correct one, and that the power to break the pavement was not to be confined to the particular purpose to which the consent had been expressly given. *Ib.*

Where a public company is created by act of parliament, with liabilities and duties cast upon it, and privileges and rights are granted to the persons dealing with it, the party imposing duties on the company must be taken to know the provisions of the statute, although it is a private act. *Cahill v. London and North-Western Railway Company*, 30 L. J., C. P. 289; 7 Jur., N. S. 1164; 9 W. R. 653.

A power derogatory to private property must be construed strictly, and not enlarged by indendment. *Anon.*, Lofft, 438.

The construction of private acts is to be governed by the principles of common law, and applied to the subject in a manner analogous to the rules of interpretation in a private deed or conveyance. *Eton College v. Winchester (Bishop)*, Lofft, 401.

Where by a statute a special authority is delegated to particular persons, affecting the property of individuals, it must be strictly pursued, and appear to be so upon the face of their proceedings. *Rea v. Croker*, Cowp. 26.

Ambiguous words in a private act, incorporating a public company, are to be construed against the company, and in favour of private property. *Scales v. Pickering*, 4 Bing. 448; 1 M. & P. 195.

What are Public Statutes.—Acts of parliament relating to trade in general are public acts. *Kirk v. Nowill*, 1 T. R. 125.

The 23 Hen. 6, c. 10, is a public act; and therefore the courts will take judicial notice of it although not pleaded. *Samuel v. Evans*, 2 T. R. 569; *S. P.*, *Lovell v. London (Sheriffs)*, 15 East, 320.

An act for the formation of a railway, containing a declaration that it is to be judicially taken notice of as a public act, cannot be treated or construed as a private assurance. *Hargreaves v. Lancaster and Preston Railway Company*, 1 Railw. Cas. 416.

A local act, though containing a clause making it a public act, is not public notice of its powers over land therein mentioned. *Ballard v. Way*, 2 Gale, 61; 1 M. & W. 520.

A canal act is not rendered a public act by containing provisions empowering the company to regulate and take tonnage rates and tolls from persons using the canal. *Brett v. Beales*, M. & M. 421.

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5. LOCAL AND PERSONAL.

What are—Building.—The Building Act (14 Geo. 3, c. 78) was an act of a local and personal nature. *Richards v. Easto*, 15 M. & W. 244; 3 D. & L. 515; 15 L. J., Ex. 163; 10 Jur. 695.

The 7 & 8 Vict. c. 84, for regulating the construction and the use of buildings in the metropolis and its neighbourhood, although printed among the public general statutes, is an act of a local and personal nature, and ought to have been so classed. *Ib.*

—Watching and Lighting.—The Watching and Lighting Act (3 & 4 Will. 4, c. 90) is a public act. *Pikington v. Riley*, 3 Ex. 739.

—Metropolitan Police.—The Metropolitan Police Acts (2 & 3 Vict. c. 47; 2 & 3 Vict. c. 71; and 3 & 4 Vict. c. 84) are not local and personal within 5 & 6 Vict. c. 97, s. 5, and therefore the times limited by the statutes respectively for the bringing of actions are not altered by that section. *Barnett v. Cox*, 9 Q. B. 617; 2 New Seas. Cas. 487; 16 L. J., M. C. 27; 11 Jur. 118.

—Other.—The 8 & 9 Vict. c. 21, gives power to the justices of the county of Lancaster to make rates on the division of Manchester for the purposes of the act, and provides that all existing powers and provisions relating to county rates shall be taken to apply to rates made under the act. The County Rates Act (55 Geo. 3, c. 51) provided a limitation of three months as the period within which actions must be brought for anything done in pursuance of the act. The 5 & 6 Vict. c. 97, s. 5, provides that actions for anything done in pursuance of local or personal acts shall be brought within two years:—Held, that the limitation in 55 Geo. 3, c. 51, was incorporated in 8 & 9 Vict. c. 21; and that even if the latter act is to be considered as a local one, it must be taken to have repealed the 5 & 6 Vict. c. 97, as far as regards the period of limitation; and, therefore, that an action brought for seizing the plaintiff's goods for a rate under 8 & 9 Vict. c. 21, was brought too late after the expiration of three months after the seizure. *Boden v. Smith*, 18 L. J., C. P. 121; 13 Jur. 428.

An act for establishing a court of requests, empowering commissioners to adjudicate on demands, not exceeding a certain amount, by any persons against defendants resident within certain limits, and having a clause making it a public act, is a public, local and personal act. *Cock v. Gent*, 1 D. & L. 413; 12 M. & W. 234; 13 L. J., Ex. 24.

The defendants were one of two corporations created by 6 Geo. 1, c. 18, s. 1, entitled, "An act for better securing certain powers and privileges intended to be granted by his Majesty by two charters for insurance of ships and merchandize by sea." By s. 4, a form of declaration to be used in actions against the companies was given; and by 11 Geo. 1, c. 30, s. 43, the companies were enabled to plead to actions of covenant upon their policies, "that they have not broken the covenants in such policy contained:—Held, that 11 Geo. 1, c. 30, s. 43, is not such a local and personal act as is contemplated and repealed by 5 & 6 Vict. c. 97, s. 3. *Carr v. Royal Exchange Insurance Company*, 1 B. & S. 956; 31

3 T

L. J., Q. B. 93; 8 Jur., N. S. 384; 6 L. T. 105; 10 W. R. 352.

Statutes which, since the resolution of the House of Commons in 1801, have been printed by the King's printers, amongst the public, local and personal acts, are statutes commonly called public, local and personal, within 5 & 6 Vict. c. 97. *Shepherd v. Sharp*, 1 H. & N. 115; 25 L. J., Ex. 254; 2 Jur., N. S. 617—Ex. Ch.

The Ramsgate Harbour Acts (32 Geo. 3, c. lxxiv. and 55 Geo. 3, c. clxxiv.) are acts commonly called public, local [and personal acts. *Id.*

An act for preventing nuisances in the parish of St. Mary, Islington, enacted, that, "if any person put or caused to be put, or cast out of any waggon, &c., in or near any of the roads, within the parish of St. Mary, Islington, or should put or cast, within the parish, and in or within a quarter of a mile of any of the roads, any noisome or offensive matter, such person might be apprehended and carried before a magistrate:"—Held, that the whole of the clause applied to such nuisances only when committed within the parish of St. Mary, Islington, and not when committed out of the parish, although within a quarter of a mile of a road within it. *Flight v. Clarke*, 13 M. & W. 155; 13 L. J., Ex. 309.

Effect of.]—A party interested in the subject-matter of a local act will have his rights affected by its provisions, though it may have been introduced and passed without notice duly given to him. *Edinburgh and Dalkeith Railway Company v. Wauchop*, 8 C. & F. 710; 3 Railw. Cas. 233.

A statute enacted that certain persons should constitute a company, and that it should be lawful for the plaintiff to sell his letters-patent to the company. It also recited that his letters-patent had become void for non-enrolment within four months, and enacted that the letters-patent should, notwithstanding, be as valid and effectual as if duly enrolled. Plea, that, after the four months for the enrolment had expired, and before the passing of the statute, the defendant took out letters-patent for an improvement upon the plaintiff's invention, and that the same could not be used without using his invention, and that since the passing of the statute the defendant used his invention in exercise of a licence granted to him by his letters-patent, and in so doing necessarily used the invention of the plaintiff, as he lawfully might:—Held, that the plea was bad; that the licence to the defendant to use his own patent gave him no licence to use that of the plaintiff; and that the statute was sufficiently public in its nature to conclude the interests of the defendant as well as of the rest of the public. *Stead v. Carey*, 1 C. B. 496; 14 L. J., C. P. 177; 9 Jur. 511.

A local act must be judicially noticed, and must have all the operation of a public statute. *Aiton v. Stephen*, 1 App. Cas. 456.

Not affected by Public General Act.]—A partial exemption from the payment of rates for borough improvement purposes, conceded by a local act, is not taken away by the mere passing of public general acts for similar purposes. *Reg. v. London and North-Western Railway Company*, 35 L. T. 626; 25 W. R. 52; *S. C.*, in

H. L., 4 App. Cas. 467; 48 L. J., M. C. 336; 41 L. T. 160; 28 W. R. 52.

Local Act excluding the Operation of the Statute of Limitations (37 & 38 Vict. c. 57).]—

In the year 1850, an act (13 Vict. c. v.) was passed to enable commissioners (appointed by 6 Geo. 4, c. cxxix.) for managing the affairs of Brighton to purchase the Pavilion estate. By s. 19 of the act the commissioners were expressly prohibited from letting or selling any part of the property to be so acquired by them without the consent of the vestry. In 1854, the town of Brighton was incorporated, and in 1855 the powers and property of the commissioners under the act of 6 Geo. 4 were transferred to the corporation. Down to the year 1853 the guardians of the poor of Brighton had had the use of offices in the town hall. On the 7th of March in that year they removed (by arrangement with the commissioners) to buildings which formed part of the Pavilion estate, in the adaptation of which to their purposes they expended a considerable sum of money; and they continued in the exclusive occupation of their new offices without payment of rent or any acknowledgment of title in the commissioners or the corporation, down to the 19th November, 1879, when an action was brought by the latter to recover possession:—Held, that, inasmuch as the guardians had had the exclusive possession of the offices for more than twelve years (assuming their relation to the corporation to have been that of tenants at will), the claim of the corporation was barred by the Statute of Limitations, notwithstanding the prohibition against letting or selling without the consent of the vestry, contained in the local act. *Brighton (Mayor) v. Brighton (Guardians)*, 5 C. P. D. 368; 49 L. J., C. P. 648; 44 J. P. 683.

Compensation for Damage.]—Statutory provisions, as to compensation for damage in a local and personal act, must be regarded as a contract between the parties, whether made by their mutual consent or forced on them by the legislature. *Roths (Countess) v. Kirkcaldy Waterworks Commissioners*, 7 App. Cas. 707.

Expenses of Obtaining.]—When commissioners appointed by a private act are authorized to do all things necessary for carrying out the object of the act, that will not give them authority to apply to parliament for a further act, so as to allow their applying funds raised for the purposes of the first act in discharging the expenses of obtaining the second act. *Att.-Gen. v. West Hartlepool Improvement Commissioners*, 10 L. R., Eq. 152; 39 L. J., Ch. 624; 18 W. R. 685.

Where the expenses of passing a public local act are directed to be defrayed out of certain tolls to be levied under the act, it is incumbent on the party, who sues for the expense of soliciting the act, to shew that tolls have been collected to cover his demand. *Andrews v. Dally*, 4 Bing. 566; 1 M. & P. 490.

6. TIME OF OPERATION.

When it Begins.]—Before 33 Geo. 3, c. 13, every act, in which no particular time was specified for its commencement, operated and took effect from the first day of that session of

parliament wherein it was made. *Panter v. Att.-Gen.*, 6 Bro. P. C. 486.

An act, which was to take effect "from and after the passing of the act," operated by legal relation from the first day of the session. *Latless v. Holmes*, 4 T. R. 660.

An act made to correct an error by omission in a former statute of the same session, relates back to the time when the first act passed, and both must be taken together as if they were one and the same act. *Att.-Gen. v. Pougett*, 2 Price, 381.

A bond with a condition, reciting that the principal obligor, with his sureties, became bound as collector of certain duties assessed under 43 Geo. 3, c. 122, to the commissioners acting for the district under that statute for the due collection and payment of those duties to the receiver-general, could not, it seems, be enforced if the statute referred to did not authorize the collection of those duties, though in fact the collector had received sums from the subjects as and for such duties. But that statute authorizing the duties to be assessed and collected "under the regulations of any act to be passed in the same session, for consolidating certain of the provisions contained in any act or acts relating to the duties under the management of the commissioners for the affairs of taxes," &c., was held to speak the language of the legislature as from the commencement of, and with reference to, the whole session, and to relate to a prior act with the title referred to passed in the same session (c. 89), and indorsed accordingly with a prior date, by virtue of 33 Geo. 3, c. 13. *Nares v. Rowles*, 14 East, 510.

Where the law is altered by a statute pending an action, the law as it existed when the action was commenced must decide the rights of the parties, unless the legislature, by the language used, shews a clear intention to vary the mutual relation of the parties. *Hitchcock v. May*, 6 A. & E. 943; 2 N. & P. 72.

— **How far Governed by Royal Assent.**—The 35 & 36 Vict. c. 65, s. 3, provides for an application for an order of affiliation by any single woman who may be delivered of a bastard child "after the passing of this act." The act, which came into immediate operation, received the royal assent on the 10th August, 1872:—Held, that an order of affiliation might be made under the act in respect of a child born at any time of the day on the 10th August, 1872, inasmuch as the act, in contemplation of law for this purpose, came into effect from the commencement of the day on which it received the royal assent. *Tomlinson v. Bullock*, 4 Q. B. D. 230; 48 L. J., M. C. 95; 40 L. T. 459; 27 W. R. 552.

Although it is expressly enacted that an act shall commence and take effect from a day named, yet, if the royal assent is not obtained until a subsequent day, the provisions of a particular section in its terms prospective, do not take effect until such subsequent day. *Burn v. Carvalho*, 4 N. & M. 893.

Consent to Bill by Parties Affected—Effect of Promoters Altering Date for Commencement of Act.—Where the promotion of a bill in parliament had been consented to in accordance with s. 4 of the Borough Funds Act, 1872, in consideration of certain benefits being conferred upon the owners of property in a borough by

such bill upon its becoming an act of parliament; and the promoters of the bill caused the coming into operation of the act at a later date than that at which the bill, as drawn at the time such consent thereto was given, intended:—Held, that the court could not allow advantage to be taken by the owners of the benefits under the act previous to its coming into operation upon grounds of equity, and that no breach of faith had been committed by the promoters of the bill. *Birkenhead (Corporation) v. Crowe*, 46 J. P. 551.

Whether Retrospective—General Rules as to.—Statutes are, *prima facie*, deemed to be prospective only. *Pettamberdass v. Thackooraneydass*, 5 Moore, Ind. App. 109; 7 Moore, P. C. C. 239; 15 Jur. 257.

The general rule in construing recent statutes is "Nova constitutio futuris formam imponere debet, non præteritis," but the rule, which is one of construction only, will yield to a sufficiently-expressed intention of the legislature, that the enactment should have a retrospective operation. *Moon or Moore v. Durden*, 2 Ex. 22; 12 Jur. 138.

A retrospective effect will not be given to a statute unless the statute by precise words clearly shews that such was the intention of the legislature. *Thompson v. Lack*, 3 C. B. 540; 16 L. J., C. P. 75.

As a general principle, acts of parliament, especially when they alter the rights of parties, are not to be construed retrospectively, unless otherwise provided. *Hickson v. Darlow*, 52 L. J., Ch. 454; 31 W. R. 362—Per Fry, J. Affirmed, 23 Ch. D. 690; 48 L. T. 449; 31 W. R. 361.

An act is not to be construed as retrospective by inference, but only by express enactment. *Beans v. Williams*, 2 Drew. & Sm. 324.

Clear and unambiguous words are necessary to give a retrospective effect to an act, so as to deprive a party of a vested right of action. *Marsh v. Higgins*, 9 C. B. 551; 1 L. J., M. & P. 253; 13 L. J., C. P. 297.

The general presumption that a statute is not intended to have a retrospective operation may give way to a contrary inference, from the remedial nature of the particular enactment. *The Ironsides*, Lush. 458; 31 L. J., Adm. 129.

It is a well-settled rule that you are not to construe an act to be retrospective, so as to alter existing rights, unless you find from the act itself that such was the intention of the legislature. *Quilter v. Mapleson*, 9 Q. B. D. 672; 52 L. J., Q. B. 44; 31 W. R. 75—Per M. R.

— **Particular Cases.**—Where a payment has been made (of interest or principal) on a promissory note by one of the co-contractors before the passing of the 19 & 20 Vict. c. 97, an action may be maintained by the holder of the note against any other of the co-contractors within six years after such payment, notwithstanding s. 14, as that section has no retrospective effect. *Jackson v. Woolley*, 8 El. & Bl. 771; 27 L. J., Q. B. 441; 4 Jur., N. S. 656—Ex. Ch.

Sect. 14 of the Wine and Beerhouse Act Amendment Act, 1870 (33 & 34 Vict. c. 29), provides that "every person convicted of felony" shall be disqualified from selling spirits by retail, and makes any licence held by such person void;

—Held, that the section had a retrospective operation, and applied to a person convicted before the passing of the act, so as to make a licence held by him void. *Reg. v. Vine*, 10 L. R., Q. B. 195; 44 L. J., M. C. 60; 31 L. T. 842; 23 W. R. 649; 13 Cox, C. C. 43.

The first paragraph of s. 35 of the Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), which abolishes derivative settlements, except in the case of a wife from her husband, and of a child under the age of sixteen from its parent, is to be read retrospectively as well as prospectively, both in the enacting part and in the exception. *Westbury-on-Severn (Guardians) v. Barrow-in-Furness (Overseers)*, 3 Ex. D. 88; 47 L. J., M. C. 79; 38 L. T. 315; 26 W. R. 372.

Sect. 35 of 39 & 40 Vict. c. 61, so far as it provides that an illegitimate child shall retain the settlement of its mother until it acquires another settlement, is not retrospective so as to affect a pauper who has acquired a birth settlement by attaining the age of sixteen before its passing. *Tenterden Poor Law Union (Guardians) v. St. Mary, Islington (Guardians)*, 47 L. J., M. C. 81; 38 L. T. 485.

The 12 & 13 Vict. c. 106, s. 224, enacted that every deed of arrangement, "now or hereafter entered into between any such trader and his creditors, and signed by six-sevenths of them in number and value, whose debts amount to 10l., shall be obligatory upon all the creditors who shall not have signed the deed, as if they had signed it:"—Held, that the section was not retrospective in its operation, and that a creditor was not barred by a deed of arrangement entered into by six-sevenths of the creditors of a debtor before the act came into operation, to which he was not a party. *Waugh v. Middleton*, 8 Ex. 352; 22 L. J., Ex. 109.

The rule that statutes ought not to be construed retrospectively, unless an intention in the legislature that they should be so construed distinctly appears, does not apply to statutes which only affect the procedure or practice of courts of justice. *Wright v. Hale*, 6 H. & N. 227; 30 L. J., Ex. 40; 6 Jur., N. S. 1212.

The 23 & 24 Vict. c. 126, s. 34, which enacts, that when the plaintiff in any action for an alleged wrong, in any of the superior courts, recovers by the verdict of a jury less than 5l., he shall not be entitled to recover or obtain from the defendant any costs whatever in respect of such verdict, whether given upon any issue or issues tried, or judgment passed by default, in case the judge or presiding officer before whom such verdict is obtained shall immediately afterwards certify, &c., should be construed retrospectively, so as to apply to actions commenced before and tried after the statute came into operation. *Id.*

The 19 & 20 Vict. c. 97, s. 1, does not operate retrospectively, so as to prevent the goods of an execution debtor being bound by fieri facias lodged with the sheriff before the act came into operation. *Williams v. Smith*, 4 H. & N. 559; 28 L. J., Ex. 286; 5 Jur., N. S. 1107—Ex. Ch.

By 30 & 31 Vict. c. 142, s. 10, it shall be lawful for any person against whom an action of tort may be brought in a superior court, to make affidavit that the plaintiff has no visible means of paying costs, and thereupon a judge of the court shall have power to make an order that, unless the plaintiff within a time named give security for costs to the satisfaction of a master,

or satisfy the judge that he has a cause of action fit to be prosecuted in the superior court, all proceedings in the action shall be stayed, or the cause be remitted for trial before a county court to be named:—Held, that the section was to be construed as retrospective, and applied to an action commenced before the passing of the statute. *Kimbray v. Draper*, 3 L. R., Q. B. 160; 37 L. J., Q. B. 80; 18 L. T. 540; 16 W. R. 539.

Temporary Acts.]—A temporary act, when made perpetual by a subsequent act, is in effect perpetual ab initio. *Rea v. Swinney*, 1 Alc. & Nap. 139.

The temporary act, 6 Geo. 4, c. 133, provided that every person who then held or hereafter shall hold a commission or warrant as surgeon or assistant-surgeon in the navy or army, should be admitted to practise as an apothecary in any part of England or Wales, without having undergone the examination required by 55 Geo. 3, c. 194, for all persons setting up the trade of an apothecary after the 1st August, 1815:—Held, that a right to practise, once acquired by the holding of such a warrant, was not taken away by the expiration of the temporary enactment on the 1st August, 1826. *Stevenson v. Oliver*, 8 M. & W. 234.

Continuance of Expiring Acts.]—The 39 Geo. 3, c. 79, s. 15, declared certain places to be disorderly places, within 36 Geo. 3, c. 8, and then enacted penalties with regard to them:—Held, that these penalties might be enforced, although the 36 Geo. 3, c. 8, which was to continue in force for a limited time, had expired. *Higginbotham, Ex parte*, 9 D. P. C. 200.

A statute intitled, "An act to indemnify certain persons upon the terms in this act mentioned, and for relief of officers," &c., was continued by a subsequent statute made for that purpose; although, in reciting its title, it was said "upon the terms therein mentioned, and for the relief of officers," &c.; for the legislature, in continuing a statute, is not bound to use any particular form of words. *Rea v. Longmead*, 2 Leach, C. C. 694.

A local act, intitled "An act for amending the roads and highways in the Isle of Wight," contained provisions other than related to turnpikes, but clauses, also, enabling the commissioners appointed under the act to raise money upon the security of tolls. The 4 & 5 Will. 4, c. 10, and other subsequent statutes, continued "all and every act for making, amending and repairing any turnpike roads in Great Britain, which will expire," &c.:—Held, that the local act was thereby continued. *Barnes v. White*, 1 C. B. 192; 9 Jur. 182.

7. ON WHOM BINDING.

Generally.]—Prima facie an English statute affects only English subjects or foreigners who come, either permanently or temporarily, within the allegiance of the English crown. *Blain, Ex parte, Savers, In re*, 12 Ch. D. 522; 41 L. T. 46; 28 W. R. 334—C. A.

The Crown.]—An enactment distinct, and without exception in itself, is not to be controlled or limited by a doubtful implication to be drawn from a previous section of the same statute, especially in respect of the prerogatives of the crown, which are not to be affected, except by

distinct enactment. *Exeter (Bishop), Es parte, Gorham, In re*, 10 C. B. 102; 19 L. J., C. P. 200.

By 11 Geo. 4 & 1 Will. 4, c. 70, s. 8, writs of error upon any judgments given by the Queen's Bench, Common Pleas or Exchequer, shall be returnable by the judges and barons, or judges only of the other two courts, in the Exchequer Chamber:—Held, that the crown was bound by this enactment, and that therefore a writ of error lay upon a judgment for the crown in a petition of right to the Exchequer Chamber. *De Bode (Baron) v. Reg. (in error)*, 13 Q. B. 364; 14 Jur. 970—Ex. Ch.

A defendant at the suit of the crown is liable to arrest as if the Debtors Act had not passed, crown debts not being either directly or by implication referred to in that act. *Att.-Gen. v. Edmunds*, 22 L. T. 667.

Foreigners.]—Part IX. of the 17 & 18 Vict. c. 104, limiting the liability of shipowners, in case of loss or damage to any other ship, has no application where one of such ships is a foreign vessel, and, therefore, none where both are foreign, and the *lex loci* applies only to the form of procedure, and not to the substance of the proceeding itself; and excepting when foreign ships are expressly mentioned, the 17 & 18 Vict. c. 104, Part IX., applies only to British ships. *Cope v. Doherty*, 2 De G. & J. 614; 27 L. J., Ch. 600; 4 Jur., N. S. 699.

Applicable to Ireland.]—Every act since the union embraces Ireland, unless Ireland is excluded from its operation, in express terms, or by necessary implication to be gathered from the construction of the statute. *Reg. v. Mallow Union (Guardians)*, 12 Ir. C. L. R. 35.

Private Act.]—See *ante*, col. 2016.

8. COLONIAL.

Should be Construed in Accordance with English Decisions.]—An act of a colonial legislature, where English law prevails, is governed by the same rules of construction as prevail in England respecting statutes *in pari materia*; and English authorities upon an act are authorities for the interpretation of a colonial act *in pari materia*. *Cutterall v. Cutterall or Sweetman*, 1 Rob. Ecc. Rep. 580; 9 Jur. 951.

Where a colonial legislature has passed an act in the same terms as an imperial statute, and the latter has been authoritatively construed by a Court of Appeal in England, such construction should be adopted by the courts of the colony. *Trimble v. Hill*, 5 App. Cas. 342; 49 L. J., P. C. 49; 42 L. T. 103; 28 W. R. 479—P. C.

Authority of Colony to Pass.]—By an act of a colonial legislature it was provided that a banking company should sue and be sued in the name of its chairman, and that execution on any judgment against the company might be issued against the property of any member for the time being, in like manner as if such judgment had been obtained against such member personally. In an action against a member of the company on a judgment obtained in the colony against the chairman:—Held, that the colonial legislature had authority to pass the act, and that there was nothing repugnant to the law of England or to natural justice in enacting that actions on contracts made by the company in

the colony, instead of being brought against the shareholders individually, should be brought against the chairman whom they had appointed to represent them. *Bank of Australasia v. Nias*, 16 Q. B. 717; 20 L. J., Q. B. 284.

Force of.]—An act of the local legislature lawfully constituted, whether in a settled or in a conquered colony, assented to by the crown, has, as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the imperial parliament. *Phillips v. Eyre*, 6 L. R., Q. B. 1; 40 L. J., Q. B. 28; 22 L. T. 869; 10 B. & S. 1004—Ex. Ch.

9. ANCIENT.

Ancient statutes are to be construed with reference to the state of things at the time of their passing. *M'Williams v. Adams*, 1 Mac. H. L. Cas. 120.

The construction of an old act may be cleared by contemporanea expositio, shewing the conduct and understanding of parties at the time of its passing, and subsequently; and for this purpose the annals or histories of the period, and antiquarian researches, may be referred to. *Montrose Peerage*, 1 Mac. H. L. Cas. 401. See also *Clyde Navigation Trustees v. Laird, ante*, col. 2008.

10. REMEDIAL, PENAL OR PROHIBITORY.

Remedial.]—In the case of a remedial statute, everything is to be done in advancement of the remedy that can be done consistently with any construction that can be put upon it. *Johnes v. Johnes*, 3 Dow, 15; *S. P., Atcheson v. Ecritt*, Cowp. 391.

It is by no means unusual, in construing a remedial statute, to extend the enacting words beyond their natural import and effect, in order to include cases within the same mischief. *St. Peter's, York (Dean and Chapter) v. Middleborough*, 2 Y. & J. 196.

Statutes intended to remedy a grievance ought to be construed liberally, so as to afford the utmost relief which the fair meaning of its language will allow. *Daputo v. Wyllie*, The "Pieve Superiore," 5 L. R., P. C. 482; 43 L. J., Adm. 20; 30 L. T. 887; 22 W. R. 777.

Penal.]—When the words of a statute are equally applicable to penal or to civil consequences, the court will construe the statute in favour of the latter. *Dickinson v. Fletcher*, 9 L. R., C. P. 1; 43 L. J., C. P. 25; 29 L. T. 540.

Every statute which introduces a capital punishment must be construed strictly. *Rex v. Harvey*, 1 Wils. 164.

As a general rule, where a penalty is affixed by an act of parliament to an act or omission, such penalty is the only punishment or loss incurred by the party guilty of such act or omission. *Knowle, In re*, 46 L. J., Ch. 625; 37 L. T. 351; 25 W. R. 822.

When a statute inflicts a penalty for not doing an act provided for, the penalty enacted implies that there is a legal compulsion to do the act in question, and this principle is not affected by the fact that the penalty has a particular destination. *Redpath v. Allan*, 4 L. R., P. C. C. 511; 42 L. J., Adm. 8; 27 L. T. 725; 21 W. R. 276; 9 Moore, P. C. C., N. S. 340.

A statute which is penal must be construed

strictly. *Lloyd v. Rosbee*, 2 Camp. 453; *S. P., Stephenson v. Higginson*, 3 H. L. Cas. 638.]

In construing a statute by which a penalty is imposed, we must look strictly at the language in order to see whether the person against whom the penalty is sought to be enforced has committed an offence within the section. *Graff v. Evans*, 3 Q. B. D. 377; 51 L. J., M. C. 25; 46 L. T. 347; 30 W. R. 381; 46 J. P. 262.

Prohibitory, what are.]—The 9 Geo. 2, c. 36 (Mortmain Act), is a prohibitory, not a penal statute. *Philpot v. St. George's Hospital*, 6 H. L. Cas. 338; 3 Jur., N. S. 1269.

Where a statute, with the view of affording protection to the public, imposes a penalty for doing an act, it thereby prohibits the act itself, and renders it illegal. *D'Allex v. Jones*, 26 L. J., Ex. 79; 2 Jur., N. S. 979.

The 3 Hen. 8, c. 11, which imposes a penalty on a person exercising or occupying himself as a surgeon without being duly admitted, is a prohibition of his practising as a surgeon, and disables him from recovering for work and labour as such. *Ib.*

The 44 Geo. 3, c. 98, s. 14, which imposes a penalty on any unqualified person who acts as a conveyancer, is a prohibitory act, and therefore such person cannot recover the fees for conveyances drawn by him. *Taylor v. Crowland Gas and Coke Company*, 2 C. L. R. 1247; 10 Ex. 293; 23 L. J., Ex. 254; 18 Jur. 913.

Effect of.]—When a statute prohibits, under a penalty, any person from agreeing to pay certain expenses, an agreement to pay such expenses is invalid, and no action is maintainable upon it, although the statute does not expressly prohibit the other party to the agreement from receiving such expenses, or impose a penalty upon him for so doing. *O'Brien v. Dillon*, 9 Ir. C. L. R. 318.

Prohibitory statutes must not be interpreted on a principle of tendency; if anything done is substantially that which is prohibited, the thing is void, not because of its tendency, but because it is, within the true construction of the statute, the thing prohibited. *Philpot v. St. George's Hospital*, *supra*.

A contract entered into in contravention of a statutory provision, whether the provision is express or implied, from the imposition of a penalty, will not support an action. *Cundell v. Dawson*, 4 C. B. 376; 17 L. J., C. P. 311.

Where a penalty is imposed by an act of parliament upon any transaction, the transaction will be illegal, though it is not expressly prohibited by the act. *Cork and Youghal Railway Company, In re*, 4 L. R., Ch. 748.

In a statute respecting marriage, prohibitory and negative words do not create a nullity, unless such nullity is expressly declared in the statute. *Catterall v. Sweetman or Catterall*, 1 Rob. Ecc. Rep. 580; 9 Jur. 951.

11. IMPOSING TAXES OR DUTIES.

Generally.]—Where a duty is imposed, with a retrospective date depending on a fact which has taken place, and which is provided for by the alternative expressions "shall be," or "shall have been found," it seems that the duty attaches from such retrospective date. *Hume v. Haig*, 8 Bro. P. C. 198.

The principle of all fiscal legislation is this: if

the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case may otherwise appear to be. In other words, if there is admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute. *Partington v. Att.-Gen.*, 4 L. R., H. L. Cas. 122—Per Cairns (Lord).

A taxing act is to be construed upon the same principle and by the same rules as any other act. *Mersey Docks and Harbour Board v. Lucas*, 51 L. J., Q. B. 118; 46 J. P. 388—Per Brett, L. J.

Taxing acts must be construed strictly. And where therefore land which, in 4 Will. & M., being employed for charitable purposes, as the site of an almshouse or hospital, was on that account declared by a statute then passed (4 Will. & M. c. 1) to be exempt from the land tax at that time imposed—and the like words of exemption were used in 38 Geo. 3, c. 5, the fact that other land had since been applied to the same charitable purposes, and the original land had been, by order of the Court of Chancery, directed to be held by the trustees of the charity to their own use, freed from its charitable trusts, did not, without more, render it liable, even in the hands of a tenant, to the taxation from which it had been previously exempt. *Cox v. Rabbits*, 3 App. Cas. 473; 47 L. J., Q. B. 386; 38 L. T. 430; 26 W. R. 483.

Intention to Tax must be Clearly Shewn.]—Acts, in order to infringe upon the legal rights of the subject, and especially to impose a tax, must be expressed in language clear beyond all reasonable doubt. *Shaw v. Raddin*, 9 Ir. C. L. R. 214; *S. P., Reg. v. Mallow Union*, 12 Ir. C. L. R. 35.

An intention to impose a charge on the subject must be shewn by clear and unambiguous language. *Oriental Bank Corporation v. Wright*, 5 App. Cas. 842, 856; 50 L. J., P. C. 1; 43 L. T. 177—P. C.

Where such intention is doubtful, that meaning must be adopted which is most beneficial to the public. *Pryce v. Monmouthshire Canal and Railway Companies*, 4 App. Cas. 187; 49 L. J., Ex. 130; 40 L. T. 630; 27 W. R. 666.

Exception or Modification.]—The cases which have decided that taxing acts are to be construed strictly, probably meant little more than this—that, inasmuch as there was not any *a priori* liability in any subject to pay any particular tax, or any antecedent relationship between the taxpayer and the taxing authority, no reason founded on any supposed relationship of the taxpayer and the taxing authority could be brought to bear upon the construction of the act, and therefore the taxpayer had a right to stand upon a literal construction of the words used, whatever might be the consequences. I cannot think this principle applies to any considerable extent where the payment spoken of in the act is a payment to be made in return for services rendered, and above all in a case where parliament does not step in to give the right to payment, but rather to moderate and limit a

right to payment which otherwise might exist without limit, or, at all events, with only such limits as would be placed upon it by a quantum meruit assessment—*Per Cairns, L. C. Ib.*

— **Acts prepared by Company strictly construed against it.**—The respondents had the preparation of their own measure, and were bound to see that it fitly expressed the purposes of parliament. They were not forced to adopt the act if they had reason to complain of its harshness or injustice; and it behoved them to have any terms favourable to themselves and involving burthens on the public explicitly and unequivocally stated. If they have not done so, the fault is theirs, and they must take the consequences. *Ib.*

Construed in Favour of Person sought to be Charged.—Clauses in acts empowering companies to levy a charge upon the public, as in railway acts, for example, must, where the meaning is doubtful, be construed favourably for the public. *Stockton and Darlington Railway Company v. Barrett*, 11 C. & F. 598; 8 Scott, N. R. 641; 7 M. & G. 870.

Although when an act imposing a duty or a toll is equally capable of two constructions, it is to be construed so as to relieve, and not to impose a burden upon, the subjects of the realm; yet if of the two constructions the one is reasonable, and will effect the object of the act, which the other construction will not, the former is to be adopted. *Hibernian Mine Company v. Tuke*, 8 Ir. C. L. R. 321.

It is a very well-established rule, that if a statute imposes a charge on the subject, it must be strictly construed as against the party in whose favour the charge is imposed. *Reg. v. Barclay*, 8 Q. B. D. 306; 51 L. J., M. C. 27; 46 L. T. 102; 30 W. R. 472; 46 J. P. 167.

Rate—Burthen of Proof.—Whenever it is sought to impose a rate, the burthen lies on those seeking to enforce it to shew that the words used by the legislature are clear and unambiguous in order to charge the subject. *Ingram v. Drinkwater*, 44 L. J., P. C. 83; 32 L. T. 746.

Doctrine that Money to be Laid out in Land is Land.—The doctrine of the court of equity, that money directed to be laid out in land is land, does not extend to the interpretation of statutes imposing duties on personal estate. *De Lancey, In re*, 4 L. R., Ex. 345.

12. POWERS CONFERRED BY.

Generally.—The court cannot impute to the legislature, in passing statutes confirming titles created by means of parliamentary powers, ignorance of the transactions which had taken place in exercise of such powers. *Beaden v. King*, 9 Hare, 522.

Where persons have special powers conferred on them by parliament for effecting a particular purpose, they cannot be allowed to exercise those powers for any purpose of a collateral kind. *Galloway v. London (Mayor)*, 1 L. R., H. L. 34; 35 L. J., Ch. 477; 12 Jur., N. S. 747; 14 L. T. 865.

When the legislature has conceded power to a body of adventurers for a certain purpose (as,

for example, the formation of a railway), such a body must shew some ground for the concession, and the legislature has no concern with its means for obtaining the funds to carry its declared objects into effect, and in order to effect them it must not exceed the limits of its powers. But the case is different where an existing public body, such as the corporation of a city, is intrusted by the legislature with the duty of making public improvements in its city, and the powers thus intrusted to it for such a purpose will not be subject, as in the other case, to a strict and restrictive construction. *Ib.*

Does not necessarily affect previously-existing Right.—An affirmative statute, giving a new right, does not of itself and necessarily destroy a previously-existing right, created by another statute to which it does not refer; but will do so, if it appears to have been the intention of the legislature that the two rights should not exist together. *O'Flaherty v. M'Dowell*, 6 H. L. Cas. 142.

— **Or Rights of other Persons.**—Where an act empowers persons to deal with their own property, or with property in a place or district or defined by a description, and does not by express words, or by necessary implication, import that the legislature intended to affect the rights of other persons in other property, courts of law do not construe mere general words in the act as affecting the rights of strangers as to property not within the description of that with which the act expressly purports to deal. *Dawson v. Paver*, 5 Hare, 415; 16 L. J., Ch. 274; 11 Jur. 766.

When persons having, as a class, certain privileges, are by statute subjected to certain liabilities, their privileges being expressly reserved to them, and other persons having the same privileges, are afterwards, as a class, subjected to the same liabilities, but nothing is said of their privileges, these privileges shall continue to exist. *Newcastle (Duke) v. Morris*, 4 L. R., H. L. 661; 40 L. J., Bk. 4; 23 L. T. 569; 19 W. R. 26.

Power to Public Body—Extent of.—Where the legislature gives power to a public body to do anything of a public character, the legislature means also to give to the public body all rights, without which the power would become wholly unavailable, although such a meaning cannot be implied in relation to circumstances arising accidentally only. *Dudley (Corporation), In re*, 8 Q. B. D. 93; 51 L. J., Q. B. 124; 45 L. T. 734; 46 J. P. 340—*Per Brett, L. J.*

Ashbury Railway, &c., Company v. Riche (7 L. R., H. L. 653) appears to me to decide this, at all events, that where there is an act of parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited. *Att.-Gen. v. Great Eastern Railway Company*, 5 App. Cas., at p. 481—*Per Blackburn (Lord)*.

Whenever the legislature has, by a special act, conferred powers upon a corporation or a body of commissioners for an object of public benefit, those powers are not affected by a subsequent statute giving to other persons, for another public purpose, inconsistent powers, in terms which, from their generality, would seem to overrule

the powers given by the former act. *London and Blackwall Railway Company v. Limehouse District Board of Works*, 3 Kay & J. 123; 26 L. J., Ch. 164.

A railway company was empowered by its special act to widen a branch of the railway passing through London, and to build additional stations. In conformity with the powers so given, the company proceeded to erect a station on its land by the side of a highway, within the distance required to be left between buildings and highways in London, by the Metropolis Management Act, which had passed shortly after the special act of the company:—Held, that the powers conferred on the company by their special act were not controlled by the latter statute, and that the company was authorized so to build their station. *Ib.*

By a statute passed prior to the special act, the trustees of the particular highway had power to prevent any building being erected so near to the road as the station was being built. The Metropolis Management Act repealed this statute, and vested this authority in the managing body thereby constituted:—Held, that the trustees of the road must be taken to have been present at the passing of the special act, as well as of the Metropolis Act, and, therefore, the powers given by the railway act must prevail. *Ib.*

— **Two Statutes—Acting under which presumed.**—Where a public body may have acted under two statutes, one of which increases its liability, and there is no evidence to shew under which statute it did act, the presumption is that it acted in pursuance of that statute under which its liability was not increased. *Burton v. Salford (Mayor)*, 11 Q. B. D. 286; 52 L. J., Q. B. 668; 49 L. T. 43; 31 W. R. 815—Per Cave, J.

Non-Liability for Damage where the Inevitable Result of Compliance with the Statute.—The defendants, under the powers conferred upon them by the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 12), ss. 135, 136, constructed, and properly constructed, a sewer having its outfall at Deptford Creek, a little above the plaintiff's coal wharf, with water-gates, which it was the duty of the person in charge of them to open when the water within them became eight feet deep,—a depth which was reached only in heavy rainfalls. On the 29th of August, 1879, there was an exceptionally heavy rainfall, and it became necessary to open the water-gates to prevent a large district from being flooded. This having been done, and the rain increasing in violence, the rush of water from the sewer carried away a portion of the plaintiff's wharf, with a barge moored thereto and a quantity of coals deposited therein and thereon:—Held, that the injury complained of was occasioned by the opening of the water-gates, and not by the act of God, and therefore the defendants were *prima facie* liable for the damage done, within the principle of *Rylands v. Fletcher* (3 L. R., H. L. 330): but that, as they were a public body acting in the discharge of a public duty, and as that which happened was only the inevitable result of what parliament had authorized them to do, they were not liable. *Dixon v. Metropolitan Board of Works*, 7 Q. B. D. 418; 50 L. J., Q. B. 772; 45 L. T. 312; 30 W. R. 83; 46 J. P. 4—Per Coleridge, C. J.

Acts which might be carried out without Purchasing Lands—Onus of Proof as to Ownership of Lands.—Provisions in different acts of parliament appointed conservators of a river navigation and gave them full powers to do what was necessary for carrying the object of the acts into effect, including powers to purchase land and levy tolls. The conservators executed the powers of the acts so far as related to the improvement of the river navigation, and the making of towing-paths, and they levied tolls. There was no evidence that they had actually purchased any of the land that lay along the course of the navigation, and had been used to form the towing-paths:—Held, that, as the acts might be carried into effect without purchasing, the burden of proof lay on the conservators to shew that they had purchased; and since they had failed to shew it, though they were entitled to an injunction to prevent any owner of adjoining land from so using the towing-paths as to obstruct in any way their free use for the purposes of the navigation, they were not entitled to be treated as owners of the soil of the towing-paths. *Lee Navigation Conservators v. Button*, 6 App. Cas. 685; 51 L. J., Ch. 17; 45 L. T. 385; 30 W. R. 233; 46 J. P. 164—H. L. (E.).

Statutory Obligation—Notice of.—When a person is bound by a private act to do certain acts whenever necessary, and the necessity is within the knowledge of the person for whose benefit the acts are to be done, and cannot be ascertained by the person who is to do them, the obligation to do the acts exists only after notice. *London and South-Western Railway Company v. Flower*, 1 C. P. D. 77; 45 L. J., C. P. 54; 33 L. T. 687.

A private act authorized the making of a road under a railway. By the act the defendant was bound to maintain the railway bridge over the road, under the superintendence and to the satisfaction of the engineer of the railway company, and to make good to the railway company all expenses occasioned by reason of the execution or failure of the works, or of any act or omission of the defendant. Repairs became necessary, but the necessity could only be ascertained by entry on and examination of the bridge. The company did the repairs without giving notice to the defendant, and sued for the expenses:—Held, that the company could not recover. *Ib.*

Statutory Powers when a Justification for a Nuisance.—If the legislature prescribe that a public body shall provide hospital accommodation, no injunction could issue, provided it were proved that the directions of the act could not be complied with at all without creating a nuisance. And if a position has not been specified in the act for the hospital, the onus of proof that the creation of a nuisance will be the inevitable result, lies on the persons seeking to justify the nuisance. The justification depends on their making good these two propositions, (1) that such are the imperative orders of the legislature, and (2) that they cannot possibly obey those orders without infringing private rights. *Metropolitan Asylum District Managers v. Hill*, 6 App. Cas. 208; 50 L. J., Q. B. 353; 41 L. T. 653; 29 W. R. 617; 45 J. P. 664—H. L. (E.)—Per Watson (Lord).

Prima facie nobody is authorized to commit a nuisance under an act of parliament, unless it

appears from express words or by necessary implication that the act was to be done or might be done notwithstanding its tending to the creation of a nuisance. *Vernon v. St. James (Vestry)*, 16 Ch. D. 466; 50 L. J., Ch. 81; 44 L. T. 229; 29 W. R. 222—C. A.

Statutory powers, although granted for the public benefit, are only co-extensive with the power to exercise them without an infringement of the general law. Where the exercise of such powers is not compulsory upon those to whom they were granted, and new and unforeseen circumstances subsequently arise which render the exercise of them a nuisance, an indictment lies in respect thereof. *Reg. v. Bradford Navigation Company*, 6 B. & S. 631; 34 L. J., Q. B. 191; 11 Jur., N. S. 769.

Giving Rights in Alieno solo.—The rights thus conferred are, as regards the landowner, of a very onerous nature, and being thus exercised in alieno solo, must, in my opinion, be construed strictly, and must be carried no further than the language of the act declaring the custom expressly warrants. *Wake v. Redfearn*, 43 L. T. 123, 126; 44 J. P. 681—Per Cockburn, C. J.

When Power Exhausted or Extinguished.—An agreement was entered into between two water companies, by which company A. should take over the works, provide for a mortgage debt, and pay interest upon the shares of company B. This agreement was sanctioned by act of parliament, and the transaction was carried into effect by a deed of January, 1857, which provided that if company A. (or their intended assignees, the corporation or local board of health), being desirous of becoming the absolute and unrestricted owners of the works of company B., subject only to the mortgage debt, should, "on or before any 25th December, after having given to company B. six months' previous notice of their desire to avail themselves of the option thereby given, pay unto the company B." 46,246l., the amount of their share capital, the party so paying should become absolutely entitled to the works. In June, 1870, the corporation, who had acquired the interest of company A., gave notice to company B. of their intention to pay this sum on the 25th of December following, but they were unable from want of funds to carry out the purchase. In June, 1871, they again gave notice that they would pay the money on the 25th of December, 1871.—Held, that the corporation, by giving the first notice and failing to act upon it, had not lost the right given to them by the deed of January, 1857, of purchasing after six months' notice, on or before any 25th day of December. *Ward v. Wolverhampton Waterworks Company*, 13 L. R., Eq. 243; 41 L. J., Ch. 308; 25 L. T. 487; 20 W. R. 85.

When powers to make certain works are granted by act of parliament, they can only be exercised once and for all, and the grantees have no power afterwards to enlarge such works. *Taylor v. St. Helens (Corporation)*, 6 Ch. D. 264; 46 L. J., Ch. 857; 37 L. T. 253; 25 W. R. 885.

Imposing Toll.—When an act authorizes the exaction of a toll, the accommodation for which the toll is authorized must be provided. *Aiton v. Stephen*, 1 App. Cas. 456.

13. IMPERATIVE OR PERMISSIVE.

Distinction between.]—Negative words will make a statute imperative; words in the affirmative are directory only. *Row v. Leicester (Justices)*, 9 D. & R. 772; 7 B. & C. 12.

A statute enacted, that certain persons should be a company, and that it should be lawful for the plaintiff to sell his letters-patent to them. It then made regulations for the company, and by a subsequent section recited that the letters-patent had become void from the non-inrolment of them within four months, and enacted, that the letters-patent should be as valid and effectual, to all intents and purposes, as if duly inrolled.—Held, that the last section was not conditional upon a compliance with the previous sections, and that, in an action by the patentee for an infringement of the patent, a plea shewing that the previous sections had not been complied with was no answer. *Stead v. Curry*, 1 C. B. 496; 14 L. J., C. P. 177; 9 Jur. 511.

By an act for paving and lighting a township, the commissioners for carrying the act into execution were empowered from time to time to enter into contract or contracts for the performance of the works, or for furnishing materials for the performance thereof, or for any other of the purposes of the act, with any persons who should be willing to undertake and engage in the same; provided always, that no such contract should be made for a longer term than three years, and before such contract should be entered into, ten days' public notice at the least should be given, in order that persons might make proposals to the commissioners at a time and place in such notice to be specified; and all such contracts should specify the several works to be done, and the prices to be paid for the same, and the times when the works were to be completed, together with the penalties to be incurred in the case of non-performance; and the same should be signed by the commissioners, or by any three of them, or by their clerk, and by the person or persons contracting to perform such works; and copies of the contract should be entered in a book to be kept by the clerk to the commissioners.—Held, that the proviso in this clause applied to the duration of the contract only, and that the subsequent provisions were directory only, and not conditional, and that a contract, signed otherwise than in the manner therein pointed out, was not therefore void. *Cole v. Green*, 6 M. & G. 872; 7 Scott, N. R. 682; 13 L. J., C. P. 30.

By 11 & 12 Vict. c. 63, s. 85, the local board of health may enter into all such contracts as may be necessary for carrying the act into execution; and every such contract, whereof the value or amount shall exceed 10l., shall be in writing and sealed with the seal of the local board.—Held, that a contract which did not comply with this condition was not capable of being enforced. *Freud v. Dennett*, 4 C. B. N. S. 576; 27 L. J., C. P. 314; 4 Jur., N. S. 897.

By 43 Geo. 3, c. 59, s. 2, where any bridge or bridges, or roads at the end thereof, repaired at the expense of any county, shall be narrow and incommodious, it shall and may be lawful to and for the justices of the county, at any of their general quarter sessions, to order and direct such bridge or bridges, and roads, to be widened, improved and made commodious for the public, provided that no money shall be applied to the amendment or alteration of any such bridge or

bridges, until presentment shall have been made of the insufficiency, inconvenience, or want of reparation of such bridge or bridges, in pursuance of some or one of the statutes made and now in force concerning public bridges:—Held, that the section is permissive, not imperative, and leaves the justices a discretion whether or not to order a bridge to be widened, though it is proved to them to be narrow and inconvenient. *Newport Bridge, In re*, 2 El. & El. 377; 29 L. J., M. C. 52; 6 Jur., N. S. 97.

Provisions which appear on the face of them obligatory, cannot, without strong reasons given, be held only directory. The rule is, that provisions with respect to time are always obligatory, unless a power of extending the time is given to the court. *Barker v. Palmer*, 8 Q. B. D. 10; 51 L. J., Q. B. 110; 45 L. T. 480; 30 W. R. 59—Per Grove, J. *S. P., Reg. v. Barclay*, 8 Q. B. D. 486; 51 L. J., M. C. 47; 46 L. T. 335; 30 W. R. 672; 46 J. P. 693—C. A.

"Shall"—"May."—When a statute declares that something "shall" be done, the language is considered imperative, and the thing must be done; where the word "may" is used, the language is, as a general rule, permissive. *Davies v. Evans*, 9 Q. B. D. 243; 51 L. J., M. C. 136; 46 L. T. 419; 30 W. R. 548; 46 J. P. 471; *S. P., Reg. v. Montgomeryshire (Justices)*, 51 L. J., M. C. 95; 46 J. P. 517.

The words "shall and may" are only imperative where the clause in a statute is for the public benefit. *Rex v. Flockwold Inclosure (Commissioners)*, 2 Chit. 251.

The word "may," in 13 & 14 Vict. c. 61 (County Courts Extension Act), s. 13, which provides that, in certain cases, the court or a judge at chambers may, by rule or order, direct that the plaintiff shall recover his costs, is not used to give a discretion, but to confer a power upon the court or judge, and the exercise of such power depends not upon the discretion of the court or judge, but upon proof of the particular case out of which such power arises. *MacDougall v. Paterson*, 11 C. B. 755; 6 Ex. 337, n.; 21 L. J., C. P. 27; *S. P., Crake v. Powell*, 2 El. & Bl. 210; 21 L. J., Q. B. 183.

The words of s. 9, "shall and may," are obligatory and not merely permissive. *Chapman v. Milcain*, 5 Ex. 61; 1 L., M. & P. 209; 19 L. J., Ex. 228; 14 Jur. 251.

"It shall be Lawful"—**Enabling or Compulsory.**—The words in a statute "it shall be lawful," of themselves merely make that legal and possible which there would otherwise be no right or authority to do. Their natural meaning is permissive and enabling only. But there may be circumstances which may couple the power with a duty to exercise it. It lies upon those who call for the exercise of the power to shew that there is an obligation to exercise it. *Julius v. Oxford (Bishop)*, 5 App. Cas. 214; 49 L. J., Q. B. 577; 42 L. T. 546; 28 W. R. 726; 44 J. P. 600.

In all cases where jurisdiction is given to a court of justice by act of parliament, by the words "it shall be lawful," those words, unless they are controlled by other parts of the act, give the court a discretion in the exercise of that jurisdiction. *Bridgman, In re*, 1 Drew. & Sm. 164.

Enabling Words when Compulsory.—Enabling words are always compulsory where they are words to effectuate a legal right. *Julius v. Oxford (Bishop)*, *supra*.

An act for making a railway recited that the formation of the railway would be beneficial to the public, and that the company was willing to execute it, and the power of compulsorily taking lands, with the then ordinary powers, was given to the company. A mandamus issued, commanding the company to complete the line:—Held, that the mandamus ought not to go, no duty being cast on the company to make the line; the words of the act being enabling, not obligatory, and there being nothing in the subject-matter or context to require that they should be construed as compulsory. *York and North Midland Railway Company v. Reg. (in error)*, 1 El. & Bl. 858; 7 Railw. Cas. 459; 1 C. L. R. 119; 22 L. J., Q. B. 225; 17 Jur. 690—Ex. Ch.

When Construed apart from Practice under Previous Law.—Where an act recites that the manner of proceeding in certain cases requires amendment, its provisions may be construed independently of the practice under the previously-existing law. Or at all events the previous practice is a matter of very slender and remote consideration. *Julius v. Oxford (Bishop)*, *supra*—Per Penzance (Lord).

Permissive Words give a Discretion.—Where the terms of a statute are not imperative, but permissive, the fair inference is that the legislature intended that the discretion, as to the use of the general powers thereby conferred, should be exercised in strict conformity with private rights. *Metropolitan Asylum District Managers v. Hill*, 6 App. Cas. 208; 50 L. J., Q. B. 353; 44 L. T. 653; 29 W. R. 617; 45 J. P. 664—Per Watson (Lord).

Where an act directs that, under certain circumstances, one or other of two matters shall be done, the party to do the act has the option of doing which act he pleases. *Reg. v. South-Eastern Railway Company*, 3 H. L. Cas. 471; 1 C. L. R. 932; 17 Jur. 901.

Exemption from Rating.—Under the Sunday and Ragged Schools (Exemption from Rating) Act, 1869 (32 & 33 Vict. c. 40), s. 1, by which rating authorities may exempt from their rates buildings used as Sunday or ragged schools, the rating authority has a discretion, and is not bound to exempt any such school. *Bell v. Cranc*, 8 L. R., Q. B. 481; 42 L. J., M. C. 122; 29 L. T. 217; 21 W. R. 911.

14. REPEALED AND REVIVED STATUTES.

How Statutes become Repealed.—Where a statute made an offence felony, punishable with death, without clergy, and a subsequent statute inflicted a milder punishment on the same offence, the latter statute was a virtual repeal of so much of the former statute as related to the offence. *Rex v. Davis*, 1 Leach, C. C. 271; 2 East, P. C. 609. And see *Rex v. Heath*, 2 East, P. C. 609.

The bare recital in a statute is not sufficient to repeal the positive provisions of a former statute. *Dore v. Gray*, 2 T. R. 365.

A general enactment in a later statute does not repeal a particular enactment in an earlier

statute, unless the intention to do so is manifest, or the implication is irresistible. *Conservators of the River Thames v. Hall*, 3 L. R., C. P. 415; 37 L. J., C. P. 163; 18 L. T. 361; 16 W. R. 971.

Affirmative words in an act do not repeal the provisions of a former act, unless there is some obvious inconsistency between the enactments. *Pukins v. Seaman*, 9 M. & W. 777.

If there are two affirmative statutes inconsistent and incompatible with each other, the earlier statute is repealed by the later one. *O'Flaherty v. McDowell*, 6 H. L. Cas. 142; 4 Jur., N. S. 33.

The principle to be applied to the construction of acts is, that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless the two acts are necessarily inconsistent. *Thorpe v. Adams*, 6 L. R., C. P. 125; 40 L. J., M. C. 52; 23 L. T. 810; 19 W. R. 352; *S. P., Reg. v. Champneys*, 6 L. R., C. P. 384, 394; 40 L. J., C. P. 95; 24 L. T. 181; 19 W. R. 886.

If a statute professes merely to repeal a former statute of limited operation, and to re-enact its provisions in an amended form, an intention to extend the operation of its provisions to classes of persons not previously subject to them is not to be presumed as a necessary inference, unless the intention to the contrary is clearly shewn. *Brown v. McLachlan*, 4 L. R., P. C. 543; 42 L. J., P. C. 18; 21 W. R. 277; 9 Moore, P. C. C., N. S. 384.

— **By Implication.**—A public general statute held to have been impliedly repealed, pro tanto, by a subsequent affirmative, but inconsistent, local and personal act. *Kelly, Ex parte*, 9 Ir. R., C. L. 114.

By 3 & 4 Vict. c. 85, s. 6, all withs and partitions between any chimney or flue, which at any time after the passing of this act shall be built or re-built, shall be of brick or stone, and at least equal to half a brick in thickness. By the Huddersfield Improvement Act, 1871, Local and Personal, s. 111, the chimneys and flues of every new building shall be constructed in such a mode and of such materials and dimensions as shall from time to time be determined on and approved by the corporation. A master builder built a chimney having a partition of stone slate of less than half a brick in thickness, and was convicted of so doing contrary to the 3 & 4 Vict. c. 85, s. 6, but he had submitted a plan and detailed section of the building to the corporation, in accordance with which it was built, under s. 103 of the local act, and such plans had been approved by them:—Held, that there was not such a contrariety between the two acts as to make the subsequent local act repeal by implication the prior general statute so as to enable the corporation to dispense with the requirements of the former statute; and the conviction was held good. *Hill v. Hall*, 1 Ex. D. 411; 45 L. J., M. C. 153; 35 L. T. 860.

An affirmative statute is not repealed by a subsequent affirmative statute, unless the two cannot stand together. *Warrington, Ex parte*, 3 De G., M. & G. 159; 22 L. J., Bk. 33; 17 Jur. 430.

Repeal by implication is never to be favoured; it is, no doubt, the necessary consequence of inconsistent legislation whenever it occurs, but which must not be imputed to the legislature

unless absolutely necessary. *Dobbs v. Grand Junction Waterworks Company*, 9 Q. B. D. 158; 51 L. J., Q. B. 504; 46 L. T. 820; 31 W. R. 15; 46 J. P. 756—Per Field, J.

The mere recital in a subsequent statute of an intention to repeal a former specific statute will not operate by implication, to repeal the former statute. In order to accomplish such a repeal, there must be a clause to that effect in the latter statute. *Mahony v. Wright*, 10 Ir. C. L. R. 420.

Mere general words in a subsequent affirmative statute, not referring expressly to a former specific statute, are not sufficient to effect a repeal of the former statute, if both statutes can stand together. *Id.*

Where a later statute describes an offence created by a former statute, and affixes a different punishment to it, varying the procedure, and giving an appeal when there was no appeal before, the offence must be prosecuted under the later statute. *Michell v. Brown*, 1 El. & Bl. 267; 28 L. J., M. C. 53; 5 Jur., N. S. 707.

When a statute prohibits a particular act, and imposes a penalty for doing it, and a subsequent statute imposes a different penalty for the same offence, the latter statute operates as a repeal of the former. *Robinson v. Emerson*, 4 H. & C. 352, 355; 12 Jur., N. S. 378; 14 L. T. 391; 14 W. R. 658.

If two statutes can be read together without contradiction, or repugnancy, or absurdity, or unreasonableness, they should be read together. *Reg. v. Mews*, 50 L. J., M. C. 6; 43 L. T. 404; 45 J. P. 93—Per Brett, L. J. And see *Fulham Union v. Isle of Thanet Union*, 7 Q. B. D. 539; 50 L. J., M. C. 101; 44 L. T. 678; 29 W. R. 723; 45 J. P. 552—C. A.

No statute can lose its force by non-user alone. Presumption is against the repeal of a statute by implication; but a subsequent statute, though not expressly referring to it, will be taken to have repealed a prior one, if the provisions of the two statutes are incompatible with each other or would lead to absurd consequences. *The India*, B. & L. 221; 33 L. J., Adm. 193; 12 L. T. 316.

Of Specific by General Enactment.—It is now well settled, that a general enactment of a later act cannot repeal a specific enactment in an earlier act merely by implication. *Gard v. Commissioners of Sewers*, 49 L. T. 327—Per Kay, J.

When Two Acts repugnant to each other come into operation on the same Day.—Where two acts come into operation on the same day, and are repugnant, the one which last received the royal assent virtually repeals the other. *Rex v. Middlesex (Justices)*, 1 D. P. C. 117; 2 B. & Ad. 818.

Repeal "Except as to Acts done under them."—A proviso in a repealing statute, that the repealed statutes shall be repealed, "except as to acts done under them," will operate to preserve to parties sued for acts alleged to have been done under colour of the powers of the repealed statutes, a protection which those statutes conferred upon persons sued for such acts, at all events, if the action is brought before the repealing statute passes. *Foster v. Pritchard*, 2 H. & N. 151; 26 L. J., Ex. 215.

Clauses which Limit the Right of the Crown.]

—Clauses which limit in any way the right of the crown must be considered as repealed by subsequent statutes, unless expressly re-enacted. *Att.-Gen. v. Newman*, 1 Price, 438.

Repeal of Statute Incorporated by Reference.]

—Where a statute is incorporated by reference into a second statute, the repeal of the first statute by a third does not affect the second. *Clarke v. Bradlaugh*, 8 Q. B. D. 69; 51 L. J., Q. B. 7; 46 L. T. 52; 30 W. R. 55—Per Brett, L. J.

Consolidation of Repealed Statutes.]—An act repealed existing statutes and gave certain powers “in terms of the said recited acts,” which were the repealed statutes:—Held, that this phrase incorporated the provisions of the repealed statutes and consolidated them. *Blantyre (Lord) v. Clyde Navigation Trustees*, 6 App. Cas. 273—H. L. (Sc.).

“Repealing Statute” Spent—Revival of Former Act.]—Where a statute professes to repeal absolutely a prior law, and substitutes other provisions on the same subject, which are limited to continue only till a certain time, the prior law does not revive after the repealing statute is spent, unless the intention of the legislature to that effect is expressed. *Warren v. Windle*, 3 East, 205.

Where a repealing statute is repealed, the first statute is, after the day on which the third statute takes effect, revived ab initio, and not merely as from that day. *Phillips v. Hopwood*, 5 M. & R. 15; 10 B. & C. 39.

Effect of Repeal.]—In order to ascertain the effect of a repealing statute the repealed words must be looked at. Where in any statute special words are followed by general words, any subject-matter which is aptly described by the special words, comes within the purview of the statute by force of the special words, and not of the general words. If, therefore, the special words are repealed, the subject-matter ceases to be within the purview of the statute, though aptly described by the general words in the absence of the special words. *Att.-Gen. v. Lamplough*, 3 Ex. D. 214; 47 L. J., Ex. 555; 38 L. T. 87; 26 W. R. 323—C. A.

No proceedings can be pursued under a repealed statute, though commenced before the repeal, unless by special exception. *Miller's case*, 3 Wils. 420; 1 W. Bl. 451.

An act from its passing repealed a former act which ousted clergy from a certain offence, and imposed a new punishment on the same offence from and after its passing:—Held, that an offence committed before the passing of the new act, but not tried till after, was not liable to be punished under either of these statutes. *Rea v. McKenzie*, R. & R. C. C. 429.

Where an act directs a mode of procedure to be adopted as contained in a former act, the repeal of such act does not operate to repeal the procedure directed, which is to be considered as incorporated in the latter act. *Reg. v. Stock*, 3 N. & P. 420; 8 A. & E. 405.

Effect of the repeal of a statute which modified a former statute considered. *Glaholm v. Barker*, 1 L. R., Ch. 223; 35 L. J., Ch. 259; 12 Jur., N. S. 82; 13 L. T. 653; 14 W. R. 296.

Where an act or part of an act is repealed, it must, except as to transactions which are past

and closed, be considered as if it had never existed. *Grisewood, Ex parte*, 4 De G. & J. 544; 28 L. J., Ch. 769; 5 Jur., N. S. 1191.

Where a road has been presented by a magistrate, under 13 Geo. 3, c. 78, s. 24, and the presentment was removed by certiorari after trial, but before judgment that statute was repealed by 5 & 6 Will. 4, c. 50, s. 1:—Held, that the court could not give judgment for the crown, as the proceedings were founded on the presentment which was no longer valid. *Reg. v. Maugan*, 3 N. & P. 502; 8 A. & E. 496.

After a statute has been repealed it cannot be acted upon in respect of a proceeding under it commenced before its repeal, and in this respect there is no valid distinction between matters of form and substance. Where, therefore, between the finding of an indictment for non-repair of a road and plea pleaded, the statute alone upon which the indictment could be supported was repealed, and afterwards the indictment was proceeded with and a conviction obtained, the court arrested the judgment. *Reg. v. Denton*, 16 Q. B. 832; Dears. C. C. 3; 18 Q. B. 761; 21 L. J., M. C. 207; 17 Jur. 463.

The 12 & 13 Vict. c. 109, s. 44, requires the name and address of any person party to an action, suit or proceeding now pending on the common law side of the Court of Chancery, or their attorney, to be entered in a book kept in the Petty Bag Office. This act repealed 11 & 12 Vict. c. 94, s. 39, which was similar to 12 & 13 Vict. c. 109, s. 44:—Held, that a compliance with the provision of the repealed act was a compliance with the new statute, and that a second entry of the name and address was not necessary. *Baddely v. Denton*, 1 L., M. & P. 172. See also *Davis v. Cary*, post, col. 2041.

— **As to Costs of Action to which a Right has already Vested.]**—The repeal of a statute does not, without express words, take away the power of the courts to make an order for costs of an action to which a right has already vested under the repealed statute. *Restall v. London and South-Western Railway Company*, 3 L. R., Ex. 141; 37 L. J., Ex. 89; 18 L. T. 331; 16 W. R. 872.

Liability for Trespass for Acting under Jurisdiction given by Repealed Statute.]—A local act prohibited the exposing for sale of goods on the footway of a street, under a penalty of 10s., and, by one of the sections, the justices had a summary jurisdiction to enforce the payment of the penalty. By a subsequent act, entitled “An act to amend and enlarge the former act,” the section in the first act creating the offence was repealed and re-enacted, with this difference, that the penalty was made 20s. instead of 10s. There was no clause in the last act as to the mode in which the penalty should be enforced:—Held, that as the first act was repealed by the second, the justices, having granted a distress warrant for the purpose of enforcing payment of a penalty imposed by the latter act, were liable to an action of trespass. *Ward v. Stevenson*, 1 New Sess. Cas. 162.

Effect of Revival.]—If an expired statute is afterwards revived in another statute, the law derives its force from the first. *Shipman v. Henbest*, 4 T. R. 109.

A reviving statute re-enacts the provisions of

the expired law, and is in fact the statute in force. *Rea v. Phipps*, 2 East, P. O. 599; 2 Leach, C. C. 673; *S. P.*, *Rea v. Morgan*, 2 East, P. C. 601.

Pleading—Repeal of Statute.]—Action against the defendant as surety for C., on a bond conditioned that C. would duly and faithfully account for, apply and pay to the plaintiff all sums of money which had or should come to his hands as treasurer of certain turnpike roads, according to the direction, true intent and meaning of the 26 Geo. 4, c. 71, and three other acts extending that act, and of the 3 Geo. 4, c. 126. Plea, that the 3 Geo. 4, c. 126, was repealed by 4 Geo. 4, c. 95, and that up to the time of such repeal C. had duly and faithfully accounted. Replication, assigning as a breach that although after the repeal C. was required by the trustees to render to persons duly appointed by them for that purpose a true and perfect account in writing of all moneys which he had received and disbursed as treasurer, C. had not rendered such account; and for a further breach, that C. had received sums of money as treasurer, and had failed duly to account for and pay the same, according to the true intent and meaning of the acts, and of the 3 Geo. 4, c. 126, and of the bond, although before and after the repeal moneys remained in his hands, and although during all the time there were trustees entitled and ready to receive the same, and although no other person was authorized to receive the same. Rejoinders as to first breach, that a part of the sum was received by C. before the repeal of the 3 Geo. 4, c. 126, for which he had duly accounted, and that the residue of the sum was received after the repeal of the 3 Geo. 4, c. 126. And as to the other breach, that no part of the sums in that breach mentioned was received by C. before the repeal of the 3 Geo. 4, c. 126.—Held, first, that the repeal of the 3 Geo. 4, c. 126, did not of itself render the bond invalid, supposing the enactments of the local act to be sufficient for enforcing it. *Davis v. Cary*, 15 Q. B. 418; 20 L. J., Q. B. 48; 15 Jur. 310.

Held, secondly, that the first breach assigned was bad, as the local act provided only for the treasurer being called upon to account to the trustees themselves, and the section in the 3 Geo. 4, c. 126, requiring the treasurer to account to such person or persons as the trustees should appoint, had been repealed by 4 Geo. 4, c. 95. *Id.*

Held, thirdly, that although the other breach required no aid from the repealed section of the 3 Geo. 4, c. 126, and therefore the statement as to that fact was surplusage; yet as there was no allegation of a requisition to account or pay, as provided by the local act, the breach failed to shew a forfeiture of the bond under that act, and was therefore bad. *Id.*

Held, fourthly, that the plea admitting a non-performance of the condition, subsequent to the repeal of the 3 Geo. 4, c. 126, did not answer the whole of the declaration, and was therefore bad. *Id.*

—Amendment of, after.]—A statute required the delivery of a certificate setting forth certain matters, and imposed a penalty upon the non-delivery of such a certificate. A subsequent statute directed that no action should be brought to recover penalties in respect of the omission of

some of the matters, and that no action already commenced in respect of such omission should be prosecuted. An action was brought for the penalty incurred, by delivering a certificate omitting all the matters required to be inserted by the first statute, and the declaration and plea were delivered before the passing of the second act. Upon the passing of the second act:—Held, that the plaintiff was bound to amend his declaration, by striking out such omissions as were cured by the act. *Grant v. Browne*, 6 M. & G. 774.

Repeal of Public by Private Act.]—A section in a private act cannot by implication repeal a provision of the common law, or of a public statute. *The Clan Gordon*, 7 Adm. D. 190; 46 L. T. 490; 30 W. R. 691—Per Phillimore (Sir R.).

Repeal of Private Act by Private Act.]—A private act does not repeal a former private act by implication. *Birkenhead Docks (Trustees) v. Laird*, 4 De G., M. & G. 732; 23 L. J., Ch. 457; 18 Jur. 883.

Where, therefore, a private act gave power to commissioners to construct a sea wall, the property in which was to be vested in them, with liberty to proprietors of adjoining lands to purchase portions of the wall, and to make openings in it, under the superintendence of the engineer of the commissioners:—Held, that under a subsequent act empowering a dock company to take some adjoining lands and to make such works for the purposes of their undertaking "as they might deem expedient," the power thus conferred was subject to the provisions of the former act. *Id.*

Repeal of Private Act by Public Act.]—A local act is not, in the absence of any indication of intention to the contrary, repealed by a subsequent public general act. *Fitzgerald v. Champneys*, 2 Johns. & H. 31; 30 L. J., Ch. 777; 7 Jur., N. S. 1006; 9 W. R. 850; *S. P.*, *Parnell v. Wolverhampton Waterworks Company*, 10 C. B., N. S. 576; 4 L. T. 513.

The rule of construction, that a general act does not repeal or affect a prior special act without express words of reference, applies to church building acts. *Id.*

The insertion in a general act of a saving clause, providing that the act shall not apply to a special case which had previously been regulated by a special act not otherwise referred to, will not prevent the application of the above rule of construction. *Id.*

A clause in a private act which is quite inconsistent with a clause in a subsequent public act dealing with the same subject is thereby repealed. *Great Central Gas Consumers' Company v. Clarke*, 13 C. B., N. S. 838; 32 L. J., C. P. 41.—Ex. Ch.

A gas company was by its act of incorporation restricted to a charge of 4s. per 1,000 cubic feet. By a subsequent public act (23 & 24 Vict. c. 125) for the supply of gas to the metropolis, an increased standard of purity and illuminating power was required from the companies electing to adopt the provisions of that act as to force, purity and illuminating power, and an increased charge to be made by them:—Held, that the company was no longer subject to the restriction as to force contained in its private act. *Id.*

By a local act, a penalty of 200l. was imposed

on any gas or other company for suffering any impure matter to flow into any stream, to be sued for by common informer. Afterwards by s. 21 of the Gasworks Clauses Act (10 & 11 Vict. c. 15), a like penalty is imposed for the same offence, such penalty to be recovered by the person into whose water such substance shall be conveyed, or whose water shall be fouled by any such act:—Held, that the later provision was, pro tanto, a repeal of the former. *Parry v. Croydon Commercial Gas Company*, 11 C. B., N. S. 579. Affirmed, 15 C. B., N. S. 568—Ex. Ch.

By a local act passed prior to 5 & 6 Vict. c. 98, in furtherance of arrangements made between the justices of a county and the council of a borough having a separate court of quarter sessions, it was provided that the prisoners of the borough should be maintained in the county gaol on certain terms:—Held, that this act was not a special contract within the meaning of the 5 & 6 Vict. c. 98, s. 18, and that the local act, being inconsistent with the general enactment, was repealed by it, though not expressly mentioned. *Bramston v. Colchester (Mayor)*, 6 El. & Bl. 246; 25 L. J., M. C. 73; 2 Jur., N. S. 809.

Two Acts giving Inconsistent Powers to Different Public Bodies—Repeal of earlier one.]—Where two statutes give authority to two public bodies to exercise powers which cannot consistently with the object of the legislature co-exist, the earlier must necessarily be repealed by the later statute. *Daw or Dow v. Metropolitan Board of Works*, 12 C. B., N. S. 161; 31 L. J., C. P. 223; 8 Jur., N. S. 1040; 6 L. T. 353.

The 145th section of the City of London Sewers Act (11 & 12 Vict. c. clxiii.), as to the naming of streets and numbering of houses in the city, is repealed by the provision for that purpose contained in 18 & 19 Vict. c. 120, s. 141. *Id.*

Re-enactment.]—A section of a statute, which merely re-enacts a provision in a previous statute, will not be construed as virtually repealing an inconsistent enactment in an act made subsequently to the first, but before the last act. *Morisse v. Royal British Bank*, 1 C. B., N. S. 67; 26 L. J., C. P. 62; 3 Jur., N. S. 137.

When a clause in an act which has received a judicial interpretation is re-enacted in the same terms, the legislature is to be deemed to have adopted that interpretation. *Campbell, Ex parte, Catheart, In re*, 5 L. R., Ch. 703; 23 L. T. 289; 18 W. R. 1056.

15. HOW AFFECTED BY LEGISLATION IN SAME AND OTHER STATUTES.

One part of an Act may be explained by another.]—If any part of a statute is obscure, and other passages in the same act will elucidate that obscurity, recourse may be had to such context for that purpose. *Res v. Palmer*, 1 Leach, C. C. 352, 355; 2 East, P. C. 898; *S. P., Reg. v. Mallow Union (Guardians)*, ante, col. 2009.

If it is doubtful whether a statute declaring an act, instrument or contract void, makes it voidable only, another clause in the same statute imposing a penalty on such act, instrument or contract, is a clear test that it is ipso facto void. *Gye v. Felton*, 4 Taunt. 876.

Where the words of a law in their ordinary signification are sufficient to include infants, the

virtual exception must be drawn from the intention of the legislature manifested by other parts of the law, from the general purpose and design of the law, and the subject-matter of it. Thus, the Statute of Limitations and of Fines would have bound infants, &c., without any express exception. *Beckford v. Wade*, 17 Ves. 92.

The headings of different portions of a statute are to be referred to, in order to determine the sense of any doubtful expression in a section ranged under any particular heading. *Hammer-smith and City Railway Company v. Brand*, 4 L. R., H. L. 171.

Right of Action given by Two Sections Conjointly.]—One section of an act for paving and improving a town, empowered commissioners to pave the streets, and enacted that the expenses should be paid to them by the owners of the land adjoining, in equal shares; and that it should be lawful for such commissioners to recover such expenses by action. The following section, beginning with "provided always," enacted, that, before the commissioners should pave the streets, they should give notice to the owner of land, adjoining the street, requiring him to pave the same; and, if the owner should neglect to pave for six months, it should be lawful for the commissioners to pave the same, and to recover the expenses from such owner in such manner as in the act was mentioned. A declaration by the commissioners, to recover from the defendant his share of the expenses of paving a street, stated that he was the owner of land within the street, that the commissioners paved the same, that his share of the expenses amounted to a certain sum of money, and alleged, as a breach, that he had not paid the same:—Held, that the giving a notice to the defendant to pave the street, was a condition precedent to the plaintiff's right of action, and, therefore, that the declaration was bad for not containing such an averment. *Salford (Mayor) v. Ackers*, 16 M. & W. 85; 16 L. J., Ex. 6.

By one section of a local act it was enacted, that money allowed by commissioners of a navigation, to their clerk, appointed by them, should be paid by the proprietors of the tolls on the navigation in certain proportions. A subsequent section enacted, that if any proprietor should neglect or refuse to pay on demand made, either of him or his agent, the money might be recovered by action, with double costs, in the clerk's name, against such proprietor, or, if he could not be found, against his agent; or otherwise the sum might be levied by distress upon the goods of the proprietor, or, if no such goods could be found, on the goods of his agent. The clerk obtained a verdict against a proprietor, but averred no demand in the declaration:—Held, that the right of action was given by the two sections conjointly; that the demand, if necessary to the action, must be presumed after verdict; and therefore, that the declaration must be considered as framed, and the verdict recovered, under both sections, and that the plaintiff was entitled to double costs. *Tibbitts v. Yorke*, 4 A. & E. 134.

Two Sections of same Act inconsistent.]—An act was passed on the 21st of July, 1851, called "The Governor and Company of Copper Miners Act, 1851," for arranging their affairs; and s. 22 provided, that after a reconveyance the company should hold their property discharged from all rights and claims of all creditors and

claimants. The 12th section referred to another action previously brought by the plaintiff against the company on the same contract, and which had been referred to an arbitrator, and provided that the plaintiff should be considered as a creditor for a certain amount till the award was made:—Held, that s. 22 referred to debts or liquidated claims, and was not a bar to an action in respect of the damage which accrued after the passing of the act. *Wood v. Copper Miners Company*, 14 C. B. 428; 2 C. L. R. 1735; 23 L. J., C. P. 209; 1 Jur., N. S. 65.

Rules of construing a statute, where a general enactment in it would override a particular one, and where two parts of it are contradictory. *Pretty v. Solly*, 26 Beav. 606.

Where one section gives to A. the power which B. has, and a subsequent section gives B. new powers, A. does not acquire the new powers given to B. *Edwards v. Hodges*, 15 C. B. 477; 24 L. J., M. C. 81.

Inconsistency between General and Special Acts.—If there is an inconsistency between the general act and a subsequent special act the latter must prevail. *Yarmouth (Mayor) v. Simmons*, 47 L. J., Ch. 792; 38 L. T. 881; 26 W. R. 802—Per Fry, J.

When a general act of parliament is incorporated with a special act, if there is any contradiction between them, the special act is to prevail. *Att.-Gen. v. Great Eastern Railway Company*, 7 L. R., Ch. 475; 41 L. J., Ch. 505; 26 L. T. 749; 20 W. R. 599.

Special will not be controlled by General Clause.—Where one clause of an act directs specific acts to be done, but which acts would be included in the general terms of a subsequent prohibitory clause, the former clause is not controlled by the latter. *De Winton v. Brecon (Mayor)*, 26 Beav. 533.

General provisions in an act do not override special provisions; so that where an act contains special provisions as to particular property, they must be read as exceptions from general provisions, whether contained in the same or any other act. *Taylor v. Oldham Corporation*, 4 Ch. D. 395; 46 L. J., Ch. 105; 35 L. T. 696; 25 W. R. 178.

Whether Schedule Restricts Enactment.—It would be quite contrary to the recognized principles upon which courts of law construe acts of parliament to enlarge the conditions of the enactment and thereby restrain its operation, by any reference to the words of a mere form given for the sake of convenience in a schedule, and still more so, when that restricted operation is not favourable to the liberty of the subject, but the reverse. *Dean v. Green*, 8 P. D. 89—Per Penzance (Lord).

Incorporation of other Statutes.—When a statute is incorporated in another, the effect is the same as if the provisions of the former were re-enacted in the latter for all its purposes; and the repeal of the former does not repeal its provisions so far as they have been incorporated in an act which is not repealed, and which incorporation was for the purpose of providing for a subject-matter not within the original statute. *Rossmore (Lord)*, *Ex parte*, 8 Ir. R., Eq. 366.

An act empowered a canal company to con-

struct canals and railroads, paying compensation to the owner of lands used; and also to make railroads to iron works, within eight miles of the canals or railroads first mentioned; and it provided that, if the owner of certain species of property situate within eight miles from any part of the canals or railways before particularly described and authorized to be made, should think it expedient that railways should be made through the lands of other persons, for the purpose of conveying goods from the canals or railways before particularly described, and, if the company should refuse to make such railways, such owners might at their own cost make such railways, paying compensation to the proprietors of the lands over which they were to be made; and that the railways so made should be open to the public on payment of such tolls as the company could demand. A subsequent act incorporated a tramroad company, and gave them or the canal company power to make certain railways, and to take thereon the tolls authorized by the former act; and it provided that the companies should have the same powers for recovering the tolls as were given by the first act, and that the several clauses, privileges, penalties and provisions therein contained, should, as far as the same would apply and the case would admit, extend to the works constructed under the new act, as if the clauses had been repeated, and the tramroad company had been therein named instead of the canal company:—Held, that this did not authorize owners of the specified kind of property within eight miles of the new works, unless authorized by the first act, to make railways from their property to the new works. *Sirhowy Tramroad Company v. Jones*, 3 A. & E. 641, n.; 5 N. & M. 88.

A prior statute may operate upon the provisions of a subsequent one, without express words. *Perrin, In re*, 2 Dru. & W. 147; 1 Con. & L. 567 (Ir.).

Where an act gives certain privileges to officers who may be sued for things done in pursuance thereof, and a subsequent act imposes new obligations, the privileges given by the former act do not attach upon things done in pursuance of the latter. *Bazing v. Shelton*, 5 T. R. 16.

Incorporation of Parts of other Statute—To what Extent.—Where statute A. incorporates sections of statute B., and those sections in statute B. refer to a particular class of cases (e.g. Settled Estates), statute A. must not be construed as to these sections as only referring to the particular class of cases affected by statute B., but must be construed in a fair manner and not with any such restriction. *Barker, In re*, 17 Ch. D. 241; 50 L. J., Ch. 334; 44 L. T. 33; 29 W. R. 873.

A clause of reference in an excise statute to a former law only extends to the general powers and provisions of that law, and not to every particular clause. *Rea v. Surrey (Justices)*, 2 T. R. 504, 510.

Incorporation of General Statutes in Special Acts.—The effect of the incorporation of a general act of parliament into the special act of any company is, that the general act must be looked at with reference to the powers conferred upon companies of dealing with the land when required; but it is to the special act that regard must be had for the purpose of ascertain-

ing the contract between the landowner and the company, and the power which the company has of taking the land. *Simpson v. South Staffordshire Waterworks Company*, 4 De G., J. & S. 679; 34 L. J., Ch. 380.

Sect. 126 of the Municipal Corporations Act (5 & 6 Will. 4, c. 76) provided that when by any act any penalties or forfeitures should thereafter be made recoverable in a summary way before any justices of the peace, and by such act the same should be made payable to his Majesty, in every such case the same, if recovered and adjudged before any justice of any borough in which a separate court of quarter sessions of the peace should be holden, should be adjudged to be paid to the treasurer of the borough to the credit of the borough fund. The 3 & 4 Vict. c. 97, enacted by s. 16, that certain offenders might be taken before a justice of the peace and convicted summarily, and should thereupon forfeit to her Majesty a sum not exceeding 5*l*. An offender having been convicted under the last-mentioned act, before justices in a borough having a separate court of quarter sessions, was sentenced to pay a fine:—Held, that the provisions of the Municipal Corporations Act must be read as incorporated in the subsequent act, and that the fine was therefore payable to the borough treasurer. *Att.-Gen. v. Moore*, 3 Ex. D. 276; 47 L. J., M. C. 103; 38 L. T. 251; 26 W. R. 366—C. A.

Representations made on plans deposited by the promoters of an intended railway in pursuance of the standing orders of the houses of Parliament previously to an application for an act, do not bind the railway company after the act is obtained nor give other persons any equity against the company, except so far as they are incorporated with the act. *Att.-Gen. v. Great Eastern Railway Company*, 6 L. R., H. L. 367; 22 W. R. 281. Affirming 7 L. R., Ch. 475; 41 L. J., Ch. 505; 26 L. T. 749; 20 W. R. 599.

A special act of parliament, with which was incorporated the Railways Clauses Act, 1845, empowered a railway company to stop up all streets within a certain area in the city of London. The deposited plans shew that Sun-street, which was within the area, was not to be stopped up, but to be crossed by an arch. The same plans shewed that other streets within the area were to be stopped up. Subsequently the company obtained another act, authorizing them to make an underground instead of an above-ground railway, and re-enacting the powers given them by the previous act:—Held, that the plans were not incorporated in the special act and that the power to stop up all streets within the area, including Sun-street, was an existing power and capable of being exercised.

In adjusting the general provisions in a general act to the particular provisions of the special act, considerations of reason and justice, and the universal analogy of such provisions in similar acts of parliament are proper to be borne in mind, and ought to have much weight and force. *Metropolitan District Railway Company v. Sharpe*, 5 App. Cas. 431; 50 L. J., Q. B. 16; 43 L. T. 130; 28 W. R. 617; 44 J. P. 716—H. L. (E.).

Reference to other Statute.—I do not see how we can construe a word in one statute by reference to its use in another, in which the context may be different, and I do not think that Lord Selborne in *Metropolitan District Railway*

Company v. Sharpe (5 App. Cas. 425) intended to lay down any general rule to the contrary. *Spencer v. Metropolitan Board of Works*, 22 Ch. D. 157; 52 L. J., Ch. 251; 47 L. T. 464; 31 W. R. 350—Per Jessel, M. R., and Cotton, L. J.

Reference to other Sections in same Statute.]

—We ought to find out the meaning of a word from the section itself, and if we can do that, we need not have recourse to the use of the same word in the other sections of the act. If we cannot find out the meaning of the word by reading the particular section then we may look through the other sections to see in what sense the word is there used, for, as a general rule, a word is to be considered as used throughout an act of parliament in the same sense. *Spencer v. Metropolitan Board of Works*, 22 Ch. D. 162; 52 L. J., Ch. 252; 47 L. T. 465; 31 W. R. 351—Per Jessel, M. R.

Effect of Subsequent General Act upon Prior Special Act Incorporating Prior General Act.]

In 1847 the Gasworks Clauses Act was passed; in 1853 a company obtained a special act which incorporated the Act of 1847. In 1871 another Gasworks Clauses Act was passed, and in it was this provision "The Gasworks Clauses Act, 1847, and this act shall be construed together as one act":—Held, that the Act of 1871 was incorporated in the Act of 1853. *Dudley Gas Company v. Warmington*, 50 L. J., M. C. 69; 44 L. T. 475; 29 W. R. 680; 45 J. P. 649.

Creation of New Felony—Incidents of Felony at Common Law will attach thereto.]

—Although a statute which creates a new felony, will attach to that felony all the common-law incidents to felony, so that accessories thereto will be included, yet it will not go farther, and include a party who is not at common law an accessory. *Rea v. Sadi*, 1 Leach, C. C. 468; 2 East, P. C. 748.

16. EXCEPTIONS AND PROVISORES.

What is an Exception.]—Where a general intention is expressed, and the act expresses also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception. *Churchill v. Crease*, 2 M. & P. 415; 5 Bing. 177, 180.

When Exception need be Negated.]—Where an act, in the enacting clause, creates a power to do certain acts, "except in the places therein-after mentioned," and the exceptions are only specified in succeeding clauses, the party claiming under a right derived from such power need not negative such exceptions. *Ward v. Bird*, 2 Chit. 582.

Where an act, in the enacting clause, creates an offence, and gives a penalty, and in the same section there follows a proviso, containing an exemption which is not incorporated with the enacting clause by any words of reference, it is not necessary for the plaintiff, in suing for the penalty, to negative such proviso in his declaration. *Steel v. Smith*, 1 B. & A. 94.

Nor where the exceptions are mentioned in a subsequent proviso. *Spieries v. Parker*, 1 T. R. 141.

Nor where exceptions are contained in a subsequent statute; in which case it must be shewn as

a matter of defence, that the defendant comes within them. *Rex v. Hall*, 1 T. R. 320.

But where an exception is in the enacting clause giving a right or a forfeiture, the party suing for the right or forfeiture must negative the exception in his declaration. *Gill v. Scriven*, 7 T. R. 27. And see *Macmurdo v. Smith*, 7 T. R. 518.

Where a clause in an act, furnishing a defence to an action of trespass, contains a proviso or an exception, the defendant should negative it in his plea; but where the proviso or exception is in another clause, in order to shew the case to be within it, or the former clause not applicable, such matters should be replied. *Grand Junction Railway Company v. White*, 2 Railw. Cas. 559.

The 8 & 9 Vict. c. 87, s. 2, enacted that, if any foreign vessel shall be found within one league of the coast of the United Kingdom, having on board certain articles, the articles and the vessel should be forfeited. Sect. 4 enacted, that "nothing herein contained shall extend to render any vessel liable to forfeiture if really bound from one foreign port to another, and pursuing such voyage, wind and weather permitting." Eys. 50, "every person not being a subject of her Majesty, who shall be found on board any vessel liable to forfeiture, within one league of the coast of the United Kingdom, is made liable to summary conviction and imprisonment:"—Held, that a commitment under s. 50 describing the offence in the words of the section was sufficient without negating the exception in s. 4. *Van Boven, In re*, 2 New Sess. Cas. 492; 9 Q. B. 669; 16 L. J., M. C. 4; 11 Jur. 119—Per Lush, J.

There is no difference, in respect of declarations and subsequent pleadings, as to negating exceptions in acts of parliament. *Palk v. Force*, 12 Q. B. 666; 17 L. J., Q. B. 299; 12 Jur. 797.

To an action for money received, the defendant pleaded, that, after the passing of the 7 & 8 Vict. c. 110 (Joint Stock Companies Act), and after the 1st November, 1844, the defendant as the broker of the plaintiff sold on account of the plaintiff, scrip shares in a company, for money, the formation of which company was commenced after the 1st November, 1844, and which at the time of the sale was a company established in England for profit, within the statute; that is to say, a partnership whereof the capital was intended to be divided into shares, and so as to be transferable without the express consent of all the co-partners, and not being a banking company, school or scientific or literary institution (following the words of s. 2), and that the money so received by the defendant for the plaintiff was the proceeds of the sale by the defendant of such shares, and at the time of the sale, and of the receipt of the money, the company had not been completely registered, nor had obtained a certificate of complete registration:—Held, that the clause at the end of s. 2, in the 7 & 8 Vict. c. 110, was an exception, and not a proviso, and that the defendant ought to have negated in the plea that the company was one which could not be carried into execution without the authority of parliament. *Bowfield v. Wilson*, 16 M. & W. 185; 16 L. J., Ex. 44; *S. P., Lawton v. Hickman*, 9 Q. B. 563; 4 Railw. Cas. 336; 16 L. J., Q. B. 20; 10 Jur. 543.

Proviso in Section—Presumption as to.—When one finds a proviso to a section, the natural presumption is, that, but for the proviso the

enacting part of the section would have included the subject-matter of the proviso. *Mullins v. Surrey (Treasurer)*, 5 Q. B. D. 170-173.

Effect of Saving Clause.—A local board of health, after having made a valuation as required by the Public Health Act, 1848, and other acts, duly gave a notice of their intention to make a rate under those acts. On the day when this notice expired, the acts under which it was made were repealed by the Public Health Act, 1875. The local board, not knowing this, proceeded to lay and collect the rate. The Public Health Act, 1875, is a consolidation act, and preserves the machinery and proceedings of the old acts. There is no difference in the kind or length of notice required, or in the estimate or the objects of the rate, but a slight alteration is made in the mode of valuing assessable property. The act contained a clause saving things duly done under the repealed acts. A question having arisen as to the validity of the rate:—Held, that the rate was valid, the valuation and notice being "things duly done" under the saving clause, and the rate itself in all material points being a good rate under the new act. *Reg. v. Yorkshire, West Riding (Justices)*, 1 Q. B. D. 220; 45 L. J., M. C. 97; 35 L. T. 358.

Under the Nuisances Removal Acts (18 & 19 Vict. c. 121, ss. 12, 13, and 29 & 30 Vict. c. 90, s. 19), justices made an order on the 15th of May, 1875, for the abatement of a nuisance and prohibiting the recurrence of the same. On the 11th of August, 1875, the Public Health Act, 1875 (38 & 39 Vict. c. 55), came into operation, and repealed the above Nuisances Removal Acts, but with a saving clause in s. 343 that such repeal should not affect any right or liability acquired, accrued or incurred under any enactment thereby repealed. A complaint was made before the justices for disobedience of the order, by allowing a recurrence of the nuisance, on the 12th of August, 1875. The justices refused to convict, on the ground that the order was gone by reason of the repealing statute:—Held, that the justices were wrong, on the ground that the defendant was liable to be convicted, as he had incurred a liability under the repealed enactment which was not affected by the repeal. *Barnes v. Edleston*, 1 Ex. D. 102; 45 L. J., M. C. 162; 34 L. T. 822.

Clause in Act saving Rights of Crown, Effect of.—Semble, that a saving clause in an act of parliament in favour of the crown refers to rights of property or rights in the nature of property which belong to the crown as crown property. *Yarmouth (Corporation) v. Simmons*, 10 Ch. D. 518; 47 L. J., Ch. 792; 38 L. T. 881 26 W. R. 802.

When Exception must be Pleaded.—Where a statute creating a penalty contains an exception in the enacting clause, the plaintiff must shew that the defendant is not within the exception; but where the exception comes by way of proviso, either in a subsequent section or statute, it is matter of defence, and must be pleaded. *Thibault v. Gibson*, 1 D. & L. 253; 12 M. & W. 88; 13 L. J., Ex. 2; 7 Jur. 1043.

In pleading usury, before the 17 & 18 Vict. c. 90, which abolishes the usury laws, the defendant need only have brought the transaction within 12 Ann. st. 2, c. 16; and if the plaintiff relied upon the 2 & 3 Vict. c. 37, as exempting the case

from the operation of the statute of Anne, that should have come by way of replication. *Derry v. Toll*, 5 Ex. 741; 20 L. J., Ex. 33.

17. OPERATION ON CONTRACTS.

Act Passed after Contract Made—Effect of.]—

The plaintiff gave a bond to the crown conditioned to be void if a certain railway was completed within a given time, and the defendants undertook to indemnify the plaintiff against all liability which he might incur in giving such bond. The railway was not completed, and the plaintiff, under the Railway Companies Act, 1867, which was passed after the giving of the bond, applied to the Board of Trade to authorize the abandonment of the railway and to cancel the bond, which was ordered upon condition that the money secured by it should be applied as assets of the company. The company was accordingly wound up, and the plaintiff paid, under an order of the court, a part of the money secured by the bond, which was then cancelled. The plaintiff brought an action to recover the amount so paid from the defendants on their undertaking to indemnify. On demurrer to the statement of claim:—Held, that the payment made by the plaintiff to obtain the cancelling of the bond was a liability incurred by him in giving the bond, for which the defendants were liable to indemnify him, although the Railway Companies Act, 1867, enabling the plaintiff to take proceedings to cancel the bond, was not passed when the indemnity was given. *Webster v. Petre*, 4 Ex. D. 127; 27 W. R. 662.

In an action by a trustee of a turnpike road against a lessee of tolls, he pleaded, that after the time of the demise to him, and before any rent became due, the 4 & 5 Vict. c. 33, passed, which took away certain of the tolls, and, therefore, the lease was void:—Held, bad. *Harris v. Morrice*, 10 M. & W. 260; 12 L. J., Ex. 42.

Where a corporation, previously to an act giving them compulsory powers of taking land, entered into an agreement for the re-sale of certain lands if the act should (as it did) authorize them to be taken, it had been held that such agreement was invalid, as being an abuse of the powers conferred by parliament, and as fettering the discretion of the corporation as to the quantity of land necessary for the purposes of the act. Subsequently an act was passed, by which it was enacted, that nothing therein contained should prejudice the rights under the agreement of the party taking under it, but that all its covenants and provisions should be as applicable to a purchase under that act as to a purchase under the act in contemplation of the passing of which the agreement was entered into:—Held, that by this act the legislature had recognized the agreement, and had removed the former objection to its validity. *Galloway v. London (Mayor)*, 1 L. R., H. L. 34; 35 L. J., Ch. 477; 14 L. T. 865.

Contract Illegal by Statute—Effect of Repeal of Statute.]—A contract declared by a statute to be illegal is not made good by a subsequent repeal of the statute. *Jacques v. Withey*, 1 H. Bl. 65.

Statute creating Public Offence—Commission of Act does not create Actionable Tort.]—A statute cannot make an act done in connexion

with a private contract an actionable wrong if it was not actionable independently of the statute. *Ward v. Hobbs*, 4 App. Cas. 13; 48 L. J., Q. B. 281; 40 L. T. 73; 27 W. R. 114.

Where a statute prohibited persons from sending animals affected with a contagious disease to market and inflicted penalties on any person so sending them, the act of sending them, if known to be so infected, was a public offence, but did not amount by implication to a representation that they were sound, and did not of itself raise, as between the vendor of the animals and the purchaser of them, any right on the part of the purchaser to claim damages in respect of an injury he had suffered in consequence of their purchase. *Ib.*

Exercise of Powers given by Act.]—A power to borrow money from the Public Works Loan Commissioners for the purpose of repairing churches must be exercised in exact accordance with the authority given, and the restrictions imposed, by the act itself. *Reg. v. All Saints, Wigan (Churchwardens)*, 1 App. Cas. 611; 35 L. T. 381; 25 W. R. 128.

A local act, for the management of the poor of Brighton, empowered the directors and guardians, when and as they should find it necessary to alter, enlarge, extend and repair the existing poorhouse, or to erect other houses or buildings for the better receiving, employing and maintaining the poor, and provided that all contracts or agreements made between the directors and guardians and any other person or persons relating to "any act, matter or thing to be done in pursuance of that act," should be reduced into writing and signed by the parties thereto. By 7 & 8 Vict. c. 101, commissioners were for the first time empowered to direct that schools should be built in parochial districts:—Held, that a contract made by the directors and guardians, by order of the poor-law commissioners, in relation to the erection of an industrial school within the parish, was not a contract for "a thing to be done in pursuance of the local act," and therefore was not required by that act to be in writing. *Armstrong v. Bowdidge*, 16 C. B. 358.

— Agreement Inconsistent with Act of Parliament.]—By an agreement between the N. local board and the C. local board, it was agreed that the N. board should make a sewer and allow the sewers of the C. district to drain into it, but the sewage of any other districts or places was not to be permitted by the C. board to pass into their sewers so as to discharge into the sewer to be made by the N. board. Under acts of parliament then in existence the owner of premises beyond the limits of a district had power to make a sewer to communicate with the sewers of the district, and by an act subsequently passed similar powers were given:—Held, that the provisions of the agreement were overruled by the subsequent act, and that the N. board could not restrain the C. board and the owners of premises beyond their district from making sewers which would discharge into the sewer of the N. district:—Held, also, that the agreement must be taken to have been made subject to the provisions of the law then existing, under which the owners of premises beyond the C. district had similar powers. *Newington*

Local Board v. Cottingham Local Board, 12 Ch. D. 725 ; 48 L. J., Ch. 226 ; 40 L. T. 58.

Covenant Repealed by Act.—By an act, a company was incorporated by the name of "The Company of Proprietors of the Chester Canal Navigation Company," for making a canal from Chester to Middlewich. By another act, another company was incorporated by the name of "The Company of Proprietors of the Ellesmere Canal," to make a canal from Shrewsbury to the River Mersey at Netherpool, in Cheshire. By another act, the Ellesmere Canal Company was empowered to take from the River Dee, at Llandisilio, in Denbighshire, a supply of water for their canal, and was also empowered to take water from Bala lake, for supplying the River Dee with as much water as they should take from it for their canal, or more ; and for that purpose to make cuts from the lake to communicate with the River Dee, at and with such embankments, trenches, and other works as might be necessary for the purpose. In 1807 the Ellesmere Canal Company covenanted with W., who was seised in fee of Bala lake, that they would not at any time thereafter draw off from the lake water for the purpose of their canal to a lower level than the mark on a standard to be erected near the Bala lake, indicating the mean summer level of the waters of the lake, nor would at any time embank or impound up the water more than one foot above such level. In 1813 the Chester Canal Company and the Ellesmere Canal Company were by statute united into one company by the name of "The United Company of Proprietors of the Ellesmere and Chester Canals." By a subsequent local statute in 1827, all the four previous acts were repealed, and the proprietors of the two companies were reunited into a new company, entitled, "The United Company of Proprietors of the Ellesmere and Chester Canals," for maintaining the former canals then already completed and making new cuts, and it was enacted, that all contracts, covenants and agreements entered into by virtue of the powers contained in the repealed acts should remain in full force as if the same had been made under the powers contained in that act ; and the company was authorized to construct such or so many weirs, embankments and other works at or near Bala lake, and to do and execute all such things as should be necessary for pounding up and drawing off the water in and from the pool, so as to be thereby enabled at all times to replace in or restore to the River Dee an equal or greater quantity of water than should or might be taken therefrom by the united company by means of the works at Llandisilio for the purpose of supplying the canal therewith. By another act it was enacted, that the company should thenceforth be called by the name of "The Shropshire Union Railways and Canal Company," and that all persons should have the same rights and remedies against the Shropshire Union Railways and Canal Company which, before the passing of that act, they had against the united company of proprietors of the Ellesmere and Chester Canal :—Held, in an action by the devisee of W. against the last-mentioned company, for the breach of the covenant by impounding the water of Bala lake to a height of more than one foot above the mark on the standard, whereby its waters overflowed and damaged the plaintiff's land, that the covenant

was repealed by the act in 1827, as to all acts bona fide done by the company, under its provisions for the purpose of restoring to the River Dee a quantity of water equal to what they should abstract for the use of the canal by means of the works at Llandisilio. *Wynn v. Shropshire Union Railways and Canal Company*, 5 Ex. 420.

When Act compels a Breach of Covenant.—Land was demised to trustees for a parish, they covenanting to build a workhouse thereon, and to use, occupy, possess and enjoy the premises, for the sole use, maintenance, and support of the poor of the parish, and not to convert the building or the land, or employ the profits to any other use, intent or purpose whatsoever. Proviso for re-entry on breach of the covenant. The house was built, and together with the land used agreeably to the covenant. Afterwards the 4 & 5 Will. 4, c. 76, passed, and the poor-law commissioners incorporated the parish in a union, and removed all the paupers to the union. The workhouse became uninhabited, and was locked up, and the land was let at a rack-rent, which was applied in aid of the poor-rates. On ejection brought (three years afterwards) for breach of the covenant :—Held, that no breach of the covenant appeared ; but, semble, that a breach caused by the compulsory operation of the statute would have been thereby excused. *Doe d. Anglesea (Lord) v. Rugeley (Churchwardens)*, 6 Q. B. 107 ; 13 L. J., M. C. 137 ; 8 Jur. 615.

A landowner who has covenanted in the usual form that neither he nor his assigns shall build upon his land, is discharged from his covenant after selling the premises to a railway company under its compulsory powers, as the company becomes an assignee of the land, not by the voluntary act of the former owner, but by compulsion of law. *Baily v. De Crespigny*, 4 L. R., Q. B. 180 ; 38 L. J., Q. B. 98.

The defendant let the basement of a store to the plaintiff, and covenanted to keep the premises in proper repair and condition, so that the same might be available for storing cartridges, and for quiet enjoyment by the plaintiff. Other parts of the store were let to other persons for the storage of gunpowder. Soon afterwards the Explosives Act, 1875, was passed, making it illegal to store cartridges and gunpowder in the same store without a licence, under pain of forfeiture. On the act coming into operation the defendant removed the cartridges which the plaintiff had deposited in the store, and gave notice that he would inform the authorities if the plaintiff stored any more :—Held, that there had been a trespass but no eviction by the defendant, and that there had been no breach of covenant by the defendant, the covenant to keep the demised premises in proper condition for storing cartridges only referring to physical condition, and there being no obligation on the defendant to procure a licence to make the storage legal notwithstanding the act. *Newby v. Sharpe*, 8 Ch. D. 39 ; 47 L. J., Ch. 617 ; 33 L. T. 583 ; 26 W. R. 685—C. A.

18. STATUTORY FORMS AND CONVEYANCES.

Of Notice.—If a particular form of a notice or an order is prescribed by a private act, it must be fully set out, and precisely pursued, and

an allegation that due notice was given is not sufficient. *Rez v. Croker*, Cowp. 30.

And a defective notice under a private act is not cured by the appearance of the party. *Id.*

Of Conviction.—In an action against a justice of the peace for a false imprisonment, who justified under a conviction under the Vagrant Act, 5 Geo. 4, c. 83 :—Held, that the conviction was not vitiated by the omission of the word "part" before "of Great Britain," in the recital of the title of the statute, as directed in the form given by the act. *Nixon v. Nanney*, 1 G. & D. 370; 1 Q. B. 747.

Of Bastardy Order.—The 8 & 9 Vict. c. 10, s. 1, reciting 7 & 8 Vict. c. 101, declares that all proceedings in matters of bastardy, under the recited act, which shall have been set forth "according to the forms in the schedule hereunto annexed, or to the like tenor and effect, shall be taken to have been valid and sufficient in law." Where an order of two justices on a putative father of a bastard child was in substance in the form given in the schedule :—Held, that it was no objection to the order that it did not state the evidence to have been given on oath, as the court would not intend that the blank in the form given in the act, after the words "evidence of such woman," was to be filled up with the words "on oath," or "on affirmation." *Reg. v. Cheshire (Justices)*, 2 New Sess. Cas. 161; 3 D. & L. 337; 15 L. J., M. C. 3; 10 Jur. 311.

An order in bastardy, under 7 & 8 Vict. c. 101, s. 3, stated, that application had been made and summons granted by a justice of the peace, usually acting in the division in which the mother resided :—Held, that, under 8 & 9 Vict. c. 10, the word "in" was to be taken to be synonymous with the word "for" contained in the forms given in the schedule, and that, consequently, the order shewed jurisdiction on the part of the magistrate granting the summons. *Reg. v. Milner*, 3 D. & L. 128; 10 Jur. 334.

Of Affidavit.—By 23 & 24 Geo. 3, c. 39 (Irish), for the encouragement of planting timber trees, tenants for lives by settlement, impeachable of waste, or tenants for years exceeding fourteen unexpired, who should plant or cause to be planted any timber trees, might fell and dispose of them at any time during the term. To secure the landlords, s. 2 enacted, that "any tenant so planting," &c., "should within twelve calendar months after such planting lodge with the clerk of the peace of the county," "an affidavit," &c., "reciting the number and kinds of trees, and the name of the lands, in form following :—I, A. B., do swear that I have planted," &c., "on the lands of —, in the parish of —, held by me from —, the following trees [here reciting the number and kinds of trees.]" The form throughout was couched in the first person, and in fact, in its terms, was only applicable to a tenant for years. A lessee for three lives having planted many trees, his agent made the affidavit required, in his own name, as agent for the lessee :—Held, that as the form given in the statute could not possibly apply to the majority of the cases which its provisions sought to meet, it did not mean that no one but the tenants was to make the affidavit; and that the form, if another person made the affidavit, might be

varied. *Mountcashell (Earl) v. O'Neill (Viscount)*, 5 H. L. Cas. 937; 2 Jur., N. S. 1030.

Conveyances.—Where a statute points out the manner in which a canal company shall convey lands, and enacts that "every such conveyance shall be valid," it does not cure any defect in the title of lands so conveyed. *Ward v. Scott*, 3 Camp. 284.

By the Bedford Level Act, it was enacted, that all conveyances by indenture of the 95,000 acres allotted to the Earl of Bedford, or any part thereof, entered with the registrar of the levels, should be of equal force to convey the freehold and inheritance, as if the same were, for valuable considerations, enrolled within six months in one of the courts of record at Westminster; and that no lease, grant or conveyance of or charge out of or upon the 95,000 acres or any part thereof, except leases for seven years or under in possession, should be of force but from the time it should be entered with the registrar. Conveyances were afterwards made of part of the 95,000 acres, but were not registered :—Held, that those conveyances were nevertheless valid for all purposes, except for entitling the grantees to the privileges conferred by the act on the owners of lands within the level, and for the other purposes of the act. *Willis v. Brown*, 10 Sim. 127.

A conveyance by the commissioners of the court for the Sale of Incumbered Estates in Ireland is, under 12 & 13 Vict. c. 77, s. 27, "effectual to pass the fee-simple discharged of all former estates," subject only to "such tenancies, leases, &c., as shall be expressed therein." Where such a conveyance is duly executed by the commissioners, it becomes under s. 49 conclusive evidence that everything required by the act to be done has been rightly done. *Ilorke v. Errington*, 7 H. L. Cas. 617; 9 Ir. C. L. R. 357; 5 Jur., N. S. 1227.

A conveyance made under 21 & 22 Vict. c. 72, is, by s. 85, for all purposes conclusive evidence that all previous proceedings leading to such conveyance have been regularly taken. Where, therefore, proceedings had been taken for the sale of estates, and their sale and resale had been directed in a manner which was declared by the House of Lords to be marked with great irregularity, but the party complaining had not brought the matter before the court of appeal until after the conveyances had been executed :—Held, that the house was precluded by the provisions of the statute from affording the appellant relief against the consequences of such irregularities. *Power v. Reeves*, 10 H. L. Cas. 645.

Transfer of Debentures.—By a local and personal act, transfers of debentures were to be by indorsement by deed, and in a given form, and were to be entered in the books of the company, and "after such entry but not till then, the assignee was to be entitled to the benefit :"—Held, that this did not apply to a transfer by act of law, as in the case of bankruptcy. *Lane v. Smith*, 14 Beav. 49; 15 Jur. 735.

19. REMEDIES GIVEN BY STATUTE.

When Statute gives no Remedy.—The plaintiffs and defendant possessed adjoining collieries in the Forest of Dean, which were gales subject

to 1 & 2 Vict. c. 43, and the rules made thereunder. The defendant's gale being drained by a steam-engine, he was bound by rule 19 to work the engine so as to prevent the water of his gale from falling into plaintiffs' gale. The defendant stopped his engine, whereby the plaintiffs' gale was flooded and damaged. Sect. 29 provides that a person working his gale contrary to the rules shall be liable to forfeit it, and may be evicted by her Majesty; and in addition thereto "the compliance with such rules may be enforced by and on behalf of her Majesty, or by any other person, by injunction of her Majesty's Court of Exchequer, or otherwise, in such manner as the court shall on application think fit:—Held, that the plaintiffs had a statutory private right which had been violated by non-compliance with the rules on the part of the defendant; that s. 29 gave no specific remedy for such breach of duty, and that the plaintiffs were therefore entitled to maintain an action at common law to recover damages. *Ross v. Price*, 1 Ex. D. 269; 45 L. J., Ex. 777; 34 L. T. 535; 24 W. R. 786.

When a statute creates a duty with the object of preventing a mischief of a particular kind, a person who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind, is not entitled to maintain an action in respect of such loss. *Gorris v. Scott*, 9 L. R., Ex. 125; 43 L. J., Ex. 92; 30 L. T. 431; 22 W. R. 575.

A shipowner undertook to carry sheep from a foreign port to England. On the voyage some of the sheep were washed overboard by reason of the shipowner's neglect to take a precaution enjoined by an order of privy council, which was made under the authority of the Contagious Diseases (Animals) Act, 1869, s. 75:—Held, that the object of the statute and the order being to prevent the spread of contagious disease among animals, and not to protect them against perils of the sea, the owners of the sheep could not recover. *Ib.*

The mere fact that the breach of a public statutory duty has caused damage does not vest a right of action in the person suffering the damage against the person guilty of the breach; whether the breach does or does not give such right of action must depend upon the object and language of the particular statute. *Atkinson v. Newcastle and Gateshead Waterworks Company*, 2 Ex. D. 441; 46 L. J., Ex. 775; 36 L. T. 761; 25 W. R. 794—C. A. Reversing *S.C.*, 6 L. R., Ex. 404; 20 W. R. 35.

When a statute creates an obligation, but gives the person injured by its violation no remedy, he can have his action for damages at common law. *Handley v. Muffat*, *infra*.

— **Or Prescribes no Procedure.**—When a statute refers generally to powers to enforce obedience, and does not prescribe any procedure, those powers generally referred to would be the powers of the court in which the proceedings are deemed to be taken. *Green v. Penzance (Lord)*, 6 App. Cas. 675; 51 L. J., Q. B. 25; 45 L. T. 353; 30 W. R. 218—H. L. (E.)—Per Selborne (Lord), L. C.

Statute giving a Particular Remedy.—Where a statute creates an offence and defines particular remedies against the person committing that offence, *prima facie* the party injured can

avail himself of the remedies so defined and no other. I see no reason to call that rule in question; but it must be examined with reference to the terms in which the statute deals with the subject. *Brain v. Thomas*, 50 L. J., Q. B. 663—C. A.—Per Selborne (Lord), L. C.

It is a settled rule that if a statute creates a new right and gives a particular remedy for enforcing it, there is no other remedy. *West v. Downman*, 14 Ch. D. 111; 42 L. T. 340; 29 W. R. 6.

By a local act, for the improvement of the pilchard fishery within the bay of St. Ives, the passing out of one stem or station into another was prohibited under a penalty; other sections contained specified prohibitions, and for each case a specific penalty with a specific mode of recovering it before magistrates was provided. A declaration shewed that the plaintiff having a right under the act, and in the exercise of it being about to enclose fish in his net, was obstructed by the defendant's capture of them in another net:—Held, that the action would not lie; the right being created by statute, and a specific remedy for its infringement being provided by the same statute. *Sterrens v. Jeacocke*, 11 Q. B. 731; 17 L. J., Q. B. 163; 12 Jur. 477; *S. P.*, *Reg. v. Beat*, 1 Den. C. C. 157; 2 C. & K. 179.

When an act creates an obligation, and enforces its performance in a specified manner, the performance of it can only be enforced in the manner pointed out by the act, and a person injured by the violation of the obligation so created has no remedy but that given by the act. *Handley v. Muffat*, 21 W. R. 231.

When a statute creates a new offence by prohibiting and making unlawful anything which was lawful before, and appoints a specific remedy against such new offence by a particular method of proceeding, that particular method of proceeding must be pursued, and no other. *Reg. v. Lovibond*, 24 L. T. 357; 19 W. R. 753.

— **Exception to Rule.**—There are two exceptions to this rule—(1) The ancillary remedy in equity by injunction to protect a right; that is, a mode of preventing that being done which if done would be an offence. (2) The remedy created by s. 25, sub-s. 8 of the Judicature Act. *Cooper v. Whittingham*, 15 Ch. D. 501; 49 L. J., Ch. 752; 43 L. T. 16; 28 W. R. 720.

— **Within Specified Time.**—A railway company constructed a culvert to carry off water from land adjacent to the railway. No complaint was made by the owner of the land of the insufficiency of the culvert, and no application was made to justices for additional accommodation works within the five years limited by the Railways Clauses Consolidation Act, 1845, s. 73. An injury having subsequently arisen to the land from the insufficiency of the culvert to carry off all the water, an action in respect of such injury was brought by the occupier against the railway company, in which it was alleged that the culvert was insufficient:—Held, on demurrer, that the action would not lie. *Colley v. London and North-Western Railway Company*, 5 Ex. D. 277; 49 L. J., Ex. 575; 42 L. T. 807; 29 W. R. 16; 44 J. P. 427.

Under Special Act.—An act empowered commissioners to borrow money upon the security of

the rates for the purposes of local improvements, and provided that they should every year pay off 100*l.* at the least of the moneys so borrowed to such of the mortgagees of the rates as should be selected by ballot. All interest upon the mortgages was duly paid, and the prescribed mode of payment of the annual instalments was observed. The mortgagees gave the commissioners notice requiring them to pay off their mortgage in six months. The commissioners refused to do so, and the mortgagees filed a bill to establish their right to be paid off and for a receiver of the rates:—Held, that they had no right to have their mortgage debt paid off, except under the provisions of the act, and that the court had no jurisdiction to appoint a receiver of parish rates, and the bill was dismissed. *Preston v. Great Yarmouth (Mayor)*, 41 L. J., Ch. 310; 26 L. T. 235. Affirmed, 7 L. R., Ch. 655; 41 L. J., Ch. 760; 27 L. T. 87; 20 W. R. 875.

Where more than one Remedy Exists.]—An act giving a summary remedy, though in terms apparently prescribing such remedy, is cumulative, and does not take away a previous right to sue by action. *Sharp v. Warren*, 6 Price, 131.

Subsequent statutes, which only add accumulative penalties, do not repeal former statutes. *Rez v. Jackson*, Cowp. 297.

Where a statute gives accumulated damages to the party grieved, it is not a penal statute. *Woodgate v. Knatchbull*, 2 T. R. 154.

If an act, by general words, purports to confer a power on several donees, one of whom possesses the same power more amply at common law, as incident to his estate, the statute will not be intended to apply to him, so as by implication to abridge his power; and acts of his, therefore, which the statute would have authorized, will be referred to his common-law right. *Clayton, Ex parte*, 1 Russ. & Mylne, 369.

Where a statute confers a right and annexes penalties for its infringement, an action for damages will not lie against a party infringing the right by the party aggrieved. *Stevens v. Jeacocke*, 11 Q. B. 731; 17 L. J., Q. B. 163; 12 Jur. 477.

The 7 & 8 Vict. c. 112, s. 118, required that every ship navigating between the United Kingdom and any place out of the same should keep constantly on board a sufficient supply of medicines suitable to accidents and diseases arising on sea voyages, and in case any default were made in keeping such medicines, the owner of a ship was liable to a penalty at the suit of any person, and was to be applied in part to the informer and as to the residue to the Seamen's Hospital Society:—Held, that the penalty was recoverable for a breach of the public duty created by the statute, and that the provisions of the statute did not interfere with the common-law right of a seaman serving on board a vessel to maintain an action for special damage resulting to him from the breach of the duty. *Couch v. Steel*, 3 El. & Bl. 402; 2 C. L. R. 940; 23 L. J., Q. B. 121; 18 Jur. 515.

20. MODE OF CITATION AND REFERENCE.

Title of.]—In reciting a statute, in pleading, the whole of its title should be stated, though it comprises several other subject-matters besides that to which the pleading relates. *Deck v. Pererley*, 11 M. & W. 845.

Where the title of an act is not accurately

stated, but still so stated as to enable the judges to know that there can be but one act referred to, such misstatement is immaterial. *Reg. v. Westley*, Bell, C. C. 193; 29 L. J., M. C. 35; 5 Jur., N. S. 1362.

A declaration by a public officer of a banking company recited the 7 Geo. 4, c. 46, as "An act of parliament made and passed in the seventh year of the reign of George the Fourth, for (amongst other things) the better regulating Co-partnerships of Bankers in England:—"Held, a sufficient recital. *Esdaile v. Maclean*, 15 M. & W. 277.

Year of Passing.]—The statute written in the statute book under the year secundo (vulgo primo) Jac. 1, c. 15, ought to be pleaded as of the first year. *Bryant v. Withers*, 2 M. & S. 123; 2 Rose, 8.

There is no parliament roll for the 29th of Eliz.; and statutes passed in that year have relation to the first day of the sessions, which commenced in the 28th year of that reign. *Rumsey v. Tuffnell*, 2 Bing. 257; 9 Moore, 425.

The description of an act in a conviction, as having been passed in the 25th year of the King's reign, when in fact the parliament in which the act was passed was continued by prorogation from the 24th to the 25th year of the reign, is not a misdescription nor ground of objection. *Rez v. Windsor*, 2 Chit. 513. See *Nixon v. Nanney*, 1 G. & D. 370; 1 Q. B. 747.

In an action against a sheriff and his officer for extortion, in taking, for executing a writ of execution, more than they were entitled to, under 28 (commonly called 29) Eliz. c. 4, the declaration recited the statute, under a videlicet, as of the 29 Eliz., instead as of the 28 Eliz.:—Held, immaterial. *Holmes v. Sparks*, 12 C. B. 242; 21 L. J., C. P. 194; 16 Jur. 975.

Where a statute is passed in a session of parliament which commenced in one year of a reign but is continued into another, it is incorrect to describe the statute as passed in both years, but it may be described as a statute passed in a session of parliament holden in both years. *Gibbs v. Pike*, 8 M. & W. 223; 9 D. P. C. 731; *S. P.*, *Ratcliffe's case*, 2 Lewin, C. C. 57.

A statute passed in a session begun in the second, and continued in the third year of a reign, must not be pleaded as passed in the second and third years of the reign, although such act is recited in a later statute as "passed in the second and third years." *Rez v. Bierr*, 3 N. & M. 475; 1 A. & E. 327.

On an indictment for a conspiracy, laying in the indictment that the defendants knew the party conspired against to bear a certain character, and to be liable, in that character, to the operation of "an act passed in the second and third years," &c., adding the title of the act correctly, the judgment was arrested for such misrecital. *Id.*

II. PROOF OF.

Generally.]—If counsel rely on an act, and cite it as an act to be judicially noticed, the opposite party has no right to insist that the counsel citing it should produce a copy of it printed by the Queen's printer. *Forman v. Dawes*, Car. & M. 127.

Sufficiency of.]—In ejectment for land, in

order to shew that an act of Edw. 6 had passed for disavelling the land, after evidence of a clerk in the parliament office, who had the custody of the records in the House of Lords, that no such act was to be found on the parliament roll, a calendar was put in, purporting to contain the titles of sixty acts passed in 2 & 3 Edw. 6, that numbered 40 being called "An act for disavelling Lands in Kent." The calendar so produced was made in 1640. Two calendars were kept in the office, one called the long calendar, the other the short calendar; and the practice had been to enter upon the long calendar such acts as passed, as soon as they had received the royal assent, but not before, with their numbers:—Quære, whether this was sufficient evidence that such an act really did pass. *Doe d. Bacon v. Brydges*, 7 Scott, N. R. 333; 6 M. & G. 282; 13 L. J., C. P. 209.

—**Private Act.**—An act for the regulation of the affairs of an insurance company containing a clause directing that it should be deemed and taken to be a public act, and should be judicially taken notice of as such by all judges, justices, and others, without being specially pleaded, is sufficiently proved for all legal purposes, by the production of a copy purchased at the office of the King's printer. *Beaumont v. Mountain*, 4 M. & Scott, 177; 10 Bing. 404.

Where copies of a private act, printed by the Queen's printer, are made evidence, counsel cannot make an objection founded on that act a ground of an application for a nonsuit, if the act has not been given in evidence on the part of the plaintiff, because it is not an act to be judicially noticed, and is only before the court when given in evidence. *Grenwolde v. Kemp*, Car. & M. 635.

An act, private in its nature, is not made admissible against strangers by a clause declaring "that it shall be deemed and taken to be a public act, and shall be judicially taken notice of without being specially pleaded." *Brett v. Beales*, M. & M. 421.

—**Local Act.**—A local act, with a clause declaring it to be a public act, and that it shall be taken notice of as such without being specially pleaded, need not be proved either to have been examined with the parliament rolls, or to have been printed by the King's printer. *Woodward v. Cotton*, 1 C., M. & R. 44; 6 C. & P. 457; 4 Tyr. 689.

Of Preamble.—A preamble to an act, reciting the existence of outrages, and making provision against them, is admissible to prove an introductory averment in an information for a libel, that divers acts of outrage had been committed. *Rez v. Sutton*, 4 M. & S. 532.

Of Recital.—But the recital in an act of parliament, either of fact or of law, is not conclusive. *Reg. v. Haughton*, 1 El. & Bl. 501; 22 L. J., M. C. 89; 17 Jur. 455.

Parliamentary Declaration.—In the reign of Richard 2, an earldom was created of an apparently non-descendible dignity. The earl was beheaded by Henry of Lancaster when he invaded England, and before he received or even claimed the crown. There was no evidence whether there had been any trial, or form of trial before the beheading. When Henry 1

was declared king a proceeding took place in parliament in which the commons were represented to have prayed that all that was done in the pursuit, arrest and judgment of the earl might be declared good for the common profit of the realm. The king, with the assent of the lords temporal, declared that it was so. This proceeding was entered on the placita coronæ in parliament, but not on the rolls of parliament. Semble, that this was not an act of parliament. *Willes Peerage claim*, 4 L. R., H. L. 126.

But it was a solemn declaration pronounced by the king in open parliament at the prayer of the commons, and with the advice of the lords, and must be taken as a parliamentary declaration that, whatever had been the nature of the grant to the earl, it was wholly at an end. *Ib.*

STAYING PROCEEDINGS.

See PRACTICE

STEALING.

See CRIMINAL LAW.

STEWARD OF MANOR.

See COPYHOLD.

STOCK.

I. NATURE OF, 2063.

II. PUBLIC, GOVERNMENT, OR PARLIAMENTARY.

1. *Bank of England*, 2063.
2. *Proprietors*, 2064.
3. *Transfer*, 2065.
4. *Sale and Purchase*.
 - a. *Contract Note*, 2069.
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1. *To whom Payable*, 2073.
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VI. BROKERS' RIGHTS AND LIABILITIES, 2081.

VII. JOBBERS' RIGHTS AND LIABILITIES, 2085.

VIII. INDEMNITY FOR CALLS, 2088.

IX. DIFFERENCES AND TIME BARGAINS, 2093.

X. OTHER MATTERS.—*See COMPANY.*

I. NATURE OF.

What is.]—Stock is a chose in action. *Rea v. Capper*, 5 Price, 217.

It cannot be sued for as money. *Nightingale v. Devisme*, 2 W. Bl. 684.

The interest in stock is nothing but a right to receive a perpetual annuity subject to redemption. *Wildman v. Wildman*, 9 Ves. 177.

Omnium is stock. *Brown v. Turner*, 7 T. R. 630; 2 Esp. 631; *S. P., Oliverierson v. Coles*, 1 Stark. 496.

Stamping.]—A bond for foreign stock signed in Paris, but issued in England, did not require an English stamp before the passing of 25 Vict. c. 22. *Yrisarri v. Clement*, 2 C. & P. 223.

Raising and Transferring.]—Raising and transferring stock is not a nuisance at common law. *Garrard v. Hardy*, 5 M. & G. 471; 6 Scott, N. R. 459.

Buying and Selling.]—A declaration stated that the plaintiff bought of and the defendant sold to the plaintiff foreign stock, to wit, 20,000 Spanish active bonds, at the rate of 26l. 5s. for every 100l. of the stock, and promised the plaintiff to deliver the bonds. Breach, non-delivery:—Held, that the words "bought" and "sold" were to be construed with reference to the subject-matter, and did not mean the actual sale of specific bonds, but merely a contract for sale, which would be performed by the delivery of any bonds of the same description. *Heselline v. Siggers*, 1 Ex. 856; 18 L. J., Ex. 166.

When exchequer bills, bonds, scrip, Spanish stock, and securities of that kind which pass by delivery merely, become the subject of a contract to buy and a contract of actual sale, as the transfer rests not so much on contract as on delivery. *Ib.*

Such a contract is not a sale of goods, wares and merchandizes, within the 17th section of the Statute of Frauds. *Ib.*

II. PUBLIC, GOVERNMENT, OR PARLIAMENTARY.

1. BANK OF ENGLAND.

Responsibility on Transfer.]—The Bank of England stands in relation to stock as a depositary of goods in relation to the goods, and therefore can only be responsible for a transfer of stock after distinct notice given to it of an existing claim upon the stock. *Humberstone v. Chase*, 2 Y. & C. 209.

Title affected by Trust.]—A memorandum on the transfer of stock, signifying a flaw respected in the title, must not be allowed, nor any secret trust as against the party who

has open legal title affect the bank. *Lady Mayo's case*, Loft, 65.

The bank is not to look beyond the legal title to the trusts, and therefore cannot prevent an executor from selling out or transferring stock. *Bank of England v. Parsons*, 5 Ves. 665.

Liability for Delay.]—If the Bank of England delays to pass a power of attorney for the transfer of stock for an unreasonable time, they are liable to answer in damages for a loss sustained, in consequence of an intermediate fall of the funds. *Sutton v. Bank of England*, R. & M. 52; 1 C. & P. 193.

Proof of Death and Identity of Stockholder.]

—The Bank of England is a body having a discretion to exercise for the benefit of the public as well as itself; and is not bound to accept as sufficient evidence of the death of a stockholder on a joint account in its books, such proof as would satisfy the Court of Chancery. *Prosser v. Bank of England*, 13 L. R., Eq. 611; 41 L. J., Ch. 327; 26 L. T. 60; 20 W. R. 362.

P. died in 1871. At her death New Three per Cent. Annuities, and no other fund, were standing in her name, and in the names of the applicants jointly in the books of the bank. The burial of P. was entered in the proper parish register. An extract from the entry, together with a statutory declaration of her identity, was forwarded to the bank, in order that they might affix to her name in their books the usual memorandum of death. The bank, however, would not do so on the ground that "the declaration did not aver that the extract had been compared with the original register for the parish where P. was buried." A motion for an injunction to restrain the bank from continuing the name of P. in their books without the memorandum was refused with costs. *Ib.*

2. PROPRIETORS.

Purchase in Joint Names—Survivorship.]

Where stock in the public funds is purchased in the joint names of two persons, the survivor is at law absolutely entitled to it. *Crossfield v. Such*, 8 Ex. 825; 1 C. L. R. 663; 22 L. J., Ex. 325.

Tenancy in Common, or Joint Tenancy.]

—Stock purchased in the joint names of two sisters, and a balance to their joint account at their bankers':—Held, under the circumstances, to belong to them as tenants in common, notwithstanding they had contributed equally, the court looking to the source whence the funds were derived, viz. rents of land, of which the two were tenants in common. *Robinson v. Preston*, 4 K. & J. 505; 27 L. J., Ch. 395; 4 Jur., N. S. 186.

The rule as to the investment of moneys in the names of two or more persons in the purchase of property is this: if invested in unequal shares, the purchasers remain tenants in common of the purchased property; if in equal shares, and the matter on the face of it purports to be a joint tenancy, it is considered to be a joint tenancy, and no equity is supposed to intervene by which it can be reduced to a tenancy in common. *Ib.*

Two sisters carried on business as farmers. They had a joint account at their bankers', and an establishment and purse in common. They in-

vested part of their money in the purchase of consols, in their joint names, and they had a balance due to them on their banking account, besides a sum due to them from their bankers on deposit notes:—Held, on the death of one, that the two sisters were joint tenants of the consols, and tenants in common of the balance and of the deposit notes. *Bone v. Pollard*, 24 Beav. 283.

Two sisters, spinsters, executrices and beneficiaries under their father's will, transferred a portion of the funds bequeathed to them as tenants in common into their joint names, and afterwards, out of the proceeds of that of which they were tenants in common, purchased stock in their joint names. They lived together, had all things in common, and made mutual wills in each other's favour:—Held, first, that the transfer made them joint tenants of the fund transferred. *Hughes, In re*, 24 L. T. 415; 19 W. R. 468.

Held, secondly, that they were joint tenants of the stock afterwards purchased, though purchased out of the proceeds of a fund of which they were tenants in common. *Ib.*

— **Right of Survivorship.**—A husband, before making his will, purchased stock in the names of himself, his wife, and a third person. The husband died:—Held, that the stock became, by survivorship, the absolute property of the wife. *Eykyn, In re*, 6 Ch. D. 115; 37 L. T. 261.

Transfer—Revocation by Will—Resulting Trust.—A testator, having first made a will in favour of the person with whom he was cohabiting, afterwards transferred stock into the joint names of himself and that person. Subsequently to this transfer he revoked his first will and made another in favour of a third person, a daughter of the original legatee, to whom by the second will nothing was given:—Held, that there was no resulting trust for the testator in the stock, and that the joint transferee was entitled by survivorship. *Tunbridge v. Care*, 25 L. T. 150; 19 W. R. 1047.

Stock, which had been acquired by a lady as the survivor of her husband, who had transferred it into their joint names, was transferred by her into the names of herself, her daughter, who had recently married, and her daughter's husband; and the dividends of the stock were enjoyed by the transferor during her life. The daughter predeceased her mother, and the son-in-law survived them both:—Held, that there was no resulting trust, and that the son-in-law was entitled to the fund. *Batstone v. Salter*, 10 L. R., Ch. 431; 44 L. J., Ch. 760; 33 L. T. 4; 23 W. R. 816.

Investment Void under 13 Eliz. c. 5.—An investment of money in the purchase of stock, in the names of trustees, upon trust for the children of the settlor, he not having at the time sufficient property, besides the money so invested, to pay his debts, is void under 13 Eliz. c. 5, because by 1 & 2 Vict. c. 110, s. 12, money or stock may be taken in execution; and therefore the effect of such a settlement would be to delay, hinder, or defraud the creditors of the settlor. *Barrack v. McCulloch*, 3 Kay & J. 110; 26 L. J., Ch. 105; 3 Jur., N. S. 180.

3. TRANSFER.

By Married Woman—When Allowed.—A feme

covert executrix having obtained an order for the protection of her property, is entitled to a transfer of stock standing in the name of her testator, without the concurrence of her husband. *Bathe v. Bank of England*, 4 Kay & J. 564; 27 L. J., Ch. 630; 4 Jur., N. S. 505.

A fund in court belonging to a married woman was ordered to be transferred in the books of the Bank of England to her name as a married woman, entitled to her separate use, according to the provisions of the Married Women's Property Act, 1870, s. 3. *Butlin, In re*, 23 L. T. 523; 19 W. R. 241.

A married woman and her daughter were entitled to a fund in court, subject to a power of appointment by the married woman over her life interest. An order was made with the consent of both, that the fund be transferred to the separate use of the mother. *Bartholmew or Bartholomew, In re*, 23 L. T. 433; 19 W. R. 95.

The Married Women's Property Act, 1870, does not enable a married woman who is entitled to stock for her separate use which is standing in her name jointly with other persons, to join in the transfer of such stock without the concurrence of her husband. *Howard v. Bank of England*, 19 L. R., Eq. 295; 44 L. J., Ch. 329; 31 L. T. 871; 23 W. R. 303.

To Trustees for Creditors.—Where a trust deed has been executed for the benefit of creditors, and registered, and the deed contains a general assignment of property to the trustees, the trustees are entitled to require from the Bank of England a transfer of bank stock standing in the name of the debtor and belonging to him, without the debtor's concurrence in the transfer, or in case of his death, without the concurrence of his legal personal representative. *Price, In re*, 2 L. R., Ch. 662; 36 L. J., Bk. 24; 16 L. T. 760; 15 W. R. 1066.

Agreement to Pay for Information given.—An agreement to pay a percentage upon the day on which any money should be received by the defendant, through the means of the plaintiff's information, does not entitle the plaintiff to the stipulated reward, upon the transfer of stock, in consequence of such information, although he might afterwards receive the dividends thereon. *Jones v. Brinley*, 1 East, 1; 3 Esp. 205.

Unclaimed Stock—Transfer to Commissioners—Re-Transfer.—A legacy to an infant was invested in stock in the names of two executors, and the dividends not having been claimed for ten years the stock was transferred to the Commissioners for the Reduction of the National Debt. One of the executors having died, the survivor presented a petition for a re-transfer of the stock:—The court, without requiring the concurrence of the beneficiaries, made an order directing the stock to be transferred to him, and that he should thereout pay the costs of the attorney-general and the commissioners. *Ackland, In re*, 26 L. T. 418.

When stock has been transferred to the Commissioners for the Reduction of the National Debt by reason of no application for dividends having been made, a re-transfer cannot be obtained, nor can inquiries be directed as to the beneficial title to the stock, in the absence of a legal representative of the person in whose name the stock stood at the date of the transfer. *Ash-*

mead, In re, 8 L. R., Ch. 113; 42 L. J., Ch. 314; 28 L. T. 1; 21 W. R. 65.

When a person establishes a right to the re-transfer of stock which has been transferred to the Commissioners for the Reduction of the National Debt, he is only entitled to a re-transfer of the stock and the payment of the amount of the dividends, but not to the invested accumulations of such dividends. *Id.*

When stock in the name of a trustee holding upon trust for a beneficiary has been transferred to the National Debt Commissioners, the re-transfer will be ordered to be made, not to the beneficiary, but to the trustee. *Jameson, Ex parte*, 19 L. R., Eq. 430; 44 L. J., Ch. 480; 23 W. R. 591.

Restraining Transfer.—The court has jurisdiction under 5 Vict. c. 5, s. 4, to restrain the Commissioners for the Reduction of the National Debt from paying or transferring an annuity payable by them. *Watts v. Watts*, 40 L. J., Ch. 388; 24 L. T. 120.

Upon motion under 5 Vict. c. 5, s. 4, *ex parte*, unsupported by any affidavit of special facts, and made by the mortgagees of reversionary interests in the stock or shares of certain railway companies, the court restrained such companies until further order from permitting any transfer of such stock or shares. *Locke, In re*, 18 W. R. 275.

Validity of Entry and Signature.—By 11 Geo. 4 & 1 Will. 4, c. 13, s. 13, it is enacted that the stock created by the act "shall be transferable as this act directs, and not otherwise;" and that the entries of transfer shall be signed by the parties making the same, or by their attorneys lawfully authorized; and that persons to whom transfers shall be made shall underwrite their acceptance thereof; and "that no other method of transferring any such stock shall be good and available in law:"—Held, that, as against the transferor, a transfer was valid, though the transferee had not underwritten his acceptance. *Foster v. Bank of England*, 8 Q. B. 689; 15 L. J., Q. B. 212; 10 Jur. 565.

Under Power of Attorney.—A power of attorney for the transfer of government stock was a deed within 2 Geo. 2, c. 25. *Rex v. Fountleroy*, 2 Bing. 413; 1 C. & P. 421; 1 M. C. C. 52; 10 Moore, 1.

It seems that, according to the practice of the bank, a power of attorney for the sale of stock is revocable without deed. *Rex v. Wait*, 1 Bing. 121; 11 Price, 518; 7 Moore, 478.

Resulting Trust.—Under a power of attorney, by the owner of stock, the transfer was not made till three days after the death of the grantor, the power, according to the usual form of Bank of England powers of attorney, containing a clause to make it valid, notwithstanding the death of the grantor before the transfer was made. The legal interest in the stock was held to be validly transferred; and there being clear evidence that the object of the transfer was to give the beneficial interest:—Held, there was no resulting trust in favour of the kin or representatives of the grantor. *Kiddill v. Farnell*, 3 Sm. & G. 428; 26 L. J., Ch. 818; 3 Jur., N. S. 786.

Where Power is Forged—Recovery of Dividends.—Property in stock is not transferred from the owner by being placed, under a forged power of attorney, to the name of another person in the books of the bank. *Davis v. Bank of England*, 2 Bing. 393; 9 Moore, 747.

A party may recover dividends from the bank, although he knew that the stock had been transferred under a forged power, and had omitted to inform the bank of the circumstance, and did not demand payment of the dividends till after the escape of the offender. *Id.*

One of two trustees of stock sold it out under a power of attorney, to which he had forged the signature of his co-trustee, and some time afterwards absconded:—Held, that the Bank of England was compellable, in a court of equity, to reinvest the stock in the name of the other trustee. *Sloman v. Bank of England*, 14 Sim. 475.

Effect of Negligence.—But a holder of bank stock may, by negligence, disable himself from recovering from the bank the stock which has been transferred from his account under a forged warrant of attorney. *Cole v. Bank of England*, 2 P. & D. 521; 10 A. & E. 437.

Action against the bank for not transferring a share of consolidated annuities, the property of the plaintiff's testatrix. Pleas: first, not guilty; and secondly, that the testatrix was not possessed. At the trial it appeared that the testatrix for many years before her death was very old and infirm, and when she received her dividends was accompanied by her nephew, who was a clerk in the bank. He asked for the amount, she signed receipts, both in the dividend warrants and in the bank books. It appeared probable that he had paid her from time to time the dividends on her whole stock; but he had at intervals taken another woman to the bank, who personated the testatrix, and forged her signature to several transfers. At the trial the jury found that the testatrix was not proved to have had knowledge of the transfers, but that she had the means of knowledge; that she was guilty of gross negligence in leading the bank to believe that she sanctioned the transfers; and that the bank was not guilty of negligence in transferring, without ascertaining her identity more fully:—Held, that the facts found constituted an answer to the action, and were available under the pleadings. *Id.*

Trustees of a charity incorporated by act of parliament, and having a common seal, possessed stock in the public funds, which stock was registered in the Bank of Ireland. The secretary of the trustees was allowed to have the seal in his possession. Five several powers of attorney prepared in different years, sealed with the seal of the trustees, the due affixing of which seal was attested by witnesses, who (though without any fraudulent intention) attested what was not true, since the seal was affixed by the unauthorized act of the secretary alone, were presented to the bank, and the stock was transferred. The facts were afterwards discovered, and the secretary was indicted and convicted. By a power of attorney duly executed, the trustees then authorized C. to transfer the stock, but the bank refused to make the transfer. An action was brought by the trustees on this refusal. The judge who tried the cause told the jury that if, under these circumstances, the trustees had so negligently conducted themselves as to contribute to the loss, the verdict must be given for

the bank :—Held, that the direction was wrong. *Bank of Ireland v. Evans' Charities in Ireland (Trustees)*, 5 H. L. Cas. 389.

— **Sale to Third Person—Recovery.**—A party whose stock has been sold under a forged power may recover the value as money had and received from the purchaser. *Marsh v. Keating*, 1 Bing., N. C. 198; 1 Scott, 5.

Fraudulent Transfer by Agents.—See CRIMINAL LAW.

Action for not Transferring—Necessary Allegations.—A declaration alleged that a plaintiff was possessed of transferable stock standing in his name in the books of the East India Company, and at the proper time for transferring the same, and after previous notice to them, requested them to transfer his stock to a proper person, about to be named by him; yet they, before the plaintiff had named the person to whom he was desirous of transferring the stock, refused to transfer to any person whatsoever :—Held, that, in order to charge the company with a breach of duty in not transferring, the declaration should have shewn that the plaintiff had named, or at least was ready to name, the party to whom he wished to transfer, and that the declaration was bad on general demurrer, for omitting such statement. *Gregory v. East India Company*, 7 Q. B. 199; 14 L. J., Q. B. 220; 9 Jur. 686.

Inspection of Transfer Books.—In an action against the Bank of England for not paying dividends upon stock, the bank admitting that the stock had, up to a certain day, stood in the bank books in the plaintiff's name, alleged that the plaintiff had on that day transferred it. Upon the affidavit of the plaintiff that she had never signed or authorized any transfer, and that if such alleged transfer existed it was a forgery, the court made absolute a rule allowing her to inspect the particular entry in the transfer book, purporting to transfer the stock. *Foster v. Bank of England*, 8 Q. B. 689; 15 L. J., Q. B. 212; 10 Jur. 372.

Effect of, as Evidence.—A transfer of stock is evidence of payment. *Breton v. Cope, Peake*, 30.

4. SALE AND PURCHASE.

a. Contract Note.

Stamp.—Before 23 & 24 Vict. c. 111, a note sent by a broker to his principal, containing an account of a purchase of shares in a joint-stock company, and the price paid for the same, did not require a stamp. *Tomkins v. Savory*, 9 B. & C. 704; 4 M. & R. 538.

b. By Trustees.

Joinder of Co-Trustees.—If one of two trustees orders a broker to sell stock standing in their joint names, and undertakes to procure his co-trustee to join in the transfer, the broker is not warranted in making the sale unless such co-trustee authorizes or concurs with the other in making the transfer. *Leyton v. Sneyd*, 2 Moore, 583.

c. Transfer and Acceptance.

Action—Necessary Allegations.—In an action upon a contract for the sale of stock, the declaration ought to shew the manner of transferring stock, and the time and place at which it is usually transferred, these being matters of which the courts cannot take judicial notice. *Stapleton v. Shelburne (Lord)*, 1 Bro. P. C. 217.

A. contracted with B. for the sale of 200l. South Sea stock for 1,360l., to be paid on or before the day of shutting the transfer books in order to make the Christmas dividend. The money not being paid, A. brought his action upon the covenant, and in his declaration alleged that he attended at the South Sea House for the space of an hour before the shutting of the books, and was ready to transfer the stock to the defendant, but that he was not ready to receive it. On a demurrer, judgment was given for the defendant, the plaintiff not having made a sufficient tender of the stock. *Id.*

— **Tender and Refusal.**—In an action for not accepting stock to be transferred on request, an averment, that the plaintiff was ready and willing to transfer, and requested the defendant to accept the stock, which he refused, can only be satisfied by shewing an actual tender and refusal, or that the plaintiff waited at the bank on the day when it was understood that the transfer was to be made, until the close of the transfer books, which was the latest time when the transfer could be made. *Bordenave v. Gregory*, 5 East, 107; 1 Smith, 306.

— **Transfer on Request.**—In another case evidence that the stock was to be transferred on a certain day, was said not to support an averment that it was to be transferred on request. *Bordenave v. Bartlett*, 5 East, 111; 1 Smith, 306.

— **Tender on Particular Day.**—In an action for not accepting stock, it appeared that the plaintiff tendered the stock on the day agreed on for making the transfer, and the defendant refused to accept it :—Held, that the plaintiff need not wait till the end of the day, but might sell the stock to a third person immediately after the tender and refusal. *Dorriens v. Hutchinson*, 1 Smith, 420.

— **Settling Day.**—A contract stated in a declaration was to deliver stock on the 27th of February. The contract proved was to deliver stock on the settling day, which, at the time, was fixed for, and understood by the parties to mean, the 27th of February :—Held, that the proof supported the declaration. *Wickes v. Gordon*, 2 B. & A. 335; 1 Chit. 60.

Sale on Broker's Credit—Disclosure of Principal.—T., a stock-broker, applied to the plaintiff, a stock-jobber, for the purchase of stock, to the amount of 5,000l., for the defendant. The plaintiff not having any stock of his own, applied to W., who agreed to transfer, and did accordingly transfer stock standing in his name to the defendant. Evidence was given that it was the usage on the Stock Exchange to give credit to the broker, even though the principal was disclosed; though credit was sometimes given

to the principal, and his cheque taken, where the broker's credit was not thought sufficient :—Held, that, under these circumstances, the judge was right in leaving it to the jury to consider whether the plaintiff sold the stock on the credit of T. and T. only, or on the credit and responsibility of the principal, the defendant; and the jury having found the latter, that the verdict was right. *Mortimer v. McCallan*, 6 M. & W. 58; 4 Jur. 172.

—**Evidence.**—A witness having been called to prove on the part of the plaintiff, that, immediately after the transfer had taken place, the plaintiff requested T. to give him the cheque of his principal :—Held, that this evidence was admissible, not as amounting to an admission, but as a part of the *res gestæ*. *Ib.*

In order to prove the acceptance of the stock by the defendant, evidence was adduced, that T. and a person unknown to the clerk in the bank, came there with T., and made an entry of his acceptance of the stock; and a witness was then called, who proved that he had inspected the bank books, and that the signature to the acceptance of the stock was in the defendant's handwriting :—Held, that this evidence was admissible to prove the acceptance of the stock by the defendant, and that it was not necessary that the bank books should be produced, they not being removable on the ground of public convenience. *Ib.*

Held, also, that the allegation in the declaration of the acceptance of stock from the plaintiff was sufficiently shewn, although made through the medium of W. *Ib.*

Contract for Share in Loans.—A. offered to B. 20,000*l.* of a proposed government loan, which B. agreed to take, provided he should have the 20,000*l.* if A. was not wholly excluded. A. applied to government for 200,000*l.*, but had only 35,000*l.* allowed him, whereupon he offered to B. 3,500*l.* :—Held, that B. was entitled to receive from A. the whole 20,000*l.* *Mocatto v. Franco*, 3 Dougl. 11.

A party who pays a deposit to a loan contractor upon a scrip receipt, entitling him to a certain portion of the loan on payment of the subsequent instalments, receives a full equivalent for the deposit in the option to become a holder of stock; and, if he omits to pay such instalments at the stipulated periods, he cannot afterwards require the contractor to accept the instalments with interest, or to return the deposit. *Rothschild v. Hennings*, 4 M. & R. 411; 9 B. & C. 470.

5. MORTGAGE AND CHARGE OF STOCK.

For Term of Years—Default—Redemption.—A stock mortgage was made for a term of years, for securing the retransfer of stock at the end of the term, and payment in the meantime of interest calculated on the proceeds of the stock sold to raise the loan. The mortgage having been allowed to run after the end of the term, and the stock having fallen in price :—Held, that the mortgagee was not entitled to the market value of the stock at the end of the term, but that the mortgagor could redeem on replacing the specific amount of stock originally sold. *Blyth v. Carpenter*, 2 L. R., Eq. 501; 35 L. J.,

Ch. 823; 12 Jur., N. S. 898; 15 L. T. 154; 15 W. R. 3.

Duty of Pledgee to Replace.—The pledgee of railway stock is bound to return the identical stock pledged to him, and is not entitled to make a profit in the meantime by selling it and repurchasing other stock of the same kind at a lower price. *Langton v. Waite*, 6 L. R., Eq. 165; 37 L. J., Ch. 345; 18 L. T. 80; 16 W. R. 508.

Sale for purpose of Loan—Reinvestment.—When stock is sold out to raise money to be advanced on loan, and it is agreed that the borrower, on repayment, will make good to the lender the difference, if any, between the price at which the stock was sold and the price at which it will have to be bought back, an actual reinvestment by the lender is no condition precedent to his right to sue for the difference. *Fowler v. Peirse*, 32 L. T. 493.

Declaration that the plaintiff had lent the defendant on mortgage for five years a sum which the plaintiff had raised by the sale of three per cent. consols and three per cent. reduced, and that it was afterwards agreed that if the loan should be repaid within five years, and "if on repayment and reinvestment" the sums repaid should not be sufficient to replace the specific stocks sold out, the defendant would forthwith make good such deficiency to the plaintiff, "so as to enable him to make such reinvestment;" that the loan had been repaid, and there was a deficiency which had not been made good to the plaintiff. Plea, that the plaintiff had not actually reinvested the money so repaid :—Held, a bad plea. *Ib.*

Bond to Replace.—If A. agrees to re-invest a sum in the 3 per cent. consols, in the name of B., charging the stock at a price not exceeding 68½ per cent., or to repay the sum in bank notes on B. giving A. six months' notice, it is in the election of B. whether he will have the money re-invested or paid in bank notes. *Chippendale v. Thurston*, 4 C. & P. 98.

Damages for Default—Assessment.—In assessing damages on a writ of inquiry, on a bond to replace stock, the fair rule is to take the price of the stock on the day of the trial, or the day previously. *Harrison v. Harrison*, 1 C. & P. 412.

And not, as was formerly held, on the day when it ought to have been replaced, or the price at the day of the trial, at the option of the plaintiff. *McArthur v. Seaforth (Lord)*, 2 Taunt. 257; *S. P., Downes v. Back*, 1 Stark. 318.

On a bond conditioned for replacing stock, the obligee is not entitled to special damages for a profit he might have made if it had been sooner replaced, unless he shews that he actually would have made it. *Ib.*

But in one case it was held not enough to take the value of the stock on that day if it has risen in the meantime, but the highest value as it stood at the time of the trial; there being no offer of the defendant to replace it in the intermediate time while the market was rising. *Shepherd v. Johnson*, 2 East, 211.

Sufficiency of Stamp.—Upon the loan of money, produced by the sale of stock, a bond was given, conditioned to replace the stock on a

given day. By agreement of the same date, reciting the bond and a deposit of title deeds of property, it was agreed that the deeds should remain as a collateral security for replacing the stock, and that the borrower should execute a mortgage of the property to secure the replacing of the stock:—Held, first, that the bond was properly stamped with an ad valorem stamp. *Blair v. Ormond*, 14 Q. B. 732; 19 L. J., Q. B. 228; 14 Jur. 191—Ex. Ch.

Held, secondly, that it was not affected by the insufficiency of the stamp on the agreement. *Ib.*

Liability to a Charging Order.—A testatrix gave her whole estate and effects, which included stock and shares, to trustees, on trust to pay debts and legacies, and as to the residue of her estate and effects, upon trust for the defendant and two other persons; and she directed her trustees to pay the legacies so soon after her decease as her means could be judiciously converted into cash, and in any case not later than twelve months after her decease. A charging order having been made upon the stock and shares, to the extent of the defendant's interest therein, in favour of a judgment creditor:—Held, that he having no interest in the stock and shares, but only an interest in their produce after performance of the prior trusts, they could not be charged with his judgment debt under 1 & 2 Vict. c. 110, s. 14, or under 3 & 4 Vict. c. 82, s. 1. *Dixon v. Wrenoh*, 4 L. R., Ex. 154; 38 L. J., Ex. 113; 20 L. T. 492; 17 W. R. 591.

III. DIVIDENDS.

1. TO WHOM PAYABLE.

Trustees for Distribution—Charging Order.—Notwithstanding an order absolute under 1 & 2 Vict. c. 110, ss. 14, 15, charging stock in the names of trustees, the Bank of England is bound to pay the dividend to the trustees, who are liable in equity for its proper distribution. *Fowler v. Churchill*, 2 D., N. S. 767; *S. C.*, nom. *Churchill v. Bank of England*, 11 M. & W. 323; 12 L. J., Ex. 233; 7 Jur. 353, 538, n.

On Death of a Testator—Income not Capital.—A testator bequeathed East and West India Dock stock to life tenants and others in succession. Some time after his death bonuses were declared upon the stock. On the 8th of February, 1865, by an order made in a suit for the administration of the estate, the bonuses were invested in 3½ per cent. annuities, and the dividends directed to be paid to the tenants for life. On the 12th of January, 1871, that investment order was discharged:—Held, that the bonuses were income, and not capital of the estate, and belonged to the life tenants. *Dale v. Hayes*, 40 L. J., Ch. 244; 24 L. T. 12; 19 W. R. 299.

A husband died on the 20th of December, 1870, having bequeathed the residue of his personal estate to trustees to invest as therein mentioned, and then to permit and empower his wife to receive "the dividends, interest and income of his trust money, stocks, funds, shares and securities" for her life; and on her death to permit his brother to receive the residue (after the payment thereof of certain legacies) of the same dividends, interest and income, for his life, with remainder to one of his brother's children and another legatee as therein mentioned. At his

death the testator had twenty-five shares in the Sun Life Assurance Society, and fifty-two in the Sun Fire Insurance Office. The trustees of the will paid his widow the dividends on those shares till 1873, when they withheld the January and July dividends on the respective shares, on the ground that it was doubtful whether the dividends were corpus, or income, of the estate. The question depended on the construction of the company's deed of settlement, and on the mode in which the company had declared the dividends, which were called extraordinary and special. The resolutions under which the dividends were declared were not produced to the court; but it was stated that they were identical in terms with the dividend warrants; and the warrants spoke of the money payable thereunder as dividend paid out of profits. The trustees paid the money into court; and the widow presented a petition praying payment of it out to her:—Held, that the dividends were income and not corpus of the estate, and belonged to the widow. *Hopkins, In re*, 18 L. R., Eq. 696; 43 L. J., Ch. 722; 30 L. T. 627; 22 W. R. 687.

2. WARRANTS FOR.

Authority to Receive Payment.—A declaration alleged that plaintiff was proprietor of a share in 3½ Reduced Annuities in the management of the Bank of England, for reward, and was entitled to receive dividends, his share standing in the books for the purpose of their paying him on request the accruing dividends when sufficient money had been received by them, whereupon the bank became liable, and it was their duty to pay the plaintiff on request, when sufficient money had been received by them, the dividends due to him; that a dividend became due to him, and sufficient money had been received by the bank, and they were requested by the plaintiff to pay him his dividend, and a reasonable time had elapsed, but they had not paid. Plea, that by usage and custom of bankers and merchants in London for sixty years past, the drafts of the Bank of England upon their cashiers, called dividend-warrants, are transferable and assignable by delivery only, and a bonâ fide holder is entitled to payment by the bank on demand; that W. received from the bank such warrant, for payment of the dividend, under a power of attorney from the plaintiff, authorizing him to receive and give receipts for dividends, and delivered the warrant to L. for good consideration, moving from L. to W.; and that L., while lawful holder of the warrant, demanded payment from the bank, and required them to hold the money for his use:—Held, first, that the allegation of usage was satisfied by proof that dividend-warrants with the receipt subscribed are passed from hand to hand like bank-notes, and are paid by the bank cashiers to any one who presents them after a certain day. *Partridge v. Bank of England*, 9 Q. B. 396; 13 L. J., Q. B. 281; 8 Jur. 803.

Held, secondly, that the alleged consideration was proved by shewing that, before the dividend was due, L., a banker, had discounted a promissory note of and for W., his customer, payable on a day subsequent to the delivery of the warrant by W. to L., and that the warrant was delivered to secure payment to L. of the note when due, although at the time of delivery the cash balance at L.'s bank was in favour of W., and the note

was not due till after the day for payment on the warrant. *Ib.*

But held, in error, that the plaintiff was entitled to judgment on the record, because, first, the power, as pleaded, did not authorize receiving payment by a warrant; and it did not appear, by plea or by any statute, that it was a usual mode of paying dividends to give a warrant. *S. C.*, 9 Q. B. 399; 15 L. J., Q. B. 395; 10 Jur. 1031—Ex. Ch.

Held, secondly, that it did not appear that the Bank of England had become liable to pay L., the warrant not being negotiable by the general law, and the supposed custom not appearing to be an immemorial custom in the particular place, nor a usage of trade of which the plaintiff was cognizant. *Ib.*

Held, thirdly, that L. was not averred to be a bonâ fide owner, but only to have taken for value; and the averment of his being lawful holder did not supply the defect. *Ib.*

3. ACTION FOR NOT PAYING.

Liability—Bank of England.—Where an action was brought against the Bank of England for a breach of duty in not paying dividends due to the plaintiff, upon stock standing in his name in the bank books:—Held, that the action was not maintainable, for not shewing that money had been actually issued by government to the bank, to pay the dividends in question, at the time of the alleged breach of duty. *Bank of England v. Davis*, 7 D. & R. 828; 5 B. & C. 185.

—**Transfer under Forged Power.**—A party may recover from the bank the dividends arising on his stock, although at the time the dividends were payable he knew the stock had been transferred under a forged power of attorney to the name of another person, and had omitted to inform the bank of that circumstance, and did not demand payment of the dividends till after the escape of the offender. *Davis v. Bank of England*, 2 Bing. 393; 9 Moore, 747.

Payment after Revocation of Authority.—A married woman, being entitled for her separate use to the dividends of government stock standing in the name of her trustee, he gave to a banking company a power of attorney to receive the dividends, and at the same time directed them to pay the dividends to her. She directed the company to pay the dividends to S. and B., bankers, at Brussels, to whom she had pledged them for advances made by S. and B. to her husband. The company for some time paid the dividends to S. and B., but at length she wrote to the company as follows: "I think it right to inform you that in consequence of the death of one of my trustees, as well as my having left Brussels, I have been obliged to have a new power of attorney made to receive my own dividends, and I shall not therefore have occasion to trouble you to do so." No new power of attorney was made out, and the banking company received the ensuing half-yearly dividend, and transmitted it to S. and B. The trustee having sued the company for that dividend:—Held, that her letter did not amount to a revocation of the authority she had given the company to pay the money they received on her account to S. and B., and consequently that the trustee could

not recover it. *Clerk v. Laurie*, 2 H. & N. 199; 26 L. J., Ex. 317; 3 Jur., N. S. 647—Ex. Ch.

Right of Married Woman to Sue.—A married woman bought with moneys earned by her, partly before and partly during coverture, railway stock in her own name, and was registered as the proprietor thereof:—Held, that, inasmuch as she might be joined with her husband, in an action against the company, for dividends due upon the stock, she might, subject to be met by a plea in abatement, maintain an action for the same in her own name. *Dalton v. Midland Counties Railway Company*, 13 C. B. 474; 1 C. L. R. 102; 22 L. J., C. P. 177.

IV. SCRIP CERTIFICATES.

Negotiability—Fraud of Broker—Estoppel.

—Scrip certificates, by which it was certified that, after the payment of certain instalments, the bearer would be entitled to be registered as the holder of shares in a banking company, were issued to the plaintiff, and by him deposited with a stockbroker for the purpose of paying the instalments remaining due, and dealing with such certificates as the plaintiff should direct. The broker, in fraud of the plaintiff, and without his authority, deposited the scrip with the defendants as security for an amount due from him, the broker, to the defendants. The defendants were not aware of the fraud. It was proved that the usage among bankers, discounters, money dealers, and on the Stock Exchange, had been for many years to treat such scrip certificates as negotiable instruments transferable by mere delivery:—Held, that the defendants were entitled to the scrip certificates as against the plaintiff, first, on the ground that by reason of the usage the certificates had become negotiable instruments transferable by mere delivery; and, secondly, on the ground that the plaintiff, by depositing with his broker instruments purporting to be transferable by delivery to a bonâ fide holder for value, was estopped from denying that they were so transferable. *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194; 46 L. J., Q. B. 346; 36 L. T. 240; 25 W. R. 366.

Scrip was issued in England by the agent of a foreign government, and such scrip purported to entitle the bearer, upon payment of 100*l.* in instalments, to receive a definitive bond for 100*l.* G. purchased scrip on the open Stock Exchange, and entrusted it to a broker, who pledged it to his bankers as a security for his private debt. All the instalments of the 100*l.* had been paid. In an action of trover by G. against the bankers for the value of the scrip:—Held, that he had, by purchasing the scrip and entrusting it to the broker, estopped himself from contending that it was not negotiable like a bank-note. *Goodwin v. Roberts*, 1 App. Cas. 476; 45 L. J., Ex. 748; 35 L. T. 179; 24 W. R. 987.

Held, also, that the scrip was in fact negotiable in the same manner as the bond itself would have been negotiable. *Ib.*

V. CUSTOMS OF STOCK EXCHANGE.

General Nature and Effect of—Employers.

—Persons employing brokers, members of the Stock Exchange, in transactions on the Stock Exchange,

are bound by its customs. *Hodgkinson v. Kelly*, 37 L. J., Ch. 837.

— **Liability of Broker.**—The rule of the Stock Exchange, by which the broker is considered the person liable in the first instance for the value of stock sold, is nothing more than an honorary regulation among its members. *Mortimer v. McCallan*, 6 M. & W. 58; 4 Jur. 172.

The rule of the Stock Exchange, by which brokers are treated as principals in respect of contracts entered into by them, cannot affect the rights of third parties, so as to prevent an undisclosed principal from suing in his own name. *Langton v. Waite*, 6 L. R., Eq. 165; 37 L. J., Ch. 345; 18 L. T. 80; 16 W. R. 508.

— **Where Unreasonable—Broker taking over Shares to cover Advances.**—An alleged usage of the Stock Exchange, relied upon as authorizing stockbrokers who are entitled to sell stock or shares of a customer for the realization and payment of money due to them by such customer, to take over to themselves, at the price of the day, stock or shares of the customer, for which there is an inadequate demand, or where a forced sale would lower the selling price:—Held, unreasonable, and incapable of being supported against a customer who was not proved to be acquainted with the existence of such alleged usage. *Hamilton v. Young*, 7 L. R., Ir. 289.

The plaintiff had been for many years engaged in speculative transactions in stocks and shares, and employed as stockbrokers the defendants, who had obtained loans for him on the security of bills of exchange, and by pledging shares. The defendants had obtained for the plaintiff from G. M. & Co., another firm of stockbrokers, a large loan on the security of shares and other property of the plaintiff, including 190 shares in the C. Mining Company. The plaintiff was also largely indebted to the defendants. They called on him to close his account; and on his failing to make any arrangement with them, the defendants paid off the amount due on the plaintiff's account to G. M. & Co., and obtained from the latter firm a transfer of the securities which they held, including the 190 shares of the C. Mining Company, and on the next day, the defendants sent to the plaintiff a note of their sale, by his order, of the 190 shares of the C. Mining Company, at the price of the day, charging him commission for such sale. The defendants did not, in fact, sell the shares, but took the shares over to themselves at the price of the day. In an action by the plaintiff to set aside the transaction, the defendants relied on an alleged custom or usage of the Stock Exchange, entitling stockbrokers who have made advances to their customers, or who hold stock or shares of their customers as security for general advances, on default by a customer in paying the sums due to the brokers, to take over to themselves, at the market price of the day, such shares or stock where an immediate sale of such shares or stock would be likely to lower their price. No proof was given that the plaintiff was aware of the existence of the alleged custom or usage, and he deposed that he was ignorant of it:—Held, that the custom or usage relied on was unreasonable, that it could not be supported, and that the transaction should therefore be set aside. *Id.*

— **Omission to state Name of Shareholder**

in a Contract.]—The defendant, a stockbroker, who had undertaken to sell shares of a joint stock bank for the plaintiff, a shareholder, sold them to a jobber on the Stock Exchange and sent an advice note of such sale to the plaintiff, but in accordance with the custom of the Stock Exchange, the bought and sold notes between the defendant and the jobber omitted to state the name of the registered proprietor of the shares, as required by 30 & 31 Vict. c. 29, s. 1, by reason of which the contract for sale was void, and the bank having stopped, and an order for its winding-up having been made before the day on which the jobber was entitled to name the person willing to be the purchaser, the contract for sale was repudiated, and the plaintiff remained the holder of the shares:—Held, that the defendant had committed a breach of duty in not making a valid contract for sale, notwithstanding the custom of the Stock Exchange to disregard the said statute, as such custom was both unreasonable and illegal, and that for such breach of duty the plaintiff was entitled to recover from the defendant by way of damages the price at which the shares had been sold. *Neilson v. James*, 9 Q. B. D. 546; 51 L. J., Q. B. 369; 46 L. T. 791—C. A.

— **Set-off of Balance due from Agent—Transaction subsequent to Sale on Stock Exchange.**]

—Four executors holding stock in their name directed their solicitor to sell the stock. The solicitor, in the name of his firm, gave to a stockbroker, whom the solicitor had employed in Stock Exchange speculations, directions to sell the stock. The stock was sold by the broker, and the solicitor returned to the stockbroker transfers of the stock, with receipts indorsed, signed by the four executors. The sale was completed, and the stockbroker sent to the solicitor a cheque for part of the purchase-money of the shares, and carried the balance on the transaction to the credit of the solicitor in the account between them, which account was afterwards settled by a payment made to the stockbroker:—Held, that, under the circumstances, the stockbroker must be held to have had notice that the shares were not the property of the solicitor, and that, though the solicitor had from the executors authority to receive the purchase-money, payment to him, by giving him credit in an account between them, was not sufficient to discharge the stockbroker, who remained liable to the executors for the balance. *Pearson v. Scott*, 9 Ch. D. 198; 38 L. T. 747; 26 W. R. 796.

The sale was made subject to the rules of the Stock Exchange, and the stockbroker alleged that by those rules the broker could recognize only the person employing him, and obey his directions as to the disposal of the proceeds of a sale:—Held, that the rules of the Stock Exchange applied only to the sale on the Stock Exchange, and not the subsequent transactions. *Id.*

Held, also, that no such rule or custom was proved, and that no such rule or custom could be upheld. *Id.*

— **Settling Day obtained by Fraud—Private Distribution of Assets.**]

—By one of the rules of the London Stock Exchange, bargains in the shares of a new company are contingent on the appointment of a special settling day by the committee:—Held, that, if the appointment of

a settling day has been obtained by fraud, the validity of contracts in relation to the shares of the company, entered into by persons who were not actors in or parties to the fraud, is unaffected. *Ward, Ex parte, or Harris, Ex parte, Ward, In re*, 20 Ch. D. 356; 51 L. J., Ch. 752; 47 L. T. 106; 30 W. R. 560—C. A.

A member of the committee of the Stock Exchange who takes part in the appointment of a settling day is not in so doing acting in a judicial capacity, and is not, therefore, disqualified from acting by reason of his having a personal interest in the matter. *Ib.*

Defaulters—Rules applicable to Members only.]—The rules of the Stock Exchange as to defaulting members of the body are the rules of a domestic forum, which have no influence on the rights of those who are not amenable, as members, to the jurisdiction of that body. They cannot, therefore, govern the rights of the general creditors of a defaulting member. *Lyon v. Saffery*, 3 App. Cas. 213; 47 L. J., Bk. 11; 37 L. T. 758; 26 W. R. 62.

—Assignment for Stock Exchange Creditors.]—C. was a member of the Stock Exchange; he became unable to meet his Stock Exchange engagements, and he gave notice thereof to the secretary. In such a circumstance the rules of the Stock Exchange prescribed the course to be followed. The defaulter ceases to be a member of the body. Two members of the body act as official assignees of the defaulter, a meeting of the creditors is called, the defaulter (as he is required to do) makes his statement, and the assembled creditors having decided what is to be done, these official assignees carry the decision into execution. The committee of the Stock Exchange has the power to re-admit the defaulter or to refuse him re-admission. C. made his statement at the first meeting, declaring, at that time, that he had no debts outside the Stock Exchange. His Stock Exchange creditors then consented to accept a composition; and, to provide for a part of it, he, at the demand of the official assignees, gave them a cheque for 5,000*l.* then standing to his credit in the Bank of England. The official assignees obtained the money and apportioned it among the Stock Exchange creditors. He afterwards confessed to owing debts to a large amount to outside creditors, and was declared a bankrupt. The trustee in bankruptcy, on behalf of the general creditors, claimed from the official assignees of the Stock Exchange the 5,000*l.* :—Held, that he was entitled to claim it; for that what was done by C. amounted to a cessio bonorum, and constituted an act of bankruptcy. *Ib.*

The money was voluntarily paid with the view to give the Stock Exchange creditors an undue preference. *Ib.*

In the 167th rule of the Stock Exchange, that the assignees shall collect and pay "the assets" to their joint account at a banker's, the word "assets" means the whole of the defaulter's available property; and under r. 153 these assets are to be distributed exclusively to those creditors whose claims arise out of Stock Exchange transactions. *Ib.*

—Rights of Defaulter's Trustee in Bankruptcy to Differences paid to Official Assignee.]—By the rules of the London Stock Exchange,

when a member is declared a defaulter, the contracts for the sale and purchase of stocks and shares, which have been made by him for the next settling or account day, are closed by a person, called the official assignee, appointed by that body, at the market prices of the stocks and shares, the subjects of the contracts, at the time of the default, and those members who, on that footing, owe differences upon their contracts with the defaulter are bound by the rules, on pain of being themselves declared defaulters, to pay those differences to the official assignee. And the official assignee is bound by the rules to employ the moneys thus received by him in the first place in paying to those members, to whom, upon the same footing, differences are due upon their contracts with the defaulter, the differences so due to them:—Held, that the moneys thus received by the official assignee, being an artificial fund created by the rules of the Stock Exchange, do not form part of the assets of the defaulter, and do not pass to his trustee in bankruptcy. *Tomkins v. Saffery* (3 App. Cas. 213) distinguished. *Grant, Ex parte. Plumby, In re*, 13 Ch. D. 667; 42 L. T. 387; 28 W. R. 755—C. A.

—Contract to Purchase—Price fixed by Official Assignee.]—A member of the Stock Exchange contracted with another member to purchase certain shares. Before completion the purchaser failed to meet his engagements, and was declared a defaulter on the Stock Exchange. By the rules of the Stock Exchange the price of shares, contracted to be bought or sold by such a defaulter, are to be fixed by the official assignee of the Stock Exchange, and the differences paid to or claimed from the assignee:—Held, that the price fixed by the assignee is substituted for the original contract, and is a liquidated sum due under the contract, and, therefore, that a bankruptcy petition may be founded upon a claim for such price. *Ward, Ex parte, Ward, In re*, 22 Ch. D. 132; 52 L. J., Ch. 73; 48 L. T. 332; 31 W. R. 112—C. A.

A creditor of a defaulter on the Stock Exchange who has taken the benefit of the private distribution of Stock Exchange assets, made by the official assignee of the Stock Exchange under its rules, is not precluded from afterwards taking ordinary legal proceedings for the recovery of his debt, though he must give credit for what he has received from the official assignee. *Ward, Ex parte, or Harris, Ex parte, Ward, in re, supra.*

Prospective Dividends—Right to recover Differences.]—The defendant instructed the plaintiffs, stockbrokers, to sell the prospective dividends on certain railway stock, which they accordingly sold to H. & Co., jobbers, calculating the dividend at a certain rate per cent. The dividend, when declared, amounted to a higher rate per cent. than that which the plaintiffs had calculated, and, according to usage of the Stock Exchange, they therefore paid H. & Co. the difference:—Held, that they were entitled to recover this difference from the defendant. *Martin v. Gibbon*, 33 L. T. 561; 24 W. R. 87—C. A.

Bargains in prospective dividends are transactions which, by rule 61 of the Stock Exchange, the committee will not recognize nor enforce. By rule 50 every bargain must be fulfilled by the members in accordance with the rules, regu-

lations and usages of the Stock Exchange. By rule 16 the committee may expel any member violating any of the regulations of the Stock Exchange:—Held, that rule 61 merely says that the committee will not enforce by expulsion, but leaves the contract good as between the parties. *Ib.*

VI. BROKERS' RIGHTS AND LIABILITIES.

Trustee of Proceeds.]—A stockbroker who is instructed to sell trust funds and to re-invest the purchase-money, with actual notice of the trust, is a trustee of the proceeds of sale, and the customer employing him is entitled as against his trustee in bankruptcy to so much of the proceeds of sale as can be identified. *Strachan, In re, Cooke, Ex parte*, 4 Ch. D. 123; 46 L. J., Bk. 52; 35 L. T. 649; 25 W. R. 171—C. A.

Benefit of Usage—Recovery of Payments.]—A party who employs a stockbroker to transact business for him at a particular place, is bound by the established usage of that place relative to the mode of transacting that sort of business, whether he knew of the usage or not. *Bayliffe v. Butterworth*, 5 Railw. Cas. 283; 1 Ex. 425; 17 L. J., Ex. 78; *S. P., Bayley v. Williams*, 7 C. B. 886; 18 L. J., C. P. 273.

By the usage of the Stock Exchange, brokers are held responsible to each other for all engagements entered into by them on behalf of third parties. A person employed a broker there to sell scrip, but on the day of settlement made default, and the purchaser compelled the broker to pay the differences:—Held, that the broker might recover the amount of those differences as money paid for the use of his employer. *Ib.*

If a party authorizes a broker to buy shares for him in a particular market where the usage is that when a purchaser does not pay for his shares within a given time, the vendor, giving the purchaser notice, may resell and charge him with the difference, and the broker acting under the authority, buys at such market in his own name, such broker, if compelled to pay a difference on the shares through neglect of his principal to supply funds, may sue the principal for money paid to his use. *Pollock v. Stables*, 12 Q. B. 765; 5 Railw. Cas. 352; 17 L. J., Q. B. 352.

— Transfer of Shares subsequently Void.]—

If A. employs B. as broker to buy shares in a company, according to the rules of the Stock Exchange, for a certain account day, and B., in accordance with such rules, pays for and takes a transfer of the shares on that day, A. is bound to repay B. the amount so paid, although before such account day the company is being wound up under 25 & 26 Vict. c. 89, s. 153, which enacts that every transfer of shares shall then be void unless the court otherwise orders. *Chapman v. Shepherd*, 2 L. R., C. P. 228; 36 L. J., C. P. 113; 15 L. T. 477; 15 W. R. 314.

After a company had commenced winding up voluntarily, the plaintiff, a broker, was employed by the defendant to sell shares in such company according to the rules of the Stock Exchange, by which it was defendant's duty to execute a transfer of such shares to the purchaser. The broker having thereupon made a contract for the sale of such shares:—Held, that the defendant

was bound to execute a transfer of them, though the sanction of the liquidators had not been obtained, and it was not defendant's duty to get such sanction, and notwithstanding 25 & 26 Vict. c. 89, s. 131, makes all transfers of shares void which have taken place without such sanction after the commencement of winding up the company. *Biederman v. Stone*, 2 L. R., C. P. 504; 36 L. J., C. P. 198.

— Consent to Transfer Refused by Com-

pany.]—A defendant directed stockbrokers and members of the Stock Exchange to purchase some shares for him in a banking company. They accordingly contracted with a stockjobber for the purchase of the shares for the 15th of September. The bank having stopped on the 3rd, the defendant, a few days after, gave notice to the brokers that he would not complete the purchase, and that they were not to pay for the shares. By the deed of settlement of the bank, the shares could not be transferred without consent of the directors, and notice of the transfer was to be given by either party to the directors. On the 15th, the directors refused to allow the holders of the shares to transfer them, but transfers were nevertheless executed by the holders to the defendant, and on that day presented by the jobber, on their behalf, to brokers for the defendant. By the rules of the Stock Exchange, the brokers were thereupon bound to pay for the shares. This they accordingly did. They had no notice of the refusal of the bank to allow the transfer:—Held, that as the defendant, by directing the brokers to purchase the shares, necessarily gave them authority to pay for them pursuant to the rules of the Stock Exchange, they were entitled to recover the amount so paid for him, notwithstanding the stoppage of the bank and the refusal of the directors to consent to the transfer. *Taylor v. Stray*, 2 C. B., N. S. 197; 26 L. J., C. P. 287; 3 Jur., N. S. 964—Ex. Ch.

Loan on Security of Bonds—Loss of Pos-

session—Fraud.]—The defendant employed a stockbroker to obtain a loan on the security of bonds, which were transferable by delivery. The broker accordingly borrowed a sum from the plaintiff, but he wrongfully applied a part to his own use. The broker was unable to redeem the bonds, and the defendant, with knowledge of the circumstances, promised and agreed to call and give the broker his cheque for the deficiency, on receiving back the bonds. The broker, acting on the faith of this promise, gave a crossed cheque to the plaintiff, and redeemed the bonds. On the same day the defendant, by a trick, obtained possession of the bonds without giving his cheque, and the broker's crossed cheque was consequently returned, and he became a defaulter:—Held, that the defendant was responsible to the plaintiff for the fraud, and that the bonds in his hands were still liable to repay the plaintiff his debt. *Mocatta v. Bell*, 24 Beav. 585; 27 L. J., Ch. 237; 4 Jur., N. S. 76.

Sale of Certificates—Payment—Warranty.]—

A. employed B., a sharebroker and member of the London Stock Exchange, to sell for him documents, which purported to be scrip or certificates, each for fifty shares in a projected railway company. B. sold these certificates to C.

and handed over the proceeds to A. The certificates being subsequently found to be forged, B. was called upon and obliged to pay (pursuant to a resolution of a committee of the Stock Exchange) to C. a certain agreed value as for genuine certificates of the company, and which considerably exceeded the price for which he had sold the spurious certificates. In an action by B. against A. to recover the sum so paid by him to C., the declaration contained a special count, averring a promise by A. that the certificates were genuine, and a count for money paid. Upon the latter count A. paid into court the sum he had received on the original sale with interest:—Held, that B. was not entitled to recover upon the special count, there being no promise, express or implied, that the certificates were genuine, and that under the count for money paid B. was only entitled to recover the amount actually paid by him to A. *Westropp v. Solomon*, 8 C. B. 345; 19 L. J., C. P. 1; 13 Jur. 1104.

Held, also, that the resolution of the committee of the Stock Exchange, made after the transaction was completed, however it might bind the members of that body, could not affect A. *Ib.*

Carrying over to Next Account—No Contract of Indemnity implied.—When a person, not a member of the Stock Exchange, employs a broker to carry over contracts for the purchase of shares and stock from one account day to the next, and in the meantime the broker, from a variety of causes, becomes insolvent, and is declared a defaulter according to the rules of the Stock Exchange, and consequently the shares and stock are sold at a loss, there is no implied contract by which the principal is under an obligation to indemnify the broker against the loss. *Duncan v. Hill, Duncan v. Beeson*, 8 L. R., Ex. 242; 42 L. J., Ex. 179; 29 L. T. 268; 21 W. R. 797—Ex. Ch.

The plaintiffs on the Stock Exchange, who had at the request of the defendant contracted for the purchase of shares for him, were on the 13th of July, the "carrying over day" for the 15th, instructed by him to carry over or continue the contract, from the 15th till the 29th of July, the next account day. On the 15th they paid for him (as was necessary in order to have the contract carried over), the difference on the shares at the price of the 13th, amounting to 1,688*l.* On the 18th of July the plaintiffs, by reason of many persons for whom they had entered into contracts failing to meet their engagements, became defaulters on the Stock Exchange, whereupon, in accordance with the rules of the Stock Exchange, all their bargains were closed and made up by the official assignees at the prices of that day. The price of the shares purchased for the defendant having fallen, the amount due in respect thereof (including the 1,688*l.* difference) was 6,013*l.*, which the plaintiffs then became liable to pay to the official assignees, and now sought to recover from the defendant:—Held, that the plaintiffs' insolvency having been brought about by want of means to meet their other primary obligations, and not by reason of their having entered into any contract on behalf of the defendant, no promise could be implied on his part, as their principal, to indemnify them against the consequences of the enforcement of

the Stock Exchange rules with regard to defaulters, and that, therefore, the plaintiffs could only recover from defendant 1,688*l.*, the amount of the differences they had actually paid for him. *Ib.*

Death or Bankruptcy of Principal—Sale of Stock.—Stockbrokers who have with their own money purchased stock for a principal are, in the event of the death, bankruptcy or insolvency of the principal, justified in immediately selling the stock. Under such circumstances, the stockbrokers have a claim against the estate of the principal for the balance due to them on the account, which balance is subject to deduction for any loss which may have been incurred by selling before the next settling-day. *Lacey v. Hill, Scrimgeour's claim*, 8 L. R., Ch. 921; 42 L. J., Ch. 657; 29 L. T. 281; 21 W. R. 857.

A speculator on the Stock Exchange having failed to pay the balance of his brokers' account against him when requested, and having died, and a bank, of which he was senior partner, having in consequence stopped payment, the brokers sold out stock which he had directed to be carried over, at a loss, but the stock had fallen still lower before the next account day. On a claim by them for the balance of their next account, which was resisted on the ground that they had broken their contract, and could not speculate as to what would have happened had they kept it:—Held, that their conduct at the most gave rise to a right of set-off for any damage resulting from it, and that, none being shewn, their claim was good. *Ib.*

Evidence was given of a custom of the Stock Exchange that where a principal who had bought for the account became bankrupt or died, leaving no person ready to take up his account, his broker might cover himself by selling out the shares or stock:—Held, that the custom was reasonable, and that the claim was sustainable on that ground also. *Ib.*

— Insolvency, what is.—By the usage of the London Stock Exchange stockbrokers who have entered into contracts for the purchase of stock are, in the event of the insolvency of their principal, justified in immediately selling the stock. A principal is insolvent within the meaning of this rule when he is unable to pay his debts in the ordinary course of business. *Lacey v. Hill, Crawley's claim*, 18 L. R., Eq. 182; 43 L. J., Ch. 551; 30 L. T. 484; 22 W. R. 586.

Messrs. C., brokers on the London Stock Exchange, on behalf of H., entered into contracts for the purchase of stocks to be completed on the 15th of July, 1870. On the 12th of July they wrote to H. to the effect that unless he paid them on the 15th a balance (which consisted of the difference between the contract price of the stock and its value at the market price of the day) owing to them from him they would be defaulters; but that if such payment were made, they would sell or continue the stocks as he thought fit. H. promised to pay, and directed them to deal with the stocks as they thought best, and they sold part and continued part. He did not pay on the 15th, but shot himself; on the next day a bank of which he was a partner stopped payment, and on the 19th he died. On the 16th Messrs. C. were (solely by reason of H.'s failure to pay them) declared

defaulters on the Stock Exchange, and ceased to be members of that body, and, in accordance with the rules, all their transactions for H. were closed, and all the stocks they had continued for him were sold at the price of the day. In consequence of the value of the stocks having fallen, the balance appearing to be due to them from H. was thus largely increased. The stocks afterwards continued to fall in value. Messrs. C. afterwards paid 6s. 8d. in the pound on their Stock Exchange debts, and were re-admitted as members of the Stock Exchange:—Held, that the sale was justifiable, both under the usage of the Stock Exchange (which entitles a broker to sell upon his principal becoming insolvent) and also because the continuation was only effected on the representation of H. that he would pay on the 15th. *Ib.*

Held, also, that although Messrs. C. had not paid their debts in full, they were entitled to prove against H.'s estate for the increased balance appearing due to them after the sales were effected. *Ib.*

Forgery of Transfer—Undisclosed Principal—Indemnity.—The plaintiffs, through a stockbroker, bought of the defendants (stockbrokers) two railway debentures. The defendants were acting as brokers for A., but did not disclose the principal to the buyer's broker. They sent what purported to be a genuine transfer signed by A., B. and C., but it was in fact signed by A. only, who had forged the signatures of B. and C. The debentures belonged to A., B. and C. as joint trustees. The transfer was registered by the railway company, and interest paid to the plaintiffs upon the debentures. B. and C. by a suit in chancery compelled the plaintiffs to deliver to them the debentures, and to pay to them the interest received:—Held, that the plaintiffs were entitled to recover from the defendants the sum paid for the debentures and the interest they had been compelled to refund to B. & C. *Royal Exchange Assurance Company v. Moore*, 8 L. T. 242; 11 W. R. 592.

Receiving Payment for Principal.—A person owing money to an agent, knowing him to be an agent, must pay in such a manner as to facilitate the money reaching the principal's hands, and cannot pay by a settlement of accounts between himself and the agent. *Pearson v. Scott*, 9 Ch. D. 198; 47 L. J., Ch. 705; 38 L. T. 747; 26 W. R. 796.

The plaintiffs, as executors, instructed S., a solicitor, to have some stock and shares sold, and in effect authorized him to receive the proceeds as money. S. employed the defendant, a stock and share broker, with whom he had at the time a current account for differences upon private speculative transactions on the Stock Exchange. The defendant having sold the property, paid a part of the proceeds to S., and by his directions placed the balance to the credit of S. in the current account. S. never paid the balance to the plaintiffs, but subsequently absconded and was declared bankrupt. The defendant had notice of the agency of S.:—Held, that he was liable for the balance. *Ib.*

VII. JOBBERS' RIGHTS AND LIABILITIES.

Rules of Stock Exchange—Furnishing Name

of Purchaser—Liability of Default.—A purchase or sale of shares made by one who is not a member of the Stock Exchange, and made through a broker who is a member of that body, will be treated as made subject to the rules of the Stock Exchange. *Nicholls v. Merry*, 7 L. R., H. L. 530; 45 L. J., Ch. 575; 32 L. T. 623; 23 W. R. 663.

The rules of the Stock Exchange imply that the name of the person given as that of the ultimate purchaser of shares must be that of one able and willing to purchase; and they are not satisfied if the name given is that of a non-existent person, a lunatic, an infant, a married woman, or a person who has not given authority for the use of his name. *Ib.*

The contract of a jobber is to accept the shares, or to furnish the name of a person able and willing to accept them; and the time limited by the rules of the Stock Exchange for the approval or rejection of the name of the ultimate purchaser applies only to the responsibility, and not to the personal capacity and willingness of the person whose name is given. *Ib.*

If, therefore, the name given is that of one who has no legal capacity to accept the shares, though the time limited (ten days) is allowed to go by without objection to him, the original contractor, the jobber, will remain liable. *Ib.*

M., not a member of the Stock Exchange, directed his broker to sell certain shares of a company, and the broker sold them to a jobber, who, according to the known practice on the Stock Exchange, sold them again (and in a similar way they passed through several hands), and the jobber (without fraud) received from his purchaser, and passed on to M.'s broker, the name (that of L.) as the name of an ultimate purchaser; M. executed a transfer to L., and received payment for the shares; L. turned out to be a minor legally incapable of accepting the shares; M.'s name (though without his knowledge) remained on the registry of the company; L. did not pay the subsequent calls, and M. was required to pay them:—Held, that the jobber was liable to make good to M. the calls which he had been compelled to pay on L.'s default. *Ib.*

Acceptance of Purchaser by Seller.—Brokers sold, on behalf of their principal, on the Stock Exchange certain shares to a jobber, for the next account day. F. & Co., brokers on the Stock Exchange, had been instructed by S. to purchase shares of the same description for the same account. S. not wishing to take a transfer of the shares, procured G. to consent to be transferee of them in consideration of a sum of money. On the same day F. & Co. issued a ticket containing their name and address, as the issuers thereof, and that of G. as the person to whom the shares were to be transferred. This ticket, coming through various intermediate parties into the jobber's hands, was by him passed to the seller's brokers. The seller made no objection to the name, and executed a transfer of the shares to G. G. turned out to be a man of straw. Calls being subsequently made on the shares, the seller was obliged to pay them. Neither F. & Co. nor the jobber were aware that G. was not a substantial person. The seller sought to recover the amount he had been compelled to pay from the jobber:—Held, that the action was not maintainable. The jobber had performed his contract in accordance with the

rules of the Stock Exchange by passing a name as that of the ultimate purchaser to which no objection was made, and into which the shares were transferred. *Masted v. Paine*, 6 L. R., Ex. 132; 40 L. J., Ex. 57; 24 L. T. 149; 19 W. R. 527—Ex. Ch.

The vendor has no right to object to the name given, inasmuch as the mere transfer of the shares into such name does not exonerate the ultimate purchaser from his obligation to indemnify the vendor against calls; and the jobber having complied with the rules of the Stock Exchange by passing a ticket issued by members of the Stock Exchange, and containing the name of a person to whom the shares were to be transferred, and actually were transferred, and the price of them having been paid, the jobber's contract was fully performed. *Ib.*

The plaintiff, by his brokers, sold to the defendants, who were stockjobbers, 200 shares, of which he was the registered proprietor, in a limited company. The contract was not in writing, but it was made for the settling-day, and it was agreed on both sides that it was to be interpreted according to the usages and business of the Stock Exchange, according to which the jobber is bound at the settling-day either to take the shares himself or to give the name or names of one or more unobjectionable transferee or transferees. The defendants duly named seventeen persons into whose names the shares were to be transferred, and the plaintiff accepted the names and executed the transfers accordingly; and on the settling-day the defendants paid the purchase-money for the shares and received from the plaintiff the certificates. Between the date of the contract and the settling-day the company stopped payment and commenced winding up, and consequently the transfers could not be registered, and the plaintiff was placed on the list of contributories. Upon a bill filed in equity by the plaintiff against the defendants for specific performance and indemnity:—Held, that they had duly fulfilled their contract, and that any further liability was with the substituted transferees, and not with them. *Coles v. Bristowe*, 4 L. R., Ch. 3; 38 L. J., Ch. 81; 19 L. T. 403.

—Purchaser a Foreigner Resident Abroad.]

—Where shares not fully paid up are sold on the Stock Exchange, the vendor is not bound to accept as purchaser a foreigner resident abroad, without having property in this country which may be made liable for calls. *Goldschmidt v. Jones*, 22 L. T. 220; 18 W. R. 513; *S. P. Allan v. Graves*, 5 L. R., Q. B. 478; 39 L. J., Q. B. 157; 22 L. T. 677.

Right of Jobber to Vendor's Compromise.]

The owner of shares in a company on which a considerable sum remained to be paid, sold them in the usual way to a stockjobber who, on name day, gave the name of a transferee who was subsequently proved to have been an infant. The vendor filed his bill against the jobber for indemnification in respect of all calls on the shares. He also made an agreement whereby he undertook to pay to the liquidator of the company a given sum, to transfer the share to the liquidator, and to give him authority to sue and use his name in all proceedings against the jobber for the amount of calls due and all expenses incident to such proceedings, in con-

sideration of which the liquidator was to do all in his power to procure a release for the vendor. In the meantime it had been decided by the House of Lords that in such a case as this the jobber is liable to the vendor. The jobber claimed the benefit of the agreement with the liquidator, and contended that the release operated in his favour, and that no more could be recovered from him than the liquidator was entitled to recover from the vendor:—Held, that as the object of the agreement was to enable the liquidator to enforce his claims against the jobber the latter could not claim the benefit of part of it without giving effect to the whole, and that consequently the agreement did not enure to his benefit. *Heritage v. Paine*, 2 Ch. D. 594; 43 L. J., Ch. 295; 34 L. T. 947.

VIII. INDEMNITY FOR CALLS.

Sale to Jobber—Transfer Paid for but not Executed.]—B. bought of a jobber on the Stock Exchange shares in a company for the next account day, which was the 27th of April. On the 10th of May, which was the day on which the company stopped payment, F. sold shares in the company to a jobber on the Stock Exchange for cash, and the name of B. was passed to F.'s broker as the ultimate purchaser in the usual course of the Stock Exchange. F. executed a transfer to B., who paid the purchase-money, and received the transfer and certificates, but did not execute the transfer, which was never registered. The company was wound up, and F. was placed on the list of contributories, and compelled to pay calls. On a bill by F. to obtain repayment from B. of the amount of the calls and for an indemnity:—Held, that the case came within the principle of *Hodgkinson v. Kelly* (6 L. R., Eq. 496), and a decree was made in favour of F. with costs. *Fenwick v. Buck*, 24 L. T. 274; 19 W. R. 597.

Refusal of Purchaser to accept Shares.]—On the 13th of April, 1856, a person, through his brokers C. & Co., purchased 100 shares in a company, of a jobber, for the account or settling-day, the 26th of April. Before the day arrived, he requested his brokers to carry over the contract to the next account-day, the 15th of May. On the 14th of May, the brokers passed a ticket with his name as purchaser of the shares. This ticket was split or divided, according to the practice of the Stock Exchange, and a part or split for fifteen shares was handed to the brokers of the seller, who was the ultimate seller of that number of shares. The seller thereupon, on the 15th of May, executed a deed of transfer to the purchaser in the proper form, and delivered the transfer and the share certificates to his brokers, who accepted them on his behalf, paid the seller's brokers the price of the shares, and forwarded the transfer and certificates to the purchaser. The purchaser refused to accept the shares, and the company having stopped payment, the seller was made a contributory and compelled to pay calls:—Held, that the transactions were evidence of a contract by which the purchaser of the fifteen shares was bound to indemnify the seller against the calls made in respect of them. *Bourring v. Shepherd*, 6 L. R., Q. B. 309; 40 L. J., Q. B. 129; 24 L. T. 721; 19 W. R. 852—Ex. Ch.

When Repudiation too Late.]—M., on the

19th April, 1866, instructed his broker to buy for delivery on the 15th May twenty shares in a company. The company stopped payment on the 10th May. On the 14th May, C., who held shares in the company, contracted through his brokers to sell to a jobber twenty shares in the company for delivery on the 25th May. The jobber passed the name of M. to C.'s brokers as the purchaser, and a transfer to M. executed by C. was sent to M.'s brokers and accepted by them. The purchase-money was paid by M. to his broker on the 15th May. The certificates were afterwards sent to M., and he retained both them and the transfer, though he refused to execute the latter, and expressed a wish to his broker to repudiate the shares. He, however, gave no notice to C. of repudiation till long afterwards. C. was placed on the list of contributories of the company, and had to pay calls, and he filed a bill against him for indemnity:—Held, that if M. ever had any right to repudiate the shares, he was too late in doing so. The repudiation, if it was to have any effect, ought to have been made almost immediately, and a decree for indemnity was accordingly made. *Crabb v. Miller*, 24 L. T. 219; 19 W. R. 519. Affirmed, 24 L. T. 892; 19 W. R. 882.

Deed of Compromise by Vendor on Payment of Calls.—On the 4th of September, 1863, the plaintiff sold to the defendant twenty shares in a company. On the 8th he executed a transfer to the defendant, who paid the purchase-money and caused the transfer to be registered by the company on the 4th of December. On the 20th of March, 1866, the defendant transferred the shares to M. On the 18th of April, 1866, the company stopped payment, and on the 8th of May, 1866, was ordered to be wound up. On the 24th of July, 1866, M. was placed on the A. list of contributories, being the list of existing members. On the 30th of October, 1866, M. executed a deed of inspectorship. An order was made upon M. to pay a call of 40*l.* a share, but he did not pay, and the liquidators failed to get any payment out of his estate. On the 6th of December, 1867, the plaintiff and defendant were placed, in respect of the same shares, on the B. list of contributories, being the list of past members. On the 27th of December, 1866, the defendant executed a deed of inspectorship under the Bankruptcy Act, 1861, s. 192, which was registered on the 29th of December, 1867. On the 20th of March, 1869, the court ordered the defendant to pay a call of 40*l.* a share, which he did not do, and on the 10th of May the plaintiff, in pursuance of an agreement of compromise made between himself and the official liquidator, paid 15*l.* per share in respect of the twenty shares sold by him to the defendant. The official liquidator proved under both deeds of inspectorship:—Held, that the plaintiff was entitled to sue the defendant for the amount which he had paid to the official liquidator, and that the deed which he had executed formed no defence to the action. *Kellock v. Enthoven*, 9 L. R., Q. B. 241; 43 L. J., Q. B. 90; 30 L. T. 68; 22 W. R. 322—Ex. Ch.

Transfer not Registered by Purchaser.—On March 21st, the plaintiffs, through their broker, sold forty shares in a company on the Stock Exchange, at the price of 202*l.* 10*s.*, for the 30th of March; and on March 26th, the defendant,

through his brokers, purchased 100 such shares, at a price amounting to 145*l.* for forty; no numbers being specified in either case. On March 28th, the plaintiffs, by direction of intermediate purchasers, and in accordance with the custom of the Stock Exchange, executed and delivered to their brokers a transfer to the defendant of the forty shares, a blank being left for the consideration, which was afterwards filled up with 145*l.*, the price at which defendant bought. The defendant paid the plaintiffs the 145*l.*, the difference between that price and 202*l.* being paid by the immediate purchaser; and the transfer and certificates were sent to and retained by the defendant. The defendant never registered the transfer, and the plaintiffs, having been compelled to pay calls on the shares, filed their bill against the defendant for specific performance and indemnity:—Held, that they were entitled to a decree. *Hawkins v. Maltby*, 3 L. R., Ch. 188; 38 L. J., Ch. 313; 17 L. T. 397.

— Guarantee of Registration by Jobber.—Where a purchase of shares on the Stock Exchange by a jobber is expressed to be "with registration guaranteed," the meaning of the contract is, that the jobber will either register them himself or will find a purchaser who will accept and register them. The giving in therefore by the jobber to the vendor's brokers of the name of a transferee, who is accepted by the vendor as purchaser, does not discharge the jobber until the transferee has actually registered the shares in his name; and, if the transferee does not register, the jobber is bound to register in his own name, and must indemnify the vendor for any damage suffered by him through such omission to register. *Cruick v. Paine*, 4 L. R., Ch. 441; 38 L. J., Ch. 225; 17 W. R. 1033.

— Purchaser's Name used without Authority.—A. authorized his broker to sell shares in a company. B. authorized the same broker to buy shares in the same company. A sold-note was sent to A. upon which B.'s name appeared as purchaser, and a transfer was executed by A., and the purchase-money paid to him. B. did not authorize the jobber to insert his name as a purchaser, and his name was not placed upon the register. The company being wound up, A.'s name was placed upon the list of contributories:—Held, that B. must indemnify A. for all liability upon the shares subsequent to the transfer. *Pender v. Fox*, 20 W. R. 966.

— What Delay a Bar to Relief.—The company was wound up in June, 1866, and A. filed a bill for indemnity in November, but withdrew it in consequence of the decisions. Subsequently these decisions were not maintained:—Held, that A. in filing his bill was not debarred from relief on the ground of delay. *Id.*

In the case of Infant Nominees.—C. & Co. directed their brokers to purchase for them 200 shares in a company, and on the settling day forwarded to them the name of an infant transferee. Shortly afterwards the company was ordered to be wound up, and upon the application of the infant his name was removed from the list of contributories, and the names of the transferors substituted in its place. By a resolution of the committee of the Stock Exchange, the broker was ordered to indemnify the trans-

ferors. Held, that C. & Co. must indemnify the brokers. *Peppercorne v. Clench*, 26 L. T. 656. A., B. and C. each bought thirty shares in a company through the same country broker. Fifteen of the shares were sold by D. The brokers placed all the ninety shares in the name of an infant nominee. On the winding up of the company D. was made a contributory. The court ordered A., B., C. and the brokers to indemnify D. *Brown v. Black*, 8 L. R., Ch. 939; 42 L. J., Ch. 814; 29 L. T. 362; 21 W. R. 892.

D. held shares in a company, which he agreed, through his broker, to sell to N., a dealer on the Stock Exchange. N. in due time gave the name of E. as the transferee, and the shares were transferred to him. The company was afterwards wound up; and as E. was an infant, D. was placed on the list as contributory in respect of these shares, and had paid 1,300*l.* for calls on them. D. commenced an action against N. to recover the 1,300*l.*, and N. then filed a bill against D. and the father of E., alleging that the father was the real purchaser of the shares and liable for any loss, and praying that the action might be restrained, and that the questions might be decided in the suit:—Held, that D. ought not to be deprived of the opportunity of establishing his claim, and of recovering, if he could, against N., merely because another person might also be liable to pay the money, and might be the person who ultimately would have to pay. *Nickalls v. Eaton*, 23 L. T. 689; 19 W. R. 172.

— Compromise of Action a Bar to Suit.]—

E. instructed his brokers to purchase 100 shares in a company to be transferred into the name of his son. The shares were accordingly purchased from M., and transferred by E.'s direction into the name of his son, who was an infant, but not known by M. or his brokers to be so. The company was shortly afterwards wound up, and the son, who had been placed on the list of contributories, commenced an action against M., who was an auditor of the company, for repayment of the purchase-money, charging fraud and failure of consideration. The action was compromised by M. repaying the purchase-money and taking back the shares, the charge of fraud being withdrawn, and M.'s name was substituted for that of the son as a contributory. Two and a half years afterwards M., who had paid several calls under the winding-up, filed his bill against E. for repayment and indemnity, alleging that E. was the real purchaser for his own benefit, and had passed the name of his son as the purchaser in order to evade liability, and also stating that the plaintiff did not know at the time of the compromise of the action that E. was the real purchaser:—Held, that the compromise of the action was a bar to the suit. *Maynard v. Eaton*, 9 L. R., Ch. 414; 43 L. J., Ch. 641; 30 L. T. 241; 22 W. R. 457.

— Usage of Stock Exchange—Question for the Jury.]—The plaintiff, through his broker, sold to the defendant, a stock jobber, a number of shares in a bank. On the same day the jobber gave to the plaintiff's broker a ticket with the name of G. E. upon it, as the intended purchaser, and which name had been passed to him from another jobber in the usual manner according to the course of business on the Stock Exchange. The plaintiff executed a transfer to

G. E., whose name was registered as a shareholder. The bank being wound up it was discovered that at the time the name was passed to the plaintiff as the transferee of the shares he was an infant, and by order of the Court of Chancery the plaintiff's name was placed upon the list of contributories in his stead. To an action by the plaintiff against the defendant to indemnify him for the amount of calls paid, in consequence of being replaced on the list of contributories, the defendant pleaded that he was discharged from his liability by the usages of the Stock Exchange. The jury found that it was not part of the usage of the Stock Exchange that, if there are several intermediate sales between the first seller and the last buyer, and the first seller receive the price of the shares and transfer them to the last buyer, the intermediate buyers are irresponsible when the name of the transferee which was passed was that of a person legally incapable of being registered:—Held, that the judge was right in leaving the jury to say what was the usage of the Stock Exchange, for it is not so universal a usage as to be binding upon all persons dealing there. *Dent v. Nickalls*, 29 L. T. 636; 22 W. R. 218. Affirmed on appeal, 30 L. T. 644—Ex. Ch.

Held, also, that the jobber, until he has passed to the purchaser the name of a person who is legally capable of contracting, and who has given authority for the use of his name as transferee, is not discharged, notwithstanding the rules and usages of the Stock Exchange to the contrary. *Id.*

— Alleged Agreement to Indemnify.]—The defendant had bought a certain number of shares in a company, and his vendor subsequently bought a like number of the same shares from the plaintiff; both these purchases were made subject to the rules of the Stock Exchange. Upon the arrival of the name-day, the defendant's vendor gave the defendant's name to the plaintiff as that of the ultimate purchaser of the shares. The plaintiff executed a transfer of the shares to the defendant, and delivered it with the share certificates to him. The defendant kept the transfer and certificates, but never executed the former. Calls were subsequently made on the shares, and the plaintiff was obliged to pay them. He thereupon brought an action against the defendant for an indemnity. The declaration alleged an agreement between the plaintiff and the defendant, that, in consideration that the plaintiff would sell and transfer the shares to the defendant, the defendant would accept and pay for them, and indemnify the plaintiff against all subsequent liabilities and calls in respect of them:—Held, per Kelly, C. B., and Piggott, B., that a contract existed such as was alleged in the declaration, and the plaintiff was therefore entitled to recover. Per Channell, B., and Cleasby, B., that no such contract existed, and therefore the plaintiff could not recover. *Davis v. Haycock*, 4 L. R., Ex. 373; 38 L. J., Ex. 155; 20 L. T. 954.

— Transfer by Deed duly Executed.]—The plaintiff sold on the Stock Exchange twenty shares in a company to P. for the account-day. The defendant, on a different day and at a different price, but for the same account-day as that for which the plaintiff had sold, bought of P. in like manner on the Stock Exchange twenty

shares in the same company. Before the account-day the defendant gave the name of C. as transferee of the shares which he had bought, and a deed of transfer of the shares from the plaintiff to C. was duly made under seal, and executed by both the plaintiff and C., and the purchase-money paid to the plaintiff. The company being shortly afterwards in a course of winding up, and the liquidators refusing to register the transfer of the plaintiff's shares, he was put on the list of contributories in respect of such shares, and had to pay a call on them:—Held, that he was not entitled to be indemnified by the defendant against such call. *Torrington v. Lowe*, 4 L. R., C. P. 26; 38 L. J., C. P. 121; 19 L. T. 316; 17 W. R. 78.

IX. DIFFERENCES AND TIME BARGAINS.

Nature of.]—Differences in consols do not necessarily apply to time bargains, but may refer to a bona fide sale and delivery of stock. *Duy v. Steward or Stuart*, 3 M. & P. 334; 6 Bing. 109.

The 7 Geo. 2, c. 8, was confined to the stocks of this country. *Wells v. Porter*, 3 Scott, 141; 2 Bing. N. C. 722; *S. P., Oakley v. Rigby*, 2 Bing. N. C. 732; 3 Scott, 194.

Foreign Funds.]—Time bargains in the foreign funds were not within the prohibition of that act, nor illegal at common law. *Elsworth v. Cole*, 2 M. & W. 31; 2 Gale, 220; *S. P., Robson v. Fullowes*, 4 Scott, 43; 3 Bing. N. C. 392; *Wells v. Porter*, 3 Scott, 141; 2 Hodges, 42; 2 Bing. N. C. 722; *Morgan v. Pebrer*, 4 Scott, 230; 3 Bing. N. C. 457; 3 Hodges, 3.

Railway Shares.]—Nor were contracts for the sale of railway shares. *Hewitt v. Price*, 5 Scott, N. R. 229; 4 M. & G. 355; 3 Railw. Cas. 175; *S. P., Williams v. Trye*, 18 Beav. 366; 23 L. J., Ch. 860; 18 Jur. 442.

A colourable contract for the sale and purchase of railway shares, where neither party intends to deliver nor to accept the shares, but merely to pay differences according to the rise or fall of the market, is gaming within 8 & 9 Vict. c. 109, s. 18. *Grizewood v. Blanc*, 11 C. B. 538.

Prospective Dividends.]—The defendant instructed the plaintiffs, stockbrokers, to sell the prospective dividends on certain railway stock, which they accordingly sold to H. & Co., jobbers, calculating the dividends at a certain rate per cent. The dividend, when declared, amounted to a higher rate per cent. than that which the plaintiffs had calculated, and, according to usage of the Stock Exchange, they therefore paid H. & Co. the difference:—Held, that they were entitled to recover this difference from the defendant. *Martin v. Gibbon*, 33 L. T. 561; 24 W. R. 87—C. A. Affirming 32 L. T. 229.

Bargains in prospective dividends are transactions which, by r. 61 of the Stock Exchange, the committee will not recognize nor enforce. By r. 50 every bargain must be fulfilled by the members in accordance with the rules, regulations and usages of the Stock Exchange. By r. 16 the committee may expel any member violating any of the regulations of the Stock

Exchange:—Held, that r. 61 merely says that the committee will not enforce by expulsion, but leaves the contract good as between the parties. *Id.*

Payment as between Broker and Principal.]—The plaintiff, a broker, was employed by the defendant to speculate for him upon the Stock Exchange; to the knowledge of the plaintiff the defendant did not intend to accept the stock bought for him, or to deliver the stock sold for him, but expected that the plaintiff would so arrange matters that nothing but differences should be payable by him; the plaintiff knew that unless he could arrange matters for the defendant as the latter expected, the defendant would be unable to meet the engagements which the plaintiff might enter into for him. The plaintiff accordingly entered into contracts on behalf of the defendant, upon which the plaintiff became personally liable; and he sued the defendant for indemnity against the liability incurred by him and for commission as broker:—Held, that the plaintiff was entitled to recover; for the employment of the plaintiff by the defendant was not against public policy, and was not illegal at common law, and, further, was not in the nature of a gaming and wagering contract against the provisions of 8 & 9 Vict. c. 109, s. 18. *Thacker v. Hardy*, 4 Q. B. D. 685; 48 L. J., Q. B. 289; 39 L. T. 595; 27 W. R. 158—C. A.

Where a person desiring to speculate on the Stock Exchange has instructed a broker to buy and sell stock for him, with the intention that he should only receive or pay "differences," and has authorized the broker to pay any losses for him, the broker is entitled to recover any sums which he has so paid for the principal, even though he has not entered into separate contracts on his behalf, but has appropriated to him parts of larger amounts of stock which he (the broker) has bought as a principal with the view of dividing them among different clients for whom he has been instructed to buy. *Robinson v. Mollett* (7 L. R., H. L. 802) distinguished. *Rogers, Ex parte, Rogers, In re*, 15 Ch. D. 207; 43 L. T. 163; 29 W. R. 29—C. A.

Action by Assignees of a Bankrupt.]—In an action by the assignees of a bankrupt, for money received by the defendant for their use, it appeared that the defendant was official assignee of the Stock Exchange for the management of the estates of those members who, being unable to fulfil their engagements on the Stock Exchange, become defaulters. Before the receipt of the money the bankrupt, a stockbroker and member of the Stock Exchange, was declared a defaulter, having at the time contracts open with members of the Stock Exchange, which had the form of legal contracts, for the sale and delivery of stock; but there was no intention that stock should be delivered, and the contracts were to be settled by the payment of differences. Under the rules of the Stock Exchange, the defendant collected the differences upon the contracts upon which the bankrupt was a gainer, and before notice of an act of bankruptcy distributed among members to whom he was indebted for differences, all except a small amount, which was paid over, after he was adjudicated a bankrupt, to the treasurer of a fund for decayed members, according to the rules of the Stock

Exchange :—Held, that the action could not be maintained, because, as to the money paid over before the adjudication of the bankruptcy, it was not money had and received by the defendant to the use of the assignees of the bankrupt ; and as to the money paid over after the adjudication of bankruptcy, the contracts, as well as the payment and receipt of the differences, being illegal by 7 Geo. 2, c. 8, neither the bankrupt nor his assignees could maintain an action to enforce the contracts or recover the sums paid ; and that the differences were not paid to the defendant as the agent of the bankrupt, but for the purpose of being distributed among his Stock Exchange creditors. *Nicholson v. Gooch*, 5 El. & Bl. 999 ; 25 L. J., C. P. 137 ; 2 Jur., N. S. 303.

Plea of Gaming and Wagering.—To an action for stock, shares, scrip, goods and chattels, bargained and sold and delivered, and for commission and money paid by the plaintiff for the defendant at his request, and for money due on accounts stated, the defendant pleaded, that the plaintiff was a stock and sharebroker, and that the defendant employed him as such broker, after the passing of 8 & 9 Vict. c. 109, to enter into, and the plaintiff accordingly entered into, on his behalf, certain contracts, by way of gaming and wagering, contrary to the form of the statute ; that is to say, wagering contracts, under the semblance of pretended sales, respecting the market price and value of certain public and other stock, shares, scrip, goods and chattels, on certain days to come, whereby, under pretence of contracts the plaintiff agreed with divers persons, that if the price and value of the public stock and shares, scrip, goods and chattels, should be lower, or should be higher, the differences should be paid. The plea went on to allege, that no real sale was intended, and that the plaintiff knew it, and that the commission was claimed in respect of the making of the wagers and contracts, and the money was paid by him as such broker on settling such differences :—Held, that the plea was no answer. *Knight v. Fitch*, 15 C. B. 566 ; 3 C. L. R. 567 ; 24 L. J., C. P. 122 ; 1 Jur., N. S. 506.

Money Lent to pay Illegal Debt.—Money lent, and applied by the borrower for the express purpose of paying or compounding differences on illegal stockjobbing transactions, to which the lender was no party, cannot be recovered back by him. *Cannan v. Bryce*, 3 B. & A. 179. See *M'Kinnell v. Robinson*, 3 M. & W. 434.

STOPPAGE IN TRANSITU.

See SALE.

STRAITS SETTLEMENT.

See COLONY.

STRANDING.

See INSURANCE.

STREET.

See HEALTH—METROPOLIS—WAY.

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SUMMONS.

I. WRIT OF.—See PRACTICE.

II. MAGISTRATES.—See JUSTICE OF THE PEACE.

III. DEBTORS.—See BANKRUPTCY.

SUNDAY.

I. PERSONS PROHIBITED WORKING ON.

II. EFFECT ON CONTRACTS, 2098.

III. PROFANATION, 2100.

IV. SERVICE AND EXECUTION OF PROCESS AND PROCEEDINGS, 2101.

V. PENALTIES AND CONVICTIONS, 2102.

VI. WHEN RECKONED AS A DAY.—See TIME.

I. PERSONS PROHIBITED WORKING ON.

Coach Proprietors.—The owner of a stage-coach is not within 3 Car. 1, c. 1, or 22 Car. 2, c. 7; and therefore an action may be maintained against him for neglecting to take a person as a passenger on a Sunday. *Sandiman v. Breach*, 7 B. & C. 96; 9 D. & R. 796.

A coach proprietor having refused to carry the plaintiff because there were no other passengers, he hired a post-chaise to go to his destination:—Held, that the proprietor was liable for the chaise hire, notwithstanding the contract was made on a Sunday. *Ib.*

Drivers.—The driver of a stage-van is subject to the penalties of 3 Car. 1, c. 1, for travelling on Sunday. *Rea v. Middleton*, 4 D. & R. 824; 3 B. & C. 164.

But the driver of a stage-coach is not. *Sandiman v. Breach*, 7 B. & C. 96; 9 D. & R. 796.

— **Of Cattle.**—A local act for a parish, in which was a large cattle market, enacted, that it should not be lawful for any drover or other person to conduct or drive through any of the streets in the parish any oxen, sheep, or other cattle during Sunday:—Held, that a person driving a van with horses, in which were calves being conveyed to the market, was not driving or conducting cattle within the meaning of the statute. *Triggs v. Lester*, 1 L. R., Q. B. 259; 13 L. T. 701; 14 W. R. 279.

Farmer.—A farmer is not within 29 Car. 2, c. 7, s. 1, even though he works with his own hands. *Reg. v. Silvester*, 33 L. J., M. C. 79; 10 Jur., N. S. 360; *S. C.*, nom. *Reg. v. Cleworth*, 4 B. & S. 927; 9 L. T. 682; 12 W. R. 375.

Seemingly, that the term "labourer," in s. 1, extends to an agricultural labourer. *Ib.*

Whether haymaking is a work of necessity, is a question of fact on which the finding of the justices before whom a party is convicted under this section must be taken as conclusive. *Ib.*

Barber.—An apprentice to a barber in Scotland, bound by his indenture "not to absent himself from his master's business on holidays and week-days, late hours or early, without leave," went away on Sundays without leave and without shaving his master's customers:—Held, that the apprentice could not be lawfully required to attend his master's shop on Sundays for the purpose of shaving the customers, and that work and all other sorts of handicraft were illegal in England as well as in Scotland, not being works of necessity, or mercy, or charity. *Phillips v. Innes*, 4 C. & F. 234.

Baker.—Baking puddings and pies and such things for dinner on Sunday is not an offence within 29 Car. 2, c. 7. *Rea v. Younger*, 5 T. R. 449; *S. P.*, *Rea v. Cox*, 2 Burr. 785.

But baking bread in the ordinary course of business is. *Ib.*

Solicitor.—An attorney, who, acting on behalf of his client, agrees to become personally responsible for part of the debt owing by him, does not thereby do any work of his ordinary calling within the meaning of the act. *Peate v.*

Dickens, 3 D. P. C. 171; 1 C., M. & R. 422; 5 Tyr. 116.

Enlistment.—An enlistment may be made on a Sunday. *Wolton v. Garin*, 16 Q. B. 48; 20 L. J., Q. B. 73; 15 Jur. 329.

Affidavits.—Quære, whether an affidavit, which appears by the jurat to have been sworn in court on a Sunday, is void. *Doe d. Williamson v. Roe*, 3 D. & L. 328; 15 L. J., Q. B. 39.

Canal Traffic.—A power given to a canal company to make bye-laws for the government of the company, for the good and orderly using of the navigation, and of warehouses, wharves, &c., and for the well governing of the bargemen, does not authorize them to close the canal on Sundays by a chain suspended across it; and a bye-law for so closing the canal on Sundays is illegal and void. *Calder and Hebble Navigation Company v. Pilling*, 14 M. & W. 76; 3 Railw. Cas. 735; 14 L. J., Ex. 223; 9 Jur. 377.

Sale of Liquor in Public-houses.—See INTOXICATING LIQUORS.

II. EFFECT ON CONTRACTS.

In what Cases.—The 29 Car. 2, c. 7, applies as well to private as to public conduct; therefore, a horse-dealer cannot maintain an action upon a private contract for the sale and warranty of a horse if made on a Sunday. *Fennell v. Ridler*, 8 D. & R. 204; 5 B. & C. 406.

Warranty on Sale.—But in an action for a breach of warranty of a horse, the seller will not be allowed to set up in answer thereto that he was a horse-dealer, and sold the horse on a Sunday. *Blossome v. Williams*, 5 D. & R. 82; 3 B. & C. 232; 1 C. & P. 294.

Not in ordinary Calling.—A sale of goods made on a Sunday, which is not made in the exercise of the ordinary calling of the vendor or his agent, is not void at common law, or by the statute. *Drury v. Defontaine*, 1 Taunt. 131.

When a person sent a mare to a farmer, to be covered by a stallion belonging to him, and the mare was taken to his stables and covered accordingly, upon a Sunday:—Held, that the contract was not void, on the ground of its having been made and executed on a Sunday, it not being made by the farmer in the exercise of his ordinary calling. *Searfe v. Morgan*, 4 M. & W. 270; 1 H. & H. 292.

As the 29 Car. 2, c. 7, s. 5, prohibits only the labour, business, or work done in the course of a man's ordinary calling, it does not apply to a contract of hiring; and therefore such a contract for a year made on a Sunday between a farmer and a labourer is valid, and service under it conferred a settlement before the passing of 4 & 5 Will. 4, c. 76, s. 64. *Rea v. Whitnash*, 7 B. & C. 596; 1 M. & R. 452.

The 29 Car. 2, c. 7, s. 1, does not extend to any case where the consideration has been executed, and a property, either general or special, has passed in the chattels which are the subject of it. *Ib.*

A guarantee, given by B., a tradesman, another tradesman, for the faithful service of C., a traveller, to be employed by A.

act done in the way of the ordinary business of B., within 29 Car. 2, c. 7, s. 1. *Norton v. Powell*, 4 M. & G. 42.

Made by an Agent.—An action will not lie on a contract entered into on a Sunday, though entered into by an agent, and although the objection is taken by the party at whose request the contract was entered into. *Smith v. Sparrow*, 4 Bing. 84; 12 Moore, 266; 2 C. & P. 544.

Bills of Exchange.—Where, in an action by an indorsee against an acceptor of a bill of exchange, it appeared that the bill was drawn on a Sunday:—Held, that the bill was not void. *Begbie v. Levi*, 1 C. & J. 180; 1 Tyr. 130.

Subsequent Promise to Pay.—Where a contract for the sale of goods, which have been delivered to and returned by the purchaser was void by reason of its having been made on a Sunday, a subsequent promise to pay will entitle the vendor to recover the value upon a quantum meruit. *Williams v. Paul*, 4 M. & P. 532; 6 Bing. 653.

Acceptance of Goods.—To a count for goods sold and delivered, the defendant pleaded that they were goods sold and delivered to him by the plaintiff in the way of his trade on a Sunday, contrary to the statute. The plaintiff replied, that the defendant, after the sale and delivery of the goods, kept them for his own use, without returning or offering to return them, and thereby became liable to pay the sum mentioned in the plea, being so much as they were reasonably worth:—Held, *bad*. *Simpson v. Nicholls*, 3 M. & W. 240; 6 D. P. C. 355; 1 H. & H. 12. See also 5 M. & W. 705, n.

A. agreed to purchase of B. a carriage then standing in the shop of B., A. at the same time desiring that certain alterations might be made in it. The alterations having been made, the carriage was, at A.'s request, placed in the back shop. On Saturday, the 14th of November, A. called at the shop, and requested B. to hire a horse and man for him, and to send the carriage to his house on the following day, in order that he might take a drive in it; A. having previously intimated his intention to take the carriage out a few times, in order that, as he was going to take it abroad, it might pass the Custom-house as a second-hand carriage. The carriage was accordingly sent to and used by A. on the Sunday, A. paying for the hire of the horse and man. A. afterwards refused to take or pay for the carriage:—Held, that there was a sufficient acceptance of the carriage by A. before Sunday, the 15th of November, within 29 Car. 2, c. 3, s. 17, to entitle the plaintiff to recover upon a count for goods bargained and sold. *Beaumont v. Brengeri*, 5 C. B. 301.

Contract within Statute of Frauds.—A plea, that the contract declared upon, being a contract which, under the Statute of Frauds, required the defendant's signature, was entered into with the plaintiff on a Sunday, in the way of the plaintiff's ordinary business, is not supported by evidence that the contract was signed and delivered by the defendant to C. on a Sunday, and delivered by C. to the plaintiff on a subsequent day. *Norton v. Powell*, 4 M. & G. 42.

Cloak-room at Railway Station.—A passenger, arriving in London by railway on Saturday evening, left a portmanteau at the luggage and cloak office of the company, on the up-platform of the Paddington station, and on paying 2d. received a ticket acknowledging the receipt, with printed conditions, among which was a notice that the company would not deliver up luggage except to persons producing the proper receipt. On Sunday evening, intending to leave London by another railway, he came to the Paddington station for his portmanteau, and found the office shut. After some time he was told by a porter that the superintendent was on the other side; whereupon he went across to the down platform, from which a train was starting, and the superintendent sent a porter with a key of the office, and he obtained his portmanteau. He was thus delayed forty minutes, and prevented from leaving London by railway that night:—Held, that by the ticket the company was bound to deliver up the portmanteau on Sunday as well as on other days on a reasonable request and within a reasonable time; and that whether there had been an unreasonable delay was a question for the jury. *Stallard v. Great Western Railway Company*, 2 B. & S. 419; 31 L. J., Q. B. 137.

III. PROFANATION.

Place of Entertainment—What is.—A company incorporated by an act of parliament was the owner of the Brighton Aquarium, a building which consisted of chambers below the level of the ground, and a terrace above. The chief part was used as an aquarium, filled with glass tanks for the exhibition of marine fish and animals. The whole was open to the public on Sunday on the payment of 6d. each person. A band played sacred music on the evenings of Sunday, and programmes were issued, stating what music the band would play, and at what time the fish would be fed. An action having been brought against the company to recover a penalty under 21 Geo. 3, c. 49, s. 1, for keeping open a place of entertainment or amusement on the Lord's Day or Sunday:—Held, that the aquarium, under these circumstances, was a place of entertainment and amusement within the statute. *Warner v. Brighton Aquarium Company*, 10 L. R., Ex. 221; 44 L. J., Ex. 175, n.; S. P., *Terry v. Brighton Aquarium Company*, 10 L. R., Q. B. 306; 44 L. J., M. C. 173; 32 L. T. 458.

Science Lectures.—A place duly and honestly registered as a place of public worship (though that worship is not according to any established or usual form), in which no music but sacred music is performed or sung, where nothing dramatic is introduced, where the discourses delivered are intended to be instructive and contain nothing hostile to religion, where the object of the promoters may be either to advance their own views of religion, or as they allege "to make science the handmaid of religion," is not a place "used for public entertainment or amusement" on the Lord's Day within 21 Geo. 3, c. 49, s. 1. *Barter v. Langley*, 4 L. R., C. P. 21; 33 L. J., M. C. 1; 19 L. T. 321; 17 W. R. 254.

The fact that payment is required for admission to a reserved portion of the place, the doors being open gratuitously, does not deprive the promoters of the protection of 1 Will. & M.

sess. 1, c. 18, continued by 21 Geo. 3, c. 49, s. 8. *Id.*

IV. SERVICE AND EXECUTION OF PROCESS AND PROCEEDINGS.

Indictable Offences—Exception.]—The exception in 29 Car. 2, c. 7, s. 6, extends to all indictable offences, and is not restricted to treason and felony, and such misdemeanors as involve an actual breach of the peace. *Rawlins v. Ellis*, 16 M. & W. 172; 16 L. J., Ex. 5; 10 Jur. 1039.

Service of Process.]—The service of process on a Sunday is absolutely void, and cannot be made good by any subsequent waiver of the defendant by his not objecting till after a rule to plead given. *Taylor v. Phillips*, 3 East, 155.

Where a declaration in ejectment was left at the house of a tenant on Saturday, and received by him on the Sunday:—Held, that this was service of process on a Sunday, and void. *Doe d. Warren v. Roe*, 8 D. & R. 342; *S. P., Goodtitle d. Mortimer v. Notille*, 2 D. & R. 232; *S. C.*, nom. *Doe v. Roe*, 5 B. & C. 764.

Service of notice of plea filed on a Sunday is void. *Roberts v. Monkhouse*, 8 East, 547.

So service of a notice to produce on a Sunday is bad. *Hughes v. Budd*, 8 D. P. C. 315; 4 Jur. 150.

When a fi. fa. had been executed on a Sunday, and the execution had been abandoned the next day:—Held, that an entry on the following Thursday to execute a distress warrant was not invalid. *Percival v. Stamp*, 23 L. J., Ex. 25; 9 Ex. 167.

The defendant, who was in custody at Cambridge, received an order on Saturday for his discharge; this was forwarded to the undersheriff, at Wisbeach. On the next day, Sunday, the gaoler received a warrant of detainer under a ca. sa., which had been issued the day before:—Held, that the sheriff was entitled to detain the defendant for a reasonable time after the receipt of the order, for the purpose of searching his office for writs; and that the defendant was not entitled to his discharge on the ground that the service of the warrant on Sunday was void. *Samuel v. Buller*, 1 Ex. 439; 17 L. J., Ex. 34.

Arrest.]—Where a prisoner has been arrested on a Sunday, a subsequent detainer by another party, without collusion, is not vitiated by the illegality of the original arrest. *Ramsden, In re*, 15 L. J., M. C. 113. See *Hooper v. Lane*, 6 H. L. Cas. 443.

By 5 & 6 Will. 4, c. 76, s. 60, the town council may apply to justices, against a town clerk, to compel him to deliver up books, papers and writings in his custody; and, upon his refusal, they are required "to commit such offender to the common gaol" until he shall have delivered up such books, papers and writings. The return to a habeas corpus, directed to a county gaoler, stated that E. was delivered into his custody, under a warrant of two justices, obtained by a town council, for not delivering up accounts and vouchers in his custody as town clerk; and that whilst he was in custody another warrant, under the hands of the same justices, and at the instance of the same parties, was lodged with him:—Held, first, that the breach of duty pro-

vided for in s. 60 was not an offence within the exception in 29 Car. 2, c. 7, s. 6; and therefore the arrest (which was shewn by affidavits to have been on Sunday) was illegal. *Eggington, Ex parte*, 2 El. & Bl. 717; 23 L. J., M. C. 41; 18 Jur. 224.

Testing a Writ.]—A writ of summons tested on a Sunday is a nullity; but a copy tested on a Sunday, and service thereof (the writ being correctly tested), are merely irregular, and the irregularity will be waived by laches. *Corrall v. Foulkes*, 2 B. C. Rep. 262; 5 D. & L. 590.

Notice of Appeal.]—Service of a notice of appeal on Sunday would be void. *Reg. v. Middlesex (Justices)*, 3 New Sess. Cas. 152; 2 B. C. Rep. 271; 17 L. J., M. C. 111; 11 Jur. 434.

Notices.]—The 6 & 7 Vict. c. 18, s. 4, enacts, that persons desirous of being put upon the register of voters, shall give or send to the overseers, on or before the 20th of July, a notice in writing; the 20th of July happening to be a Sunday:—Held, that the notice might legally be given upon that day. *Rawlings v. West Derby (Overseers)*, 2 C. B. 72; 15 L. J., C. P. 70; *S. P., Colville v. Lewes*, 2 C. B. 60.

Delivery of Nomination Paper.]—By an article of the general orders of the poor-law board, the nomination papers on the election of guardians shall be sent to the clerk of the guardians after the 14th and on or before the 26th March; and by another article, when the day for the performance of any act relating to the election of guardians shall be a Sunday, "such act shall be performed on the day next following, and each subsequent proceeding shall be postponed one day:—Held, that the delivery of a nomination paper to the clerk on the 26th March, being Sunday, might be treated as a delivery on the Monday following, and was valid. *Westbury-on-Tyeme Union, In re*, 4 El. & Bl. 314; *S. C.*, nom. *Reg. v. Poor Law Commissioners*, 1 Jur., N. S. 251.

Of Process—By Post.]—Delivery of process by post on Sunday is not service of process within the statute. *Reg. v. Leominster*, 2 B. & S. 391; 31 L. J., M. C. 95; 8 Jur., N. S. 793; 6 L. T. 216.

Notice to Quit.]—A notice to quit, given on a Sunday, is valid. *Sangster v. Noy*, 16 L. T. 157.

IV. PENALTIES AND CONVICTIONS.

Jurisdiction—One Penalty for a Day.]—A person can commit but one offence on the same day, by exercising his ordinary calling on a Sunday, contrary to the 29 Car. 2, c. 7; and if a justice of the peace proceeds to convict him in more than one penalty for the same day, it is an excess of jurisdiction for which an action will lie. *Crepps v. Durden*, Cowp. 640.

Mode of Recovery—Distress.]—By 29 Car. 2, c. 7, ss. 1, 2, a penalty of 5s. is imposed to be levied by distress, and in default of such distress, or in cases of insufficiency or inability to pay

the penalty, the offender is to be set publicly in the stocks for two hours. By 11 & 12 Vict. c. 43, s. 18, the amount of costs is to be specified in a conviction, and is to be recoverable in the same manner as any penalty adjudged by such conviction is to be recoverable. A conviction under 29 Car. 2, c. 7, s. 1, adjudged the offender to forfeit and pay 5*s.* and 11*s.* costs, and that the several sums, if not paid, should be levied by distress, and in default of sufficient distress that the party convicted should be set publicly in the stocks for the space of two hours, unless the several sums should be sooner paid:—Held, that the conviction was bad, as the justice was not warranted in adjudging that the offender should be set in the stocks in default of payment of the costs, that not being a method provided by 29 Car. 2, c. 7, for recovering the pecuniary penalty, but a substituted punishment. *Reg. v. Barton*, 3 New Sess. Cas. 470; 12 Q. B. 389; 18 L. J., M. C. 56; 13 Jur. 232.

— **Illegal Order—Action against Justice.**
—Under the conviction, the offender's goods were distrained, but the conviction was afterwards quashed on account of the illegal alternative as to confinement in the stocks, and an action was brought for the distress against the justice:—Held, that the justice was protected by 11 & 12 Vict. c. 44, s. 1, and that s. 2 did not apply to the act of distraining for which the action was brought, being one which the justice had jurisdiction to order. *Barton v. Bricknell*, 13 Q. B. 393; 20 L. J., M. C. 1; 15 Jur. 668.

SUPPORT.

See EASEMENT.

SURETY.

See PRINCIPAL AND SURETY.

SURGEON.

See MEDICINE AND MEDICAL PRACTITIONER.

SURVEYOR.

I. OF HIGHWAYS.—*See* WAY.

II. IN OTHER CASES.—*See* VALUER AND APPRAISER.

SURRENDER.

I. OF COPYHOLDS.—*See* COPYHOLD.

II. OF LEASES. — *See* LANDLORD AND TENANT.

III. ATTENDANT TERMS.—*See* EJECTMENT.

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